SCC File No. 37427

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

B E T W E E N:

ALEX BOUDREAULT

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-and-

HER MAJESTY THE QUEEN
ATTORNEY GENERAL OF QUEBEC

RESPONDENTS

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INTERVENERS

SCC File No. 37774

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

A N D B E T W E E N:

EDWARD TINKER, KELLY JUDGE, MICHAEL BONDOC, AND WESLEY MEAD

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PART I – OVERVIEW

1. Aboriginal Legal Services (ALS) intervenes in these cases pursuant to an Order issued by Justice Abella on November 2, 2017 and Justice Rowe on March 3, 2018.
2. ALS is a non-profit organization that was incorporated to assist Aboriginal people gain access and control over justice-related issues that affect them.
3. ALS adopts the position of the Appellants in both of the cases being appealed before this Court.

PART II – STATEMENT OF POSITION

4. ALS' position is that the amendments made in 2013[1] to s. 737 of the *Criminal Code*,[2] disproportionately impact Aboriginal offenders by removing judicial discretion in imposing the victim surcharge. These amendments violate s. 7 and s. 12 of the *Canadian Charter of Rights and Freedoms*.[3] These violations are not saved by s. 1 of the *Charter*.

PART III – STATEMENT OF ARGUMENT

5. ALS will make three arguments with respect to the case at bar:
   a) To fully understand the impact of the legislation, a s. 15 *Charter* lens is required. The inability of judges to waive the surcharge due to financial hardship will have a disproportionate impact on Aboriginal offenders as Aboriginal people rank lower on all socio-economic indicators than other Canadians.
   b) The Supreme Court of Canada ruled in *R v Wu*[4] that an offender cannot be imprisoned for the inability to pay a fine. Nevertheless, the practical impact of the ancillary procedures used by courts to determine the ability of an offender to pay the victim surcharge still leads to incarceration.
   c) The imprisonment that follows the ancillary procedures associated with enforcement of the *Increasing Offenders' Accountability for Victims Act* (the "*IOAVA*") is a loss of liberty that is not in accordance with the principles of fundamental justice under s. 7 and constitutes cruel and unusual punishment under s. 12. These *Charter* breaches do not have to occur as there is a clear mechanism to safeguard those who cannot pay the victim

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[1] *Increasing Offenders' Accountability for Victims Act*, RSC 2013, c 11 [*IOAVA*].
[2] *Criminal Code*, RSC 1985, c C-46, s 737 [*Criminal Code*].
[3] *Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), c 11, ss 7 and 12 [*Charter*].
[4] *R v Wu*, 2003 SCC 73, [2003] 3 SCR 530 [*Wu*].

surcharge. That mechanism is to return the ability to waive the surcharge where the person cannot pay to the judiciary, as was the case prior to the enactment of the *IOAVA.*

1) The *Charter* analysis must consider the disproportionate impact of the legislation on Aboriginal people using a s. 15 lens

6. This Honourable Court has been clear that the equality provisions of s. 15 of the *Charter* apply to all other rights guaranteed by the *Charter*[5] and the Court must consider the impact of the law on discrete and insular minorities. Therefore, it is essential that a s. 15 equality lens be utilized where the impugned legislation widens the gap between Aboriginal and non-Aboriginal people in relation to their experiences in the criminal justice system.[6]
7. Aboriginal people are significantly more likely to live in poverty[7] than non-Aboriginal people. According to the Statistical Profile of Poverty in Canada, 18.7% of Aboriginal people who live in economic families[8] and 42.8% of unattached Aboriginal individuals experienced low income in 2005. By contrast, among non-Aboriginal people, the percentages were 8.4% and 28%, respectively.[9]
8. In 2015, Statistics Canada reported in "Aboriginal peoples: Fact sheet for Canada" that close to half (46%) of Aboriginal people in Canada were under the age of 25, compared with 30% of the non-Aboriginal population.[10] Among these Aboriginal youth, 19.2% for those in economic families and 63% of unattached individuals lived in poverty. By contrast, the rate of poverty among the non-Aboriginal youth population was 9.8% and 59.1%, respectively.[11]

