File Number: 37427

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ALEX BOUDREAULT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF ONTARIO
COLOR OF POVERTY - COLOR OF CHANGE
INCOME SECURITY ADVOCACY CENTRE
BRITISH COLUMBIA CIVIL LIBERITIES
ABORIGINAL LEGAL SERVICES
CANADA CIVIL LIBERATIES ASSOCIATION
PIVOT LEGAL SOCIETY

Interveners

FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF ALBERTA
PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

ROBERT FATA
Counsel for the Intervener
Attorney General of Alberta
Justice and Solicitor General
Appeals, Education & Prosecution Policy
3rd Floor, 9833 – 109 Street
Edmonton, AB T5K 2E8
Tel: (780) 422-5402
Fax: (780) 422-1106

D. LYNNE WATT
Ottawa Agent for Counsel for the Intervener
Attorney General of Alberta
Gowling WLG (Canada) LLP
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Email: robert.fata@gov.ab.ca

YVES GRATTON
Counsel for the Appellant
Aide juridique de Montréal
800, boul. De Maisonneuve Est
9e étage
Montreal, QC H2L 4M7
Tel: (514) 842-2233 Ext. 265
Fax: (514) 842-1970
Email: ygratton@ccjm.qc.ca

DANIEL CYR
Ottawa Agent for Counsel for the Appellant
Centre communautaire juridique de l'Outaouais
136, rue Wright
Gatineau, QC J8X 2G9
Tel: (819) 772-3084
Fax: (819) 772-3105
Email: dcyr@ccjo.qc.ca

ROBERT BENOIT/ÉRIC DUFOUR/ LOUIS-CHARLES BAL
Counsel for the Respondent
Poursuites criminelles et pénales du Québec
1, rue Notre-Dame Est
Pièce 4. 100
Montréal, QC H2Y 1B6
Tel: (514) 393-2703 Ext. 52185
Fax: (514) 873-9895
Email:

SANDRA BONANNO
Ottawa Agent for Counsel for the Respondent
Directeur des poursuites criminelles et
Pénales du Québec
17, rue Laurier, Bureau 1.230
Gatineau, QC J8X 4C1
Tel: (819) 776-8111 Ext. 60446
Fax: (819) 772-3986
Email: sandra.bonanno@dpcp.gouv. qc.ca

JULIEN BERNARD/JULIE DASSYLVA/ SYLVAIN LEBOEUF
Counsel for the Intervener
Attorney General of Québec
Ministère de la Justice
1, rue Notre-Dame est, bureau 8.00
Montréal, QC H2Y 1B6
Tel: (514) 939-2336 Ext. 51451
Fax: (514) 873-7074
Email: julien.bernard@justice.gouv.qu.ca

PIERRE LANDRY
Ottawa Agent for Counsel for the Intervener
Attorney General of Quebec
Noël & Associés
111, rue Champlain
Gatineau, QC J8X 3R1
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

MICHAEL PERLIN
Counsel for the Intervener
Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9
Tel: (416) 326-4500
Fax: (416) 326-4025
Email: michael.perlin@ontario.ca

NADIA EFFENDI
Ottawa Agent for Counsel for the Intervener
Attorney General of Ontario
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Tel: (613) 337-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

JACKIE ESMONDE/DANIEL ROHDE
Counsel for the Intervener
Color of Poverty – Colour of Change
Income Security Advocacy Centre

MARIE-FRANCE MAJOR
Ottawa Agent for Counsel for the Intervener
Color of Poverty - Colour of Change
Supreme Advocacy LLP

425 Adelaide Street West, 5th Floor
Toronto, ON M5V 3C1
Tel: (416) 597-5820, Ext. 5153
Fax: (416) 597-5821
Email: esmondj@lao.on.ca

JACKIE ESMONDE/DANIEL ROHDE
Counsel for the Intervener
Income Security Advocacy Centre
Income Security Advocacy Centre
425 Adelaide Street West, 5th Floor
Toronto, ON M5V 3C1
Tel: (416) 597-5820, Ext. 5153
Fax: (416) 597-5821
Email: esmondj@lao.on.ca

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855, Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

MARIE-FRANCE MAJOR
Ottawa Agent for Counsel for the Intervener
Income Security Advocacy Centre
Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855, Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

GREG J. ALLEN
Counsel for the Intervener
British Columbia Civil Liberties Association
Hunter Litigation Chambers Law Corporation
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1
Tel: (604) 891-2400
Fax: (604) 647-4554
Email: gallen@litigationchambers.com

