

SUPREME COURT OF CANADA

CITATION: R. *v*. Boudreault, 2018 SCC 58

APPEAL HEARD: April 17, 2018
JUDGMENT RENDERED: December 14, 2018
DOCKETS: 37427, 37774, 37782, 37783

BETWEEN:

Alex Boudreault
Appellant

and

Her Majesty The Queen and Attorney General of Quebec
Respondents

- and -

Attorney General of Alberta, Colour of Poverty – Colour of Change, Income Security Advocacy Centre, British Columbia Civil Liberties Association, Aboriginal Legal Services Inc., Canadian Civil Liberties Association, Pivot Legal Society and Yukon Legal Services Society
Interveners

AND 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 Inc., Colour of Poverty – Colour of Change, Income Security Advocacy Centre, Criminal Lawyers' Association of Ontario, Yukon Legal Services Society and Canadian Civil Liberties Association

Interveners

AND BETWEEN:

Garrett Eckstein
Appellant

and

Her Majesty The Queen
Respondent

- and -

Colour of Poverty – Colour of Change, Income Security Advocacy Centre and Canadian Civil Liberties Association
Interveners

AND BETWEEN:

Daniel Larocque
Appellant

and

Her Majesty The Queen and Attorney General of Ontario
Respondents

- and -

Colour of Poverty – Colour of Change, Income Security Advocacy Centre and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 111)	Martin J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon and Brown JJ. concurring)
DISSENTING REASONS: (paras. 112 to 200)	Côté J. (Rowe J. concurring)

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Alex Boudreault *Appellant*

v.

Her Majesty The Queen and
Attorney General of Quebec *Respondents*

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Colour of Poverty – Colour of Change,
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Indexed as: R. *v.* Boudreault

2018 SCC 58

File Nos.: 37427, 37774, 37782, 37783.

2018: April 17; 2018: December 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Right to liberty — Right to security of person — Remedy — Mandatory victim surcharge — Offenders required to pay monies to state as mandatory victim surcharge — Amount of surcharge set by law and owed for each and every summary conviction or indictable offence — Offenders challenging constitutionality of surcharge — Whether surcharge constitutes punishment that is cruel and unusual — Whether surcharge infringes right to liberty and security of

person in manner that is overbroad — Appropriate remedy — Canadian Charter of Rights and Freedoms, ss. 1, 7, 12 — Criminal Code, R.S.C. 1985, c. C-46, s. 737.

Under s. 737 of the *Criminal Code*, everyone who is discharged, pleads guilty to, or is found guilty of an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* is required to pay monies to the state as a mandatory victim surcharge. The amount of the surcharge is 30 percent of any fine imposed, or, where no fine is imposed, $100 for every summary conviction count and $200 for every indictable count. Although sentencing judges have the discretion to increase the amount of the surcharge where appropriate, they cannot decrease the amount or waive the surcharge for any reason. The imposition of the surcharge cannot be appealed.

At sentencing, several offenders challenged the constitutionality of the surcharge on the basis that it constitutes cruel and unusual punishment, contrary to s. 12 of the *Charter*, violates their right to liberty and security of the person, contrary to s. 7 of the *Charter*, or both. The offenders all live in serious poverty and face some combination of addiction, mental illness and disability. While the results were mixed at sentencing, the respective courts of appeal rejected the constitutional challenges.

Held (Côté and Rowe JJ. dissenting): The appeals should be allowed. Section 737 of the *Criminal Code* infringes s. 12 of the *Charter* and is not saved by s. 1. It is invalidated with immediate effect.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown and **Martin** JJ.: The mandatory victim surcharge constitutes punishment, engaging s. 12 of the *Charter*, and its imposition and enforcement on several of the offenders, as well as the reasonable hypothetical offender, result in cruel and unusual punishment. The surcharge cannot be saved under s. 1 of the *Charter*. It is not necessary to consider whether s. 7 of the *Charter* is infringed.

The surcharge constitutes punishment because it flows directly and automatically from conviction and s. 737(1) itself sets out that it applies "in addition to any other punishment imposed on the offender". The surcharge also functions in substance like a fine, which is an established punishment, and it is intended to further the purpose and principles of sentencing.

