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The Adverse Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights

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Case Commented On: *R v Boudreault*, 2018 SCC 58 (CanLII)

It was just over one year ago that our former colleague Sheilah Martin was appointed to the Supreme Court of Canada (see our tribute on ABlawg). Justice Martin has now written her first decision for the Court, *R v Boudreault*, 2018 SCC 58 (CanLII) which was released in December 2018. The case concerns the constitutionality of victim surcharges, which are mandatory for persons who are discharged, plead guilty, or are found guilty of an offence under the *Criminal Code*, RSC 1985, c C-46, or the *Controlled Drugs and Substances Act*, SC 1996, c 19. Writing for a majority of the Court, Justice Martin's judgment holds that these surcharges violate section 12 of the *Canadian Charter of Rights and Freedoms*, which protects against cruel and unusual punishment.

Our interest in this post is in exploring how equality infuses Justice Martin's decision. Equality rights were not directly at issue in the case; rather, the constitutional challenge focused on section 12 as well as the guarantee of life, liberty and security of the person in section 7 of the *Charter*. Equality arguments were made by only two interveners (see here and here) and equality is mentioned explicitly only once in Justice Martin's ruling (at para 28). Nevertheless, the discriminatory impact of the surcharge animates her entire judgment.

This leads us to reiterate a point we have made in previous writing (see e.g. here): section 15 of the *Charter*, the equality guarantee, is often overlooked in favour of other rights and freedoms as a result of the courts' difficulties with and inconsistent treatment of equality rights. This has led to the analysis of other *Charter* rights – including section 7 and section 12 – that overlaps with equality, which muddies the content of these other rights. In turn, the lack of a robust equality jurisprudence perpetuates the tendency of parties and courts to avoid section 15. This is not necessarily a problem when other rights can be successfully invoked, as in this case, but it can be a problem when a successful claim depends on equality rights.

The Decision

We summarize the *Boudreault* decision only briefly here because our interest is in exploring its discussion of and implications for equality. For more detailed summaries of the facts and decision, see Bailey Fox's post, *R v Boudreault*: Imagine There's No Surcharge, and Heather Donkers' post, Heather's Legal Summaries: The case of *R v Boudreault*, 2018 SCC 58.

Since 2013, the mandatory victim surcharge has been 30 percent of any fine, or $100 for every summary conviction offence and $200 for every indictable offence if no fine is imposed (see paras 7-9 and *Criminal Code* section 737(1) and (2)). Most significantly, the 2013 amendments removed the previous judicial discretion to reduce or waive the surcharge in individual cases involving undue hardship.

For offenders who do not pay the surcharge, enforcement mechanisms include a deemed period of imprisonment, suspension of their licenses or permits, and committal of the offender for non-payment without reasonable excuse (at para 10, citing *Criminal Code* sections 734 to 734.8). Provinces may also create fine option programs that permit offenders to work in lieu of paying their fines, but not all have done so (see para 72 and section 736).

After describing the mandatory victim surcharge, Justice Martin introduced the circumstances of the seven individuals who challenged the surcharge in the courts of Quebec and Ontario, whose cases were consolidated for the Supreme Court appeal (at paras 12-14). Although these challenges were brought under both section 7 and section 12 of the *Charter*, Justice Martin's analysis focused on section 12, which provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

Justice Martin found that the surcharge amounts to both "treatment" and "punishment" (at paras 37-44). The dissenting judgment of Justices Côté and Rowe agreed with her on this point (at para 125).

Turning to the issue of whether the surcharge was a "cruel and unusual" treatment or punishment, Justice Martin noted that this was a "high bar" – the punishment "must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society'" (at para 45, quoting *R. v. Lloyd*, 2016 SCC 13 (CanLII) at para 24, which in turn quoted from *R. v. Morrisey*, 2000 SCC 39 (CanLII) at para 26). A two-step test has been developed to determine whether mandatory minimum sentences reach this level:

> First, a court must determine what would constitute a proportionate sentence for the offence according to the principles of sentencing in the *Code*. Second, a court must ask whether the mandatory punishment is grossly disproportionate when compared to the fit sentence for either the claimant or for a reasonable hypothetical offender (at para 46, citing *R. v. Nur*, 2015 SCC 15 (CanLII)).

Justice Martin acknowledged that the surcharge is not "a typical mandatory minimum sentence for a specific offence"; rather it is "a universal punishment that is added without exception to all offences, and for each and every offence, to the other punishment imposed." Nevertheless, she found the test from *Nur* to be applicable here, with the overarching question being whether "the victim surcharge render[s] the sentences of either the appellants or a reasonable hypothetical offender grossly disproportionate based on its overall impact and effects?" (at para 47).