JONATHAN RUDIN/CAITLYN E. KASPER
Counsel for the Intervener
Aboriginal Legal Services
Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4
Tel: (416) 408-4041
Fax: (416) 408-4268
Email:

MICHAEL BOSSIN
Ottawa Agent for Counsel for the Intervener
Aboriginal Legal Services
Community Legal Services-Ottawa Carleton
1 Nicholas Street, Suite 422
Ottawa, ON K1N 7B7
Tel: (613) 241-7008, Ext. 224
Fax: (613) 241-8680
Email: bossin@lao.on.ca

CHRISTOPHER D. BREDT
PIERRE N. GEMSON
ALANNAH M. FOTHERINGHAM
Counsel for the Intervener
Canadian Civil Liberties Association
Borden Ladner Gervais LLP
Scotia Place, 40 King Street West
Toronto, ON M5H 3Y4
Tel: (416) 367-6165
Fax: (416) 361-7063
Email: cbredt@blg.com

NADIA EFFENDI
Ottawa Agent for Counsel for the Intervener
Canadian Civil Liberties Association
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Tel: (416) 237-5160
Fax: (416) 230-8842
Email: neffendi@blg.com

GRAHAM KOSAKOSKI
Counsel for the Intervener
Pivot Legal Society

MARIE-FRANCE MAJOR
Ottawa Agent for Counsel for the Intervener
Income Security Advocacy Centre

Rosbenberg Kosakoski LLP
671D Market Hill
Vancouver, BC V5Z 4B5
Tel: (604) 879-4505
Fax: (604) 879-4934
Email: graham@rklitigation.ca

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855, Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

TABLE OF CONTENTS

Page No.

FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. The Attorney General of Alberta intervenes in support of the constitutional validity of the mandatory victim surcharge prescribed by section 737 of the *Criminal Code*. Alberta confines its submissions to the first constitutional question relating to the section 12 *Charter* analysis of this provision.

2. This appeal raises issues of national importance and broad application. The direct issue is the constitutional significance of the mandatory federal victim surcharges that are imposed in respect of all criminal offences. This provides a revenue stream for victim services in Alberta and other jurisdictions. If this Honourable Court adopts the reasoning of the dissenting opinion from the Quebec Court of Appeal, then the indirect significance of this case is the potential application of that reasoning upon minimum fines under the *Criminal Code* and other federal statutes. Further, there would be nothing preventing that reasoning from applying to provincial victim surcharges and provincial specified penalties in the form of fines imposed on impecunious offenders for having committed provincial offences. It is trite law that the *Charter* applies to these quasi-criminal offences.

3. Alberta has a significant and broad interest that this Honourable Court does not open the constitutional principle of cruel and unusual punishment or treatment to include a non-custodial order in circumstances where the burden of that order is significantly ameliorated. If the appeal succeeds on the basis of the dissent's reasoning, it begins a trivialization of "cruel and unusual punishment or treatment." For the first time, this constitutional principle could apply to a non-custodial form of sentence.

4. Alberta holds this concern notwithstanding that on Oct. 21, 2016, the Minister of Justice, Canada, announced Bill C-28, which seeks to amend the federal victim surcharge leaving the calculation intact but re-introducing a hardship exemption and creating an exception for multiple convictions.[1] Even if this legislation is passed, if this Honourable Court adopts the dissent's reasoning, that reasoning could nevertheless be applied to minimum fines under the *Criminal Code*, minimum fines under other federal statutes, provincial victim surcharges and specified penalties imposed by provincial statutes.

5. In Alberta, both the federal and the provincial victim surcharges generate revenue streams providing funds for services that are available to victims of crime. These services include police and community-based victims' programs, restorative justice initiatives, and a Financial Benefit Program. These services and the availability of specified fines for provincial offences as viable sentencing tools would be jeopardized if this Honourable Court adopts the reasoning of the dissenting opinion in the Court below.

Facts

6. Alberta takes no position on the facts as set forth by the parties in their facta.

[1] The exception would enable the judge to impose the federal victim surcharge on some of the offences being globally disposed. This Bill last appeared on the "Order Paper and Notice Paper" No. 136 on February 8, 2017. However, it cannot be known for certain whether, or when, this might become law.

PART II – ISSUES

7. Constitutional Questions:

   a. Does the repeal of the judicial discretion formerly provided in section 737(5) of the *Criminal Code of Canada*,[2] when imposing a victim surcharge on an offender, contravene section 12 of the *Canadian Charter of Rights and Freedoms*?[3]

   b. If so, is it upheld by the application of s. 1 of the *Charter*?

