ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

A GROUP OF 68,851 RESPONDENTS

Ruling released March 28, 2022

Mr. M. Perlin…….counsel for the Crown
Ms. B. Vandebeek...……*amicus curiae*

Kelly J.:

INTRODUCTION

[1] The Crown applied on behalf of 68,851 respondents[1] for a 99-year extension of time to pay victim surcharges ordered under legislation declared unconstitutional in *Boudreault*.[2]

[2] The requested order would relieve the respondents from having to pay the surcharges during their lifetime so they would never default on their debt to the government.

[3] The application proceeded *ex parte* but with the assistance of *amicus curiae*, who joined in the Crown's request.

[4] Two Superior Court judges have made similar orders in recent months.[3]

[5] These reasons explain why I allowed the application at the hearing on March 10, 2022.

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[1]The respondents are identified (not by name) in an electronic appendix to the application.
[2]*R. v. Boudreault*, 2018 SCC 58
[3]*R. v. A Group of 721 Respondents*, 2021 ONSC 7380 [*721 Respondents*], *R. v. A Group of 54 Respondents*, 2022 ONSC 1595 [*54 Respondents*]

OVERVIEW

[6] On October 24, 2013, an amendment to the victim surcharge legislation removed the judicial authority to waive for undue hardship. The surcharge became mandatory for anyone convicted or discharged of a criminal offence.

[7] On December 14, 2018, the Supreme Court of Canada released *Boudreault*, striking down the surcharge provision as unconstitutional. The majority held that for people who cannot pay the surcharge, the legislation caused a collection of harms that combined to constitute cruel and unusual punishment contrary to s. 12 of the *Charter*. The principal harms were

- the risk of disproportionate financial consequences;
- the threat of imprisonment or detention on default;
- provincial efforts to collect surcharge debt; and
- the specter of *de facto* indefinite sentences, including the inability to obtain a record suspension.

[8] On the issue of remedy, the *Boudreault* majority invalidated the appellants' surcharges and suggested that non-parties to the litigation with cases still "within the judicial system" could appeal their surcharges on constitutional grounds.

[9] The majority observed, however, that for non-parties who could not pay the surcharge but whose cases were no longer in the system, the court's declaration of invalidity was of little help because it had only prospective effect.[4] The majority declined to grant a class-based remedy for non-parties but encouraged government and Parliament to act in order to "attend to their responsibility to ensure that *Charter* rights are protected."[5]

[10] Neither the provincial government nor the court has the power to set aside a victim surcharge. Only the federal government can extinguish unpaid surcharge debt through its remission power in s. 748.1 of the *Criminal Code*.

[11] After *Boudreault*, the Ontario Crown responded to the majority's call to act administratively in an effort to ameliorate the harmful effects of the unconstitutional victim surcharge regime. For example, the province halted enforcement mechanisms for all surcharges ordered in circumstances that suggested there had been no judicial assessment of the person's ability to pay.

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[4] *Boudreault* at paras. 103-05, *R. v. Thomas*, [1990] 1 S.C.R. 713 at 715-16, *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 757, *R. v. Sarson*, [1996] 2 S.C.R. 223 at para. 26, *Schacter v. Canada*, [1992] 2 S.C.R. 679 at 720

[5] *Boudreault* at paras. 103-09. Recently, in *Parent v. Attorney General of Canada et al.*, 2022 ONSC 1374, James J. dismissed a request for a broad-based retrospective s. 24(1) remedy vacating victim surcharges for people who were not parties to the litigation.

[12] Ontario twice asked the federal Crown to order remission of victim surcharges imposed in cases where the sentence did not include a discretionary fine.

[13] The application before me is another component of the provincial Crown's multi-faceted effort to take up the *Boudreault* majority's challenge within the limits of its authority.

[14] The federal Crown too has taken steps in response to *Boudreault*'s call to action. For example, within weeks of the decision, the Public Prosecution Service of Canada ceased recovery procedures for outstanding mandatory federal victim surcharges ordered between October 1, 2013 and December 14, 2018. The Crown also took proactive measures to notify offenders that they were no longer expected to pay the surcharges.

[15] The Parole Board of Canada changed its policy so that unpaid victim surcharges ordered between October 24, 2013 and December 13, 2018 are not considered when determining eligibility for a record suspension.

[16] The federal government has not, however, cancelled any victim surcharges under its statutory remission power.

[17] On June 21, 2019, Parliament amended the victim surcharge scheme, reintroducing the judicial discretion to waive.

