SCC Court File #37774

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

BETWEEN:

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

AND:

HER MAJESTY THE QUEEN
Respondent

AND:

ATTORNEY GENERAL OF QUEBEC, ABORIGINAL LEGAL SERVICES, COLOUR OF POVERTY – COLOUR OF CHANGE, INCOME SECURITY ADVOCACY CENTRE, CRIMINAL LAWYER'S ASSOCIATION OF ONTARIO, CANADIAN CIVIL, LIBERTIES ASSOCIATION, YUKON LEGAL SERVICES SOCIETY
Interveners

SCC Court File # 37427

(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ALEX BOUDREAULT
Appellant

AND:

HER MAJESTY THE QUEEN
ATTORNEY GENERAL OF QUÉBEC
Respondents

AND:

ATTORNEY GENERAL OF ALBERTA, COLOR OF POVERTY – COLOR OF CHANGE, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, ABORIGINAL LEGAL SERVICES, CANADIAN CIVIL LIBERTIES ASSOCIATION, PIVOT LEGAL SOCIETY, YUKON LEGAL SERVICES SOCIETY
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

[1] The mandatory victim fine surcharge operates as a blanket tax levied by the criminal justice system on vulnerable and impecunious Canadians.

[2] The current Minister of Justice has said: "Imposing a victim-fine surcharge on somebody that is a marginalized person that has an absolute inability to pay because of their financial circumstances, whether that be homelessness or not being employed, does not bolster a fair justice system."[1]

[3] Yukon Legal Services Society ("YLSS") agrees that the mandatory victim surcharge is unfair, and further submits that it is unconstitutional.

[4] YLSS is a non-profit organization which has provided free legal assistance to low-income individuals in the Yukon for over 22 years. YLSS regularly sends staff lawyers to rural communities in the Yukon, including communities with no road access. These lawyers have witnessed the detrimental effects of the mandatory victim surcharge on the Yukon's most vulnerable.

[1] Galloway, "New Legislation will empower judges to waive victim surcharge," *Globe and Mail*, October 21, 2016. Available at https://www.theglobeandmail.com/news/politics/new-legislation-will-empower-judges-to-waive-victim-surcharge/article32481681/.

PART II – STATEMENT OF POSITION

[5] The mandatory victim fine surcharge imposed under s. 737 of the *Criminal Code* violates s.7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") on account of overbreadth and gross disproportionality.

[6] In reaching this conclusion, YLSS relies on four premises:

i. Some criminal conduct is victimless.

ii. The liberty interest of some victimless offenders is engaged by s.737.

iii. The purpose of s. 737 should be construed in direct relation to victims of crime as a group.

iv. Victimless criminal conduct bears no relation to the purposes of s. 737.

[7] Furthermore, the mandatory nature of the victim fine surcharge imposed under s. 737 of the *Criminal Code* violates s.12 of the *Charter.*

[8] YLSS invites this Court to approach s.12 *Charter* challenges using a contextualized approach, taking into consideration the social aims pursued by the surcharge.

[9] YLSS takes no position on the other issues in this appeal.

PART III – STATEMENT OF ARGUMENT

Section 7 of the *Charter*

[11] YLSS advances four premises in its s.7 analysis. Each premise and the ensuing conclusions about overbreadth and gross disproportionality shall be considered in turn.

i) Some criminal conduct is victimless

[12] In *Malmo-Levine*, this Court impliedly and explicitly recognized the existence of victimless criminal conduct.

[13] The Court rejected the harm principle as a principle of fundamental justice. However, in so concluding, the Court contemplated the existence of criminalized conduct that does not cause discernible harm. The majority wrote: "the state may sometimes be justified in criminalizing conduct that is…not harmful (in the sense contemplated by the harm principle)."[2] Such criminal conduct might rightly be called "victimless."

[14] In her dissent, Arbour J recognized the existence of "conduct" that "caused…no reasoned risk of harm."[3] In a separate dissent, Deschamps J recognized the existence of criminalized conduct that is, "[o]n the whole…harmless"[4]

[15] For the purposes of this argument, the scope of victimless crime—which will be tightly contested—is less important than the recognition that there is such a thing as victimless crime.[5]

ii) The liberty interest of some victimless offenders is engaged by s.737

[16] Some victimless offenders who cannot afford mandatory fines are paying with their liberty.

