Case Name:

R. v. Express Roll-Off Services

IN THE MATTER OF The Provincial Offences Act R.S.O. 1990

Between
Her Majesty the Queen, and
Express Roll-Off Services

[2002] O.J. No. 5518

Ontario Court of Justice
Cresswell J.P.

May 23, 2002.
(39 paras.)

Counsel:

P. Moore, provincial prosecutor.
S. Pelaccia, agent for the defendant.

CRESSWELL J.P.:—

¶ 1 MR. MOORE: Yes, the other matter is Express Roll-Off.

¶ 2 MR. PELACCIA: Yes, again, Your Worship, the last name for the record is Pelaccia, initial S.

¶ 3 MR. MOORE: Yes, unfortunately, because of the late hour, Your Worship, I am going to have to ask for an adjournment.

¶ 4 **THE COURT**: Well, he had an argument. I want to hear the argument first and then, if it is something I can resolve today, fine. If I can't then it may have to go over. What is your argument, first of all?

¶ 5 MR. PELACCIA: It's a motion to quash, Your Worship.

¶ 6 **THE COURT**: On what grounds?

¶ 7 MR. PELACCIA: On the grounds that the certificate is not proper before the Court and that the maximum fine allowable for a proceeding commenced under Part I is $500 and the total payable on the certificate itself is $532. And it's my respectful submission that it's in excess of what the allowable amount is under a Part I offence. And my friend may argue that well, the set the fine is $437 and that's the only factor that should be considered. But I direct, Your Worship, to section 60(1) of Provincial Offences Act or sub 2, which indicates that "a surcharge shall be deemed to be a fine for the purpose of enforcing payments." So, the surcharge is considered a fine and thus, I submit the fine itself is $532, which is in excess of what the maximum is under a Part I offence. In brief, that would be submission. I understand that we are limited in regards to time.

¶ 8 MR. MOORE: Yes, and this just can't be correct, Your Worship, what the gentleman's indicating. In fact, I guess the operative word for enforcement purposes is it's, it is a fine and for that section, for doing enforcement,

$500 and certainly we have other sections of act that have a maximum, could be 500 or whatever it could be. That doesn't mean that ....

¶ 9 **THE COURT**: This particular one is only 500 because there are procedures. One of the procedures -- and your officer has taken the position of going by way of certificate of offence. And by indicating a fine, set fine which is prior to court which includes the victim witness surcharge. It, also, gives the defendant the right to apply for a trial which is his right to exercise those options.

¶ 10 MR. MOORE: Right.

¶ 11 **THE COURT**: He can come down and speak to a Justice of the Peace and plead guilty with an explanation; he can send in his money, which is deemed to be guilty under section 8(1) of the Act; or he can apply for a trial. He is applying for trial and therefore, he now comes under the umbrella of this Court as a trier of fact.

¶ 12 The other option that the officer had was he could have gone by Part 3 information which allows the Court to look at beyond the maximum that may be set by regulation. But as counsel says, 60(2) says, "the surcharge shall be deemed to be a fine for the purposes of enforcing a payment." So, if his client wanted to pay it prior to court, he cannot, only because he is subject to a fine more than is laid down by legislation.

¶ 13 MR. MOORE: No. Well, just thinking about this. If it were not intended that the surcharge was part of the fine for all purposed, he would not have the 60, he put it in section 1. And that would be a fine for all purposes of the Act, and it would apply to section 12, which talks about a maximum fine of $500. So, it is similar to that if you have a fine in the statute, a $500 maximum fine, that does not mean that the Court can only assess a penalty of $405, because there will be a victim fine surcharge on top of that. Just the reasoning cannot be true. It cannot work that way. I do not have the Appeal Court authority on that.

¶ 14 **THE COURT**: The thing is, I didn't create the legislation, but they have now added this victim-witness surcharge and they have included it to become part of the enforce payment. So, at this point, because it is there ....

¶ 15 MR. MOORE: For its enforcement purposes.