Intervener's Position with regard to The Constitutional Questions

8. Alberta submits that the majority of the Quebec Court of Appeal properly concluded that the victim surcharge regime in s. 737 of the *Criminal Code*, notwithstanding the repeal of s. 737(5), does not violate section 12 of the *Charter.* Alberta's submissions will be confined to the section 12 analysis.

9. Alberta adopts the arguments advanced by the Respondent, Attorney General of Quebec, in answer to the first constitutional question.

---

[2] R.S.C. 1985, c. C-46. (Hereinafter "***Criminal Code***")

[3] Part I of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11. (Hereinafter "***Charter***")

PART III – ARGUMENT

Lowering the Standard for "cruel and unusual" Will have Far Reaching Effects

10. Alberta submits that this appeal involves a fundamental constitutional principle of national dimension which in its application would go well beyond the particular fact situation.

11. The majority opinion in the Court of Appeal articulated the danger of a broader application of a diluted principle of cruel and unusual punishment or treatment:

> 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. Justice Binnie rejected this type of reasoning, noting that "poverty should not become a shield against any punishment at all."…
>
> Take for example impaired driving, for which the first offence is sanctioned by a minimum fine of $1,000 (s. 253 and sub-par. 255(1)(a)(i) Cr.C.). Should the impecunious offender simply be exempted from this sanction because he or she is unable to pay the fine in the foreseeable future? I cannot support such an assertion. Incapacity to pay should not be conflated with immunity from sanction.[4]

12. The majority characterized the federal victim surcharge as "a unique measure (one might also say *sui generis*, autonomous, freestanding or original), which is neither a fine nor a restitution, but which is closer to a form of general restitution."[5] Although there are two lines of authority regarding whether a victim surcharge is a

---

[4] ***R. v. Boudreault***, 2016 QCCA 1907, Appellant's Record - Volume I, paras. 200, 201 (Hereinafter "***Boudreault***")

[5] *Ibid*, para. 178.

punishment/sentence, or merely a requirement imposed due to a violation of the law, the majority held that the federal surcharge is an integral component of a sentence, and engages s. 12 of the *Charter*.[6]

13. The majority held that it was insufficient that the treatment or punishment be excessive and that a finding that this is grossly disproportionate will be rare, otherwise the *Charter* will tend to be trivialized.[7] The majority stated:

> The expression "cruel and unusual treatment or punishment" at section 12 of the Charter must therefore be taken as a concise formulation of a strict constitutional norm: the punishment must be excessive to the point of being incompatible with human dignity; in other words, it must be so excessive as to be abhorrent or intolerable to society.[8]

14. Currently, the bar of s. 12 of the *Charter* is set high: only punishment disproportionate to the point of being abhorrent or intolerable, incompatible with human dignity,[9] violates it. This Honourable Court has only invalidated three minimum sentences on the application of s. 12 of the *Charter*.[10] The standard for invalidation is very high:

---

[6] *Ibid*.
[7] *Ibid*, paras 156-157.
[8] *Ibid*, para 159, referencing ***R. v. Smith (Edward Dewey)***, [1987] 1 S.C.R. 1045, p. 1072.
[9] ***R. v. Smith***, supra, p. 1072; ***R. v. Luxton***, [1990] 2 S.C.R. 711, p. 724; ***R. v. Goltz***, [1991] 3 S.C.R. 485, p. 499.
[10] ***R. v. Smith***, supra at FN 8 (mandatory minimum sentence of seven years for importing narcotics); ***R. v. Nur,*** [2015] 1 S.C.R. 773, 2015 SCC 15 (mandatory minimum sentence of three years for unauthorized possession of a prohibited firearm or a restricted firearm when the firearm is loaded or ammunition is readily accessible); ***R. v. Lloyd***, 2016 SCC 13 (mandatory minimum sentence of one year for trafficking or

> It is fundamental to my thinking that the norm not be depreciated by labelling cruel and unusual, punishment which does not qualitatively outrage our sense of what is decent. The bar was set high in *Smith* as it should be. In *Nur* and *Lloyd*, McLachlin C.J., writing for the majority, observed that mandatory minimum sentencing for offences that can be committed in a variety of ways should be closely considered by Parliament as vulnerable to constitutional challenge. I do not however read in these cases that the bar has been lowered.[11]

