

**IN THE SUPREME COURT OF CANADA**  
(On Appeal from the Court of Appeal for Quebec)

**BETWEEN:**

**ALEX BOUDREAULT**

**APPELLANT**

- and -

**HER MAJESTY THE QUEEN**  
**ATTORNEY GENERAL OF QUÉBEC**

**RESPONDENTS**

- and -

**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**

**INTERVENERS**

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**FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO**

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**MINISTRY OF THE ATTORNEY  
GENERAL**  
**Crown Law Office – Criminal**  
10<sup>th</sup> Floor, 720 Bay Street  
Toronto, ON M5G 2K1  
Tel: 416-326-4600  
Fax: 416-326-4656  
michael.perlin@ontario.ca

**BORDEN LADNER GERVAIS, LLP**  
World Exchange Plaza  
100 Queen Street, Suite 1300  
Ottawa, ON K1P 1J9  
Tel: 613-237-5160  
Fax: 613-230-8842  
neffendi@blg.com

**Michael Perlin**  
Counsel for the Intervener, AG Ontario

**Nadia Effendi**  
Agent for the Intervener, AG Ontario

**AIDE JURIDIQUE DE MONTRÉAL**

800 boul.de Maisonneuve Est  
 9e étage  
 Montréal, Quebec  
 H2L 4M7  
 Tel : (514) 842-2233 (ext. 265)  
 Fax: (514) 842-1970  
 ygratton@ccjm.qc.ca

**Yves Gratton**

Counsel for the Appellant

**CENTRE COMMUNAUTAIRE  
 JURIDIQUE DE L'OUTAOUAIS**

136, rue Wright  
 Gatineau, Quebec  
 J8X 2G9  
 Tel: (819) 772-3084  
 Fax: (819) 772-3105  
 dcyr@ccjo.qc.ca

**Daniel Cyr**

Agent for the Appellant

**POURSUITES CRIMINELLES ET  
 PÉNALES DU QUÉBEC**

1, rue Notre-Dame Est  
 Pièce 4.100  
 Montréal, Quebec H2Y 1B6  
 Tel: (514) 393-2703 ext. 52185  
 Fax: (514) 873-9895

**Robert Benoit****Éric Dufour****Louis-Charles Bal**

Counsel for Respondent, Her Majesty the  
 Queen

**DIRECTEUR DES POURSUITES  
 CRIMINELLES ET PÉNALES DU  
 QUÉBEC**

17, rue Laurier  
 bureau 1.230  
 Gatineau, Quebec J8X 4C1  
 Tel: (819)776- 8111 ext. 60446  
 Fax: (819) 772-3986  
 sandra.bonanno@dpcp.gouv.qc.ca

**Sandra Bonanno**

Agent for Respondent, Her Majesty the  
 Queen

**MINISTÈRE DE LA JUSTICE**

1, rue Notre-Dame est  
 bureau 8.00  
 Montréal, Quebec H2Y 1B6  
 Tel: (514) 939-2336 ext. 51451  
 Fax: (514) 873-7074  
 julien.bernard@justice.gouv.qc.ca

**Julien Bernard****Julie Dassylva****Sylvain Leboeuf**

Counsel for the AG of Québec

**NOËL & ASSOCIÉS**

111, rue Champlain  
 Gatineau, Quebec J8X 3R1  
 Tel: (819) 771-7393  
 Fax: (819) 771-5397  
 p.landry@noelassociés.com

**Pierre Landry**

Agent for the AG of Québec

**JUSTICE AND SOLICITOR  
GENERAL**

3rd Floor  
9833 – 109 Street  
Edmonton, Alberta T5K 2E8  
Tel: (780) 422-5402  
Fax: (780) 422-1106  
robert.fata@gov.ab.ca

**Robert Fata**  
Counsel for the AG of Alberta

**GOWLING WLG (Canada) LLP**

160 Elgin Street  
Suite 2600  
Ottawa, Ontario K1P 1C3  
Tel: (613) 786-8695  
Fax: (613) 788-3509  
lynne.watt@gowlingwlg.com

**D. Lynne Watt**  
Agent for the AG of Alberta

**INCOME SECURITY ADVOCACY  
CENTRE**

425 Adelaide Street West, 5<sup>th</sup> Floor  
Toronto, Ontario M5V 3C1  
Tel: (416) 597-5820 (ext 5153)  
Fax: (416) 597-5821  
[esmondja@lao.on.ca](mailto:esmondja@lao.on.ca)

**Jackie Esmonde**  
**Daniel Rohde**  
Counsel for Income Security Advocacy  
Centre

**SUPREME ADVOCACY LLP**

100 – 340 Gilmour Street  
Ottawa, Ontario K2P 0R3  
Tel: (613) 695-8855 (ext 102)  
Fax: (613) 695-8580  
[mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**  
Agent for Income Security Advocacy  
Centre

**HUNTER LITIGATION CHAMBERS  
LAW CORPORATION**

2100 – 1040 West Georgia Street  
Vancouver, British Columbia V6E 4H1  
Tel: (604) 891-2400  
Fax: (604) 647-4554  
[gallen@litigationchambers.com](mailto:gallen@litigationchambers.com)

**Greg J. Allen**  
Counsel for British Columbia Civil  
Liberties Association

**ABORIGINAL LEGAL SERVICES**

211 Yonge Street  
 Suite 500  
 Toronto, Ontario M5B 1M4  
 Tel: (416) 408-4041  
 Fax: (416) 408-4268

**Jonathan Rudin****Caitlyn E. Kasper**

Counsel for Aboriginal Legal Services

**COMMUNITY LEGAL SERVICES –  
OTTAWA CARLETON**

1 Nicholas Street, Suite 422  
 Ottawa, Ontario K1N 7B7  
 Tel: (613) 241-7008 ext. 224  
 Fax: (613) 241-8680  
 bossinm@lao.on.ca

**Michael Bossin**

Agent for Aboriginal Legal Services

**BORDEN LADNER GERVAIS LLP**

Scotia Plaza  
 40 King Street West  
 Toronto, Ontario M5H 3Y4  
 Tel: (416) 367-6165  
 Fax: (416) 361-7063  
[cbredt@blg.com](mailto:cbredt@blg.com)

**Christopher Bredd****Pierre N. Gemson****Alannah M. Fotheringham**Counsel for Canadian Civil Liberties  
Association**BORDEN LADNER GERVAIS, LLP**

World Exchange Plaza  
 100 Queen Street, Suite 1300  
 Ottawa, ON K1P 1J9  
 Tel: 613-237-5160  
 Fax: 613-230-8842  
 neffendi@blg.com

**Nadia Effendi**Agent for Canadian Civil Liberties  
Association**ROSENBERG KOSAKOSKI LLP**

671D Market Hill  
 Vancouver, British Columbia V5Z 4B5  
 Tel: (604) 879-4505  
 Fax: (604) 879-4934  
[graham@rklitigation.ca](mailto:graham@rklitigation.ca)

**Graham Kosakoski**

Counsel for Pivot Legal Society

**SUPREME ADVOCACY LLP**

100 – 340 Gilmour Street  
 Ottawa, Ontario K2P 0R3  
 Tel: (613) 695-8855 (ext 102)  
 Fax: (613) 695-8580  
[mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**

