Court File No. 37427

**IN THE SUPREME COURT OF CANADA**

(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

**ALEX BOUDREAULT**

APPELLANT

- and –

**HER MAJESTY THE QUEEN and ATTORNEY GENERAL OF QUEBEC**

RESPONDENTS

- and –

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, COLOUR OF POVERTY – COLOUR OF CHANGE, INCOME SECURITY ADVOCACY CENTRE, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, ABORIGINAL LEGAL SERVICES, CANADIAN CIVIL LIBERTIES ASSOCIATION, PIVOT LEGAL SOCIETY and YUKON LEGAL SERVIES SOCIETY**

**INTERVENERS**

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**FACTUM**

**(PIVOT LEGAL SOCIETY, INTERVENER)**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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# TABLE OF CONTENTS

**Tab** **Page**

## PART I — OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Pivot Legal Society ("Pivot") intervenes in support of a finding that the mandatory victim surcharge contained in s. 737 of the *Criminal Code* amounts to cruel and unusual punishment contrary to s. 12 of the *Canadian Charter of Rights and Freedoms*.

2. The protections relied upon by Justices Mainville and Schrager of the Quebec Court of Appeal (collectively, the "majority") to uphold the constitutionality of the surcharge are either inapplicable or illusory in British Columbia, a jurisdiction that deploys sweeping civil enforcement mechanisms while offering no alternative method to discharge the debt.

3. BC's judges routinely sentence impoverished offenders to incarceration in immediate default of surcharge payment.[1] Although alarming, this practice is rooted in mercy not malice. The real-world effects of surcharge debt on marginalized offenders in BC are devastating. When sentencing individuals in this circumstance, BC's judges are forced to choose between two evils: the lessor of which is, by most judges' standards, imprisonment.

### B. Statement of Facts

4. Pivot takes no position on the particular facts of this appeal and provides the following context, not as evidence of adjudicative facts, but to ground the s. 12 analysis in "experience and common sense," as instructed by this Court in *R. v Nur*.[2]

5. Pivot is a legal advocacy organization that serves marginalized residents of Vancouver's Downtown Eastside neighbourhood ("DTES"), one of Canada's poorest urban neighborhoods. This Court has described the reality of DTES residents as follows:

> The DTES is home to some of the poorest and most vulnerable people in Canada. Its population includes 4,600 intravenous drug users, which is almost half of the intravenous drug users in the city as a whole. This number belies the size of the DTES. It is in fact a very small area,

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[1] See Appendix A for a list of more than one hundred reported decisions imposing imprisonment in default in BC since 2013. The imposed terms vary from one day, served concurrently, to fifty-two days, served consecutively.

[2] *R. v. Nur*, 2015 SCC 15 at para. 72.

> stretching for a few blocks in each direction from its heart at the intersection of Main and Hastings…
>
> While some affordable housing is available in the DTES, living conditions there would shock many Canadians. The DTES is one of the few places where Vancouver's poorest people, crippled by disability and addiction, can afford to live. Twenty percent of its population is homeless. Of those who are not homeless, many live in squalid conditions in single-room occupancy hotels. Residents of single-room occupancy hotels live with little in the way of security, privacy or hygienic facilities. The residents of one building often have to share a single bathroom. Single-room occupancy hotels are commonly infested with bedbugs and rats. Existence is bleak.[3]

6. Pivot advocates on behalf of three groups of people who are particularly vulnerable to iniquity and trauma: people with addiction, street-level sex workers, and people experiencing homelessness. There is significant overlap between these groups, with membership in one both a cause and consequence of membership in others. While all of Pivot's clients have diverse origins and unique personal histories, familiar themes emerge. Two such themes are particularly prevalent and pernicious: (1) the grinding cycle of poverty, and (2) the learned fear of authority, both of which inevitably result in increased involvement in high-risk survival activities and reduced access to care.[4]