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[2] *R. v. Malmo-Levine*, [2003] 3 SCR 571, at para 115.
[3] *R. v. Malmo-Levine*, [2003] 3 SCR 571, at para 190.
[4] *R. v. Malmo-Levine*, [2003] 3 SCR 571, at para 295. In this case, "moderate use of marihuana."
[5] However, to venture one possible definition: victimless crime is criminal conduct in which no injury is attempted or inflicted.

[17] The liberty interest that is protected under s. 7 is notably engaged when, on default of payment, an offender is a) compelled to attend a committal hearing or b) detained pending a committal hearing.[6]

iii) The purpose of s. 737 should be construed in direct relation to victims of crime as a group

[18] YLSS submits that the s.737 of the *Criminal Code* has two purposes: holding offenders accountable to victims of crime as a group, and funding victim services. Crucially, both purposes relate directly to victims of crime as a group.

[19] By contrast, the characterization of the Ontario Court of Appeal was overly broad. Pardu J.A. wrote:

> I would state the purposes of the regime as follows: 1. To rectify some of the harm done by criminal activity by raising funds for public services devoted to assisting victims of crime; and 2. To hold offenders accountability to victims of crimes and to the community by requiring a contribution by them to these funds at the time of sentencing."[7]

[20] The additional reference of accountability toward a "community" at large, in addition to the broad group of victims, insulates the law from s.7 scrutiny.[8] In this case as in others, to characterize the purpose of a law "too broadly" is to "immunize the law from challenge under the *Charter*."[9] The broader the purpose, the less potential for overbreadth.[10]

[21] YLSS submits that a slightly narrower, victim-centric characterization is supported by legislative history, both at the time of the surcharge's initial enactment in 1988[11] and the 2013 amendment to make it mandatory.

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[6] *R v Tinker*, 2017 ONCA 552, at paras 70 and 113.
[7] *R v Tinker*, 2017 ONCA 552, at para 86. Emphasis added.
[8] *R v Tinker*, 2017 ONCA 552, at para 103.
[9] *Carter v. Canada*, [2015] 1 S.C.R. 331, at para 77.
[10] *R. v. Moriarty*, [2015] 3 S.C.R. 485, at para 28: "almost any challenged provision will likely be rationally connected to a very broadly stated purpose."
[11] Houses of Commons Debates, 33rd Parl., 2nd Sess., C-89, 1987, Vol. 9 at 10973-85; 1988, Vol. 12 at 15084-98, 15105-7.

[22] In 2012, the Parliamentary-Secretary to the Minister of Justice noted that the original victim surcharge had two goals: "First was to make each offender accountable in a small way to victims of crime as a group. Second was to generate revenue for victim services."[12]

[23] The Parliamentary-Secretary further added: "The money from the victim surcharge is used by the province or territory where the offender is sentenced to fund services for victims of crime. This is how the first goal of holding offenders accountable to victims of crime as a group is intended to be met, by having each offender contribute a small amount to victim services in their province or territory." The Parliamentary-Secretary then re-iterated that the second goal of the law was "generating revenue for victim services." The fine option program, too, was framed as a means for offenders "to demonstrate their accountability for the harm they have caused to victims."

[24] The 2013 amendments, which notably made the surcharge mandatory, did not materially alter the law's original two purposes. It merely modified the means to achieve them—as it happens, in a constitutionally suspect manner.

[25] YLSS welcomes the victim-centric characterization of s. 737's twin purposes by the Attorney-General of Québec: "1) de rehausser la responsabilisation des contrevenants à l'égard des victimes de la criminalité 2) tout en finançant les programmes et services leur venant en aide."[13]

[26] YLSS agrees with the Attorney-General of Québec that the victim surcharge is distinct from the separate, additional remedy of restitution from an offender to their victim(s).[14] However, distinguishing between the victim surcharge and restitution is not reason to decouple the surcharge from its victim-centered purposes. Restitution holds offenders accountable to their

[12] *House of Commons Debates*, 41st Parl., 1st Sess., No. 196 (11 December 2012), C-37. Emphasis added. Debate available in full at https://openparliament.ca/bills/41-1/C-37/?singlepage=1.
[13] Factum of the Attorney General of Quebec (*Boudreault*), at para 3.
[14] Factum of the Attorney General of Quebec (*Boudreault*), at para 137.

direct victims; the victim surcharge holds offenders accountable to victims of crime as a group. Both involve criminal conduct with victims.

iv) Victimless criminal conduct bears no relation to the purpose of s. 737

[27] Victimless criminal conduct bears no relation to s.737's victim-centric purposes.