Agent for Pivot Legal Society

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**INDEX**

Part I – Overview and Statement of Facts .....	1
Part II – Position with respect to the Appellant’s Questions .....	4
Part III – Ontario’s Statement of Argument .....	5
A. The surcharge is not “unusual” punishment or treatment .....	5
1. Only a truly unusual financial penalty should infringe s. 12 of the Charter .....	5
2. The victim surcharge is common, not unusual, and certainly not exceptional .....	7
a. Financial penalties as high or higher than the surcharge are common .....	7

b. Mandatory minimum fines are common .....	8
c. Fines commonly operate irrespective ability to pay .....	9
d. Fines commonly persist if unpaid.....	9
e. Fines are commonly enforced through mechanisms likes those in the <i>Criminal Code</i> 10	
B. The victim surcharge of \$100 or \$200 is not “cruel” and cannot make a sentence for commission of a criminal offence grossly disproportionate .....	10
1. Operation consistent with ss. 718(e) and (f) and 718.1 of the <i>Criminal Code</i> .....	11
2. Surcharge not preventing application of totality principle.....	12
3. Limited consequences of non-payment.....	13
a. Certain collateral consequences of the victim surcharge are not relevant to the analysis of its constitutionality since they are entirely illusory .....	13
b. No abhorrent psychological effects .....	15
C. Certain collateral consequences of non-payment are not properly assessed through a constitutional challenge to the victim surcharge .....	17
D. The appropriate remedy under s. 52 would be to strike s. 2, 3(1) and 3(3) of the <i>Increasing Offenders’ Accountability for Victims Act</i> .....	19
Part IV – Submissions concerning Costs .....	19
Part V – Permission to Present Oral Argument .....	20
Part VI – Table of Authorities .....	20

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**Part I – Overview and Statement of Facts**

**A. Overview**

1. The Attorney General for Ontario submits that the mandatory victim surcharge in s. 737 of the *Criminal Code* does not infringe s. 12 of the *Charter*:

A. The surcharge is not “unusual” treatment or punishment. Financial penalties should only rarely infringe s. 12 of the *Charter*, and only when truly unusual. Mandatory financial penalties akin to the surcharge are common in our law;

- B. The surcharge's effects are not "cruel" and not grossly disproportionate. The surcharge operates cooperatively with statutory sentencing principles. A judge may account for it in crafting a fit sentence. There is no evidence that a person who truly cannot pay suffers significant psychological effects as a result. No civil enforcement measures may be undertaken. So long as the offender remains unable to pay, the deadline to pay must be extended to avoid all tangible enforcement mechanisms. Inability to pay is a reasonable excuse that precludes imprisonment for non-payment;
- C. The prospect of imprisonment, licence suspensions and delayed ability to obtain a criminal-record suspension do not provide a proper basis for a constitutional challenge to the surcharge. These consequences apply to non-payment of a variety of financial penalties, and are contingent on the operation of specific legislative provisions other than s. 737 of the *Criminal Code*. Challenges to those consequences should be aimed at the legislation directly responsible for them, rather than at their indirect cause, the surcharge.

2. Ontario takes no position on s. 1 of the *Charter*, but submits that if the mandatory surcharge is unconstitutional, the appropriate remedy is to restore discretion to waive the surcharge that existed before the surcharge was amended in 2013 by striking portions of the *Increasing Offenders' Accountability for Victims Act*.

### **B. Facts**

3. Ontario makes no submissions on the facts of the case, and relies on the following additional legislative facts.

4. Before October 24, 2013, the victim surcharge under s. 737 of the *Criminal Code* was 15 per cent of any fine imposed for an offence. Where no fine was imposed, the surcharge was \$50 for summary-conviction offences and \$100 for offences prosecuted by indictment. The judge had jurisdiction to increase the surcharge or to reduce or waive it if requiring payment would cause "undue hardship" to the offender or the offender's dependants.<sup>1</sup>

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<sup>1</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 737 (prior to amendment by *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c. 11).



5. Section 737 was amended on October 24, 2013, by the *Increasing Offenders' Accountability for Victims Act*. Under the amended law, the surcharge is 30 per cent of any fine imposed or, where no fine is imposed, \$100 for each charge prosecuted by summary conviction or \$200 for each charge prosecuted by indictment. The jurisdiction to waive the surcharge no longer exists, but the jurisdiction to increase it remains.<sup>2</sup>

6. Prior to the 2013 amendment, s. 737(10) of the *Criminal Code* precluded an offender from 'working off' a surcharge through participation in a provincially established fine option program. An offender may do so under the amended law. All three territories and seven provinces (but not Ontario) have fine option programs.<sup>3</sup>

7. Pursuant to s. 737(7), funds obtained from the surcharge "shall be applied for the purposes of providing such assistance to victims of offences" as determined by the province. In Ontario, pursuant to the *Victims' Bill of Rights*, a "victims' justice fund account" consisting of surcharge funds "shall be used to assist victims, whether by supporting programs that provide assistance to victims, by making grants to community agencies assisting victims or otherwise." In Ontario, surcharge revenue funds a wide range of services, including the following:

- Thirty-nine sexual assault and rape crisis centres, which provide a 24-hour crisis and support line, group and one-on-one counselling, accompaniment to hospital, court or police, information and referral services, and public awareness sessions;
- Victim crisis assistance and referral services, which provide short-term assistance on a 24-7 basis to victims at the scene of a crime and make referrals to community services for longer-term assistance;
- The Ontario victim support line, which provides a province-wide, toll-free information line

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<sup>2</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 737, as amended.

<sup>3</sup> *Boudreault v. R.*, 2016 QCCA 1907, at paras. 144, 150; *R. v. Tinker*, 2017 ONCA 552, at para. 14; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 736, 737(9); *House of Commons Debates*, No. 146 (17 September 2012) at p. 10059 (Robert Goguen (Parliamentary Secretary to the Minister of Justice)).

in English and French; and

- The Ontario child witness project, which provides specialized preparation and support to child victims and /or witnesses and their caregivers. The project works closely with the victim /witness assistance programs in their communities.<sup>4</sup>

8. The 2013 amendments to the surcharge responded to that fact that, prior to the amendment, the surcharge was waived in most cases. Statistics Canada reported that in fiscal 2009 / 2010, the surcharge was imposed (*i.e.* not waived for undue hardship) in only 13 per cent of cases in Ontario. In other jurisdictions (excluding Quebec and Manitoba, which did not report data), the surcharge was imposed in the following percentages of cases:

- 52 per cent in Prince Edward Island;
- 36 per cent in the Yukon;
- 34 per cent in New Brunswick;
- 31 per cent in Nova Scotia;
- 30 per cent in Newfoundland & Labrador;
- 29 per cent in Alberta;
- 29 per cent in British Columbia;
- 26 per cent in the Northwest Territories;
- 23 per cent in Saskatchewan; and
- 4 per cent in Nunavut.<sup>5</sup>

### **Part II – Position with respect to the Appellant’s Questions**

9. Ontario submits that the victim surcharge in s. 737 of the *Criminal Code*, made mandatory by removal of the discretion to waive the surcharge in s. 737(5), does not infringe s. 12 of the

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<sup>4</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 737(7); *Victims’ Bill of Rights*, S.O. 1995, c. 6, s. 5; *House of Commons Debates*, No. 146 (17 September 2012) at p. 10050 (Kerry-Lynne D. Findlay (Parliamentary Secretary to the Minister of Justice)).

<sup>5</sup> Minister of Justice and Attorney General of Canada, *Inquiry of Ministry* (Response to Q-170, from Mr. Cotler (Mount Royal)) (6 December 2013), p. 1.

*Charter*. A financial penalty of \$100 or \$200 for the commission of any criminal offence is neither shocking nor abhorrent, particularly in light of the penalty’s purpose.

### **Part III – Ontario’s Statement of Argument**

#### **A. The surcharge is not “unusual” punishment or treatment**

10. Sentences of imprisonment only rarely meet the stringent standard of s. 12. Financial penalties are qualitatively different and less severe than imprisonment. They will even more rarely infringe s. 12, and only when truly unusual. Whether a penalty is unusual is a consideration under s. 12. The surcharge is not unusual; it is entirely common.