7. The effect of poverty on the ability of Pivot's clients to materially support themselves is not hard to imagine: a skeletal income makes the struggle to eat, stay warm, provide for children, and find shelter even more desperate and difficult. In addition, such poverty puts extreme pressure on poor people to engage in increasingly dangerous income-generating practices in order to survive. For a person who already relies on food banks and emergency shelters, the need for basic sustenance will often supersede the ability to mitigate the hazardous health and safety risks marginalized individuals encounter on a daily basis.[5]

8. Fear of authority, an adaptive survival strategy learned in response to the historical treatment of these "deviant" populations, has a similarly hazardous effect on Pivot's clients: in efforts to avoid police detection, many individuals in the DTES are forced to carry out already risk-laden activities – including drug use, sex work, and sheltering from the elements – in more clandestine and dangerous environments. As this Court and others have recognized, 'going

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[3] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 4 and 8
[4] *PHS* at para. 10; *Bedford v. Canada (Attorney General),* 2013 SCC 72 at paras. 86-89.
[5] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at paras. 209, 213.

underground' creates significant barriers for accessing critical resources and services, including those provided by police, healthcare providers, outreach and support workers, harm reduction workers, peers, and other Good Samaritans.[6]

## PART II – QUESTIONS IN ISSUE

9. Pivot takes the position that the mandatory victim surcharge contained in s. 737 of the *Criminal Code* amounts to cruel and unusual punishment in contravention of s. 12 of the *Charter.*

## PART III – STATEMENT OF ARGUMENT

### A. Introduction

10. Proportionality – the "*sine qua non*"[7] – of a just sanction is the fundamental principle of sentencing and underlies the guarantee provided by s. 12 of the *Charter*. A sentence will only infringe s. 12 if it is "grossly disproportionate" to the punishment that is fit and proportionate in the circumstances, having regard to the gravity of the offence and the blameworthiness of the offender. In addition, a law will violate s. 12 if its reasonably foreseeable applications will impose grossly disproportionate sentences on others.[8]

11. The majority of the Quebec Court of Appeal, in finding that the surcharge does not contravene s. 12, identified three principal protections which it held ameliorate the surcharge's foreseeable effects on impoverished offenders: (1) the surcharge cannot be collected using civil enforcement mechanisms; (2) surcharge debt may be paid off with compensatory work; and (3) individuals can apply for additional time to pay the surcharge.[9]

12. Pivot's submissions are two-fold: first, none of the protections are available to offenders in BC, a jurisdiction that deploys sweeping civil enforcement mechanisms while offering no alternative method to discharge the debt; and second, the real-world impact of the surcharge on Pivot's clients is grossly disproportionate to what is fit in most circumstances and would shock the conscience of Canadians.[10]

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[6] See *PHS* at para. 10; *Bedford; Shantz.*
[7] *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
[8] *R. v. Lloyd*, 2016 SCC 13 at para. 22.
[9] *R. v. Boudreault*, 2016 QCCA 1907 at paras. 194, 206.
[10] *Lloyd* at para. 33.

## B. Surcharge Protections Unavailable in BC

13. The three principal protections relied upon by the majority are either unavailable or illusory for Pivot's clients.

### a. BC vigorously pursues civil enforcement measures

14. The majority held that "the victim surcharge cannot be recovered through a seizure of the offender's income or other assets" because s. 737(9) of the Criminal Code does not incorporate s. 734.6.[11] Unfortunately, for Pivot's clients, this reasoning is mistaken. Section 734.6 allows Attorneys General to, "in addition to any other method provided by law for recovering the fine," register the debt as a civil judgment.[12] The fact that s. 737 does not incorporate s. 734.6 does not prevent provinces like BC from utilizing their own methods, including legislation such as the *Financial Administrations Act* and the *Land Title Act*[13], to garnish wages, register debt against assets, and seize bank accounts to collect outstanding surcharge debt. Indeed, BC actively utilizes all three measures to enforce the surcharge. The BC Provincial Court recently summarized the evidence of a provincial compliance officer tasked with overseeing the collection of surcharge debt:

