SUPREME COURT OF YUKON

Citation: *R. v. Leclerc*, 2011 YKSC 13

Date: 20110209
S.C. No. 10-AP013
Registry: Whitehorse

Between:

REGINA

Appellant

And

NORMAN LECLERC

Respondent

Before: Madam Justice S.L Martin

Appearances:

Andrew Brown, Student-at-Law	Counsel for the appellant
Judith Hartling	
Norman Leclerc	Self-Represented

REASONS FOR JUDGMENT

INTRODUCTION

[1] At issue in this appeal are the sentencing powers of a judge under the *Highways Act,* R.S.Y. 2002, c. 108. The precise question is whether s. 42(4) establishes a fixed fine of $500 for all offences for which no other penalty is set out in the *Act*. I find that had the legislature intended uniform mandatory fines for all residual offences under both the *Highways Act* and its regulations, it would have clearly so stated. In the result, a sentencing judge under s. 42(4) retains the discretion to tailor the fine to the seriousness and circumstances of the offence and the offender up to an amount of $500.

FACTS

[2] Mr. Leclerc was convicted of towing two vehicles along the Alaska Highway contrary to s. 34(1) of the *Highways Regulation* (O.I.C. 2002/174). The sentencing judge imposed a fine of $100. The Crown argued both here and at trial, that s. 42(4) sets out a specified penalty and the phrase "liable to a fine of $500" means a fine of $500 – no more and no less. The trial judge held that the section was vague on whether a minimum penalty was imposed and that any ambiguity in the *Act* must be resolved in favour of the accused. The judge chose $100 because there were no allegations of previous non-compliance and no evidence of actual endangerment to the public.

[3] The Crown argues that the judge erred in law because it says the *Act* imposes a fixed fine for this category of offence. Mr. Leclerc represented himself. Although there was no cross appeal on conviction, Mr. Leclerc pointed out that he is in the towing business and there should not be an offence for removing dangerous things from the highway at the request of the RCMP.

[4] At issue is s. 42, the penalty provision in the *Act*. It should be quoted in full because its interpretation lies at the heart of the present appeal. It reads:

> 42(1) A person who is convicted of an offence under section 24 is liable to a fine of up to $100,000, to imprisonment for a term not exceeding one year, or to both.
>
> (2) A person who is convicted of an offence under
> (a) section 16, 17, 25, 28, or 32;
>
> (b) subsection 7(2), 8(3), 8(4), 9(2), 14(4), 21(1), 22(1), 22(2), 26(2), 29(1), 35(2), or 35(3)
>
> is liable to a fine of up to $ 10,000, to imprisonment for a term not exceeding one year, or to both.

(3) A person who is convicted of an offence under subsection 30(2) is liable

(a) for a first offence, to a fine of $100;

(b) for a second offence within three years, to a fine of $300; and

(c) for each subsequent offence within three years, to a fine of $500.

(4) Any person convicted of an offence under a provision of this Act or the regulations for which a penalty is not otherwise provided is liable to a fine of $500, to a period of imprisonment for a term not exceeding six months, or to both.

(5) An officer may issue tickets under the *Summary Convictions Act* for the prosecution of offences under this Act.

[5] Mr. Leclerc committed the type of offence which falls within s. 42(4): s. 34(1) of the *Regulation* is not expressly listed in 42(1), (2) or (3) and therefore falls within the residual section covering offences "for which a penalty is not otherwise provided."

ANALYSIS

Does Section 42(4) require a fixed fine?

[6] The answer to this question rests on the proper interpretation of s. 42. The Supreme Court of Canada tells us:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at para. 26, quoting E.A. Driedger, *Construction of Statues* (2nd ed. 1983).

[7] A review of cases which have judicially considered the phrase "liable to a fine of" demonstrate two points. First, the division of opinion that exists over what such words may mean and second, the different outcomes reached when interpreting different statutes.

[8] Some argue that these words connote a mandatory fine on the basis that if the legislature intended to give the sentencing judge a discretion to impose a lesser fine it would have used terms such as "liable to a fine up to $500" or "not more than $500". See *R. v. Smith*, [1923] 1 D.L.R. 820 (N.S.S.C.); *Canada v. Panko*, [1972] S.C.R. No. 319.