##### ***1. Only a truly unusual financial penalty should infringe s. 12 of the Charter***

11. Section 12 of the *Charter* enshrines “the right not to be subjected to any cruel and unusual treatment or punishment”. A law’s effects are “cruel and unusual” if they are “grossly disproportionate” to the fit punishment or treatment in the circumstances. Gross disproportionality is “a high bar” that is not met by punishment that is “merely excessive”. To infringe s. 12, a law must result in punishment or treatment that is “abhorrent or intolerable” to society and “so excessive as to outrage standard of decency”. The test is “very properly stringent and demanding” because “[a] lesser test would tend to trivialize the *Charter*”. The standard will be met only on “rare and unique occasions”.<sup>6</sup>

12. It will be particularly rare for financial penalties to infringe s. 12.<sup>7</sup> Canadian appellate courts have not been receptive to s. 12 challenges to financial or property-based penalties.<sup>8</sup> For example, in *R. v. Pham*, the Court of Appeal for Ontario upheld a \$154,000 fine mandated by the

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<sup>6</sup> *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 22, 24, 46; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417.

<sup>7</sup> In *R. v. Goltz*, [1991] 3 S.C.R. 485, this Court upheld a financial penalty under s. 12.

<sup>8</sup> *R. v. Pham*, [2002] O.J. No. 2545 (C.A.); *R. v. Zachary*, [1996] J.Q. No. 2970 (Que. C.A.); *R. v. Desjardins*, [1996] N.B.J. No. 467 (N.B.C.A.); *R. v. MacFarlane*, [1997] P.E.I.J. No. 116 (S.C. (A.D.)); *Turner v. Manitoba*, 2001 MBCA 207; *R. v. Morash*, [1994] N.S.J. No. 53 (C.A.); *R. v. Lambe*, 2000 NFCA 23.

*Excise Act*, even though the offender could not pay.<sup>9</sup> In *R. v. Lambe*, the Newfoundland and Labrador Court of Appeal remarked that a finding that a restriction on property rights infringes s. 12 would be “extremely rare” or exceptional, and that such penalties may even be “immune from attack founded on violation of *Charter* guarantees”. The court observed that,

If it is only in ‘rare and unique’ occasions that s. 12 can be invoked in respect of sentences affecting the personal liberties and freedoms of an individual’s the protection of which is the essential reason for the *Charter*’s existence, then it appears eminently reasonable that the occasions for bringing fines and forfeiture under s. 12’s umbrella will be even more exceptional.<sup>10</sup>

13. Financial penalties are qualitatively different than the restrictions on liberty typically assessed under s. 12. Property rights were intentionally excluded from the scope of the *Charter*’s protection.<sup>11</sup> This Court affirmed the distinction between property and liberty interests in *R. v. Peers*. There, this Court rejected a claim that a punishment under a provincial statute of imprisonment of five-years-less-a-day and up to \$5 million amounted to “imprisonment for five years or a more severe punishment”, which would have entitled the applicants to a jury trial under s. 11(f) of the *Charter*. The Court affirmed the decision of the majority in the court below, which held that “[o]ur legal system does not recognize any equivalency between money and deprivation of liberty”.<sup>12</sup> Sanctions like “corporal punishment, banishment from the community, forced labour, or revocation of citizenship”, when added to a sentence of imprisonment, might increase its severity to the point that it would be a “more severe” sentence, but adding a financial penalty, even a very large one, could not have that effect.<sup>13</sup> Financial penalties are not akin to deprivations of liberty and should only exceptionally infringe s. 12 of the *Charter*.

14. To decide whether an impugned financial penalty is sufficiently exceptional to infringe s. 12, it is useful to consider how that penalty is similar to or different from financial penalties

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<sup>9</sup> *R. v. Pham*, [2002] O.J. No. 2545 (C.A.), at paras. 16-21.

<sup>10</sup> *R. v. Lambe*, 2000 NFCA 23, at paras. 65-72.

<sup>11</sup> See e.g. *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927, at pp. 1003-04; *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, at pp. 1170-71; *R. v. Lambe*, 2000 NFCA 23, at para. 71.

<sup>12</sup> *R. v. Peers*, 2015 ABCA 407, at para. 10, aff’d, 2017 SCC 13; see also *R. v. Angelis*, 2016 ONCA 675, at para. 52, leave to appeal refused [2016] S.C.C.A. No. 484.

<sup>13</sup> *R. v. Peers*, 2015 ABCA 407, at para. 15, aff’d, 2017 SCC 13.

routinely imposed. Although the terms “cruel” and “unusual” in s. 12 operate together to state a single normative standard for unconstitutional punishment and treatment, whether a penalty is “usual” or “unusual” is relevant to the analysis. The majority of this Court in *R. v. Goltz* held that “whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion” is a relevant factor under s. 12. In *R. v. Smith*, Wilson J. (concurring) commented on how the terms “cruel” and “unusual” in s. 12 operate together, such that a penalty, by its unusual degree of disproportionality, can also be seen as cruel:

Section 12 on its face appears to me to be concerned primarily with the nature or type of a treatment or punishment. Indeed, its historical origins would appear to support this view. The rack and the thumbscrew, the stocks, torture of any kind, unsanitary prison conditions, prolonged periods of solitary confinement were progressively recognized as inhuman and degrading and completely inimical to the rehabilitation of the prisoner who sooner or later was going to have to be released back into the community. I agree, however, with my colleague that s. 12 is not confined to punishments which are in their nature cruel. It also extends to punishments which are, to use his words, “grossly disproportionate”. And by that I mean that they are cruel and unusual in their disproportionality in that no-one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity either by him or by them. It shocked the communal conscience. It was “unusual” because of its extreme nature. Adopting Laskin C.J.’s concept of “interacting expressions colouring each other” (see *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680 at pp. 689-90) it was so unusual as to be cruel and so cruel as to be unusual.<sup>14</sup> [Emphasis added.]

## ***2. The victim surcharge is common, not unusual, and certainly not exceptional***

15. There is nothing unusual about the victim surcharge. The salient features of the surcharge said to render it unconstitutional are that it (a) is a financial penalty, (b) is mandatory in the amount of \$100 or \$200 per offence (or 30 per cent of a fine imposed), (c) operates without consideration of ability to pay, (d) persists indefinitely if unpaid, and (e) is enforced through s. 734 of the *Criminal Code*. Those features are shared with numerous other regulatory and criminal instruments.

### **a. Financial penalties as high or higher than the surcharge are common**

16. Financial penalties are a particularly common mechanism through which government

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<sup>14</sup> *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 500; see also *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 13, 84; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1109.

ensures compliance with the rule of law. Canadians anticipate fines for breaching municipal parking by-laws, provincial rules of the road, and federal statutes like the *Income Tax Act* and *Criminal Code*. We anticipate fines for breaches of the law less serious than criminal offences, even for absolute liability offences with no *mens rea* defence, like speeding.<sup>15</sup>

b. Mandatory minimum fines are common

17. Mandatory fines equivalent to the \$100 or \$200 surcharges are not unusual for the commission of a criminal offence or even for the commission of a regulatory offence. For example, the surcharge is less than the minimum \$1000 fine and additional consequences for criminal offences like impaired driving,<sup>16</sup> the minimum \$5000 fine in Ontario for driving without insurance, which is frequently committed by individuals under financial strain,<sup>17</sup> and the minimum \$1000 fine under the *Income Tax Act* and *Excise Tax Act* for failing to file a return.<sup>18</sup> The *Employment Insurance Act* establishes a minimum \$200 fine under s. 135(3) for among other acts, making false representations.<sup>19</sup> In Ontario, offences under the *Highway Traffic Act* often have minimum fines of at least \$100, plus provincial fine surcharges.<sup>20</sup>

<sup>15</sup> *R. v. Raham*, 2010 ONCA 206, at para. 30.