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[5] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 185 [*Andrews*].
See also: *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1 at para 75; *R v O'Connor*, [1995] 4 SCR 411, [1995] SCJ No 98 (QL) at para 128; *R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321 at para 21; *New Brunswick (Minister of Health and Community Services) v G. (J.) [J.G.]*, [1999] 3 SCR 46, [1999] SCJ No 47 (QL) at para 115.
[6] *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575 at para 67 [*Summers*].
[7] Library of Parliament, *A Statistical Profile of Poverty in Canada*, (Ottawa: Library of Parliament, Social Affairs Division, 2009) < https://lop.parl.ca/Content/LOP/ResearchPublications/prb0917-e.pdf> at p 1 [*Library of Parliament, a Statistical Profile*] Statistics Canada uses an indicator called Low Income Cut-offs to measure low income. The cut off is an income threshold below which a family spends at least 20 percentage points more of its income on food, shelter and clothing than the average family.
See also: Stephen Gaetz et al, "The State of Homelessness in Canada 2014" (2013) Canadian Homelessness Research Network Press at p 40, 60.
[8] *Ibid* at p 3: *Library of Parliament, a Statistical Profile* defines an economic family as a "group of two or more persons who live in the same dwelling and are related to each other by blood, marriage, common-law or adoption.
[9] *Ibid* at p 16-17.
[10] Statistics Canada, *Aboriginal peoples: Fact sheet for Canada*, Catalogue No 89-656-X2015001 (Ottawa: Statistics Canada, 2015) < http://www.statcan.gc.ca/pub/89-656-x/89-656-x2015001-eng.pdf>. The term youth means being under the age of 25.
[11] *Library of Parliament, a Statistical Profile, supra* note 7 at p 19.

9. Another report by Statistics Canada released in 2016, "Hidden Homelessness in Canada"[12] noted that some population groups are more likely to experience hidden homelessness[13] and that the Aboriginal population are more than twice as likely (18%) to have experienced this than their non-Aboriginal counterparts (8%).[14] Canadians experiencing hidden homelessness are also more likely to have been involved in recent criminal incidents and more likely to have been the victims of childhood abuse.[15]
10. The persistence of poverty and homelessness among Aboriginal people has been recognized as a consequence of colonialism. A related consequence of colonialism, as this Court has recognized, is the overrepresentation of Aboriginal people in prisons. Eighteen years ago, this was described as a crisis by this Court in *R v Gladue*[16] and thirteen years later in *R v Ipeelee*[17] the situation had only grown worse. Today, correctional statistics from 2014-2015 indicate that Aboriginal adults account for one in four admissions to provincial/territorial correctional services.[18]
11. There is no question that Aboriginal people rank lower on all socio-economic indicators than other Canadians and therefore, that the inability to pay the victim surcharge as a result of financial hardship will have a disproportionate impact on the Aboriginal offender.

2) The practical impact of the ancillary procedures used by courts to enforce payment of the victim surcharge

12. Section 737(9) of the *Criminal Code* relies on the procedure for collecting unpaid fines set out in s. 734.7 in relation to the victim surcharge. Section 734.7 states:

> (1) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine
>
> (*a*) until the expiration of the time allowed for payment of the fine in full; and

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[12] Statistics Canada, *Hidden Homelessness in Canada*, Catalogue No 75-006-X (Ottawa: Statistics Canada, 2016) < http://www.statcan.gc.ca/pub/75-006-x/2016001/article/14678-eng.pdf>.
[13] Hidden homelessness is defined by the Hidden Homelessness in Canada report as having to temporarily live with family, friends, in their car, or anywhere else because they had nowhere else to live. It is also known by the term "concealed homelessness."
[14] *Ibid* at p 2.
[15] *Ibid* at p 9.
[16] *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 at para 64 [*Gladue*].
[17] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*] at para 62
[18] Statistics Canada, *Adult Correctional Services in Canada 2014/2015*, Catalogue No 85-002-X (Ottawa: Statistics Canada 2016) <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>.

(*b*) unless the court is satisfied

(i) that the mechanisms provided by sections 734.5 and 734.6 are not appropriate in the circumstances, or
(ii) that the offender has, without reasonable excuse, refused to pay the fine or discharge it under section 736.