[9] Others contend that the words "is liable to a fine of" mean "exposed to", giving the court discretion to impose a smaller fine. If the legislature intended to remove the sentencing judge's discretion, it could easily have said is "liable to a fine equal to $500" or "the fine shall be $500". See *R. v. Fraser*, [1944] 2 D.L.R. 461 (P.E.I.S.C.); *R. v. Spacemaker*, [1980] O.J. No. 3039 (Ont. Co.Ct.); *R. v. Robinson*, [1951] S.C.R. 522.

[10] To determine the meaning of this statutory provision the primary focus needs to be on the *Highways Act* itself. Section 42 is the main penalty provision in the *Act*. Before amendments were made to subsections (1) and (2) in 1996, all subsections contained the same wording of "liable to a fine of". No case law was submitted about how such a phrase was interpreted before the amendments. Consulting *Hansard* about the reasons behind the amendments provides limited helpful information. The Minister introducing the amendments stated that "[t]he amendments to the *Business Corporation Act* and to the *Highways Act* will clarify the intents of these acts by clarifying the wording of the text": See Yukon, Legislative Assembly, *Hansard*, 28th Legislature, Session 2 (11 April 1996). While the intention may have been clarity, the result falls short of the stated purpose.

[11] Under the *Highways Act*, subsections (1) and (2) say "liable to a fine of up to". These words clearly provide a range of fines for the offences specifically enumerated in these subsections. They are serious offences with penalty ranges to $100,000 under s. 42(1) and $10,000 under s. 42(2).

[12] Section 42(3) is a particular provision, directed only to breaches of one section: being s. 30(2). It uses the term "liable to a fine of", but expressly outlines legislated amounts and gradations based on whether it is a first, second or third offence. The amounts set out are interesting: only on a third offence within three years is the fine set at the highest level of $500. It is not difficult to conclude that, for this one chosen type of breach, the legislature intended to provide a specific penalty for each separate offence. Indeed, on a very similar type of provision the Ontario Court of Appeal found that the context, history, structure and wording of its comparable legislation meant that there was no discretion to change the formula provided by statute for fines outlined for speeding offences. See *R. v. Winlow*, 2009 CarswellOnt 5208, 2009 ONCA 643.

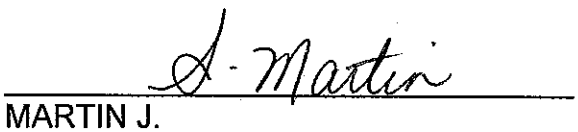
[13] While the wording in s. 42(4) is the same as s. 42(3) ("is liable to"), and different from ss. 42(1) and (2) ("is liable to a fine up to") that one factor does not persuade me that the legislature intended a fixed fine in all cases caught by s. 42(4). Normally different words are intended to mean different things: sometimes however, they are just mishaps in drafting. If the use of the same words was the only, or indeed the primary, consideration in statutory interpretation then the Crown's position may have merit. However, the words "is liable to" contain ambiguity. Further, context and purpose are important considerations. It is the structure of s. 42(3) that underpins the argument that its gradations are mandatory. While the wording in s. 42(4) is the same as s. 42(3), it is

the structure and nature of that provision that points in entirely the opposite direction. Subsection 42(4) sets out the penalty regime for all offences not specifically mentioned in s. 42, and its residual category is large and diverse. The catch-all nature of this penalty provision suggests that discretion in sentencing was thought to be appropriate.

[14] Other aspects of s. 42(4) support this conclusion. It is most unlikely that the legislature would combine a fixed fine, a range of imprisonment with a stated maximum term and the express power to give either or both. This subsection appears to be built around the concept of discretion in sentencing. It appears much more consistent to have flexibility, within the legislated range, on each and every available sanction, including the ability to set what is a fair and just fine.

CONCLUSION

[15] In my view, s. 42(4) allows discretion in sentencing and sets a maximum fine of $500. The appeal is dismissed.



MARTIN J.