¶ 16 **THE COURT**: The pre-set fine is laid down by the Chief Justice of Province of Ontario as it was then. They have then added, since that time, the victim-witness surcharge, but they have also amended the Act to say that the surcharge to be deemed to be a fine for the purpose of enforcing the payment. Court of Appeal says that you really cannot go above - you should not go above the set fine. His only alternative - if he wanted to, he could have laid a Part 3 information, which would have taken all that out of counsel's control.

¶ 17 MR. MOORE: Well, I don't mind coming back and dealing with this if there is an authority from the Appeal Court - I assume you have that.

¶ 18 MR. PELACCIA: I'm simply relying on what is in the Provincial Offences Act, Your Worship.

¶ 19 MR. MOORE: And I would be happy to come back and deal with this issue a fresh and we will get the authority. I believe there is not an authority on this issue ...

¶ 20 **THE COURT**: Well, I think you are going to ....

¶ 21 MR. MOORE: ... rather than have the decision made and then find out that there is some Appeal Court authority that we did not know about.

¶ 22 **THE COURT**: Well, what I am saying is that the Act says under section 60, which deals with fines, fixed costs on a conviction - well, they have now added this section 60.1(1), which is a surcharge.

¶ 23 MR. MOORE: Yes, but the ....

¶ 24 **THE COURT**: And I did not create the legislation but the Lieutenant Governor and Counsel.

¶ 25 MR. MOORE: But you have to read it, and section 12 is the section that talks about there being a maximum penalty on the Part 1. "A maximum fine of $500."

¶ 26 **THE COURT**: That's right.

¶ 27 MR. MOORE: So, when you are looking at section 60, and you are applying that to section 12, it does not work, because section 60 on its face says, "for enforcement purposes". That is when you are going to go and get whatever kind of tools you are going to use to, after there is a fine, whatever tool you are going to use to collect on it, you can do it in the same way, which is a totally different section than section 12.

¶ 28 **THE COURT**: But what I am saying now, Mr. Moore, is that the officer exercised the option of issuing a certificate of offence. Once he gets that mechanism in place, certain things come into place. One is, he could have gone by way of a summons, using the certificate of offence, which would have precluded this. But he has not. He has put the pre-set fine. When you add the victim-witness surcharge, which did not exist years ago, it now exits today. They have now amended the regulation, amended it by way of regulation that say that it now forms part of the enforcing - it is deemed to be a fine for the purpose of enforcing payment, which is beyond section 12. Section 12 says that "the fine shall be - includes the fine of more than 500 or imprisonment. The provision for the fine or the imprisonment does not apply in lieu of the offences punishable by a fine of not more than the maximum."

¶ 29 They have now added - they are now making it - prior to coming to court the certificate of offence, by virtue of the pre-set fine and the victim-witness surcharge, goes out of section 12. You have to look at section 60.1(2), which is the surcharge to be deemed to be a fine for the purpose of enforcing a payment. I cannot look at the total payable. Only when it comes to - in this case, when they bring something to me prior to.

¶ 30 MR. MOORE: That is fine. If you want to - if that is your decision, that section 60.1 should be used to interpret section 12, then you can proceed in that way.

¶ 31 **THE COURT**: What section 12 says that it cannot be more than $500. He gone by way of Part 1 certificate. Okay.

¶ 32 MR. MOORE: Okay. You have my submissions on that point and you, obviously, from what we have said here, we understand the rationale for your opinion.

¶ 33 **THE COURT**: If the defendant - you look at it too - if the defendant had done nothing, it would be quashed on the fail-to-respond docket, only because it exceeds what is down here.

¶ 34 MR. MOORE: I wish I had the authority here. Perhaps, we will have a decision here and I will come and get authority later and we will have to deal with in another court. Those are all my submissions on that issue and I don't see that we are going to go any further on that.

¶ 35 **THE COURT**: Nothing further from you?

¶ 36 MR. PELACCIA: Your Worship, I have nothing further to say.

¶ 37 **THE COURT**: Well, I think in this case, the way to end it all, I am just going to stay the proceedings.

¶ 38 MR. PELACCIA: Thank you, Your Worship.

¶ 39 **THE COURT**: I'll accept your motion, sir.

CRESWELL J.P.

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