<sup>16</sup> *Criminal Code*, s. 255(1), 259(1); see e.g. *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 41, 41.2, and 42.

<sup>17</sup> *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, s. 2; see also *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 59(2).

<sup>18</sup> See e.g. *Income Tax Act*, R.S.C., 1985, c. 1 (5<sup>th</sup> Supp.), at ss. 238, 239, 243; *R. v. Atlantic Technologist Ltd.*, [2008] N.J. No. 247 (P.C.), at paras. 12-13; *R. v. Ford*, 2003 NLSCTD 36, at para. 32; *R. v. Euerby*, [1992] B.C.J. No. 396 (S.C.); *Excise Tax Act*, R.S.C. 1985, c. E-15, ss. 115(1), 326(1).

<sup>19</sup> *Employment Insurance Act*, S.C. 1996, c. 23, s. 135.

<sup>20</sup> See e.g. *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 32(16) (\$200-\$1000; driver's licence infractions), 41.2(13) (\$200-\$1000; ignition interlock infractions), 51 (\$200-\$1000; driving motor vehicle with suspended or cancelled permit), 53(1) (\$1000-\$5000; driving while licence suspended), 53(1.1) (\$5000-\$25000; driving while licence suspended for conviction for certain offences), 172(1) (\$2000-\$10000; stunt driving), 140(1)(c), (7) (\$150-\$500; driving into crossover while before pedestrian completes crossing the street); *Provincial Offences Act*, s. 60.1 (surcharge); O. Reg. 161/00 (amount of surcharge).

18. The law routinely subjects individuals to mandatory fines. Within the *Criminal Code*, minimum fines for impaired driving, driving “over 80”, and refusing to provide a breath sample, are imposed without consideration of the offender’s means.<sup>21</sup> Fines in lieu of forfeiture are imposed if an offender, without present means or present control of proceeds of crime, exercised even temporary control over proceeds.<sup>22</sup> The fines referred to in the paragraph above from the *Income Tax Act*, *Excise Tax Act*, and *Employment Insurance Act*, are minimum fines. In Ontario, speeding fines are mandatory based on the driver’s speed in relation to the speed limit; 30 kilometres per hour over the limit attracts a \$210 mandatory fine.<sup>23</sup>

c. Fines commonly operate irrespective ability to pay

19. Ability to pay is usually a precondition to the imposition of a fine under s. 734 of the *Criminal Code* for an offence under any Act of Parliament. However, where a minimum fine is specified, ability to pay is not a precondition.<sup>24</sup> The mandatory fines identified immediately above are imposed irrespective ability to pay. Inability to pay does not bar restitution orders.<sup>25</sup> Although non-mandatory fines under s. 734 of the *Criminal Code* may be imposed only if an offender can pay, an offender who is sentenced and then loses the ability to pay before paying is, in all meaningful ways, in the same position as someone who receives a fine when unable to pay.

d. Fines commonly persist if unpaid

20. It is not uncommon for debts to persist, and not simply expire, if unpaid. Unpaid federal fines are not extinguished by bankruptcy and are not subject to prescription or limitation.<sup>26</sup> They may, however, like the surcharge, be cancelled by order of the Governor in Council pursuant to s.

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<sup>21</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 255, 734(2); see also ss. 286, 430(4.11).

<sup>22</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 462.37(3), 734(2); *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at paras. 37-48; *R. v. Dwyer*, 2013 ONCA 34, at paras. 24-25.

<sup>23</sup> *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 128(14), (14.1).

<sup>24</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 734(2); *Boudreault v. R.*, 2016 QCCA 1907, at paras. 187-190; *R. v. Noseworthy*, 2000 NFCA 45, at paras. 23-26.

<sup>25</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 739.1.

<sup>26</sup> *Boudreault v. R.*, 2016 QCCA 1907, at paras. 197-98, 226; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178; cf. *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 69(15).

748.1 of the *Criminal Code*.<sup>27</sup>

e. Fines are commonly enforced through mechanisms like those in the *Criminal Code*

21. Collateral consequences for non-payment, akin to those associated with the surcharge, are common. Pursuant to s. 734(8) of the *Criminal Code*, the enforcement mechanisms under ss. 734.2 to 734.8 – like the prospect of licence suspensions and imprisonment on default – are applicable for all fines “imposed under any Act of Parliament”. The potential consequences of non-payment of the surcharge (imprisonment and loss of licences) plus civil enforcement, which is not applicable for non-payment of the surcharge, apply to all fines imposed for federal offences. Similar mechanisms apply to the enforcement of provincial fines in Ontario.<sup>28</sup>

**B. The victim surcharge of \$100 or \$200 is not “cruel” and cannot make a sentence for commission of a criminal offence grossly disproportionate**

22. The severity of a sanction’s effects on an individual is relevant to the s. 12 analysis.<sup>29</sup> As the Quebec Court of Appeal held in the present case and Court of Appeal for Ontario held in *R. v. Tinker*, a \$100 or \$200 surcharge required for every conviction or discharge under the *Criminal Code* and *Controlled Drugs and Substances Act* is not grossly disproportionate to the appropriate sentence for the appellant or a reasonable hypothetical offender.

23. If the law permitted a surcharge to be waived, one would not be included in the sentence of some reasonable hypothetical offenders – for example, an offender convicted of a relatively minor offence (such as a breach of probation, mischief, or being unlawfully at large while subject to an intermittent sentence), who is impecunious, and perhaps disabled, unemployed, addicted to substances and / or homeless. Under ordinary sentencing principles, the Crown would be required

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<sup>27</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 716 (“fine”), 748.1; see also paragraph 34, below.

<sup>28</sup> *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 59; *Boudreault v. R.*, 2016 QCCA 1907, at para. 192; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 737(9), 734.6; *Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 69, 69.1.

<sup>29</sup> See e.g. *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1092-94, 1097.



to establish the offender's ability to pay, and would not be able to do so.<sup>30</sup>

24. However, the surcharge does not render a sentence “grossly disproportionate” to what would otherwise be fit. The surcharge works cooperatively with statutory sentencing principles. Any stress or stigma it causes does not rise to the level of being constitutionally significant. The fact that reasonable extensions of time must be granted and imprisonment cannot result from inability to pay attenuates its effect.<sup>31</sup>

**1. Operation consistent with ss. 718(e) and (f) and 718.1 of the Criminal Code**

25. The purpose of a sanction and the objectives and principles of sentencing it serves are relevant to the degree of punishment or treatment s. 12 will permit.<sup>32</sup> The victim surcharge serves dual objectives: increasing offenders' accountability and funding victim services.<sup>33</sup> The Court of Appeal for Ontario held in *Tinker* that the surcharge is founded on the sentencing objective codified in s. 718(f) of the *Criminal Code*: to promote “a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community”. In seeking to fund victim services, the legislation also serves the s. 718(e) objective of providing “reparations for harm done to victims or to the community”.<sup>34</sup>

26. The surcharge imposed is proportionate to the number of separate offences for which the offender has been found guilty, and thus operates consistently with the requirement of proportionality in s. 718.1 of the *Criminal Code*. The surcharge does not become grossly disproportionate when applied in a sentence for multiple offences. Assuming, as has been held in Ontario,<sup>35</sup> a separate surcharge is required for each offence, this result reflects an offender's

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<sup>30</sup> *R. v. Tinker*, 2017 ONCA 552, at paras. 132-34, leave to appeal requested.

<sup>31</sup> *R. v. Tinker*, 2017 ONCA 552, at paras. 131-143, leave to appeal requested.

<sup>32</sup> *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 40-46; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073.

<sup>33</sup> *Boudreault v. R.*, 2016 QCCA 1907, at para. 130; Factum of the Respondent, Attorney General of Quebec, at paras. 31-33.