> If a surcharge is not paid within 30 days of the due date, the Province's Revenue Services begins collection. A series of letters are mailed to the offender if the surcharge remains unpaid. Once the final letter, a legal warning letter, is sent the debt is then registered with Canada Revenue Agency, which causes the debt to be paid out of any tax refund owed to the offender. The final step would be to pursue legal action to collect the debt, including registering it against an interest in land, or issuing a demand against wages or bank accounts. The Insurance Corporation of BC may suspend or refuse to renew a driver's licence where the offender's victim surcharge is attached to a motor vehicle related Criminal Code offence (and other specified motor vehicle related offences). (Motor Vehicle Act R.S.B.C. 1996 c. 318 s. 26.).[14]

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[11] *Boudreault* at para 192.
[12] *Criminal* Code, s. 734.6 [emphasis added].
[13] RSBC 1996, c. 38, s. 83; RSBC 1996, c. 250, s. 204.
[14] *Barinecutt* at para. 13.

15. Once the surcharge is registered with the Canada Revenue Agency, social safety net funds, such as GST rebates, may be garnished. BC can thus extract outstanding surcharge debt from the basic assistance marginalized individuals rely on to negotiate their survival. The argument that the surcharge is effectively unenforceable against impoverished offenders has no application in BC.

**b. BC offers no alternative fine option program**

16. The second protection principally relied on by the majority below is the availability of a compensatory work option program. If the argument is that a fine option program saves the constitutional validity of s. 737, it has no relevance to BC, where no such program exists.[15] Indigent offenders unable to pay in BC remain exposed to the deleterious effects of the surcharge for the remainder of their lives.[16]

**c. BC court procedure renders time-extensions illusory**

17. The contention that the deadline for payment may be extended upon application of the offender is illusory for many offenders in BC, where the court procedure required to bring the application is insurmountable for many marginalized individuals.[17]

18. In order to be granted an extension, the BC offender must successfully complete a lengthy application procedure, which includes drafting, filing, and speaking to the issues raised by the required Form ADM-312 in the BC Provincial Court, after affording the Crown 30 days to make submissions – all without province-funded legal assistance. Many marginalized offenders face great physical and cognitive challenges due to disability. The jurisprudence details the inability of individuals to comply with this procedure.[18]

19. In the unlikely event that a marginalized, impoverished individual suffering from homelessness, addiction, and intellectual disability is somehow able to complete the procedural steps required for an extension – including returning to court to speak to the

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[15] *Barinecutt* at para. 67.
[16] *Barinecutt* at paras. 42, 70.; *R. v. Michael*, 2014 ONCJ 360 at paras. 74-77.
[17] *Barinecutt* at para. 66; Form ADM-312, "Application to change time to pay", British Columbia Courthouse Services Online. Retrieved on January 13, 2018 from http://www.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/court-files-records/court-forms/admin/adm312.pdf;
[18] *Barinecutt* at para. 66; See also *R. v. Flaro*, 2014 ONCJ 2 at para. 63; *R. v. Tinker*, 2017 ONCA 552 at para. 79; *R. v. Dennis*, 2013 BCCA 153.

application, which may be opposed – the extension, if granted, will still not change the fact of the offender's criminal indebtedness. An extension of time in these circumstances is, as observed by Justice Paciocco, "nothing more than a promise of ongoing legal obligation, with all of the stress and risks that this implies, only that stress is compounded by the imposition of impending deadlines that are apt to be unrealistic from the start."[19]

## C. Foreseeable Effects of s. 737 in BC

20. Pivot's concern is directed at the tangible effects of the surcharge on its clients and, in particular, the effects related to (a) increased impoverishment due to civil enforcement, (b) heightened fear of police, and reduced access to health and emergency services, due to threat of arrest, and finally (c) the routine incarceration of impoverished offenders in BC.

