MANDATORY VICTIM SURCHARGES: CRUEL AND UNUSUAL PUNISHMENT OR BENEFICIAL PROGRAM? By Yuet Al

In December 2018, the Supreme Court of Canada decided the case *R v Boudreault.*[1] The case involved a *Charter* challenge of the mandatory victim fine surcharge that was in place. This law required every offender who was found guilty of a crime to pay a minimum surcharge of $100 for summary offences and $200 for indictable offences. The court ultimately held that the mandatory victim surcharge was a form of cruel and unusual punishment that should not be tolerated according to the *Charter*. Specifically, they found that the surcharge violated s.12 of the *Charter* that guarantees a right against cruel and unusual punishment using the two-step test from *R v Nur.*[2]

The purpose of the mandatory victim fine surcharge was to assist victims of crime, which was recognized as a valid public purpose. However, when balancing the benefits of raising funds for victim support services and increasing the offender's accountability to individual victims of crime with the harms, the court found the costs outweighed the benefits.[3] The costs included causing offenders to suffer deeply disproportionate financial consequences regardless of moral culpability, creating a treat of incarceration, causing offenders to become targeted by collection efforts supported by the province, and creating a de facto indefinite sentence for offenders who would not be able to ever pay it.[4] The punishment contravened the goals of rehabilitation and reintegration that are integral to sentencing principles. Moreover, the surcharge contributed to the revolving door of criminality and poverty rather than dismantling it.

The use of mandatory minimum sentences is especially troubling because of the removal of the sentencing judge's discretion. This discretion is critical for tailoring sentences imposed on offenders, as set out in the sentencing principles outlined in section 718 of the *Criminal Code of Canada.*[5] The mandatory victim

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[1] *R v Boudreault,* 2018 SCC 58 [*Boudreault]*.
[2] *Ibid* at para 46.
[3] *Ibid* at para 62.
[4] *Ibid* at paras 67, 71, 74, and 76.
[5] *Criminal Code*, RSC 1985, c C-46, s 718.

fine surcharge regime neglects to realize that those who are most affected by it have a lower economic position due to their marginalization and relative position in society. The concept of equality has long relied on the assumption that everyone should be treated equality. Equity, on the other hand, recognizes that everyone should have individual supports that they need to raise them to an equal level. By treating everyone the same, you may end up harming groups of people. Applied to the treatment of offenders when enforcing mandatory minimum sentences, while it may appear fair because everyone is treated the same, there are disproportionately negative impacts on members of society who have low incomes, mental health issues, or addiction issues.

The decision in *Boudreault* reinforces the importance of considering the differential impact of the law on people with different identities and needs. Offenders may be victims of broader social, psychological, and economic marginalization which breeds mental illness, addiction and poverty. By using mandatory sentences, the principles of rehabilitation and reintegration are neglected in favour of denouncing and deterring unlawful conduct through punishment. However, it has been made clear that a 'lock them up and throw away the key' mentality is not the answer to reducing re-offending and reducing crime. The court in *Boudreault* took a strong step forward by acknowledging the severe marginalization of the reasonable hypothetical offender.

The court's use of the reasonable hypothetical offender revealed the disproportionate number of marginalized people who fall under the net of the criminal justice system. The court took note of the similar circumstances of the actual offenders – serious poverty, precarious housing situations, addiction, physical disabilities, child protection, Indigenous backgrounds, and set them as the "representative offenders".[6] They found that a fit sentence for a representative offender in this case would not include the charge due to the undue hardship that would be placed on them.[7] In particular, the surcharge may trigger and contribute to re-offending. Offenders may resort to criminal activities to afford the fine. This is especially likely when offenders are living with a constant threat for not paying the fine. Thus, it is clear that imposing undue

[6] *Supra* note 1 at para 54.
[7] *Ibid* at para 57.

hardship must be avoided in order to address the characteristics that place individuals at a disadvantage and are often the very cause of their criminal activities.

The decision in *Boudreault* led Parliament to enact several changes with respect to the victim fine surcharge, including Bill C-75, which received Royal Assent on June 21, 2019.[8] The bill re-enacted the victim surcharge regime by essentially restoring the requirement for the surcharge to be imposed for every offence which an offender is sentenced. However, judicial discretion can be applied to depart from the surcharge in cases where it would cause undue hardship due to financial circumstances and where it would constitute a form of disproportionate punishment with respect to the gravity of the offence. Allowing for judicial discretion is certainly a step forward with respect to this issue. However, the default presumption that continues to remain is that the surcharge should be imposed. This runs contrary to the assumption established in *Boudreault* with respect to the hypothetical offender. The new law places the onus on offenders to demonstrate they are in a disadvantaged situation. By creating this extra step and hurdle for offenders, it appears Parliament has strayed from the intention of the court to place a greater weight on the presumed marginalized position of offenders.

[8] Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Leg, 2019 (assented to 21 June 2019, SC 2019), c 25.