<sup>34</sup> *R. v. Tinker*, 2017 ONCA 552, at paras. 131-143, leave to appeal requested; *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

<sup>35</sup> *R. v. Fedele*, 2017 ONCA 554.

involvement in multiple distinct criminal offences. The surcharge must be ordered for “[a]n offender who is convicted, or discharged”, but not an offender whose charges are stayed. Pursuant to *R. v. Kienapple*, conditional stays are required where an offender would otherwise be subject to multiple findings of guilt for offences arising out of the same transaction that constitute the same criminal wrong. Each criminal delict can result in only one finding of guilt. In this regard, the appellant’s hypothetical involving convictions for each day that an offender is unlawfully at large is not reasonable.<sup>36</sup>

## ***2. Surcharge not preventing application of totality principle***

27. The surcharge does not prevent differentiation in sentencing; the surcharge need not be imposed in addition to the fit sentence. The Quebec Court of Appeal held in *R. v. Cloud* that when determining the sentence, the judge “must take into account the principles of totality and proportionality, which include ... [considering] the surcharge”.<sup>37</sup> In most cases where the cumulative effect of the surcharge, when combined with other sentencing measures, might offend the totality principle, the sentence can be adjusted to account for the effect of the surcharge – *e.g.* by reducing a term of imprisonment or probation or the amount of a fine, or by adjusting terms of a probation or conditional-sentence order.

28. This principle has limits. Courts in Quebec and Ontario have held that the sentencing court cannot “impos[e] a sentence which would not have been imposed [*i.e.* a nominal fine], simply for the purpose of frustrating the will of Parliament”: “the judge cannot impose fines that do not and cannot have a consistent penological objective other than neutralizing the surcharge”. That said, in a case where a small fine that the offender can afford is a fit sentence having regard to relevant principles of sentencing, the surcharge would be 30 per cent of that fine.<sup>38</sup>

29. In cases where the court cannot accommodate the surcharge’s effect when fashioning a fit

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<sup>36</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 737(1); see *e.g.* *R. v. Bienvenue*, 2016 ONCA 865, at para. 9; *R. v. Tinker*, 2017 ONCA 552, at para. 140, leave to appeal requested.

<sup>37</sup> *R. v. Cloud*, 2016 QCCA 567, at paras. 73-75. See also *Boudreault v. R.*, 2016 QCCA 1907, at paras. 179-181; *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at paras. 6-14, 18.

<sup>38</sup> *R. v. Cloud*, 2016 QCCA 567, at paras. 65-77; *R. v. Berhe*, 2016 ONSC 6474, at paras. 20-24; *Criminal Code*, R.S.C. 1985, c. C-46, s. 737(2).

sentence – *i.e.* when the fit sentence, before addressing the surcharge, is an absolute discharge or a mandatory minimum sentence – adding a surcharge does not thereby render the fit sentence grossly disproportionate. For an offender whose criminal conduct is so minimal that his or her absolute discharge is not contrary to the public interest, a financial burden of \$100 or \$200 is not abhorrent or intolerable to society. As noted above, it is less than the minimum fine for many regulatory offences, so it is not “unusual”. As discussed below, the consequences of non-payment for a person who cannot pay are too limited to be considered “cruel”. Adding the surcharge to a minimum fine or term of imprisonment is also not objectionable. As Schragger J.A. noted in the court below, attaching “an additional \$200” onto “a sentence for infractions serious enough to merit a prison term” is not outrageous.<sup>39</sup>

### 3. *Limited consequences of non-payment*

- a. Certain collateral consequences of the victim surcharge are not relevant to the analysis of its constitutionality since they are entirely illusory

30. The appellant complains about certain consequences of non-payment. Most operate only on default – *i.e.* once time to pay has expired. Default need never occur. A person may acquire the means to pay or the debt will persist with limited tangible consequences. As such, the consequences complained of are illusory for a truly impecunious offender.

31. An offender may seek an extension of time to pay when sentenced, and may seek subsequent extensions, such that he or she need never default. This factor attenuates the effect of a mandatory fine on someone who cannot pay. Sections 737(9) and 734.3 of the *Criminal Code* permit “a court that makes an order under [section 737]”, “on application by or on behalf of the offender” to “change any term of the order” other than the amount of the surcharge. This Court held in *R. v. Wu* that if it is clear that the offender cannot pay, “he or she should be given time to pay” that is “reasonable in the circumstances”. Indeed, in *Tinker*, the Court of Appeal for Ontario held that impoverished offenders must be given reasonable time to pay, and that the procedure to obtain an extension of time need not be onerous:

[I]f an impoverished offender applies to the court to extend the time to pay a surcharge to which he or she is subject, the court must give the offender reasonable time to pay. Although in Ontario there are set times within which a surcharge must be paid that must

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<sup>39</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 730; *Boudreault v. R.*, 2016 QCCA 1907, at para. 223.

be imposed along with the surcharge at sentencing, there is no reason why the offender cannot bring an application for an extension of time at the conclusion of a sentencing hearing itself so as to obtain an extension immediately after the surcharge is imposed. I would add the observation that neither s. 737 of the *Code* nor the *Code*'s Fines and Forfeiture provisions specify that a formal court application is necessary to obtain an extension of the time to pay. Obtaining an extension should not be onerous or procedurally difficult. A lengthy extension may be granted where the offender will be unable to pay in the foreseeable future.<sup>40</sup> [Emphasis in original.]

Adjustment of the time to pay ensures that a particular surcharge need never fall into default for someone truly unable to pay, and permits individualization in the sentence. Section 734.3 of the *Criminal Code* permits the courts to delegate to a person the power to adjudicate requests to vary terms of an order. The requests may be made by the offender or “on behalf of the offender” – and could thus be made by a friend, family member, or organization. The court “shall” give the offender notice of the procedure to apply to extend time. A lengthy extension of time can be given to account for the actual anticipated income and expenses of an offender.<sup>41</sup>

32. The power to limit participation in licensed activities operates only on default. Section 734.5 permits the province that would receive an unpaid surcharge to “refuse to issue or renew or [to] suspend” provincial licences, permits, or other instruments – *e.g.*, a driver’s licence. The power operates only “[i]f an offender is in default of payment”.<sup>42</sup>

33. Imprisonment for non-payment cannot lawfully occur until after default, and even then not for someone too poor to pay. Pursuant to *Wu*, imprisonment under s. 734.7 is contingent on a wilful refusal to pay after the time to pay has expired. At default proceedings, which need not occur if an extension is sought, the burden is on the Crown to establish the ability to pay. Genuine

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<sup>40</sup> *Order in Council*, O.C. 2173/99; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 734(3), 734.3, 737(9), 737(8), 737(9)(b); *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 31; *Boudreault v. R.*, 2016 QCCA 1907, at para. 188-190; *R. v. Novielli*, 2015 ONCJ 192, at para. 77; *R. v. Pham*, [2002] O.J. No. 2545 (C.A.), at para. 17; *R. v. Tinker*, 2017 ONCA 552, at paras. 54-59, 137, leave to appeal requested.

<sup>41</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 734.3, 737(8); see *e.g. R. v. Ridley*, 2017 ONSC 4672, at paras. 8-9.

