SCC File No. 35982

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

B E T W E E N :

JOSEPH RYAN LLOYD

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

-and-

**CANADIAN BAR ASSOCIATION,
AFRICAN CANADIAN LEGAL CLINIC,
PIVOT LEGAL SOCIETY AND UNION OF BRITISH COLUMBIA INDIAN CHIEFS
HIV & AIDS LEGAL CLINIC ONTARIO,
CANADIAN HIV/AIDS LEGAL NETWORK, BRITISH COLUMBIA CENTRE FOR EXCELLENCE IN HIV/AIDS, PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK, AND CANADIAN ASSOCIATION OF PEOPLE WHO USE DRUGS,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**

INTERVENERS

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. Over the last ten years, mandatory minimums have proliferated in our country. Canada now has the second most mandatory minimum sentences in the world – behind only the United States. [1] In *Nur* [2], this Court recognized that mandatory minimums have destructive consequences: they handcuff the judiciary, making it harder to impose just sentences, and they do not deter crime.[3] *Nur* teaches that these minimums may also be constitutionally suspect.

2. Now more than ever, judges at all levels of court need the power to meaningfully review mandatory minimums under the *Charter*.[4] If a mandatory minimum is unconstitutional, placing roadblocks in the way of striking the law down does nothing to further the ends of justice. It works only to frustrate access to justice and keeps bad laws on the books.

3. To ensure that judges have the tools they need to strike down unconstitutional mandatory minimums, the Criminal Lawyers' Association ("CLA") makes two submissions. First, this Court must recognize that provincial court judges have the power to declare legislation invalid. This position is consistent with the wording of section 52 of the *Constitution* and this Court's precedent in *Big M Drug Mart*[5] and *Ferguson*[6]. Depriving judges of the ability to declare legislation invalid is bad for the administration of justice: it immunizes unconstitutional laws from effective review, duplicates proceedings, and erodes access to justice.

4. Second, the CLA submits that mootness should not be used to create a threshold barrier to reviewing mandatory minimums under the *Charter*. If a judge is willing to embark on the constitutional analysis she should not be precluded simply because the minimum has no impact on the offender before her. Forcing a court to wait until a perfect offender – one for whom the

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[1] See: British Columbia Civil Liberties Association, News Release, "Mandatory Minimum Sentencing Costs Too Much" (8 September 2014) online: https://bccla.org/news/2014/09/mandatory-minimum-sentencing-costs-too-much/.
[2] *R. v. Nur*, 2015 SCC 15 ["*Nur*"].
[3] *Ibid.* at paras. 113 – 114.
[4] *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982 ["the *Charter*"].
[5] *R. v. Big M Drug Mart Ltd.*,[1985] 1 S.C.R. 295 ["*Big M Drug Mart*"].
[6] *R. v. Ferguson*, 2008 SCC 6 ["*Ferguson*"].

minimum has a direct effect – will curtail the use of reasonable hypotheticals, is inconsistent with the judicial discretion to decide moot cases and results in unconstitutional laws being left to linger. This Court should recognize that constitutional litigation is not like litigation between two parties. Its hybrid nature should mean that a principle like mootness ought to be of lesser application.

5. The CLA accepts the facts as set out in the parties' facta and takes no position on disputed facts.

PART II: QUESTIONS IN ISSUE

6. The CLA will address the following questions:

(1) Should provincial courts have the power to issue declarations of invalidity?

(2) Should a court be able to consider the constitutionality of a mandatory minimum even if the accused's sentence will be equal to or greater than the minimum?

PART III: ARGUMENT

A. The Lower Court Rulings

7. The trial judge in this case held that the one-year mandatory minimum sentence in section 5(3)(a)(i)(d) of the *Controlled Drugs and Substances Act*[7] violated section 12 of the *Charter* and could not be saved by section 1. The judge declared the law invalid and of no force or effect.[8]

8. The British Columbia Court of Appeal set aside this declaration. The Court found that provincial court judges lack the power to make formal declarations of invalidity under the *Charter*.[9] According to the Court, there is little utility to recognizing this remedial power since provincial court decisions are not binding on other courts.[10] The Court further held that while a provincial court judge may find an enactment to be of "no force or effect" under section 52 of

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[7] *Controlled Drugs and Substances Act* (S.C. 1996, c. 19) ["*CDSA*"].
[8] *R. v. Lloyd*, 2014 BCPC 8 ["*Lloyd*"] at para. 54. See also: *R. v. Lloyd*, 2014 BCPC 11 ["*Lloyd*"] at para. 19.
[9] *R. v. Lloyd*, 2014 BCCA 224 ["*Lloyd*"] at paras. 29 – 38.
[10] *Ibid.* at para. 37.