In examining the situations of the offenders before the Court, Justice Martin took a highly contextualized approach, stating that:

> When examined together, the circumstances of the actual appellants … reveal striking similarities. All live in serious poverty. All have precarious housing situations. All struggle with addiction. In addition, Mr. Larocque and Mr. Michael grew up under child protection and have physical disabilities. Mr. Michael is Indigenous....Without a doubt, offenders with some or all of these characteristics appear with staggering regularity in our provincial courts. Given this reality, referring to "hypotheticals" in this case is somewhat of a misnomer (at paras 54-55).

On the first question from *Nur*, Justice Martin held that a fit sentence for these offenders would not include the surcharge. If judges had discretion in the matter, they would find that the surcharge "would cause undue hardship for offenders as impecunious as these" (at para 57).

On the second question from *Nur* – whether the victim surcharge is grossly disproportionate – she found that for those individuals "with adequate financial capacity, an additional financial punishment of a few hundred dollars per offence could hardly be called grossly disproportionate" (at para 60). However, for several of the offenders before the Court, as well as reasonable hypothetical offenders, "the story is very different: the actual imposition, operation, and effects of the mandatory surcharge, when combined, create a grossly disproportionate punishment" (at para 61).

While the surcharge had a valid penal purpose – to raise funds for victim support services and to increase offenders' accountability to victims of crime and the community – Justice Martin found that "these objectives are not likely to be realized" in the case of offenders such as those before the Court (at para 63).

She also detailed the "four interrelated harms" the surcharge causes offenders: "(1) the disproportionate financial consequences suffered by the indigent, (2) the threat of detention and/or imprisonment, (3) the threat of provincial collections efforts, and (4) the enforcement of *de facto* indefinite criminal sanctions" (at para 65). As an example of the first harm of "deeply disproportionate effects" on the most impoverished, Justice Martin noted Shaun Michael's $250 monthly income and the "crushing" surcharge of $900 imposed on him (at para 66). In connection with the second harm, Justice Martin acknowledged that inability to pay provided impecunious offenders with a reasonable excuse to avoid a committal warrant, but noted that poor, homeless and addicted offenders will likely spend some time in detention as a result of the surcharge because a committal hearing must be held and a police officer may arrest and detain an offender in default in order to ensure their attendance at that hearing (at paras 69-70). The fine option programs that are available in some provinces are not a realistic option for some offenders due to their severe mental disabilities, illness or age (at para 72). The third harm arises because provinces are responsible for enforcing the surcharges and some delegate collection efforts to private collection agencies (at para 74). As for the fourth harm – the surcharge's creation of a *de facto* indefinite sentence – Justice Martin noted that the surcharge debt endures until it is paid and some offenders, such as those grappling with mental illness and severe addiction or some of those living with a permanent disability, will never be able to pay the surcharge (at para 76-77). For them, their repeated court appearances to explain they cannot pay becomes a ritual akin to "public shaming" (at para 77). Furthermore, recognizing that any criminal sanctions affecting marginalized and vulnerable persons disproportionately are likely to fall disproportionately on

Indigenous peoples, Justice Martin found that the surcharge "undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison" (at para 83). Additionally, impecunious offenders who are more likely to be self-represented will be at a further disadvantage because the surcharge amount is based on the number of charges and the type of offence, which are both in the prosecutor's discretion and therefore something defence counsel might help to minimize (at para 87).

Overall, then, the surcharge was seen to meet the test of gross disproportionality and amounted to cruel and unusual punishment contrary to section 12 of the *Charter*. The majority thus found it unnecessary to consider section 7 of the *Charter*. It was also unnecessary to consider section 1 because the government did not attempt to argue that a grossly disproportionate sentence could still be a reasonable limit on section 12 rights (at para 97).

The dissenting justices agreed with the majority that the mandatory victim surcharge may have adverse effects on some impecunious offenders, "particularly those who might spend the rest of their lives with the surcharge hanging over their heads" (at para 138). Nevertheless, they did not believe that the surcharge rose to the level of cruel and unusual punishment under section 12.

Commentary

As we have written about previously, adverse impact discrimination (also known as adverse effects or indirect discrimination) is one of the forms of discrimination that is protected against under section 15 of the *Charter*. It applies where a law or policy is neutral on its face but has adverse effects upon members of groups protected under section 15. Although recognized in cases such as *Eldridge v British Columbia*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC), adverse effects discrimination is typically more difficult to establish than direct discrimination.

This difficulty is seen in cases such as *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII), where the Supreme Court rejected the claim that a community election code adopted by the First Nation – which restricted eligibility for some elected positions to persons who had a Grade 12 education or equivalent – had an adverse impact on the basis of age and residency on reserve (for our posts on that case see here and here). One of the Court's key reasons for rejecting Taypotat's claim was the lack of evidence particular to his First Nation in terms of the adverse impact of the election code on these grounds. Failure to prove adverse effects based on the relevant grounds to the satisfaction of the Court is a common reason for rejecting these claims under section 15 of the *Charter* (see e.g. *Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55 (SCC); *Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99 (SCC); *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 (CanLII)).