<sup>42</sup> *Criminal Code*, R.S.C. 1985, c. C-46, ss. 734.5, 737(9), 737(7); *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 56; *Boudreault v. R.*, 2016 QCCA 1907, at para. 193.

inability to pay is not a choice, and “not a proper basis for imprisonment”.<sup>43</sup>

34. An unpaid surcharge does not preclude an offender from seeking a pardon. While, under s. 4 of the *Criminal Records Act*, an offender becomes eligible to apply for a “record suspension” (*i.e.* pardon) only after paying “any fine, imposed for an offence”, an ineligible or not-yet-eligible offender may still apply for clemency in the form of a “conditional pardon”, which is closely akin to a record suspension. The Parole Board is empowered to consider and make recommendations to the Governor in Council on clemency applications. Decisions on clemency are subject to judicial review.<sup>44</sup>

b. No abhorrent psychological effects

35. The majority in the court below correctly rejected the claim that an unpaid surcharge causes psychological stress that is so great as to be considered abhorrent, socially intolerable, or incompatible with human dignity.<sup>45</sup>

36. While the Court of Appeal for Ontario held in *Tinker* that offenders with an unpaid surcharge “are subject to the stress of an unpaid fine hanging over their heads ... [and] ongoing stigma of criminalization stemming from their inability to discharge the debt obligation imposed

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<sup>43</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 737(9), s. 734.7(1), 734(3); *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at paras. 23, 60-66; *Boudreault v. R.*, 2016 QCCA 1907, at paras. 191-95; *R. v. Novielli*, 2015 ONCJ 192, at paras. 63, 65; *R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119, at para. 21; *R. v. Pham*, [2002] O.J. No. 2545 (C.A.), at para. 17; *R. v. Tinker*, 2017 ONCA 552, at paras. 61-65, 137, leave to appeal requested.

<sup>44</sup> *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4, 4.1; *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 110; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paras. 113-16, 122; Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (N.p.: Parole Board of Canada, 2017), Ch. 13.1, 13.3; *Pardon Services Fees Order*, SOR/95-210, s. 3; Parole Board of Canada, *Application Form - Royal Prerogative of Mercy (Clemency)* (N.p.: Parole Board of Canada, 2017); Parole Board of Canada, *Clemency - Schedule A* (N.p.: Parole Board of Canada, undated); *Letters Patent Constituting the Office of Governor General of Canada* (1947), (reproduced in R.S.C. 1985, App. II, No. 31), Article 12; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 748, 749; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at paras. 28, 43.

<sup>45</sup> *Boudreault v. R.*, 2016 QCCA 1907, at paras. 199, 226.

during the sentencing”,<sup>46</sup> any such stress and stigmatization does not render the surcharge cruel and unusual. The surcharge may cause some degree of stress or inconvenience; but it does not cause suffering or degrade human dignity:<sup>47</sup>

- There is no evidence that stress from the threat of imprisonment exists. If it does exist, it is not relevant to the analysis because it is not caused by the surcharge, which does not truly threaten imprisonment for those who cannot pay;<sup>48</sup>
- There is no evidence to support claims that offenders might forego food or other necessities of life to pay off the surcharge. The law does not force that choice; extensions of time to pay are available for offenders who truly cannot pay;<sup>49</sup>
- An unpaid surcharge cannot be equated with an indeterminate sentence. So long as the surcharge is not in default, the surcharge is not being “served”; it is much more akin to a suspended sentence;<sup>50</sup> and
- The surcharge does not stigmatize an offender. Stigma flows from the finding of guilt. There is no evidence that unpaid surcharges attract social stigma, or have any effect on offenders’ rehabilitation. There is no evidence that a delay or inability to obtain a record suspension causes psychological stress so great that it would amount to cruelty.<sup>51</sup>

37. Taken to its logical conclusion, an argument that psychological stress of non-payment means monetary penalties cannot be imposed on those who cannot pay would lead to a significant curtailment of the federal and provincial criminal and regulatory jurisdiction. Mainville J.A. made

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<sup>46</sup> *R. v. Tinker*, 2017 ONCA 552, at para. 136, leave to appeal requested.

<sup>47</sup> *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1068, 1091-92, 1095-98.

<sup>48</sup> *Boudreault v. R.*, 2016 QCCA 1907, at para. 199; *R. v. Tinker*, 2017 ONCA 552, at para. 80, leave to appeal requested.

<sup>49</sup> *R. v. Tinker*, 2017 ONCA 552, at para. 79, leave to appeal requested.

<sup>50</sup> *Boudreault v. R.*, 2016 QCCA 1907, at paras. 196-98, 226; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178.

<sup>51</sup> See *R. v. Tinker*, 2017 ONCA 552, at para. 81, leave to appeal requested; *R. v. Novielli*, 2015 ONCJ 192, at para. 72; *R. v. Michael*, 2014 ONCJ 360, at paras. 60, 76.

this point in the court below:

I do not accept that the psychological burden which flows from the imposition of a fine or the victim surcharge can reasonably be qualified as cruel and unusual punishment....

If this were the case, it would be constitutionally prohibited to inflict a fine on an impecunious individual, which would have the effect of creating a social category that would be sheltered from any form of sanction in the case of offences which do not warrant imprisonment, that is to say the majority of provincial offences and some federal offences. [In *Wu*, at para. 37] Justice Binnie rejected this type of reasoning, noting that “poverty should not become a shield against any punishment at all.”<sup>52</sup>

**C. Certain collateral consequences of non-payment are not properly assessed through a constitutional challenge to the victim surcharge**

38. The appellant complains about effects that are contingent on the operation of s. 4 of the *Criminal Records Act* and ss. 734(4), 734.5 and 734.7 of the *Criminal Code*, which are not relevant to whether the mandatory surcharge is constitutional. The appellant alleges that the surcharge has the effect of delaying offenders’ access to criminal-record suspensions (*i.e.* pardons) under the *Criminal Records Act* and creates a risk of imprisonment and licence suspensions. The Parole Board interprets s. 4 the *Criminal Records Act* as mandating that an unpaid surcharge should prevent an offender from applying for a criminal-record suspension. This effect is caused directly by the *Criminal Records Act*, not the surcharge. It operates in respect of all unpaid criminal fines associated with criminal convictions.<sup>53</sup> The powers to imprison and suspend licences are established in ss. 734(4), 734.5 and 734.7 of the *Criminal Code*. These powers apply to the surcharge by virtue of s. 737(9), and also to fines “imposed under any Act of Parliament” pursuant to s. 734(8).

39. The Court should decline to treat the effects of s. 4 of the *Criminal Records Act* and ss. 734(4), 734.5 and 734.7 of the *Criminal Code* as effects of the surcharge. The provisions operate independently of the surcharge. They could have been challenged, but were not. The appellant’s constitutional questions are whether the removal of discretion in s. 737 of the *Criminal Code* contravenes s. 12 and whether that removal can be justified under s. 1. The impugned legislative

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<sup>52</sup> *Boudreault v. R.*, 2016 QCCA 1907, at paras. 199-200, 227.

<sup>53</sup> *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4; *R. v. Novielli*, 2015 ONCJ 192, at para. 72; *R. v. Michael*, 2014 ONCJ 360, at paras. 60, 76.

effects of s. 4 of the *Criminal Records Act* and ss. 734(4), 734.5 and 734.7 are not symptoms of Parliament's decision to render the surcharge mandatory. Those provisions operate generally in respect of fines under the *Criminal Code* and *Controlled Drugs and Substances Act* and operated in respect of an unpaid victim surcharge even before the surcharge was made mandatory.

40. It would offend general principles of constitutional analysis to strike one law based on an impugned legislative effect that can be more precisely and directly traced to “the offending portion” of another law. A challenged law need not be the dominant cause of impugned legislative effects; only a “sufficient causal connection” is required.<sup>54</sup> However, in *Schachter v. Canada*, the Court held that in applying s. 52 of the *Constitution Act, 1982*, courts should exercise restraint, only “interfere with the laws adopted by the legislature as little as possible”, and only apply a remedy to “the offending portion” of a law. It is not proper to “declare inoperative parts of a legislative enactment which do not themselves violate the Constitution”.<sup>55</sup> To the extent that s. 4 of the *Criminal Records Act* and ss. 734(4), 734.5 and 734.7 of the *Criminal Code* offend s. 12 of the *Charter*, those provisions – not the surcharge – are the proper target of constitutional scrutiny.