### a. Increased impoverishment due to civil enforcement

21. Abject poverty does not necessarily mean that nothing will be paid from the funds that individuals may possess for their "minimally tolerable support". Those who make payments, either because they are ordered to, or under pressure from authorities and the threat of imprisonment, do so at the cost of compromising their welfare, health, and safety to a degree that other offenders do not. This problem is grossly magnified in BC, a jurisdiction that has equipped itself with the ability to garnish wages, bank accounts, and social-safety-net funds to collect surcharge debt.[20]

22. Notably, the income assistance support rate for a single person in BC is $335 per month.[21] Extracting any amount from that paltry sum – including the $100 associated with just one summary-conviction surcharge –leaves those who already rely on income assistance with even less money for food and other necessities and even more ill-equipped to lift themselves out of poverty.[22]

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[19] *Michael* at para. 81.
[20] *Barinecutt* at paras. 13, 69; *Madeley* at para. 17.
[21] "Income Assistance Rate Table". Province of British Columbia Online. Retrieved on January 16, 2018 from http://www.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/income-assistance-rate-table
[22] *Michael* at para. 81.

23. For some, the daily reality of going hungry, unclothed, unsheltered, and un-medicated precipitates a cycle of criminalization, whereby crimes of desperation are committed to obtain basic necessities, resulting in additional convictions and surcharges.[23]

24. Moreover, due to the complex relationship between homelessness, addiction, and historic criminalization, impoverished individuals are more likely to be bound by court orders and are thus more likely to accumulate breach charges which can result in thousands of dollars of surcharges.[24] Consider the homeless offender in *R. v. Pelkey*, who suffered from extreme alcoholism and incurred 13 breach convictions in less than two years resulting from his "refusal" to comply with release conditions mandating sobriety.[25] Mr. Pelkey's situation is not unique. Due to the unfortunately common practice of imposing abstinence and "no go" conditions on people patently unable to comply, a seemingly modest $100 surcharge debt can turn into a formidable $400 surcharge debt which can then turn into an otherworldly $1600 surcharge debt—and on and on it goes.

25. The harms inflicted by the extraction of surcharge debt are not merely financial. Pivot's clients live with a level of poverty that is intolerable by most standards but is survivable under certain conditions. An additional strain to their income, surcharge debt upsets an already fragile survival system and can lead to desperation, serious illness, and death.

26. BC currently faces an overwhelmingly toxic opioid supply that has resulted in the deaths of thousands of individuals across the province at an increase of over 500 percent in the last six years.[26] Given the chronic nature of addiction, which this Court has recognized as an illness, it is foreseeable that a person in a particularly desperate financial situation will, rather than stop using entirely, resort to compromising the quality and certainty of the drugs they consume in order to afford a fix. This could mean purchasing a cheaper substance of unknown potency from an unfamiliar dealer rather than one's usual supply from a known and trusted dealer. Similarly, an impoverished dealer who routinely tests his or her supply prior to sale may abandon this practice in order to ensure a quick sale.

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[23] See *Shantz; PHS; Bedford; Madeley* at paras. 106-108.
[24] *Madeley* at paras. 106-108.
[25] *R. v. Pelkey*, 2012 BCSC 815 at para. 63.
[26] "Illicit Drug Overdose Deaths in BC".Province of British Columbia Online. Retrieved on January 15, 2018 from http://www.gov.bc.ca/assets/gov/public-safety-and-emergency-services/death-investigation/statistical/illicit-drug.pdf; *R. v. Smith*, 2017 BCCA at paras. 9-10.