[…]

(3) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under paragraph (1)(*b*).

13. While s. 737(9) may limit the number of people jailed due to failure to pay a fine; it does not eliminate that possibility. Individuals are still jailed for fine defaults. According to Statistics Canada, in 2015/16 6,859 people were jailed for fine defaults although the use of custody to enforce fine defaults differed significantly across the country. [19]
14. There are three ways in which the imposition of the victim surcharge can lead to the imprisonment of an offender for reasons other than a refusal to pay where the offender clearly has the means to pay. First, where the issuance of the warrant of committal is done by way of an *ex parte* application by the crown; second, where a summons is issued and served on the offender for the warrant of committal hearing and the hearing proceeds without the offender; and third, where the offender is served a summons and detained prior to the hearing.

a) Warrant of committal by way of *ex parte* hearing

15. The *Criminal Code* is silent on the question of whether a warrant of committal can issue by way of an *ex parte* application by the crown. The case of *R v Herzog*[20] stands for the proposition that such an approach is permitted.[21]
16. *Herzog* was decided before the Supreme Court of Canada's decision in *Wu*. Post-*Wu*, the proposition that warrants of committal may issue on an *ex parte* basis is still held by the Royal Canadian Mounted Police.[22]

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[19] Statistics Canada, Fine Default Admissions by jurisdiction and sex 2015/16, December 13, 2017. Reproduced and distributed on an "as is" basis with the permission of Statistics Canada. (The Adult Correctional Statistics in Canada, 2015/2016 report does not contain fine default admissions survey data. In November 2017, Aboriginal Legal Services made a request to Statistics Canada for fine default admissions data from the Adult Correctional Services Survey 2015/16 which was provided December 2017).
[20] *R v Herzog*, 2000 ABPC 210, 287 AR 74 [*Herzog*].
[21] *Ibid* at para 22.

17. A warrant of committal delivers the subject of the warrant directly to jail with no practical remedy to challenge the warrant. If such a warrant can issue on an *ex parte* basis as a result of failure to pay the victim surcharge, the result would be the imprisonment of the impoverished offender.

b) <u>Summons is issued and served on the offender but the hearing proceeds without the offender</u>

18. More recent case law suggests that a summons must issue prior to a warrant of committal hearing. In *Boulet v RCMP et al*,[23] the Supreme Court of the Northwest Territories relied on *Wu* when interpreting s. 723.7 of the *Criminal Code*:

> The section clearly contemplates a hearing to determine whether the defaulter is truly unable to pay the fine. Further, for purposes of proceedings taken to ensure that the court is satisfied as set out above, subsection (3) of 734.7 provides that the provisions of Parts XVI and XVIII apply to compel the attendance of the defaulter before the court.[24]

19. In 2014 the Quebec Superior Court in *R c Cook*[25] established that if an individual does not attend the warrant of committal hearing for which they were summonsed, then the warrant may issue in that person's absence.[26] *Cook* also clarified that once a warrant of committal has issued, a court has no power to modify the warrant to take into account the circumstances of the offender.[27]
20. It may be argued that the offender who does not attend the warrant of committal hearing effectively waives the opportunity to present arguments about why they should not be imprisoned. However, such an argument would overlook the reality of both criminal procedure and the lived experiences of impoverished offenders.
21. Under the *Criminal Code*, a summons may be served either on the person to whom it is directed, or to another resident of his or her usual place of abode who is at least 16 years of

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[22] Royal Canadian Mounted Police, "Codiac Regional RCMP steps up enforcement of court ordered warrants, Moncton, N.B." (23 April 2012) <https://web.archive.org/web/20130627064408/http://www.rcmp-grc.gc.ca/nb/news-nouvelles/releases-communiques/12-04-23-090415-eng.htm>.
[23] *Boulet v RCMP et al*, 2005 NWTSC 90, 67 WCB (2d) 673 [*Boulet*].
[24] *Ibid* at para 13.
[25] *R c Cook*, 2014 QCCS 6657 [*Cook*].
[26] *Ibid* at para 8. (noting, however, that no Charter argument had been raised)
[27] *Ibid* at para 64-71.