The surcharge constitutes cruel and unusual punishment and therefore violates s. 12 of the *Charter*, because its impact and effects create circumstances that are grossly disproportionate to what would otherwise be a fit sentence, outrage the standards of decency, and are both abhorrent and intolerable. In the circumstances of this case, the fit sentence for the offenders would not have included the surcharge, as it would have caused undue hardship given their impecuniosity. Sentencing is first and foremost an individualized exercise which balances various goals, while taking into account the particular circumstances of the offender as well as the nature and number of his or her crimes. The crucial issue is whether the offenders are able to pay, and in this case, they are not.

For the offenders in this case and for the reasonable hypothetical offender, the surcharge leads to a grossly disproportionate sentence. Although it advances the valid penal purposes of raising funds for victim support services and of increasing offenders' accountability to both individual victims of crime and to the community generally, the surcharge causes four interrelated harms to persons like the offenders. First, it causes them to suffer deeply disproportionate financial consequences, regardless of their moral culpability. Second, it causes them to live with the threat of incarceration in two separate and compounding ways — detention before committal hearings and imprisonment if found in default. Third, the offenders may find themselves targeted by collections efforts endorsed by their province of residence. Fourth, the surcharge creates a *de facto* indefinite sentence for some of the offenders, because there is no foreseeable chance that they will ever be able to pay it. This ritual of repeated committal hearings, which will continue indefinitely, operates less like debt collection and more like public shaming. Indeterminate sentences are reserved for the most dangerous offenders, and imposing them in addition to an otherwise short-term sentence flouts the fundamental principles at the very foundation of our criminal justice system.

The surcharge also fundamentally disregards proportionality in sentencing. It wrongly elevates the objective of promoting responsibility in offenders above all other sentencing principles, it ignores the fundamental principle of proportionality set out in the *Criminal Code*, it does not allow sentencing judges to consider mitigating factors or the sentences received by other offenders in similar

circumstances, it ignores the objective of rehabilitation, and it undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison. The cumulative charge-by-charge basis on which the surcharge is imposed increases the likelihood that it will disproportionately harm offenders who are impoverished, addicted and homeless. It will also put self-represented offenders at an additional disadvantage because they may not know that they may negotiate the terms of their plea in order to minimize the amount of the surcharge. While judicial attempts to lessen the disproportion may be salutary, they cannot insulate the surcharge from constitutional review. Indeed, reducing some other part of the sentence may minimize disproportion, but it cannot eliminate the specific and extensive harms caused by the surcharge. Moreover, imposing a nominal fine for the sole purpose of lowering the amount of the surcharge would ignore the legislature's intent that the surcharge, in its full amount, would apply in all cases as a mandatory punishment.

It is unnecessary to engage in a s. 1 *Charter* analysis, because the state did not put forward any argument or evidence to justify the surcharge if found to breach *Charter* rights. It follows that the mandatory victim surcharge imposed by s. 737 of the *Criminal Code* is unconstitutional.

Section 737 of the *Criminal Code* should be declared to be of no force and effect immediately. The state has not met the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the

rule of law. Reading back in the judicial discretion to waive the surcharge that was abrogated in 2013 is also the wrong approach, because it is a highly intrusive remedy, and because Parliament ought to be free to consider how best to revise the imposition and enforcement of the surcharge. Because robust submissions on the issue were not made, it would be inappropriate to grant a remedy to offenders not involved in this case and those no longer in the system who cannot now challenge their sentences. However, a variety of possible remedies exist. The offenders may be able to seek relief in the courts, notably by recourse to s. 24(1) of the *Charter*. The government could also proceed administratively, while Parliament may act to bring a modified and *Charter*-compliant version of the surcharge back into the *Criminal Code*.

Per **Côté** and Rowe JJ. (dissenting): The surcharge is constitutionally valid. It does not constitute cruel and unusual punishment, nor does it deprive impecunious offenders of their security of the person. Moreover, any deprivation of liberty that may result from its application accords with the principles of fundamental justice.

While the surcharge constitutes punishment within the meaning of s. 12 of the *Charter*, and while a fit and proportionate sentence for the offenders in this case or the hypothetical impecunious offender would not include the surcharge, the negative effects associated with the surcharge are not abhorrent, intolerable or so excessive as to outrage the standards of decency. As a result, they do not rise to the level of gross disproportionality, and therefore the surcharge cannot be characterized

as cruel and unusual. Indeed, a number of the components to the surcharge regime attenuate the particularly severe impact of the surcharge on impecunious offenders.