the *Constitution*, the most the court can do is refuse to give effect to the impugned provision in rendering its judgment.[11]

9. Even though the British Columbia Court of Appeal is empowered to issue declarations, the Court declined to consider the constitutionality of the mandatory minimum on the grounds that it should avoid making constitutional pronouncements if the case could be decided on a "less esoteric" basis (i.e. on non-constitutional grounds).[12] Because the Appellant deserved a sentence equal to or greater than the mandatory minimum, the Court held that a court was not obliged to consider the minimum's constitutionality. This reasoning injected a threshold requirement into the section 12 analysis. Before embarking on the constitutional inquiry, courts must now consider whether the impugned provision would have any effect on the sentence to be imposed.[13]

B. Provincial Court Judges Should be Able to Declare Legislation Invalid

10. The CLA submits that this Court should hold that provincial court judges *can* make declarations of invalidity. The wording of section 52 of the *Constitution* implies that provincial court judges have this power:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[14]

11. Moreover, in *Big M Drug Mart*, this Court explicitly held that provincial court judges have the ability to declare legislation invalid. In that case, a corporation challenged a Sunday closing law on the grounds that it infringed freedom of religion. The corporation brought this challenge in the provincial court. The Crown argued that the challenge had been brought in the wrong forum as the provincial court lacked prerogative power to declare legislation invalid.[15] In rejecting this argument, this Court held that provincial courts have "always" had the power to make declarations of invalidity:

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[11] *Ibid.* at para. 31.
[12] *Ibid.* at paras. 42 – 43.
[13] *Ibid.* at para. 44.
[14] *Supra* note 4.
[15] *Big M Drug Mart*, *supra* note 5 at paras. 35, 44.

> The appellant overlooks the fact that it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute [emphasis added].[16]

12. Furthermore, this Court held in *Ferguson* that section 52 "does not create a personal remedy."[17] A claimant who has standing "can generally seek a declaration of invalidity under s. 52" on the grounds that the law has unconstitutional effects either directly or on third parties.[18] This Court held that a general declaration – and not a personal remedy under s. 24(1) of the *Charter* – as the proper response to an unconstitutional mandatory minimum. Individual remedies for *Charter* violating mandatory minimums are inappropriate because they erode key values that underpin the rule of law: certainty, accessibility, intelligibility, clarity, and predictability.[19]

13. As a result, this Court in *Ferguson* held that the only remedy for an unconstitutional mandatory minimum sentence is a declaration of invalidity:

> I conclude that constitutional exemptions should not be recognized as a remedy for cruel and unusual punishment imposed by a law prescribing a minimum sentence. If a law providing for a mandatory minimum sentence is found to violate the *Charter*, it should be declared inconsistent with the *Charter* and hence of no force and effect under s. 52 of the *Constitution Act, 1982* [emphasis added].[20]

14. Despite this Court's holdings in *Big M Drug Mart* and *Ferguson* and the wording of section 52, the British Columbia Court of Appeal held that provincial court judges cannot make declarations of invalidity. If this is correct, it means that provincial court judges must effectively do what *Ferguson* sought to avoid. A provincial court judge cannot grant a general remedy against an unconstitutional mandatory minimum. Instead, all she can do is refrain from applying it to the accused before the court. This amounts to nothing more than a constitutional exemption for the accused, one that has no broader effect on any other person facing that same minimum penalty.

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[16] *Ibid.* at para. 46.
[17] *Ferguson, supra* note 6 at para. 59.
[18] *Ibid.*
[19] *Ibid.* at paras. 69 – 73.
[20] *Ibid.* at para. 74.

15. Forcing provincial court judges to deal only in personal remedies causes the same problems this court foresaw in *Ferguson*.

16. First, preventing provincial courts from making constitutional declarations creates a needless duplication of proceedings. While it is true that provincial court judgments are never binding, forbidding provincial court judges from issuing declarations makes it *impossible* for judges to follow past provincial court decisions that have found mandatory minimum sentences unconstitutional. A provincial court judge simply cannot rely on a past judgment to avoid imposing a mandatory minimum. The law remains presumptively valid, and accused persons must bring the same challenge and seek the same remedy over and over again in every case. This pointlessly wastes judicial resources in an overburdened court system and it thwarts access to justice.