27. As this Court recognized in *Bedford*, it is financial desperation and a lack of available employment opportunities that leads many women to engage in sex work.[27] Thus, for women already living on the poverty line, it is foreseeable that the garnishment of wages, bank accounts, and government assistance might leave no other option but to engage in street-based sex work as a means of survival. This "option" poses great risk. For women already involved in that line of work, financial desperation could elicit a need to favour quantity over quality with respect to sexual transactions. This could mean seeking out additional clients with whom the sex worker is neither familiar nor comfortable, as well as disregarding concerns about prospective clients in favour of much-need income. As this Court observed when considering the financial desperation faced by street-level sex workers, "[i]t is certainly conceivable…that some street prostitutes would not refuse a client even if communication revealed potential danger."[28]

**b. Heightened fear of police and the threat of arrest**

28. As with abject poverty, fear of police can lead to high-risk survival activities as well as reduced access to desperately required health, emergency, and social services.[29]

29. When the surcharge is imposed, the court is required to explain to the offender, among other things, the potential consequences of non-payment, which includes arrest, detention, compelled attendance at committal hearings, and, ultimately, imprisonment.[30]

30. The issue for the present analysis is not whether it is foreseeable that an individual will face arrest but whether it is foreseeable that an individual will *fear* arrest. As has been observed, "a person told that they could be incarcerated for not paying can be expected to find that threat stressful."[31] Impoverished offenders in BC are keenly aware of the potential consequences of non-payment. In the likely scenario that a Pivot client will default on payment, that client will justifiably be left to fear that the next interaction with law enforcement might, at the unfettered discretion of the state, lead to the individual's arrest and compelled appearance in court to justify the "reasonableness" of their failure to satisfy the debt.

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[27] *Bedford* at para. 59.
[28] *Bedford* at para. 158.
[29] *PHS* at para. 10; *Bedford* at para. 64; *Shantz* at para. 213.
[30] *Criminal Code*, s. 737(1); *Tinker* at para. 113.
[31] *Michael* at para. 74.

31. The causal relationship between the threat of arrest and the adoption of risky survival mechanisms has been formally recognized by Canada's federal government, which recently enacted the *Good Samaritan Drug Overdose Act*, S.C. 2017, c. 4 ("*GSDOA*") to encourage people to call 911 at the scene of an overdose. Conservative M.P. Michael Cooper explained the impetus for the bill as follows:

> The vast majority of drug overdoses occur in the presence of at least one other person and yet, far too often, individuals who witness a drug overdose do not do the right thing. They do not pick up the phone. They do not call 911 to get help. One may ask why someone would not call for help. The simple answer is that far too often they are afraid. They are afraid of being charged with a criminal offence. They are afraid of being caught up in the criminal justice system, so they do not call. They do not act, and the consequences of inaction can be fatal.[32]

32. The *GSDOA* affords arrest and charge protection with respect to certain drug offences and related breach convictions. These protections do not, however, extend to persons in default of surcharge payment. For impoverished offenders, recalling the court's formal warning about surcharge default, one of the foreseeable consequences of s. 737 is a reluctance to call 911, believing that doing so could result in their arrest, detention, and possible comital. Given the magnitude of the overdose crisis felt every day by Pivot and its clients, there is no circumstance in which it is justifiable to put lives at risk because people simply cannot pay. One life lost for fear of calling 911 due to unpaid court fines is one life too many.

33. This Court and others have also recognized the adverse health and safety impacts that can result when marginalized communities fear police detection. In *Bedford*, it was acknowledged that sex workers, under threat of criminalization, were forced into dangerous conditions and dissuaded from taking critical health and safety precautions, such as hiring security guards, "screening" potential clients, or meeting those clients in well-lit areas. In *PHS*, this Court described the reality that, for people suffering from addiction, fear of police can override ingrained safety habits, including rushed injections, dirty needles, and overdosing "alone and far from medical help." In *Shantz*, the BC Supreme Court described how people experiencing homelessness will migrate, due to fear of authority, toward more remote and isolated locations, leading to an increased risk of assault, decreased access to

[32] Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 168 (2 May 2017). Retrieved from https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-168/hansard

service providers, increased drug use to stay awake, and impaired sleep and psychological pain and stress.[33]

### c. The routine incarceration of impoverished offenders in BC

34. The described effects of surcharge debt on marginalized offenders are recognized by judges in BC, who routinely sentence offenders to incarceration in default of surcharge payment. Reported custodial terms vary from one day imprisonment served concurrently to fifty-two days imprisonment served consecutively. While the terms may vary, their rationale does not: for the impoverished offender, imprisonment is better than the alternative.[34]