First, offenders who are unable to pay within the prescribed time will not be subject to enforcement mechanisms if they either participate in a fine option program or seek the extension of time to pay to which they are entitled. There are no restrictions on the number of extensions an offender can seek over a given period, and there is no limit on the length of an extension. Extensions may also be granted either before or after the offender defaults, and obtaining an extension is not onerous or procedurally difficult given that applications can be brought by the offender or by someone else on his or her behalf and may be adjudicated either by the court or by a person designated by the court. To the extent that a province establishes procedures that are complex to the point of being inaccessible, this cannot be attributed to the impugned provision but rather to the manner in which the province implements it.

Second, offenders will not be imprisoned if they default due to poverty; only offenders who have the means to pay, but who choose not to, risk being imprisoned following a committal hearing. While it may be difficult for judges to draw the line between an inability to pay and a refusal to do so, the fact that judges may misapply the law cannot render the surcharge unconstitutional, particularly since the provision providing for committal in default of payment does not establish an overly broad standard that cannot be properly applied by trial judges.

Third, while compelled attendance at a committal hearing will necessarily deprive a defaulting offender of his or her liberty to some degree, the deprivation will only occur where it is necessary in the public interest. Such cases will also be very rare, especially given that non-payment is not a criminal offence. Moreover, there is no evidence that impecunious offenders are in fact routinely being detained unnecessarily pending their committal hearings.

Fourth, an unpaid surcharge cannot be entered as a civil judgment, and therefore, an offender who defaults will not face the same financial consequences as one who defaults in paying a fine or an ordinary debt. Any provincial collection efforts employed against defaulting offenders are neither required nor authorized by the *Criminal Code* and are therefore not an effect of the impugned surcharge.

Fifth, there is insufficient evidence to conclude that the stress caused by the surcharge to impecunious offenders is severe enough to make the punishment imposed cruel and unusual. And finally, although the surcharge may not be conducive to attempts by some offenders to achieve rehabilitation and reintegration into society, this alone is not sufficient to meet the high bar for establishing a s. 12 *Charter* violation. In any event, an offender who is ineligible for a traditional record suspension as a result of his or her inability to pay the surcharge is not left without recourse. While not perfect alternatives, conditional pardons and remission orders may be granted by the Governor in Council. While it is likely that some will face great difficulty in paying the surcharge, courts should not simply accept that the

circumstances of the offender at the date of sentencing will necessarily continue into the future. Not only are findings to the contrary pessimistic in nature; they also undermine the very basis on which the principle of rehabilitation is premised.

With respect to s. 7 of the *Charter*, the surcharge does not engage the offenders' security interest due to the stress associated with the mandatory imposition of the surcharge. Neither common sense nor the evidence provides a basis for the conclusion that the actual stress impecunious offenders may experience as a result of the surcharge is serious enough that it has a profound effect on their psychological integrity.

The offenders' liberty interest is nevertheless engaged insofar as non-payment of the surcharge triggers the possibility of being compelled to attend a committal hearing which will necessarily entail some deprivation of personal liberty. However, this deprivation of liberty is not overbroad in relation to impecunious offenders — it is rationally connected to the purpose underlying the committal hearing: to determine whether an offender has the funds to pay the surcharge and to give him or her an opportunity to explain the non-payment.

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By Côté J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Rouleau, van Rensburg and Pardu JJ.A.), 2017 ONCA 552, 136 O.R. (3d) 718, 39 C.R. (7th) 53, 385 C.R.R. (2d) 83, 351 C.C.C. (3d) 310, [2017] O.J. No. 3435 (QL), 2017 CarswellOnt 10029 (WL Can.), affirming a decision of Glass J., 2015 ONSC 2284, 20 C.R. (7th) 174, 331 C.R.R. (2d) 206, [2015] O.J. No. 1758 (QL), 2015 CarswellOnt 4936 (WL Can.), setting aside the decision of Beninger J., 2014 ONCJ 208, 120 O.R. (3d) 784, 11 C.R. (7th) 43, 309 C.R.R. (2d) 291, [2014] O.J. No. 2056 (QL). Appeal allowed, Côté and Rowe JJ. dissenting.