15. According to the majority in the Court below, the federal victim surcharge was not cruel and unusual in the offender's circumstances nor in reasonable hypothetical circumstances because

> (a) a judge may take the victim surcharge into account in determining what is the just and appropriate sentence;
>
> (b) no civil enforcement measures may be undertaken to ensure payment of the surcharge;
>
> (c) the time allotted for payment may be extended to ensure that an impecunious offender does not risk having a license or permit refused or suspended for defaulting on payment;
>
> (d) an impecunious offender may not be imprisoned for default of payment so long as he or she does not have the means to pay; and
>
> (e) in most Canadian provinces and territories, including Quebec, an optional program exists for payment through earning credits for work performed.[12]

16. These ameliorate the burden of the federal victim surcharge on offenders.

17. Moreover, the Appellant does not challenge the calculation of the federal surcharge for each count.[13] A large total of federal victim surcharges is driven by an

---

possession with the intention to traffic for a delinquent who, in the course of the past ten years, had been found guilty of any drug offence (other than simple possession)).

[11] ***Boudreault***, *supra* FN 4, para. 213.
[12] *Ibid*, paras. 135, 206.
[13] Appellant's Factum, para. 1.

offender committing many offences. Since there are more victims, theoretically, with each offence, it is appropriate there be more frequent contributions to this general restitution fund.[14] To the extent that crimes are purportedly "victimless," the federal victim surcharge nevertheless provides funds available to victims of *other* crimes.

18. Adopting the reasoning of the dissent would significantly lower the standard of "cruel and unusual", ***precisely because*** such a characterization would occur despite the presence of the ameliorations. In the case of federal victim surcharges and minimum fines in the *Criminal Code*, the offender's ability to pay is not considered when determining the amount to be paid. Capacity to pay may be considered at the point of determining the manner and time in which the federal victim surcharge must be paid. The risk of a successful appeal is the risk of characterizing as cruel and unusual a debt even where the offender may, in many provinces, including Alberta, supply labour instead of legal tender, and apply to slow the pace of repayment. At all times, his wages and assets are immune from garnishee and seizure, respectively, and he will not go to jail due to the inability to pay.

19. To date, this Honourable Court has never pronounced a fine as cruel and unusual punishment or treatment. The far-reaching consequence of a successful appeal is that this would be the first time a non-carceral order may be held to be cruel and unusual. The significant step of characterizing a monetary order as cruel and unusual would trivialize s. 12 of the *Charter*, despite the ameliorations noted above and despite the fact that relatively larger federal surcharge amounts are caused by recidivism.

20. Moreover, this Honourable Court has stated that minimum sentences are a forceful expression of government policy which must be applied absent a declaration of

---

[14] ***Boudreault***, *supra* FN 4, para. 224.

unconstitutionality.[15] Adopting the approach of the dissent in the Court below would effectively encroach upon Parliament's sentencing policy.

> As a final word, minimum sentences are not *per se* contrary to Section 12 of the *Charter*… However, the reasoning of those who would rule the minimum victim surcharge as cruel and unusual might well lead to the result that all minimum fines are cruel and unusual by the mere fact that many offenders are poor. Such a result would in my view usurp the role of Parliament in determining policy in criminal sentencing matters.[16]

21. Alberta submits that adopting the reasoning of the dissent below would be a significant departure from precedent. To date, this Honourable Court has found a breach of s. 12 where the underlying offence may be "banal" but the mandatory sentence is abhorrent or intolerable relative to it:

> The sentencing judge commented that it is only by force of arithmetic and the number of offenses Appellant committed that one is shocked by the enormity of the amount compared to Appellant's ability to pay. Put in perspective, per offense the surcharge is $200 in respect of guilty verdicts which merited carceral sentences. The latter, as we know, is the last measure of severity in the sentencing ladder (Section 718.2 (d) and (e) Cr.C.). My moral code is not outraged by an additional $200 tacked onto a sentence for infractions serious enough to merit a prison term. This situation is wholly different from that in *Smith*, *Nur* and *Lloyd*, where a relatively ***significant carceral sentence*** was dictated by the statutory minimum for what, in itself, was a relatively ***banal offense***.[17] (emphasis mine)

22. With respect to federal victim surcharges, we have the reverse. It is each federal surcharge which is relatively banal. The accumulated federal surcharge becomes

---

[15] ***R. v. Nasogaluak***, [2010] 1 S.C.R. 206, para. 45; see also ***R. v. Perry*** (1984), 14 C.C.C. (3d) 5, 2013 QCCA 212, paras. 150 to 152. Motion for leave to appeal to the Supreme Court denied, 21/11/13.