17. The controversial victim fine surcharge perfectly illustrates the absurdity this causes. The *Criminal Code*[21] now requires a surcharge of thirty percent on top of any fine imposed by a court. In cases where no fine is imposed, there is a mandatory surcharge of one hundred dollars per summary conviction offence and two hundred dollars per indictable offence.[22] In *Michael*[23], Justice Paciocco of the Ontario Court of Justice found that the victim fine surcharge violated section 12 of the *Charter*:

> It is no doubt obvious from the foregoing that I am persuaded, applying to the best of my ability objective legal standards, that a reasonable person, properly informed, would find that imposing $900 in surcharges on an addicted, impoverished and troubled Mr. Michael, in which each $100 component represents 40% of his monthly income and in which there is no adjustment allowed for his ability to pay, a sum that he is unlikely to be able to pay in the foreseeable future and that will result in an overlong if not perpetual delay in repayment of his debt to society for the modestly serious offences he committed, is "more than merely excessive."[24]

Assuming *arguendo* that this decision is correct, a provincial court judge's inability to issue declaratory relief would mean that Justice Paciocco's decision can have no application beyond the accused in that case. Another judge of the provincial court who agrees with this reasoning

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[21] *Criminal Code* (R.S.C., 1985 c. C-46) ["*Criminal Code*"].
[22] *Ibid.* at section 737.
[23] *R. v. Michael*, 2014 ONCJ 360 ["*Michael*"].
[24] *Ibid.*, at para. 99.

would be *unable* to follow the decision unless the accused brought another constitutional challenge seeking the same remedy. Given how many accused persons pass through "plea courts" in Canada's provincial courts each and every day, requiring a fresh challenge in every case is simply unworkable. It would grind courtrooms to a halt. Justice Paccioco noted this result in *Sharkey*[25], and this duplication of effort is precisely what this Court strove to avoid with its ruling in *Ferguson*.[26]

18. Second, denying declaratory power to provincial court judges creates the risk that unconstitutional laws will continue to be applied to those who do not have the wherewithal to bring constitutional challenges. If a provincial court judge finds a mandatory minimum unconstitutional but has no declaratory power, the minimum remains in place. If an accused in a future case does not bring a constitutional challenge, the law is presumed valid and must be applied. This is precisely what the Superior Court held Justice Paciocco was required to do in *Sharkey*.[27] Absent another challenge to the law, Justice Paciocco had to apply the victim fine surcharge he struck down in *Michael*.

19. Third, the lack of declaratory relief makes it difficult to access effective remedies for unconstitutional mandatory minimums that attach to summary conviction offences. Exclusive jurisdiction over summary conviction offences lies with the provincial courts. Amendments to the *Safe Streets and Communities Act*[28] alone created six new mandatory minimum sentences for offences where the Crown proceeds summarily. Constitutional challenges to those minimums begin in the provincial court.[29]

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[25] *R. v. Sharkey*, 2014 ONCJ 437 ["*Sharkey*"] at para. 31: "A Charter application requires 30 days notice. Cases in a busy plea court such as this often involve individuals who are held in custody. Those individuals are encouraged to resolve their cases quickly. The efficient administration of justice requires cooperation."

[26] *Ferguson*, *supra* note 6 at para. 72.

[27] *R. v. Sharkey*, 2015 ONSC 1657 ["*Sharkey*"]. The Crown appealed Justice Paciocco's decision to the Superior Court of Justice where the Court held that because the decision in *Michael* is not binding precedent, section 737 is presumed valid and could not be ignored in subsequent cases. As a result, a challenge had to be brought in every case and the parties must be given the opportunity to make meaningful submissions: see para. 26.

[28] *Safe Streets and Communities Act* (S.C. 2012, c. 1).

[29] The argument that an accused charged with a summary conviction offence could have the case heard in superior court, *ab initio*, is not workable in practice. It would lead to bifurcated proceedings and force cases to be decided by courts, which do not deal with these offences on a daily basis. Provincial courts deal with summary conviction offences every day. On margin, they are the best courts to hear and rule on the

20. Indecent exposure, criminalized by section 173(2) of the *Criminal Code*, provides an example. The offence now carries a mandatory minimum sentence of 90 days on summary conviction. If a constitutional challenge were launched against this minimum, a provincial court judge could find that the minimum is cruel and unusual punishment on the basis of a real or hypothetical offender (e.g. an 18 year old accused with no criminal record suffering from mental health issues that do not render him not criminally responsible). If the challenge was successful but the provincial court cannot make a declaration, the unconstitutional minimum could survive on the books indefinitely. A broad declaration could only be obtained on appeal to the Superior Court. The Crown could immunize the minimum from a broad declaration of invalidity by simply refusing to appeal any judgment where the law is not applied.[30]