[18] In the last few months, the Ontario Crown brought two applications in the Superior Court of Justice for orders identical to the one requested before me. Both applications succeeded. In thoughtful rulings, Justices Goldstein and Di Luca reached the following essential conclusions:

- They had jurisdiction to make the requested order on *ex parte* application by the Crown on behalf of the defined group of respondents; and

- it was in the interests of justice to make the order.[6]

ANALYSIS

[19] I agree with and adopt the conclusions and reasons of Justices Goldstein and Di Luca. I will not repeat what they have said.

[20] I will make four points.

[21] First, I have the authority to make the requested order. Section 734.3 of the *Criminal Code* empowers the court to change the time for payment of a victim surcharge on an application made on behalf of an offender.[7] There is no limit on the length of the extension the court can grant.

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[6] *721 Respondents*, *54 Respondents*

[7] Section 734.3 applies to victim surcharges by virtue of s. 737(7) of the *Code*.

[22] Second, this is a proper case for a global *ex parte* application. Proceeding *inter partes* on almost 69,000 individual applications would be impossible. The Crown's manner of proceeding is efficient and effective. The requested order carries no risk of prejudice; it is an obvious benefit to each respondent. Moreover, I had the benefit of the perspective of *amicus curiae*.

[23] Third, the Crown has carefully delineated the class of respondents. The requested order targets people prosecuted for *Criminal Code* offences in the Ontario Court of Justice, who committed their offences and were sentenced between October 24, 2013 and December 14, 2018, and whose sentence did not include a discretionary fine. The group is designed to capture all victim surcharges ordered under the unconstitutional scheme in circumstances where there was no judicial determination of the offender's ability to pay.[8]

[24] Fourth, the authority in s. 734.3 to extend the time for payment is discretionary. A discretion must be exercised reasonably. The test is whether the requested order is in the interests of justice. The answer must be yes. An order granting what is effectively an indefinite extension of time to pay will prevent the surcharge from going into default. As long as there is no default, most of the deleterious consequences that troubled the *Boudreault* majority will not materialize:

- The surcharge becomes only a notional financial obligation that the respondents will never have to pay;
- Imprisonment or detention for non-payment are impossible;
- Recovery efforts, including referral to collection agencies and licence suspensions, cannot commence;[9]
- There is no risk of "public shaming"[10] through repeated court appearances to address outstanding surcharges.

CONCLUSION

[25] I am satisfied I have the authority to make the requested order and that it is in the interests of justice that I make it.

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[8]As Di Luca J. explained in *54 Respondents*, at paras. 17-22, the Crown will seek to notify the respondents of the court's order and reasons by distributing them to about 140 organizations. The court's electronic records will also be updated to reflect the extended time, so a respondent who contacts the court about a victim surcharge will learn that the time to pay has been extended for 99 years from the date of imposition.
[9]According to the Crown's policy, once an offender dies, efforts to enforce fine end. In any event, a defaulted victim surcharge is not enforceable as a civil debt: *Criminal Code*, s. 737(7), *54 Respondents* at paras. 23-24
[10]*Boudreault* at paras. 77, 110

[26] The Crown's application is a commendable solution that goes a long way towards mitigating the harms that led the *Boudreault* majority to strike down the victim surcharge regime as cruel and unusual punishment.

[27] But it does not go all the way. As the Crown, *amicus curiae*, and both Superior Court Justices have recognized, extending the time to pay is not a complete answer to the problems posed by mandatory surcharges. The debt owed by each respondent to the government will continue to exist even though, practically speaking, it will be unenforceable. This lingering financial obligation raises the specter of a *de facto* indefinite sentence and could be seen as an impediment to a respondent's complete reintegration into society.[11]

[28] Moreover, a provincial government's commitment to cease enforcement efforts for victim surcharges, or the Parole Board's decision to remove unpaid surcharges as a factor on record suspension applications, are policy choices that can be changed over time.

[29] I agree with Justices Di Luca and Goldstein that the proper solution here is for the federal government to cancel the impugned victim surcharges through its statutory remission power. This is surely preferrable to a patchwork of provincial solutions and piecemeal policy decisions that can only respond indirectly to the concerns animating the majority's decision in *Boudreault*.

[30] I am indebted to Mr. Perlin and Ms. Vandebeek for their assistance, including their excellent written materials.

Justice R. Kelly

[11] Boudreault at paras. 76-79