## D. Conclusion

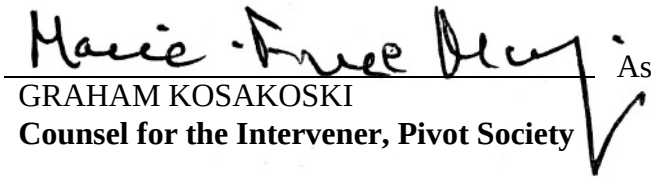
35. The present task is to compare a foreseeably fit sentence with the foreseeable impact of the surcharge. Can there be any doubt that the described effects of the surcharge, which can be literally life-threatening, are grossly disproportionate to a foreseeable fit sentence, like a discharge, in the circumstance of a near-blameless offender who committed a trivial offence?[35]

36. Ultimately, it is respectfully submitted that there can be no clearer example of the cruel and unusual nature of s. 737 than the practice of BC's sentencing judges, who preside within and understand the conditions of their respective communities[36], to impose imprisonment on impoverished offenders, in a spirit of compassion, rather than burdening the offenders with the permanent consequences of a criminal debt they know they will never be able to pay.

## PART IV – COSTS

37. Pivot does not seek a cost award and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 25th day of January 2018.



As Ottawa Agent

GRAHAM KOSAKOSKI
**Counsel for the Intervener, Pivot Society**

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[33] *Bedford* at para. 158; *PHS* at para. 10; *Shantz* at paras. 69, 71, 213, 219

[34] Appendix A; *R. v. Bailey*, 2013 BCPC 326 (one day concurrent) to *R. v. Learning*, 2017 BCSC 1594 (52 days consecutive)

[35] See *R.v. Bateman*, 2015 BCSC 2071.

[36] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91

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| *R. v. Bailey*, 2013 BCPC 326 | 34 |
| *R. v. Bateman*, 2015 BCSC 2071 | 35 |
| *R. v. Barinecutt*, 2015 BCPC 189 | 14, 16, 17, 18, 21 |
| *R. v. Boudreault*, 2016 QCCA 1907 | 11, 14 |
| *R. v. Dennis*, 2013 BCCA 153 | 18 |
| *R. v. Flaro*, 2014 ONCJ 2 | 18 |
| *R. v. Ipeelee*, 2012 SCC 13 | 10 |
| *R. v. Learning*, 2017 BCSC 1594 | 34 |
| *R. v. Lloyd*, 2016 SCC 13 | 10, 12 |
| *R. v. M*, (C.A.), [1996] 1 S.C.R 500 (S.C.C.) | 36 |
| *R. v. Madeley*, 2016 ONCJ 108 | 21, 23, |
| *R. v. Michael*, 2014 ONCJ 360 | 16, 19, 22, 30 |
| *R. v. Nur*, 2015 SCC 15 | 4 |
| *R. v. Pelkey*, 2012 BCSC 815 | 24 |
| *R. v. Smith*, 2017 BCCA 112 | 26 |
| *R. v. Tinker*, 2017 ONCA 552 | 18, 29 |

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|---|---|
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| **CASES** | |
|---|---|
| *R. v. Andel*, 2017 BCPC 146 | |
| *R. v. Andrews*, 2017 BCSC 216 | |
| *R. v. Athey*, 2016 BCSC 1449 | |
| *R. v. B.A.B.*, 2016 BCPC 451 | |
| *R. v. Bell*, 2015 BCPC 235 | |
| *R. v. Berg*, 2016 BCPC 379 | |
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| *R. v. Biwer*, 2017 BCPC 133 | |
| *R. v. Brotherston*, 2017 BCPC 161 | |
| *R. v. Butz*, 2015 BCPC 75 | |
| *R. v. Campbell*, 2017 BCPC 126 | |
| *R. v. Campbell*, 2017 BCPC 313 | |
| *R. v. Cantwell*, 2016 BCSC 837 | |
| *R. v. Carmichael*, 2014 BCPC 285 | |
| *R. v. Carmichael*, 2017 BCPC 269 | |
| *R. v. Chamberlain*, 2016 BCSC 379 | |
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| *R. v. Christie*, 2016 BCPC 375 | |
| *R. v. Cole*, 2014 BCSC 2408 | |