age.[28] It is therefore possible that a summons may never reach the person for whom it was intended. As long as the summons was served correctly, the hearing regarding the issuance of a warrant of committal can take place and the warrant can then issue, regardless of whether the person actually received the summons. The reality is that marginalized and vulnerable individuals living in poverty and who are homeless or precariously housed often fail to appear in court. [29]

22. Even where a person does receive a summons, he or she may fail to appear and the hearing may proceed without them. The consequences of failing to appear on a summons for a warrant of committal would not be readily apparent to most impoverished offenders. Homeless or under-housed people rarely have calendars with them allowing them to track appointments, and it is not unusual for important papers to be lost or stolen. Such circumstances are sadly common for many Aboriginal people.

c) Custodial remand prior to hearing on warrant of committal

23. The third way in which the liberty interests of an impoverished offender can be violated for failing to pay a victim surcharge is if the person is remanded into custody while awaiting a warrant of committal hearing. Although it is possible to issue a warrant of committal in the absence of the individual summonsed when he or she fails to appear, a court may choose not to proceed with the hearing in the absence of the offender. A judge who is concerned about hearing from the individual may issue a bench warrant to compel the person to be brought to court for that hearing.
24. Section 734.7(3) incorporates the provisions of Parts XVI and XVIII of the *Criminal Code*. Part XVI is concerned with compelling the appearance of the accused before the court. It is therefore possible for an offender who has not paid the victim surcharge to be remanded into custody until a hearing before the court to determine whether a warrant of committal will issue. Given that many impoverished Aboriginal offenders will have difficulty meeting the criteria necessary to receive bail,[30] many would be deprived of their liberty while awaiting a

[28] *Criminal Code, supra* note 2 at s 509(2).
[29] Department of Justice Canada, Summary Report: Administration of Justice Offences Among Aboriginal People, (Ottawa: Dept. of Justice, 2013) at p 2-3.
[30] *Summers, supra* note 6 at para 66-67.

hearing even if a warrant of committal would ultimately never issue for failure to pay the surcharge.

3) Conducting the s. 12 analysis

25. This Court has been clear that reasonable hypotheticals are permitted when undertaking a s. 12 challenge.[31] Such reasonable hypotheticals can include personal characteristics such as Aboriginal identity.[32] In the context of this particular challenge a reasonable hypothetical can be drawn from the case of *R v Michael.*[33]
26. Mr. Michael was 26 years old when he was sentenced in Ottawa. He is an in Inuk person born in Iqaluit. His earliest memories were of his father drunkenly beating his mother. When he was seven he left Iqaluit with his mother for Montreal. His mother left him with his father for six months when she moved to Toronto.[34] While with his father he lost his language due to bullying and was constantly hungry and neglected.[35] He moved to Toronto to live with his mother and was apprehended by Children's Aid when he was 13 and he began living on the street and abusing drugs and alcohol.[36] He worked only sporadically due to his addictions and past trauma and could not hold down a job.[37] At the time of his sentencing he had amassed a significant number of offenses and lived on the streets, occasionally with relatives. He received $250 a month from social assistance and owned nothing of material value.[38]
27. If the Court were to use Mr. Michael as a reasonable hypothetical, it is clear he has no ability to pay a victim surcharge if he were convicted again of a criminal offence or offences, despite its mandatory nature. His living conditions are so precarious that it would be impossible to determine how to reach him at any particular time. When he was sentenced his last known address was that of his aunt but there could be no reasonable guarantee that any summons

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See also: Deshman, Abby& Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, (Canada: Canadian Civil Liberties Association and Education Trust, July 2014), online: Canadian Civil Liberties Commission https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf at p 14-20.
[31] *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 at para 58.
[32] *Ibid* at para 76.
[33] *R v Michael*, 2014 ONCJ 360, 121 OR (3d) 244.
[34] *Ibid* at para 36.
[35] *Ibid* at para 37.
[36] *Ibid* at para 38-39.
[37] *Ibid* at para 40.
[38] *Ibid* at para 41-42.

served on his aunt would reach him. If a bench warrant issued on his failure to appear at his warrant of committal hearing he would likely be held in custody until that hearing was held.

