

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**BRITTANY NAPAYOK**

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**REASONS FOR DECISION**  
**of the**  
**HONOURABLE JUDGE GARTH MALAKOE**

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Heard at: Yellowknife, Northwest Territories

Date of Decision: January 29, 2019

Date of Hearing: January 29, 2019

Counsel for the Crown: Trevor Johnson

Counsel for the Accused: Charles Davison

[s. 734.7 *Criminal Code*]  
[Default of Payment of Victim Surcharge]

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**A. INTRODUCTION**

[1] Prior to December 14, 2018, Brittany Napayok was ordered to pay fines and victim surcharges in respect of a number of offences for which she was sentenced. The victim surcharges were imposed pursuant to section 737 of the *Criminal Code* as it read after October 24, 2013.

[2] In total, Ms. Napayok owes \$1,450 in outstanding fines and \$935 in outstanding victim surcharges. She is before the Court for a fine default hearing pursuant to section 734.7 of the *Criminal Code*.

[3] Counsel for Ms. Napayok is requesting that the Court take no further steps to enforce the victim surcharge orders previously made against Brittany Napayok. This request is based on the recent Supreme Court of Canada decision in *R. v. Boudreault* 2018 SCC 58 (hereafter referred to as “*Boudreault*”).

**B. ANALYSIS**

[4] The majority decision in *Boudreault* struck down section 737 in its entirety, with immediate effect. It declared that the victim surcharge as authorized by section 737 was a cruel and unusual punishment contrary to section 12 of the *Charter of Rights and Freedoms*. The Crown did not seek to justify or “save” section 737 pursuant to section 1 of the *Charter*.

[5] The Court in *Boudreault* did not direct how the Court should deal with offenders who were subject to victim surcharges and for whom the appeal period had passed. The Court suggested, at paragraph 109, “that a variety of possible remedies exist” for such persons, including by way of an application under section 24(1) of the *Charter*.

[6] In its factum, counsel for Ms. Napayok outlines five arguments in favour of the proposition that enforcing payment of the surcharges would be illegal and unconstitutional:

9. First, the Supreme Court has struck down section 737 as unconstitutional. Pursuant to section 52 of the *Constitutional [sic] Act, 1982* any law which is contrary to the constitution is “of no force and effect”. There is simply no longer a law in force in Canada which permits a court to make an order for payment of a victim surcharge penalty. As section 737 was struck down in its entirety, there is also no longer a legal means by which to enforce any orders previously made: subsection 737(9) had adopted the enforcement mechanisms applicable to fine orders to the situation of the surcharges but that provision has also now been struck down.
10. In a democracy governed by the Rule of Law, it is a most basic proposition that punishment – or any other form of state action against an individual – must be authorized and permitted by law. Simply put, there is no longer a law in Canada which authorizes or permits any enforcement of a previously-issued surcharge order.
11. Second, in the specific context of the criminal law, the constitutional principle just stated finds statutory expression in section 6(1)(b) of the *Criminal Code*. That provision provides that only punishment prescribed by the *Code* itself (or any other authorizing enactment) is to be imposed upon conviction. As of December 14, 2018, the *Criminal Code* no longer provides for imposition or enforcement of a victim surcharge penalty.
12. Third, as a statutory court, the Territorial Court of the Northwest Territories may only act where authorized by law. It does not have inherent authority or jurisdiction. Therefore, with the striking down of section 737, this Court has lost any power to impose, or to enforce, an order for payment of the victim surcharge.
13. Fourth, to now seek to enforce a penalty for which there is no legal foundation would also be contrary to the “principles of fundamental justice” contemplated by section 7 of the *Charter*. There can be no issue, it is submitted, that the requirement for a proper foundation in law of any penalty or punishment is one of, if not *the* most basic foundational principles of our legal system. Furthermore, the steps which could have been taken against a non-paying offender under section 737 prior to December 14, 2018 included imprisonment (subs. 737(9) and s. 734) so the liberty interest of the subject is clearly engaged.
15. Finally, as the Supreme Court noted in paragraphs 106 and 107 of *Boudreault*, for a court to take any enforcement measures against a person previously ordered to pay the surcharge would put the court itself in the position of continuing the infliction of a punishment which is cruel and unusual, contrary to section 12 of the *Charter*.

[7] The Crown is not contesting Ms. Napayok's application. I accept and adopt the above-noted arguments submitted by her counsel.

### C. REMEDY

[8] Section 24(1) of the *Charter* states:

Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[9] In providing a remedy to Ms. Napayok, my remarks are specific to the victim surcharges which were imposed under section 737 of the *Criminal Code* as it read on December 14, 2018. To be clear, these remarks do not apply to victim surcharges imposed under section 737 of the *Criminal Code* prior to October 24, 2013; nor under the Territorial legislation, the *Victims of Crime Act*, R.S.N.W.T. 1988 c.9 (Supp.); nor under section 53 of the *Youth Criminal Justice Act*.

[10] I note, in passing, that section 737 of the *Criminal Code* applied only with respect to offences under the *Criminal Code* and the *Controlled Drugs and Substances Act*. Accordingly, the victim surcharges imposed on an adult offender with respect to a violation of section 137 of the *Youth Criminal Justice Act* would appear to be invalid.

[11] In my view, it would be contrary to the *Charter* to enforce the orders for payment of victim surcharges against Brittany Napayok. Accordingly, I declare that effective immediately, the orders for these victim surcharges, in the amount of \$935.00, are not enforceable and I direct the Clerk of the Territorial Court to take no action to enforce payment.

Garth Malakoe  
T.C.J.

Dated at Yellowknife, Northwest  
Territories, this 29<sup>th</sup> day of  
January, 2019.

*R. v. Brittany Napayok*, 2019 NWTTC 03

*Date: 2019-01-29*

*File: T-1-CR-2016-000956/1451/1754/*

*2008/2388/2403*

*T-1-CR-2017-000136/761/1698/1865*

*T-1-CR-2018-000340*

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