41. A court asked to review the constitutionality of a law, based on legislative effects that are more directly caused by some other law that has not been challenged, is left ill prepared, without tools needed to perform that task. Section 52 constitutional review should only address the specific provision or provisions challenged by the parties. A challenge to one law based on the effects of a second law leaves the reviewing court without the ability to address and remedy the true source of the alleged constitutional problem. Moreover, any remedy applied to the challenged law would be incomplete, to the extent that the second law has the same unconstitutional effects when it interacts with other laws not before the court. Finally, if the law that directly causes the impugned effect is not challenged, responding governments may choose not to intervene in a constitutional challenge or may be deprived the opportunity to file materials necessary to fully defend the legislative effect, and the reviewing court may be deprived of the evidentiary record required to properly adjudicate the constitutional issue – for example, a s. 1 record that speaks to the true

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<sup>54</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 73-78.

<sup>55</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696.



source of the alleged problem.<sup>56</sup>

**D. The appropriate remedy under s. 52 would be to strike s. 2, 3(1) and 3(3) of the *Increasing Offenders' Accountability for Victims Act***

42. Pursuant to *Schachter v. Canada*, the appropriate remedy for a *Charter* breach is the one that brings the provision into compliance with the *Charter* while intruding only minimally into the legislative sphere. If the Court concludes that the surcharge should not be imposed on those who cannot pay at the time of sentencing, the appropriate remedy is a declaration of invalidity narrowly focussed on ss. 2, 3(1) and 3(3) of the *Increasing Offenders' Accountability for Victims Act*. Striking those provisions would restore ss. 737(1), (5), (6) and s. 673 of the *Criminal Code* to their pre-amendment forms:

- Striking s. 3(3) – which repealed ss. 737(5) and (6) of the *Criminal Code* – would restore those subsections, so as to restore judicial discretion to waive the surcharge, and an obligation on the sentencing court to give reasons for exercising that discretion;
- Striking s. 3(1) would restore s. 737(1) of the *Criminal Code* to its pre-amendment form so as to include reference to s. 737(5), and make the imposition of the surcharge “[s]ubject to subsection (5)”; and
- Striking s. 2 would restore s. 673(b) of the *Criminal Code* to its pre-amendment form, so as to restore a right of appeal against a decision under s. 737(5) to waive the surcharge.<sup>57</sup>

43. This targeted remedy would address the mandatory nature of the surcharge by restoring the discretion to waive it, while preserving the legislative scheme as much as possible.

**Part IV – Submissions concerning Costs**

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<sup>56</sup> *Eaton v. Brant (County) Board of Education*, [1997] 1 S.C.R. 241, at paras. 45, 53-54; *Paluska, Jr. v. Cava* (2002), 59 O.R. (3d) 469 (C.A.), at para. 16; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 28.

<sup>57</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 697-98, 700, 707-08, 715-18; *R. v. Novielli*, 2015 ONCJ 192, at paras. 82-87; *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c. 11, ss. 2, 3.

44. Ontario makes no submissions regarding costs.

**Part V – Permission to Present Oral Argument**

45. Ontario takes no position on the outcome of the case at bar, and seeks permission to present oral argument, for such duration as the Court may direct, at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 8<sup>th</sup> day of November, 2017.

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**Michael Perlin**  
 COUNSEL FOR THE INTERVENER

**Part VI – Table of Authorities**

<b>Relevant Statutory Provisions</b>	<b>Paragraph(s)</b>
<i>Bankruptcy and Insolvency Act</i> , R.S.C. 1985, c. B-3, s. 178 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	20, 36
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c. 11.	
1 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	2, 39
11(f) [ <a href="#">English</a> ] [ <a href="#">French</a> ]	13
12 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	1, 9, 10, 11, 12, 13, 25, 39, 40
<i>Compulsory Automobile Insurance Act</i> , R.S.O. 1990, c. C.25, s. 2 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	17
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c. 11, s. 52	40, 41
<i>Controlled Drugs and Substances Act</i> , S.C. 1996, c. 19 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	22, 39
<i>Corrections and Conditional Release Act</i> , S.C. 1992, c. 20, s. 110 [ <a href="#">English</a> ] [ <a href="#">French</a> ]	34
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 737 (prior to amendment by <i>Increasing Offenders' Accountability for Victims Act</i> , S.C. 2013, c. 11). [ <a href="#">English</a> ] [ <a href="#">French</a> ]	4, 42
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, as amended	

255 <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
259(1) <a href="#">[English]</a> <a href="#">[French]</a>	17
286 <a href="#">[English]</a> <a href="#">[French]</a>	18
430(4.11) <a href="#">[English]</a> <a href="#">[French]</a>	18
462.37(3) <a href="#">[English]</a> <a href="#">[French]</a>	18
716 <a href="#">[English]</a> <a href="#">[French]</a>	20
718 <a href="#">[English]</a> <a href="#">[French]</a>	25
718.1 <a href="#">[English]</a> <a href="#">[French]</a>	26
730 <a href="#">[English]</a> <a href="#">[French]</a>	29
734 <a href="#">[English]</a> <a href="#">[French]</a>	15, 18, 19, 21, 31, 33, 38, 39, 40
734.2 <a href="#">[English]</a> <a href="#">[French]</a>	21
734.3 <a href="#">[English]</a> <a href="#">[French]</a>	21, 31
734.4 <a href="#">[English]</a> <a href="#">[French]</a>	21
734.5 <a href="#">[English]</a> <a href="#">[French]</a>	21, 32, 38, 39, 40
734.6 <a href="#">[English]</a> <a href="#">[French]</a>	21
734.7 <a href="#">[English]</a> <a href="#">[French]</a>	21, 33, 38, 39, 40
734.8 <a href="#">[English]</a> <a href="#">[French]</a>	21
736 <a href="#">[English]</a> <a href="#">[French]</a>	6
737 <a href="#">[English]</a> <a href="#">[French]</a>	1, 4, 5, 6, 7, 9, 21, 26, 28, 31, 32, 33, 38, 39, 42
739.1 <a href="#">[English]</a> <a href="#">[French]</a>	19
748.1 <a href="#">[English]</a> <a href="#">[French]</a>	20, 34
749 <a href="#">[English]</a> <a href="#">[French]</a>	34
<i>Criminal Records Act, R.S.C. 1985, c. C-47</i>	
4 <a href="#">[English]</a> <a href="#">[French]</a>	34, 38, 39, 40
4.1 <a href="#">[English]</a> <a href="#">[French]</a>	34
<i>Excise Tax Act, R.S.C. 1985, c. E-15</i>	
115(1) <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
326(1) <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
<i>Employment Insurance Act, S.C. 1996, c. 23, s. 135 <a href="#">[English]</a> <a href="#">[French]</a></i>	
<i>Highway Traffic Act, R.S.O. 1990, c. H.8</i>	