In spite of the difficulty of proving adverse effect discrimination under section 15, Justice Martin referred to this concept in several passages in *Boudreault* in discussing the impact of the "universal" (i.e. neutral on its face) victim surcharge. In addition to paragraphs 54 to 55 quoted above, she stated:

> In effect, not only are impecunious offenders treated far more harshly than those with access to the requisite funds, their inability to pay this part of their debt to society may further contribute to their disadvantage and stigmatization (at para 3).
>
> [T]he victim surcharge also has a significant impact on the liberty, security, equality, and dignity of those subject to its application (at para 28).
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> In a constitutional context, the court is also called upon to consider the rights of particular individuals who may be affected by this punishment in a way that is grossly disproportionate, understanding that people have varied life situations and many are impecunious, impoverished, ill, disabled, addicted and/or otherwise disadvantaged. Given this focus, it is less important that other individuals who are differentially situated may be able to pay, that some other fines set by law may be higher or that the amount of the surcharge depends on the number of offences committed (at para 58)
>
> [T]he cumulative charge-by-charge basis on which the victim surcharge is imposed increases the likelihood that it will disproportionately harm offenders who are impoverished, addicted, and homeless. These circumstances will often bring them into conflict with the law …. This reality alone will result in higher total amounts owing. Furthermore, any conditions attached to discharge or probation for these offenders would likely include a prohibition against consuming alcohol and drugs.… [P]eople suffering from addiction routinely accumulate numerous breaches without causing serious harm or anyone (at para 86).

Justice Martin also discussed the disproportionate effects of the surcharges on offenders who live in poverty at paragraphs 66 to 68. She based her conclusion in part on the circumstances of the offender, Shaun Michael, who had a monthly income of $250 and was required to pay a surcharge of $900 (as noted above). Justice Martin compared Mr. Michael's surcharge to what the equivalent would be for those earning the median income in Canada in 2015 ($70,336), which would translate to a $23,000 fine. She based this calculation on Statistics Canada, *Household income in Canada: Key results from the 2016 Census*, September 13, 2017. Interestingly, the Federal Court of Appeal was said to have erred for taking judicial notice of statistical information pertaining to education levels based on age and residency on reserve in *Taypotat* (2015 SCC 30 at para 31). Justice Martin's broader approach to evidence of adverse impact in *Boudreault* is a welcome one.

Another interesting feature of *Boudreault* is that the grounds upon which the surcharge was found to have a differential impact – poverty, addiction, disability, age, and Indigeneity – are not all protected under section 15 of the *Charter* either explicitly or via judicial interpretation. Age is an enumerated ground under section 15, as is disability. Addiction has been found to be a form of disability, though one that is sometimes treated less favourably when it comes to causation issues (see *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII) and a post on that case here). Poverty has not yet been recognized by the Supreme Court as an analogous ground under section 15 – which requires analysis of whether the proposed ground describes a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at

para 13) – and there are lower court decisions to the contrary (see Joshua Sealy-Harrington's post on that issue here). Although race is an enumerated ground, Indigeneity cannot be conflated with race (see the compelling Women's Court of Canada judgment by Sonia Lawrence on this issue, "*R v Kapp*" (2018) 30(2) Canadian Journal of Women and the Law 268). Nor has Indigeneity been independently recognized as an analogous ground under section 15, although off-reserve residency has been (see *Corbiere* at paras 14 and 62). The tenuous status of many of these grounds under section 15 is one reason why an equality claim in this case may have been difficult to make and may explain why sections 7 and 12 were favoured by the challengers.

As discussed earlier, Justice Martin's analysis under section 12 of the *Charter* focused on whether the surcharge was grossly disproportionate in light of what would have been a fit sentence to achieve the *Criminal Code*'s sentencing objectives. The concept of gross disproportionality is also relevant under section 7 of the *Charter*, where laws that deprive persons of life, liberty or security of the person in a way that is grossly disproportionate are seen to violate the principles of fundamental justice (see e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII)). Although the majority did not need to address the section 7 arguments in *Boudreault*, the overlap between these two *Charter* sections and section 15 adverse impact analysis is important to note. As we argued at the outset, the muddying amongst these sections – combined with the evidentiary requirements of section 15 and the courts' failure to recognize certain grounds of discrimination – has led to a lack of robust equality jurisprudence and a tendency to avoid section 15 when possible. But while avoidance was possible in *Boudreault*, that is not always the case, and decisions such as *Taypotat* illustrate the challenges for claimants who must rely on section 15. That being said, Justice Martin took a deeply contextual, equality-driven approach under section 12 that – especially in her analysis of poverty – has not been seen in previous Supreme Court decisions (except perhaps the dissent in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII)).