[16] ***Boudreault***, *supra* FN 4, para 227.

[17] *Ibid*, para 223.

significant only in the hands of the offender. He adds to the total by his repeated misconduct. It is only after this repeated misconduct that the federal victim surcharge has attracted constitutional scrutiny, not before. Where an impugned sentence has become cruel or unusual only when rendered so by the offender and despite the presence of ameliorations, it becomes difficult to see what would clearly ***not*** be characterized as cruel and unusual. In, *Smith, Nur* and *Lloyd*, ***Parliament*** created the sentence which was impugned. In the present case, the ***Appellant*** engendered the total of the federal victim surcharges. It is that total which has driven this constitutional challenge.

The Impact of the Appeal on Alberta

23. Alberta has a provincial victim surcharge regime. Section *8 of the Victims of Crime Act (Alberta)* ("VOCA")[18] reads as follows:

> 8(1) If a fine is imposed on a person who is convicted of an offence under an enactment, the person must pay a surcharge unless
>
> (a) the offence is a contravention of a municipal bylaw or a Metis settlement bylaw, or
>
> (b) the offence is excluded from the application of this section by the regulations.
>
> (2) The amount of a surcharge is the amount provided for in the regulations.
>
> (3) The surcharge may be collected in the same manner as a fine.
>
> (4) Notwithstanding any other enactment, any payment made by or on behalf of a person convicted of an offence is to be applied first to payment in full of the surcharge.
>
> (5) Notwithstanding any other enactment, the proceeds of the surcharge must be deposited in the Fund,

[18] ***Alberta Victims of Crime Act***, (Hereinafter "***VOCA***") R.S.A. 2000, c. V-3, s. 8.

(6) Section 34 of the *Corrections Act* does not apply to a surcharge.

24. The specific regulation in Alberta states as follows.[19]

> 12 The amount of a surcharge that is to be paid into the Fund is an amount that is equivalent to 15% of the fine, rounded down to the nearest dollar, imposed on a person convicted of an offence.

25. The *VOCA* does not impose this 15% provincial victim surcharge on non-fine sentences for provincial offences. However, for those offences, the provincial equivalent to a $100 federal victim surcharge applicable to summary offences applies to provincial statutes by virtue of the *Provincial Offences Procedures Act* [20] (hereinafter "*POPA*"), s. 3.

> 3 Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the Criminal Code (Canada), including the provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.

26. If this Honourable Court adopts the reasoning of the dissent in the Court below, this would impact Alberta's provincial victim surcharge fund and the services it supports. Challenges to this provincial victim surcharge would need to be launched, but they would be expected to draw heavily from this Honourable Court's comments about the federal victim surcharge.

27. From the victim's perspective, both the federal and provincial victim surcharge funds provide partial reparation from offenders for the wrongs caused to victims or to communities in Alberta. Unlike a specific restitution order under s. 738 *Criminal Code*

---

[19] ***Victims of Crime Regulation***, Alta. Reg 63/2004, s. 12.
[20] ***Provincial Offences Procedure Act***, R.S.A. 2000, c P-34, s. 3.(Hereinafter "***POPA***")

which is a more direct payment from the offender to the victim, revenue from s. 737 *Criminal Code* and the provincial victim surcharge is a collective fund accessible to many victims and to which all offenders contribute.

28. Each type of victim surcharge raises awareness among offenders of their responsibilities towards victims, and the community, which are consequent to their conduct. So far as the federal victim surcharge is concerned, and as recognized by the majority in the Court below, promoting offender accountability was a recurrent theme in the Parliamentary debates.[21]

Alberta's Experience with the Federal Victim Surcharge

29. On October 24, 2013, federal legislation doubled the amount of the federal victim surcharge and removed judicial discretion of a waiver. [22] A 2016 Federal report which used key informants in nine jurisdictions, including Alberta, discussed various effects of that legislation.[23]

---

[21] ***Boudreault***, *supra* FN 4, paras. 136, 218.