21. Finally, the CLA accepts that it has generally been accepted that provincial court judges do not have the power to issue declaratory relief. The authority in favour of this argument is that prerogative relief – which includes general declarations – is the exclusive right of the superior courts as courts of inherent jurisdiction.[31] Resort to this argument cannot be the complete answer. Provincial court judges must be able to consider the constitutional pronouncements of their colleagues absent a challenge in their courtrooms. Otherwise, laws that violate the *Constitution* – the supreme law of this country – will continue to be applied. This would render the words of section 52 – that "any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect" – hollow with no real teeth. Recognition of this declaratory power is not about entrenching on the prerogative powers of the superior court. Rather, it is a recognition that the *Constitution* itself demands that provincial court judges be able to make declarations of invalidity – a power this Court recognized even as far back as in *Big M Drug Mart*.

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evidentiary framework of the challenge. See: *R. v. Conway*, 2010 SCC 22 ["*Conway*"] at para. 35 citing *R. v. 974649 Ontario Inc.*, 2001 SCC 81 ["*Dunedin*"].

[30] *Sharkey*, *supra* note 25.

[31] *Lloyd*, *supra* note 9 at paras. 34 – 35.

C. Mootness should not Act as a Barrier to Deciding the Constitutionality of Mandatory Minimums

22. The CLA submits that mootness should not be used to prevent judges who are willing to embark on a challenge from deciding the constitutionality of mandatory minimums.

23. First, such a threshold requirement is inconsistent with this Court's precedent. In *Smith*[32] – the only other decision apart from *Nur* in which this Court found a mandatory minimum unconstitutional – the accused was not affected by the mandatory minimum. That case involved a challenge to the seven-year mandatory minimum sentence for importing a narcotic. This Court, agreeing with the trial judge, found that the minimum violated section 12 of the *Charter*. However, after the minimum was struck down, the trial judge imposed an eight-year sentence.[33] A threshold requirement did not act to bar the trial judge from finding an unconstitutional law unconstitutional.

24. A requirement that an offender receive a tangible benefit before embarking on a constitutional challenge appears to be rooted in the concern that a better future claimant – one who is directly affected by the law – may exist:

> If this court [the BCCA] were to find for the Crown on the s. 12 issue, it would mean that people who are potentially much more directly affected by the issue than is Mr. Lloyd would be effectively precluded from raising challenges to the legislation short of an appeal to the Supreme Court of Canada.[34]

While this may be true for other types of constitutional challenges, the reasonable hypothetical prong of the section 12 test eliminates this concern. Under section 12, a court is not confined to the circumstances of the immediate offender before it. Rather, a court is obliged to go on to consider the circumstances of other offenders. The circumstances of a "much more directly affected" accused can be considered as a reasonable hypothetical. This branch of the section 12 inquiry eliminates any advantage that may be gained by waiting for a "better future claimant."

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[32] *R. v. Smith*, [1987] 1 SCR 1045 ["*Smith*"].
[33] *Ibid.* at para. 16.
[34] *Lloyd*, *supra* note 9 at para. 47.

25. In fact, injecting a threshold requirement into the section 12 analysis effectively invites this Court to limit the use of reasonable hypotheticals — an invitation this Court rejected in *Nur*. The general principle that courts should avoid deciding constitutional issues needlessly cannot give courts carte blanche to leave unconstitutional laws intact until the perfect offender – who may never materialize – comes before them. To do so would permit unconstitutional laws to remain on the books and undermines the prospect of bringing certainty to the constitutionality of legislation. That is why this Court reaffirmed the importance of reasonable hypotheticals and the need to retain them in *Nur*.[35] The Crown's invitation in this case results in the same limit on reasonable hypotheticals, and it too should be rejected.

26. Finally, a threshold requirement frustrates access to justice. By requiring that judges first determine whether a minimum has an impact on the sentence imposed will force judges who are willing participants in the constitutional challenge to decline from deciding the issue. This is precisely what the British Columbia Court of Appeal told the trial judge he ought to have done. Constraining judges in this way ignores that the doctrine of mootness is not absolute – courts always possess the discretion to decide moot cases – and the value in deciding these cases.[36] Furthermore, constitutional litigation is lengthy. Mootness can mean that some cases may never be adjudicated because the potentially unconstitutional sentence is less than the time needed to bring the application. Constitutional litigation is also expensive. However, there are some accused – such as the Appellant – who meet the requirements of standing and are willing to undertake the cost and effort of challenging a mandatory minimum sentence knowing full well that they may prevail on the merits but receive no tangible benefit in the end. It makes little common sense to prevent these accused from undertaking such important challenges.