28. In the normal course of events, when a person like Mr. Michael appears before the court for sentencing a judge must take into account his circumstances as an Aboriginal person. This Court in *Ipeelee* stressed the need to construct a proportionate sentence that reflected both the gravity of the particular offence and also the individual's moral blameworthiness.[39] In *R v Anderson* this Court held that where a mandatory sentence prevented a judge from arriving at a proportionate sentence for an Aboriginal offender the proper course was to challenge that mandatory sentence.[40]

29. It hardly need be argued that incarcerating a person for failure to pay a victim surcharge that they cannot afford to pay must constitute cruel and unusual punishment. This Court made that point abundantly clear in *Wu* where Justice Binnie stated:

> Debtors' prison for impoverished people is a Dickensian concept that in civilized countries has largely been abolished. Imprisonment for civil debt was abolished in Ontario by the end of the 19th century. In its 1996 sentencing reforms, Parliament decreed that jail should be reserved for those whose conduct deserves to put them there.
>
> As will be seen, the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment.

4) Conducting the s. 7 analysis

30. It is respectfully submitted that detention clearly violates the liberty interests of impoverished Aboriginal offenders, whether it is due to a) warrants issued on an *ex parte* basis, b) failure to attend the warrant of committal hearing resulting in a warrant issued in their absence, or c) remand into custody until a warrant of committal hearing.

31. The process by which an offender may be brought before the court for failure to pay a fine does not end with that appearance: as long as the fine remains unpaid, it results in an ongoing legal obligation. A finding that an offender is unable to pay is only a determination of that person's circumstances at that point of time. It is possible for the same person to be repeatedly brought before the court to explain their non-payment, and to lose their liberty on each occasion.

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[39] *Ipeelee*, *supra* note 18 at para 37-38.
[40] *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at para 25.

i. Violation of the principles of fundamental justice

32. That a provision of the *Criminal Code* leads to a deprivation of liberty is, in and of itself, not proof that s. 7 of the *Charter* has been violated. For a violation of the section to be made out, the deprivation of liberty must not be in accordance with the principles of fundamental justice. This Court considered this issue in *Canada v Bedford*.[41] The Court found that laws which violate the principles of fundamental justice are those that are arbitrary, overbroad, or grossly disproportionate.[42]

33. In *Bedford*, the Court found that while overbreadth is related to arbitrariness, it is a distinct violation:

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.[43]

34. In the case at hand, it is submitted that the victim surcharge is overbroad. The issue at this stage of the inquiry is whether the deprivation of liberty occasioned by the mandatory nature of the victim surcharge in s. 737(2) of the *Code* violates the principles of fundamental justice due to its overbreadth. The issue of justification for the mandatory nature of the surcharge falls within the *Charter* s. 1 inquiry.

35. The purpose of the law is to use the fines collected from offenders to pay, in part, the costs of the operation of a province or territory's victim services program.[44] A secondary purpose of the law is to increase the accountability of offenders with respect to their offences.[45] These are legitimate legislative purposes, and for most offenders they will not result in a violation of *Charter* s. 7, because the imposition of a victim surcharge will not put most offenders at risk of losing their liberty. However, for impoverished Aboriginal offenders, the potential for loss of liberty is very real.

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[41] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].
[42] *Ibid* at para 96.
[43] *Ibid* at para 112.
[44] Factum of the Respondent, Attorney General of Ontario at para 41.
[45] *Ibid* at para 41.

ii. The mandatory victim surcharge is overbroad for Aboriginal offenders

36. For impoverished Aboriginal offenders, the victim surcharge is overbroad. There is no connection between the purpose of the legislation and the deprivation of liberty of an offender who cannot pay an outstanding victim surcharge. That individual would be detained solely because of his or her inability to pay a fine, or for a pending hearing on whether or not to issue a warrant of committal that the Appellant acknowledges would not ultimately issue. There can be no valid purpose in breaching someone's liberty interests in such a fashion. The imposition of the victim surcharge on an impoverished Aboriginal offender who cannot pay it serves neither the purpose of providing funds for victim services, nor the purpose of increasing the accountability of the offender. It is submitted that based on the reasoning in *Bedford*, the law is clearly overbroad.