[22] Formerly Bill C-37, ***Increasing Offenders' Accountability for Victims Act*** (S.C. 2013 c.11)

[23] "*The Federal Victim Surcharge: The 2013 Amendments and their Implementation in Nine Jurisdictions-Final Report 2016*," (hereinafter "***Federal Victim Surcharge Report***") by Moira A. Law, PhD. **[see attached Appendix to Intervener Factum]**. Its methodology was primarily qualitative in nature. The primary key informants for Alberta included:

- Special Initiatives Project Lead, Victims Services, Justice and Solicitor General, Alberta
- Legal Counsel, Justice and Solicitor General, Alberta
- Administrator, Justice and Solicitor General, Alberta

30. The Fine Option program, a compensatory work -instead -of-pay program, is available for federal victim surcharges in Alberta, where non-payment could result in a default period of custody. [24]

31. There is a high degree of variation among jurisdictions in approaching collection and enforcement of the federal surcharge. However, Alberta uses the **most** collection and enforcement methods out of eight provinces and one territory studied in this respect. In brief, except for collection services from a third party, Alberta uses an internal government collection agency, motor vehicle sanctions, a Canada Revenue Agency Federal Refund Set-off Program and default hearings/time served. [25] This is

---

• Research & Evaluation Analyst, Strategic Information and Evaluation, Resolution and Court Administration Services, Justice and Solicitor General, Alberta

• Executive Director, Strategic Services Branch, Correctional Services Division, Justice and Solicitor General, Alberta

• Director of Collections, Claims & Recoveries, Justice Services, Justice and Solicitor General, Alberta

• Collections Supervisor, Justice and Solicitor General, Alberta

• Director, Policy Unit, Justice and Solicitor General, Alberta

• Policy Counsel, Justice and Solicitor General, Alberta

[24] However, Alberta has no estimate as to how many offenders use it to satisfy the federal surcharge.

[25] ***Federal Victim Surcharge Report***, *supra* FN 23, p. ix **[see Appendix attached to intervener factum]**. There were not any data available that would show how these enforcement techniques are related to collection rates of the federal victim surcharge. Similarly, the rate the Fine Option Program is being used for that purpose was not

evidence of the high priority which Alberta has placed historically on collecting this federal surcharge and thereby assisting its victims.

32. Alberta identified key impacts of the federal victim surcharge legislative change. There have been increases in revenues generated for victim services. In the fiscal year in which the 2013 amendments came into force (2012-2013), there was a large decrease in the federal victim surcharge collected. However, as with other jurisdictions that experienced this, there had been a steady increase in the next three years, with the largest collection occurring prior to the 2013 amendments. [26]

33. Alberta's revenue history regarding the federal victim surcharge does not discern whether the general increase in funds is due to the change to the calculation formula for the surcharge, or due to it being mandatory. However, the dissent in the Court below would have declared the entire s. 737 of the *Criminal Code* unconstitutional, which is arguably the proper remedy upon finding a breach of s. 12 of the *Charter*.

34. With respect to collection/enforcement, there is the obvious burden on offenders who are impecunious.[27] Some interviewees in the ***Federal Victim Surcharge Report*** noted that "although there may be an increase in revenues for victim services, the imposition of a mandatory federal VFS [sic] on impecunious offenders is not effective as it does not provide revenues to fund victim services and therefore does nothing to provide for support of victims."[28]

---

available from any key informant. There was no meaningful comment on the impact of the federal victim surcharge on offenders' ability to complete their sentences.

[26] *Ibid*, pp. x, 10 and Appendix B **[see Appendix attached to factum]**
[27] *Ibid*, p. x **[see Appendix attached to factum]**
[28] *Ibid*, p. 9 **[see Appendix attached to factum]**

35. However, if this Honourable Court holds that the federal victim surcharge regime is unconstitutional, the most likely remedy would jeopardize the surcharge itself. That would cease all revenue for victims services sourced from the federal victim surcharge fund. This would reduce the services to victims of crime. These services include police and community-based victims' programs, restorative justice initiatives, and a Financial Benefit Program.[29]

Alberta's Experience with the Provincial Victim Surcharge

36. Alberta's provincial victim surcharge is levied whenever a fine is imposed as a penalty under any enactment, unless exceptions apply,[30] and whenever a non-fine penalty is imposed for provincial offences.[31]

37. Revenue from provincial victim surcharges would be revenue generated from, *inter alia*, offences such as traffic violations (ex. speeding tickets, driving without insurance) and regulatory offences (ex. environmental offences).

38. Not surprisingly, the application of the reasoning of the dissent upon provincial victim surcharges would have a significant effect on the Alberta government's ability to aid victims of crime with services.