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[35] *Nur*, *supra* note 2 at paras. 63 – 65.
[36] *Borowksi v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 ["*Borowski*"] at paras. 15 – 16.

D. Conclusion

27. Constitutional litigation should not be viewed through the same lens as private litigation. The question to be decided in cases like *Smith* and *Nur* is not what will happen with the accused, but what will happen to Canadians found guilty of these offences. If a challenge to a mandatory minimum sentence raises an important issue, is not duplicitous or frivolous and can muster proper argument, it should be allowed to proceed. This is especially so in light of this Court's findings that these minimums do more harm than good. While provincial court judges have the power to entertain these challenges their power falls short when it comes to the required relief. In the words of the Chief Justice, "Without effective remedies, the law becomes an empty symbol; full of sound and fury but signifying nothing."[37]

PART IV: COSTS

28. The CLA seeks no costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

29. The CLA requests that it be allowed 10 minutes to provide oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

as agent for

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as agent for

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[37] Justice Beverley M. McLachlin (as she then was), "The *Charter*: A New Role for the Judiciary?" (1991), 20 Alta. L. Rev. (No. 3) 540 at 548.

PART VI: TABLE OF AUTHORITIES

Case law

Analysis and Commentary

PART VII: STATUTORY PROVISIONS

The Constitution Act, 1982, s. 52
Controlled Drugs and Substances Act (S.C. 1996, c. 19), s. 5(3)(1)(i)(d)
Criminal Code, (R.S.C., 1985, c. C-46), s. 737

***The Constitution Act*, 1982, s. 52**

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52. (1)La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

***Controlled Drugs and Substances Act* (S.C. 1996, c. 19), s. 5(2)(1)(i)(d)**

Trafficking in substance

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

Possession for purpose of trafficking

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

Punishment

(3) Every person who contravenes subsection (1) or (2)

(a) subject to paragraph (*a.1*), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and

(i) to a minimum punishment of imprisonment for a term of one year if

(A) the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the *Criminal Code*,
(B) the person used or threatened to use violence in committing the offence,
(C) the person carried, used or threatened to use a weapon in committing the offence, or
(D) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

Trafic de substances

5. (1) Il est interdit de faire le trafic de toute substance inscrite aux annexes I, II, III ou IV ou de toute substance présentée ou tenue pour telle par le trafiquant.

Possession en vue du trafic

(2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.

Peine

(3) Quiconque contrevient aux paragraphes (1) ou (2) commet :

a) dans le cas de substances inscrites aux annexes I ou II, mais sous réserve de l'alinéa *a.1)*, un acte criminel passible de l'emprisonnement à perpétuité, la durée de l'emprisonnement ne pouvant être inférieure :

(i) à un an, si la personne, selon le cas :

(A) a commis l'infraction au profit ou sous la direction d'une organisation criminelle au sens du paragraphe 467.1(1) du*Code criminel* ou en association avec elle,
(B) a eu recours ou a menacé de recourir à la violence lors de la perpétration de l'infraction,
(C) portait ou a utilisé ou menacé d'utiliser une arme lors de la perpétration de l'infraction,
(D) a, au cours des dix dernières années, été reconnue coupable d'une infraction désignée ou purgé une peine d'emprisonnement relativement à une telle infraction,

Criminal Code (R.S.C., 1985, c. C-46), s. 737

Victim surcharge

737. (1) An offender who is convicted, or discharged under section 730, of an offence under this Act or the *Controlled Drugs and Substances Act* shall pay a victim surcharge, in addition to any other punishment imposed on the offender.

Amount of surcharge

(2) Subject to subsection (3), the amount of the victim surcharge in respect of an offence is

(a) 30 per cent of any fine that is imposed on the offender for the offence; or
(b) if no fine is imposed on the offender for the offence,
(i) $100 in the case of an offence punishable by summary conviction, and
(ii) $200 in the case of an offence punishable by indictment.

Suramende compensatoire

737. (1) Dans le cas où il est condamné — ou absous aux termes de l'article 730 — à l'égard d'une infraction prévue à la présente loi ou à la *Loi réglementant certaines drogues et autres substances*, le contrevenant est tenu de verser une suramende compensatoire, en plus de toute autre peine qui lui est infligée.

Montant de la suramende

(2) Sous réserve du paragraphe (3), le montant de la suramende compensatoire représente :

a) trente pour cent de l'amende infligée pour l'infraction;
b) si aucune amende n'est infligée :

(i) 100 $ pour une infraction punissable sur déclaration de culpabilité par procédure sommaire,
(ii) 200 $ pour une infraction punissable sur déclaration de culpabilité par mise en accusation.