32(16) <a href="#">[English]</a> <a href="#">[French]</a>	17
41 <a href="#">[English]</a> <a href="#">[French]</a>	17
41.2 <a href="#">[English]</a> <a href="#">[French]</a>	17
42 <a href="#">[English]</a> <a href="#">[French]</a>	17
51 <a href="#">[English]</a> <a href="#">[French]</a>	17
53(1) <a href="#">[English]</a> <a href="#">[French]</a>	17
53(1.1) <a href="#">[English]</a> <a href="#">[French]</a>	17
128(14) <a href="#">[English]</a> <a href="#">[French]</a>	23
128 (14.1) <a href="#">[English]</a> <a href="#">[French]</a>	23
140(1)(c) <a href="#">[English]</a> <a href="#">[French]</a>	17
140(7) <a href="#">[English]</a> <a href="#">[French]</a>	17
172(1) <a href="#">[English]</a> <a href="#">[French]</a>	17
<i>Income Tax Act</i> , R.S.C., 1985, c. 1 (5 <sup>th</sup> Supp.) <a href="#">[English]</a> <a href="#">[French]</a>	16
238 <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
239 <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
243 <a href="#">[English]</a> <a href="#">[French]</a>	17, 18
<i>Increasing Offenders' Accountability for Victims Act</i> , S.C. 2013, c. 11 <a href="#">[English]</a> <a href="#">[French]</a>	1, 5
2 <a href="#">[English]</a> <a href="#">[French]</a>	42
3 <a href="#">[English]</a> <a href="#">[French]</a>	42
O. Reg. 161/00 <a href="#">[English]</a> <a href="#">[French]</a>	17
<i>Order in Council</i> , O.C. 2173/99	31
<i>Pardon Services Fees Order</i> , SOR/95-210, s. 3 <a href="#">[English]</a> <a href="#">[French]</a>	34
<i>Provincial Offences Act</i> , R.S.O. 1990, c. P.33	
59(2) <a href="#">[English]</a> <a href="#">[French]</a>	17
60.1 <a href="#">[English]</a> <a href="#">[French]</a>	17
69 <a href="#">[English]</a> <a href="#">[French]</a>	20, 21
69.1 <a href="#">[English]</a> <a href="#">[French]</a>	21
<i>Victims' Bill of Rights</i> , S.O. 1995, c. 6, s. 5 <a href="#">[English]</a> <a href="#">[French]</a>	7
<b>Government documents</b>	
<i>House of Commons Debates</i> , No. 146 (17 September 2012) at p. 10059 (Robert Goguen (Parliamentary Secretary to the Minister of Justice))	6

<a href="#">House of Commons Debates</a> , No. 146 (17 September 2012) at p. 10050 (Kerry-Lynne D. Findlay (Parliamentary Secretary to the Minister of Justice))	7
Letters Patent Constituting the Office of Governor General of Canada (1947) (reproduced in R.S.C. 1985) App. II, No., 31)	34
Minister of Justice and Attorney General of Canada, <i>Inquiry of Ministry</i> (Response to Q-170, from Mr. Cotler (Mount Royal)) (6 December 2013)	8
Parole Board of Canada, <a href="#">Application Form – Royal Prerogative of Mercy (Clemency)</a> (N.p.: Parole Board of Canada, 2017)	34
Parole Board of Canada, <a href="#">Clemency – Schedule A</a> (N.p: Parole Board of Canada, undated)	34
Parole Board of Canada, <a href="#">Decision-Making Policy Manual for Board Members</a> (N.p.: Parole Board of Canada, 2017)	34

<b>Jurisprudence</b>	<b>Para(s)</b>
<a href="#">British Columbia (Attorney General) v. Christie</a> , 2007 SCC 21, [2007] 1 S.C.R. 873	41
<a href="#">Boudreault v. R.</a> , 2016 QCCA 1907	6, 19, 20, 21, 25, 27, 29, 31, 32, 33, 35, 36, 37
<a href="#">Canada (Attorney General) v. Bedford</a> , 2013 SCC 72, [2013] 3 S.C.R. 1101	40
<a href="#">Eaton v. Brant (County) Board of Education</a> , [1997] 1 S.C.R. 241	41
<a href="#">Hinse v. Canada (Attorney General)</a> , 2015 SCC 35, [2015] 2 S.C.R. 621	34
<a href="#">Irwin Toy v. Quebec</a> , [1989] 1 S.C.R. 927	13
<a href="#">Kienapple v. R.</a> , [1975] 1 SCR 729	26
<a href="#">Operation Dismantle Inc. v. The Queen</a> , [1985] 1 S.C.R. 441	34
<a href="#">Paluska, Jr. v. Cava</a> (2002), 59 O.R. (3d) 469 (C.A.)	41
<a href="#">R. v. Angelis</a> , 2016 ONCA 675, leave to appeal refused [2016] S.C.C.A. No. 484	13
<a href="#">R. v. Atlantic Technologist Ltd</a> , [2008] N.J. No. 247 (P.C.)	17
<a href="#">R. v. Berhe</a> , 2016 ONSC 6474	28
<a href="#">R. v. Bienvenue</a> , 2016 ONCA 865	26
<a href="#">R. v. Cloud</a> , 2016 QCCA 567	27, 28

<a href="#"><i>R. v. Desjardins</i></a> , [1996] N.B.J. No. 467 (N.B.C.A.)	12
<a href="#"><i>R. v. Dwyer</i></a> , 2013 ONCA 34	18
<a href="#"><i>R. v. Euerby</i></a> , [1992] B.C.J. No. 396 (S.C.)	17
<a href="#"><i>R. v. Fedele</i></a> , 2017 ONCA 554.	26
<a href="#"><i>R. v. Ford</i></a> , 2003 NLSCTD 36	17
<a href="#"><i>R. v. Goltz</i></a> , [1991] 3 S.C.R. 485	12, 14
<a href="#"><i>R. v. Lambe</i></a> , 2000 NFCA 23	12, 13
<a href="#"><i>R. v. Lavigne</i></a> , 2006 SCC 10, [2006] 1 S.C.R. 392	18
<a href="#"><i>R. v. Lloyd</i></a> , 2016 SCC 13, [2016] 1 S.C.R. 130	11
<a href="#"><i>R. v. MacFarlane</i></a> , [1997] P.E.I.J. No. 116 (S.C. (A.D.))	12
<a href="#"><i>R. v. Michael</i></a> , 2014 ONCJ 360	36, 38
<a href="#"><i>R. v. Morash</i></a> , [1994] N.S.J. No. 53 (C.A.)	12
<a href="#"><i>R. v. Noseworthy</i></a> , 2000 NFCA 45	19
<a href="#"><i>R. v. Novielli</i></a> , 2015 ONCJ 192	31, 33, 36, 38, 42
<a href="#"><i>R. v. Nur</i></a> , 2015 SCC 15, [2015] 1 S.C.R. 773	14, 25
<i>R. v. Peers</i> , <a href="#">2015 ABCA 407</a> , aff'd, <a href="#">2017 SCC 13</a>	13
<a href="#"><i>R. v. Pham</i></a> , 2013 SCC 15, [2013] 1 S.C.R. 739	27
<a href="#"><i>R. v. Pham</i></a> , [2002] O.J. No. 2545 (C.A.)	12, 31, 33
<a href="#"><i>R. v. Raham</i></a> , 2010 ONCA 206	16
<a href="#"><i>R. v. Ridley</i></a> , 2017 ONSC 4672	31
<a href="#"><i>R. v. Smith</i></a> , [1987] 1 S.C.R. 1045	14, 22, 25, 36
<a href="#"><i>R. v. Tinker</i></a> , 2017 ONCA 552, leave to appeal requested	6, 22, 23, 24, 25, 26, 31, 33, 36
<a href="#"><i>R. v. Topp</i></a> , 2011 SCC 43, [2011] 3 S.C.R. 119	33
<a href="#"><i>R. v. Wu</i></a> , 2003 SCC 73, [2003] 3 S.C.R. 530	21, 31, 32, 33
<a href="#"><i>R. v. Zachary</i></a> , [1996] J.Q. No. 2970 (Que. C.A.)	12
<a href="#"><i>Reference re ss. 193 &amp; 195.1(1)(c) of the Criminal Code</i></a> , [1990] 1 S.C.R. 1123	13
<a href="#"><i>Schachter v. Canada</i></a> , [1992] 2 S.C.R. 679	40, 42
<a href="#"><i>Steele v. Mountain Institution</i></a> , [1990] 2 S.C.R. 1385	11
<a href="#"><i>Therrien (Re)</i></a> , 2001 SCC 35, [2001] 2 S.C.R. 3	34
<a href="#"><i>Turner v. Manitoba</i></a> , 2001 MBCA 207	12