39. In Alberta, the Victims of Crime Fund is a regulated fund administered by the Minister of Finance and operated under the authority of *VOCA*. It is financed by the federal and provincial victim surcharges. This fund services police and community-

---

[29] Alberta Justice And Solicitor General, VICTIMS SERVICES STATUS REPORT, 2014-2015. (Hereinafter "***Alberta Victim Services Report***")
[30] ***VOCA***, *supra* FN 18, s. 8
[31] ***POPA***, *supra* FN 20, s. 3

based victims' programs, restorative justice initiatives, and a Financial Benefit Program. The latter program provides various benefits to victims; an injury benefit for a confirmed injury (whether physical or psychological) sustained as a direct consequence of the crime; a death benefit that reimburses funeral costs to a maximum of $12,500; a $5,000 psychological benefit available to victims who witnessed the death of a loved one due to a violent crime; and a monthly $1,000 supplemental benefit for victims who sustained quadriplegia or severe brain injury that has left them fully dependent on others.[32] The continued validity of the federal and provincial victim surcharge regime would help sustain these important services to Alberta's victims.

40. Furthermore, it is logical that the reasoning of the dissent below, if adopted by this Honourable Court, would apply to all specified fines for provincial offences imposed on impecunious offenders. There is no practical difference between a fine specified by statute or regulation, and a mandatory minimum fine. If the reasoning of the dissent is adopted and later applied to specified fines, the continued viability of specified fines as a tool for the achievement of sentencing objectives could be seriously jeopardized.

CONCLUSION

41. If this Honourable Court adopts the reasoning of the dissent from the Quebec Court of Appeal, the standard for "cruel and unusual punishment or treatment" will be severely lowered because of the available ameliorations: payment may be delayed until the offender has the capacity to pay; in most jurisdictions, he may work off the surcharge with labour; and at no point is his liberty, assets or wages in jeopardy from an inability to pay the federal surcharge.

---

[32] ***Alberta Victim Services Report***, *supra* FN 29, at pp. 4,5,17 and 19

42. The Attorney General of Alberta asks this Honourable Court to consider that if the reasoning of the dissent in the Court below is adopted by this Honourable Court, that reasoning may be applicable more broadly in the future to minimum fines in the *Criminal Code*, minimum fines for other federal offences, provincial victim surcharges and minimum/specified fines for provincial offences.

43. The direct consequences of such a ruling would be the trivialization of the constitutional principle, "cruel and unusual punishment or treatment." This will jeopardize the use of minimum fines and specified penalties in many sentencing contexts and venues.

44. The indirect consequence of holding the federal victim surcharge regime to be cruel and unusual is to stifle an ability to assist victims of crime through key programming and direct financial benefits to them.

45. This Honourable Court should affirm the reasoning of both the learned trial Judge and the majority of the Court of Appeal in this case.

PART IV – SUBMISSIONS ON COSTS

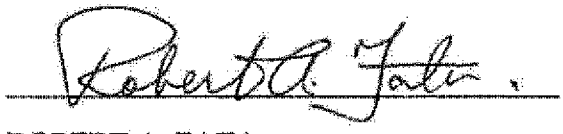
46. Alberta makes no submissions regarding costs.

PART V – REQUEST TO PRESENT ORAL ARGUMENT

47. Pursuant to Rule 71(5.2) of the *Rules of the Supreme Court of Canada*, Alberta is prepared to present oral argument of no longer than 5 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 7th day of November, 2017.



ROBERT A. FATA
COUNSEL FOR THE INTERVENER

PART VI - TABLE OF AUTHORITIES

Case Law	Cited at Paragraph No.
1. ***R. v. Boudreault***, 2016 QCCA 1907	11, 12, 13, 14, 15, 17, 20, 21 28
2. ***R. v. Goltz***, [1991] 3 S.C.R. 485	14
3. ***R. v. Lloyd***, 2016 SCC 13	14, 22
4. ***R. v. Luxton***, [1990] 2 S.C.R. 711	14
5. ***R. v. Nasogaluak***, [2010] 1 S.C.R. 206	20
6. ***R. v. Nur***, [2015] 1 S.C.R. 773	14, 22
7. ***R. v. Perry*** (1984), 14 C.C.C. (3d) 5, 2013 QCCA 212	20
8. ***R. v. Smith (Edward Dewey)***, [1987] 1 S.C.R. 1045	13, 14, 22

PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW

	Cited at Paragraph No.
Bill C-37, ***Increasing Offenders' Accountability for Victims Act*** (S.C. 2013 c.11)	29
Canadian Charter of Rights and Freedoms, section 1 *Loi Constiutionalelle*, section 1	7
Canadian Charter of Rights and Freedoms, section 12 *Loi Constiutionalelle*, section 12	1, 7, 8, 12, 13, 14, 19, 21, 33
Criminal Code, R.S.C. 1985, c. C-46, section 737 *Code Criminel*, LRC 1985, ch C-46, section 737	1, 7, 8, 27, 33
Criminal Code, R.S.C. 1985, c. C-46, section 738 *Code Criminel*, LRC 1985, ch C-46, section 738	27
Alberta Victims of Crime Act, R.S.A. 2000, c. V-3, s. 8	23, 25, 36, 39
Corrections Act, *Section 34*	23
Provincial Offences Procedure Act, R.S.A. 2000, c P-34, s. 3	25, 36
Victims of Crime Regulation, *Alta. Reg 63/2004, s. 12*	24

REPORTS

Alberta Justice And Solicitor General, VICTIMS SERVICES STATUS REPORT, 2014-2015	35, 39
"*The Federal Victim Surcharge: The 2013 Amendments and their Implementation in Nine Jurisdictions-Final Report 2016*," by Moira A. Law, PhD. **(see attached Appendix to Intervener Factum)**	29, 31, 32, 34

CANADA'S LEGAL TEAM
L'ÉQUIPE JURIDIQUE DU CANADA

The Federal Victim Surcharge
The 2013 Amendments and their Implementation in Nine Jurisdictions

Final Report

2016

Moira A. Law, PhD.

Department of Justice Canada | Ministère de la Justice Canada

Canada

The views expressed in this publication are those of the authors and do not necessarily represent the views of the Department of Justice Canada or the Government of Canada.

Table of Contents

List of Tables

Executive Summary

In October 2013, former Bill C-37, *Increasing Offenders' Accountability for Victims Act* (S.C. 2013 c.11), which doubled the amount of the federal victim surcharge (FVS) and removed judicial discretion of a waiver, came into effect. The Research and Statistics Division, Department of Justice Canada, was interested in better understanding how the 2013 amendments to the *Criminal Code* that were made to the FVS provisions (*Bill C-37*) have been working in terms of collection and enforcement in several jurisdictions since its coming into force on October 24, 2013. The results of this study will be used to identify the various impacts of the FVS 2013 amendments.

The ten primary research questions were:

1. a) What is the standard process in your jurisdiction followed by court staff/community corrections in order to collect the federal victim surcharge where the offender is unable to pay?

   b) Is this process documented in a policy, manual or guidelines? Y/N

2. Does your jurisdiction offer a Fine Option Program? Y/N

3. a) Is the Fine Option Program available to the federal victim surcharge? Y/N

   b) When did it become available?

4. Based on your records, since November 2013, how many offenders cannot pay their federal victim surcharge and are being referred to the Fine Option Program? What proportion of total offenders does this group represent?

5. Since November 2013, where offenders cannot pay their federal victim surcharge and there is no Fine Option Program, or it is not available in these cases, how is your jurisdiction enforcing these orders?

6. Based on your records, since November 2013 how many offenders' cases, in which their federal victim surcharge has not been paid, are referred to collection agencies? What proportion of total offenders does this group represent?

7. a) Since November 2013, what other measures are used to enforce payment of the federal victim surcharge in your jurisdiction? For example, income tax refund hold back, denial of renewal of driver's license, denial of renewal of other permits/licenses, etc.

   b) Were any of these measures added after former Bill C-37 came into force? If so, which ones?

8. Subsection 737(4) of the *Criminal Code* notes that the jurisdiction is to establish the time in which a surcharge must be paid and, "If no time has been so established, the surcharge is payable within a reasonable time after its imposition."

   a) Has a time frame been established by the Lieutenant Governor in Council of your jurisdiction? Y/N If so, what is the time frame?

   b) How was this time frame communicated? (e.g., memo to staff, issuance of guidelines, etc.)

   c) From your records, what percentage of the federal victim surcharge is being collected within a "reasonable time" as defined by your jurisdiction?

9. Based on your experience, what problems have you had with the enforcement of/collection of the federal victim surcharge?

10. Based on your experience in your jurisdiction, what has been the impact of the mandatory surcharge (e.g., since former Bill C-37 came into force) on:

    a) resources in courts administration and community corrections in your jurisdiction,

    b) revenues to fund victim services, and

    c) ability of offenders to complete their sentences?