[28] It is irrational to hold victimless offenders accountable to victims of crime. The law captures conduct that is insufficiently related to the law's purpose.

S. 737 breaches s. 7 of the *Charter* due to overbreadth

[29] As this Court noted in *Bedford*, "Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose."[15]

[30] Where impecunious offenders guilty of victimless crimes are (repeatedly) compelled to attend committal hearings, and most dramatically in cases where offenders are detained pending a committal hearing, these "impacts" on offenders have "no rational connection" to the law's purpose, properly construed.[16] These are cases of overbreadth.

S. 737 breaches s. 7 of the *Charter* due to gross disproportionality

[31] If the Court retains a broader characterization of legislative purpose and on this basis finds no overbreadth (thereby rejecting premises iii and iv), YLSS maintains that the law is grossly disproportionate in cases of detention pending committal hearings. Imprisoning impecunious offenders without victims—with negligible prospects of fundraising, on account of advancing a nebulous notion of accountability—amounts to a grossly disproportionate cost in terms of liberty with negligible advancement of legislative purpose. In such extreme and foreseeable cases, the impact on the offender is "draconian." [17]

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[15] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para 112.
[16] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para 112.
[17] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para 120.

[32] The Attorney General of Ontario views the scenario of an offender detained pending a committal hearing as "unlikely."[18] For its part, the Ontario Court of Appeal gave this possibility its due: "At the most severe level, there is potential for [some offenders] to be arrested without a warrant by a peace officer and detained pending committal proceedings."[19] The recognition by the Ontario Court of Appeal that "there is potential" for this situation to arise—along with its detailed treatment of the possibility[20]—suggests that we are not dealing with "(f)anciful or remote situations."[21]

[33] That the situation may be "unlikely" does not alter its constitutional significance. *Bedford* stands for the proposition that *one is too many*—that is, a single individual denied their liberty interest without a sufficient relation to a valid legislative purpose is a section 7 violation.[22]

Section 12 of the *Charter*

[34] YLSS further submits that the impugned law violates s.12 of the *Charter*.

[35] There is a tendency in the jurisprudence to reduce s.12 *Charter* challenges to mathematical equations which compare the sentence imposed to the gravity of the offence committed and the circumstances of the offender.

[36] This appeal provides the Court with an opportunity to unshackle the somewhat dormant potential of s.12, which draws its roots from as far back as the *R. v. Smith* and *R. v. Miller* decisions.[23]

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[18] Factum of the Attorney General of Ontario (Tinker), at para 87.
[19] *R v Tinker*, 2017 ONCA 552, at para 113.
[20] *R v Tinker*, 2017 ONCA 552, at paras 114-118.
[21] *R. v. Nur*, [2015] 1 SCR 773, at para 62.
[22] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para 123: "The question under s.7 is whether *anyone's* life, liberty or security of the person has been denied by a law…a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s.7."
[23] *R. v. Miller*, [1977] 2 S.C.R. 680; *R. v. Smith*, [1987] 1 S.C.R. 1045.

[37] The following passage from McIntyre J's judgment in *R. v. Smith,* to which Le Dain and Wilson JJ concurred, provides a starting point for an understanding of the expression "cruel and unusual treatment" under s.12:

> *A punishment will be cruel and unusual and violate s. 12 of the Charter if it has any one or more of the following characteristics:*
>
> > *1. The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;*
> > *2. The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or*
> > *3. The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.*[24]

[38] The above passage is precedent which establishes that a s.12 analysis calls for consideration of the context in which the treatment is both enacted and imposed. Courts should consider what social aim and penological purposes are being pursued. The analysis then turns to whether the sentencing legislation goes beyond what is necessary to achieve these purposes,[25] and whether it is imposed on a rational basis.

Reasonable hypothetical in the Yukon context

[39] Typically, the conclusion that a mandatory minimum sentence offends s.12 of the *Charter* is reached by means of the reasonable hypothetical. This analysis serves to highlight that in some *reasonably foreseeable* case, the sentence imposed will be excessive.

[40] A significant concern for northern and rural communities is the aggressive policing and prosecution of probation orders or bail conditions. Individuals with substance or alcohol addiction are often unable to comply with court orders requiring sobriety, reporting or curfews.

