

Federal victim surcharge bound for Supreme Court, defence lawyers say



The Supreme Court of Canada in Ottawa on Friday, Feb. 6, 2015. (Sean Kilpatrick / THE CANADIAN PRESS)

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OTTAWA -- Defence lawyers say mandatory victim surcharges being imposed on destitute offenders are destined for the Supreme Court of Canada as fierce legal battles play out in lower courts in British Columbia and Ontario.

The latest skirmish is taking place in B.C.'s provincial court, where the Crown is expected to argue next month that the surcharge is a reasonable limitation of a homeless offender's Charter rights.

Trial judge Donna Senniw has already determined the man's rights, outlined under sections 7 and 12, were violated.

"I believe that a reasonable person, properly informed, would find the imposition of a mandatory \$200 surcharge on someone with Mr. (Bruce) Barinecutt's personal characteristics, and in his circumstances, to be grossly disproportionate," Senniw wrote in her ruling.

David Fai, the defence lawyer in this case, says it is only a matter of time before the Supreme Court has to weigh in on victim surcharges.

He argues the fines place an unnecessary and disproportionate burden on people who are poor.

"It creates sort of a two-tier justice system," Fai said in a phone interview. "One for the people that can afford it and one for the ones that can't."

Victim surcharges for offenders became law in 1989 to support provincial and territorial victim services, but the optional fees only became mandatory in 2013 under Conservative government legislation.

The new rules require offenders to pay a 30 per cent premium on any fine imposed on them. Where no fine is imposed, the surcharge is \$100 for minor offences and \$200 for serious offences.

Many judges across the country felt the mandatory surcharge removed their sentencing discretion and some tried to find ways to circumvent the surcharge, such as setting lengthy payment schedules.

"The response we have seen from the judiciary has been exceptional," said Ottawa criminal lawyer Michael Spratt.

"The reason why the judges, I think, are finding creative ways to try and bring fairness back into the system is because these are the people who hear and see the homeless individual who has no money, who is faced with what can be, for them, a back-breaking fine for minor offences."

The mandatory fee, which is applied on top of any other jail sentence or fine, has also been contested in Ontario courts with varying results that will be hashed out at the Ontario Court of Appeal later this year.

Justice Minister Peter MacKay continues to support the surcharge.

"Our government remains committed to ensuring that criminals are held fully accountable for their actions and that the safety and security of law-abiding Canadians and victims come first in Canada's justice system," said spokeswoman Clarissa Lamb.

Anthony Moustacalis, the president of the Criminal Lawyers' Association, said fining impoverished offenders fails to address victim services.

"The political problem is that the amount of funding for victims who have been affected by crime ... is low," said Moustacalis. "The federal government had an opportunity to fund country-wide victim services directly but chose to do it through this surcharge, which is not the most effective way of getting money into victims' pockets."

Instead, Moustacalis said the government's legislation targets a marginalized population that does not have the resources to pay up.