37. In *R v Hall*,[46] Justice Iacobucci stressed the importance of the principle of liberty:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[47]

38. It may be argued that s. 7 of the *Charter* is not violated because the loss of liberty does not come about as a result of the law itself but rather the fact that impoverished Aboriginal offenders may not attend a warrant of committal hearing or are remanded in custody pending the hearing. Thus, it is not the law that leads to the deprivation of liberty, but rather the personal life choices of the Aboriginal offenders. This argument has been considered and rejected by this Court.

39. In *Canada v PHS*,[48] intravenous drug users argued that federal laws barring access to Insite, a safe injection site in Vancouver, violated s. 7 of the *Charter*. In that case, the government argued that the problem arose from the decision of intravenous drug users to use illegal drugs, not the operation of the law prohibiting safe injection sites.[49] The Supreme Court rejected that argument:

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[46] *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309 [*Hall*].
[47] *Ibid* at para 47 (dissenting), quoted with approval in *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21, [2010] 1 SCR 721; *R v Whyte*, 2014 ONCA 268, [2014] OJ No 1633; and *R v Zarinchang*, 2010 ONCA 286, [2010] OJ No 1548.
[48] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 *[PHS]*.
[49] *Ibid* at para 97.

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, **when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter***.… The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.[50] [Emphasis added.]

40. The government advanced a similar argument in *Bedford*, which was a *Charter* s. 7 challenge to prostitution laws. There, it argued that the risks faced by sex workers were caused not by the law, but by their decision to engage in inherently risky activity – even where the law made the activity riskier.[51] Again, the Court rejected this argument:

> As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population. Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" — these are not people who can be said to be truly "choosing" a risky line of business.[52]

41. It is submitted that the approach taken by the Supreme Court in *PHS* and *Bedford* are equally applicable in the case before this court. Aboriginal people are disproportionately overrepresented among the poor and marginalized, with fewer choices available to them when it comes to paying mandatory fines. They are also overrepresented in the justice system, where they face well-documented systemic and direct discrimination.[53]
42. Where legislation has the effect of requiring that impoverished Aboriginal offenders face jail time for failing to pay mandatory fines that they are not able to pay, it not only violates their liberty interests, but does so in a manner that is clearly overbroad.

5) The s. 1 test is not met

43. Impoverished Aboriginal individuals can and will be jailed even though they remain unable to pay the victim surcharge, whether through a warrant of committal issued *ex parte*, a warrant of committal that is issued in the absence of an offender summonsed to a hearing, or

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[50] *Ibid* at para 105.
[51] *Bedford, supra* note 44 at para 79.
[52] *Ibid* at para 86.
[53] See: *Gladue, supra* note 17 at paras 61, 68; *Ipeelee, supra* note 18 at paras 67, 83.

a remand into custody prior to a hearing about the warrant. In any of these circumstances, imprisonment will result even if the offender is not able to pay the fine.

44. This impairment to the liberty of impoverished Aboriginal offenders does not have to occur. There exists a clear mechanism to safeguard those who cannot pay the victim surcharge. This mechanism is to return to sentencing judges the ability to waive the surcharge where the person cannot pay, as was the case prior to the enactment of the *Increasing Offenders' Accountability for Victims Act*. This does not mean that the surcharge will be waived for everyone: it is perfectly legitimate to require an actual inquiry into the ability of the individual to pay the fine, but where the person cannot pay the fine, they should not be required to do so. Striking down the mandatory nature of the victim surcharge simply returns matters back to the sentencing judge to determine whether imposing the fine is a proportionate response. If Parliament wishes they can give guidance to sentencing judges in how they might determine the ability of the offender to pay the surcharge but ultimately, this is a decision that must belong to the sentencing judge to ensure compliance with the *Charter*.

PART IV – POSITION ON COSTS

45. ALS seeks no costs and respectfully submits that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th day of March, 2017.

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PART VI – TABLE OF AUTHORITIES

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