| | |
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| *R. v. Compton*, 2015 BCPC 395 | |
| *R. v. Corbett*, 2016 BCPC 132 | |
| *R. v. D.*, 2014 BCPC 326 | |
| *R. v Delellis*, 2017 BCSC 2253 | |
| *R. v. Donald*, 2017 BCSC 614 | |
| *R. v. E.R.E.P.*, 2016 BCPC 50 | |
| *R. v. Fabas*, 2017 BCSC 1693 | |
| *R. v. Fader*, 2014 BCPC 327 | |
| *R. v Ferguson*, 2017 BCSC 1774 | |
| *R. v. Fitzpatrick*, 2017 BCPC 319 | |
| *R. v. Friesen*, 2017 BCSC 702 | |
| *R. v. Gabriel*, 2016 BCPC 153 | |
| *R. v. Gellatly*, 2015 BCSC 2139 | |
| *R. v. Godron*, 2017 BCSC 628 | |
| *R. v Grant*, 2016 BCSC 2588 | |
| *R. v. Haggstrom*, 2017 BCPC 190 | |
| *R. v. Hambly*, 2016 BCPC 215 | |
| *R. v Harris*, 2017 BCSC 1552 | |
| *R. v. Heeley*, 2015 BCPC 33 | |
| *R. v. Herft*, 2016 BCPC 393 | |
| *R. v. Hildebrandt*, 2015 BCPC 130 | |
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| | |
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| *R. v. Hunter*, 2016 BCSC 796 | |
| *R. v. James*, 2015 BCPC 465 | |
| *R. v. Jay*, 2014 BCPC 301 | |
| *R. v. Jensen*, 2016 BCSC 2317 | |
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| *R. v. Johnson*, 2017 BCPC 251 | |
| *R. v. Laramee*, 2017 BCSC 1799 | |
| *R. v Learning*, 2017 BCSC 1594 | |
| *R. v. Leboe*, 2014 BCPC 320 | |
| *R. v. Lee*, 2017 BCPC 37 | |
| *R. v. Leppington*, 2016 BCPC 349 | |
| *R. v. Lewis*, 2015 BCPC 388 | |
| *R. v. L.M.S.*, 2017 BCPC 250 | |
| *R. v. Lornsten*, 2016 BCPC 114 | |
| *R. v. MacDonald*, 2015 BCSC 2032 | |
| *R. v. MacGraw*, 2017 BCPC 116 | |
| *R. v. Marks*, 2016 BCPC 230 | |
| *R. v. McCormick*, 2017 BCSC 145 | |
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| *R. v. Nadeau*, 2017 BCPC 158 | |

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| *R. v. O'Soup*, 2016 BCPC 461 | |
| *R. v. Pawlak*, 2016 BCSC 1534 | |
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| *R. v Pelgrom*, 2017 BCSC 2410 | |
| *R. v. Phillips*, 2016 BCSC 2522 | |
| *R. v. Pogue*, 2016 BCPC 444 | |
| *R. v. Powers*, 2016 BCSC 2585 | |
| *R. v. Quigley*, 2016 BCSC 2184 | |
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| *R. v. Rautenberg*, 2017 BCPC 227 | |
| *R. v. Reddemann*, 2017 BCSC 1731 | |
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| *R. v. Ridgeway*, 2017 BCSC 1472 | |
| *R. v. Rogers*, 2017 BCPC 184 | |
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| *R. v. S.D.M.*, 2015 BCPC 112 | |
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| *R. v. Vickerson*, 2016 BCPC 204 | |
| *R. v. Vignjevic*, 2016 BCSC 475 | |
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