[41] For every such offence, per s.737, a victim fine surcharge must be imposed, regardless of the nature of the conduct, the means of the offender, and the presence or not of a victim.

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[24] *R. v. Smith,* [1987] 1 S.C.R. 1045, at para 94.
[25] *R. v. Smith,* [1987] 1 S.C.R. 1045, at para 45, 58; *R. v. Nur*, [2015] 1 SCR 773, at para 104.

[42] In 2016, the three territories had a rate of administration of justice offences completely out of proportion from the Canadian national average.[26] The per capita rate of offenders found guilty of "disturbing the peace" is nearly **1,000 times** higher in the Yukon than it is in Québec.[27]

[43] The reasonable hypothetical is a Yukoner arrested for failing to abide by the conditions of a probation order whilst drinking in a bar. This Yukoner is brought before a Justice of the Peace and released on conditions identical to those of the probation order, colloquially known as "conditions" to: keep the peace, abstain, not attend premises who serve or sell alcohol, and obey a curfew.

[44] Unfortunately, this particular Yukoner is and has been struggling with alcohol ever since attending residential school. And so this Yukoner keeps getting arrested, charged and released for the same reason. Every time, they will be breaching four conditions of both their probation and bail orders, and will therefore incur 8 additional criminal charges.

[45] It will not take long for this person to incur an impressive number of charges. After three cycles of release and arrest, a total of 24 breach charges will be laid, which can result in victim fine surcharges between $2400-4800.

[46] Moreover, this Yukoner's conduct will have caused no discernible victims. If there is any victim, it is the offender, who has a non-negligible chance of dying from alcohol addiction. Unfit to work, this Yukoner will simply never be able to pay this fine with a monthly social assistance income of $400.

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[26] *"Crimes by type of violation, and by province and territory, 2016",* Statistics Canada: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal50b-eng.htm.

[27] Yukon rate per 100,000 population: 6,244. Quebec rate per 100,000 population: 6.41.

[47] One of the possible consequences of being unable to pay the fine will be denial of a driver's license. In rural and isolated communities, where individuals rely on cars, boats, ATVs or snowmobiles for their livelihood, this consequence is particularly harsh.

Cruel and unusual punishment in the reasonable hypothetical

[48] The above reasonable hypothetical illustrates the cruel and unusual treatment which flows from the application of a mandatory victim fine surcharge. There are various disjunctive ways in which to reach this conclusion.

[49] Firstly, the victim fine surcharge, including the consequences that flow from it, is grossly disproportionate to benign offences and to the reduced moral blameworthiness of offenders dealing with alcohol addiction.

[50] Secondly, the imposition of the fine for the purpose of making reparation for the harm done to victims is both arbitrary and unnecessary in the absence of a victim. In such cases, the treatment goes beyond what is necessary to achieve the social aims of this law.

[51] Thirdly, the automatic imposition of a fine that an offender may never be able to pay defies the mandatory minimum rationality that can be expected of the criminal justice system.

[52] Fourth, mandatory minimum sentences are archetypes of legislation which fail to pass constitutional muster on s.12 grounds.[28] The mandatory nature of the victim fine surcharge suffers from the same ills. Notably, mandatory minimum sentences impermissibly shift the focus of the sentencing process away from the offender, and emphasize certain sentencing principles in such a way as to result in unjust penalties.[29]

[28] *R. v. Lloyd*, [2016] 1 S.C.R. 130, at para 3.
[29] *R. v. Nur*, [2015] 1 SCR 773, at para. 44.

Conclusion

[53] All of the above formulations of the short-comings of the mandatory victim fine surcharge are merely reflections of a deeper problem: the elimination of judicial discretion in the sentencing process.

[54] The mandatory victim fine surcharge is turning the sentencing process, which should be a highly individualized, fact-driven and sensitive process, into an automatic taxation machine, applied irrationally and unfairly.

[55] This unfairness can be alleviated by a finding that the mandatory surcharge violates s.7 or s.12 of the *Charter*, in a manner not justified by s. 1.

[56] In the meantime, the overreaching nature of s.737 is wreaking systemic havoc in human lives and communities.

PART IV – COSTS

[57] YLSS seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of April, 2018 at Whitehorse, in the Yukon Territory.

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PART V – AUTHORITIES

Caselaw	Paragraph where cited
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