Our final comment on Justice Martin's decision relates to her discussion of the appropriate remedy. She declared section 737 of the *Criminal Code* to be of no force and effect under section 52(1) of the *Constitution Act, 1982*, and she ordered this remedy to take immediate effect. Although the government sought a suspension of the law's invalidity to give it time to re-draft the surcharge provision so as to meet constitutional muster, Justice Martin noted that their request did not meet "the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the rule of law" (at para 98). Here, she relied on *Schachter v. Canada*, [1992] 2 SCR 679, 1992 CanLII 74 (SCC) – an equality rights case that actually got to the remedy stage – where the Court held that remedial suspensions should be rare. That admonition has not always been followed, and Justice Martin reminds us that governments must make the case for allowing an ongoing violation of rights to continue while a remedy is suspended. Her discussion of the continuing effects of the surcharge on people who were subject to it before the constitutional challenge is also important. Although they will not directly benefit from the law being struck down, Justice Martin discusses a number of possible avenues for people in this category to use to challenge the ongoing effects of their surcharges on a go-forward basis (at para 109). This reminds us of her judgment on assisted dying while she was still a justice of the Court of Queen's Bench of Alberta, where she endeavoured to provide guidelines for people applying for relief in future (see *HS (Re)*, 2016 ABQB 121 (CanLII)).

What might have happened had section 15 played a direct role in this decision? The current test for proving an equality claim is set out in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (*APP*). The majority in that case held that "[t]he test for a prima facie violation of s. 15 proceeds in two stages: does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose "burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating… disadvantage…" (*APP* at para 25).

In the first step, a significant problem in *Boudreault* would have been the need for distinctions based on enumerated or analogous grounds, as already discussed above. The arguments in favour of recognizing poverty as an analogous ground are very strong in this case, and the adverse impacts of the surcharge are more directly tied to impecuniosity than to any other grounds. However, appellate courts have rejected poverty as an analogous ground in other cases, so the acceptance of this ground in the victim surcharge context is unpredictable (see e.g. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 (CanLII); leave to appeal rejected, 2015 CanLII 36780 (SCC)). The existence of the other grounds – age, mental and physical disability (including addiction) and Indigeneity – may be part of the cause of poverty in some cases, but their relationship to inability to pay the surcharge is more indirect and socially constructed. Proof of adverse impact based on these grounds may therefore have been more difficult to make out, similar to how adverse impact based on age and residency on reserve were difficult to prove in *Taypotat*. This step illustrates how section 12 analysis is broader than that under section 15, as gross disproportionality need not be linked to a ground that is protected under the latter section. The same is true of section 7 analysis as well.

As for the second step, it appears that, unlike many cases of adverse impact discrimination, there was a great deal of evidence of the discriminatory effects of the surcharge admitted in these consolidated cases. That the victim surcharge created burdens on these offenders which reinforced and exacerbated their disadvantage is plain from the quotes on adverse impact highlighted above. Thus, if the claimants had met the first step, a section 15 claim could have prevailed on at least some grounds.

Assuming that the Crown would not have tried to justify a section 15 *Charter* breach any more than they tried to justify the breaches of section 7 and 12, the claimants should have succeeded under section 15.

What might have been their remedy? Given that the surcharge would have violated the rights of only some offenders under a section 15 breach, it would have been more difficult to avoid the remedy of reading in judicial discretion to refuse to impose the surcharge on those whose disadvantage it exacerbated. Justice Martin refused to do so for the breach of section 12 because Parliament very deliberately eliminated judicial discretion to waive the surcharge in 2013 and because Parliament had a number of ways to revise the legislation open to it (at paras 100-101). The narrower basis of the remedy in any section 15 claim might also explain why the challengers favoured sections 7 and 12 of the *Charter*.

Conclusion

It is worth pointing out that before she was appointed to the judiciary, Sheilah Martin was recognized as an academic expert on equality rights (see e.g. "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Canadian Bar Review 299), and her expertise would have allowed her to reject some of the usual arguments for interpreting section 15 claims narrowly if such a claim had been pursued in *Boudreault*. However, as we explained in our post on *APP* and its companion case, *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (CanLII), the Court is deeply split at present in its approach to equality rights. Whether Justice Martin could have convinced a majority of Supreme Court justices to sign on to a robust section 15 judgment is uncertain.

As we noted in our tribute to Justice Martin, during her remarks at the Supreme Court nomination hearing she made a point about the importance of thinking about the differential impact of the law on people with different identities and needs. Her decision in *Boudreault*, her first for the Supreme Court, amply demonstrates her ability to bring this perspective to the Court, even if that analysis occurred under section 12 rather than section 15.

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