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[2015] O.J. No. 1869 (QL), 2015 CarswellOnt 5865 (WL Can.). Appeal allowed, Côté and Rowe JJ. dissenting.

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Graham Kosakoski and *D. J. Larkin*, for the intervener the Pivot Legal Society (37427).

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Sylvain Leboeuf, *Julien Bernard* and *Julie Dassylva*, for the intervener the Attorney General of Quebec (37774).

Vanora Simpson and *Breana Vandebeek*, for the intervener the Criminal Lawyers' Association of Ontario (37774).

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown and Martin JJ. was delivered by

MARTIN J. —

I. Introduction

[1] Under the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Code*"), anyone who is discharged, pleads guilty to, or is found guilty of an offence under the *Code* or the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, ("*CDSA*") is required to pay monies to the state as a "mandatory victim surcharge". The amount is set by law and is owed for each and every summary conviction or indictable offence. The surcharge is intended to fund government programs designed to assist victims of crime. The surcharge applies regardless of the severity of the crime, the characteristics of the offender, or the effects of the crime on the victim.

[2] Judges must impose a surcharge in every case — they have no discretion to waive this surcharge and cannot decrease it. Its imposition can only be appealed when the amounts imposed exceed the minimum mandated amount. Once the surcharge is levied, an individual remains indebted to the state until the amount is paid in full, although a court may, on application, give the offender more time to pay.

[3] Many of the people involved in our criminal justice system are poor, live with addiction or other mental health issues, and are otherwise disadvantaged or marginalized. When unable to pay the victim surcharge, they face what becomes, realistically, an indeterminate sentence. As long as they cannot pay, they may be taken into police custody, imprisoned for default, prevented from seeking a pardon, and targeted by collection agencies. In effect, not only are impecunious offenders treated far more harshly than those with access to the requisite funds, their inability to

pay this part of their debt to society may further contribute to their disadvantage and stigmatization.

[4] These appeals are concerned with whether the mandatory victim surcharge is consistent with ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and, if not, whether that inconsistency can be justified under s. 1 of the *Charter*. I conclude that the mandatory surcharge amounts to, and operates as, a constitutionally impermissible form of cruel and unusual punishment. Consequently, s. 737 of the *Code* violates s. 12 of the *Charter* and cannot be saved under s. 1. Given this conclusion, it is unnecessary to address s. 7.

[5] I would allow the appeals and declare s. 737 invalid, with immediate effect.

[6] The reasons that follow are divided into five main parts. The first provides a legislative background to the mandatory victim surcharge. The second provides the factual matrices and judicial histories for the cases under appeal. The third section articulates the issues at hand. The fourth section is the analytical one and includes the analysis for ss. 12 and 1 of the *Charter* as well as the analysis of the appropriate remedy in this case. The fifth section provides a conclusion for the reasons.

II. Legislative Background

[7] The victim surcharge, formerly known as the victim fine surcharge, was first introduced into the *Code* in 1988. Former s. 727.9(1) of the *Code* stated that the court, at sentencing, "shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge": R.S.C. 1985, c. 23 (4th Supp.), s. 6. At the time, the amount payable was 15 percent of any fine imposed or such lesser amount as may be prescribed by regulation. The base amounts have changed through the years. Since October 2013, the amount of the surcharge is 30 percent of any fine imposed, or, where no fine is imposed, $100 for every summary conviction count and $200 for every indictable count: ss. 737(1) and 737(2) of the *Code*.

[8] The surcharge is levied "for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time": s. 737(7) of the *Code*.

[9] In 1988, offenders could avoid the imposition of the surcharge by satisfying the court that "undue hardship to the offender or the dependants of the offender would result": (4th Supp.), s. 6, introducing s. 727.9(2). This undue hardship exception was maintained until October 2013, when amendments to the *Code* eliminated this judicial discretion: *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c. 11 ("2013 Amendments"). Under the current provisions, the sentencing judge retains discretion to increase the amount of the surcharge where

appropriate, but not to decrease the amount or to waive the surcharge for any reason: s. 737(3) of the *Code*.

[10] Subsection 737(9) incorporates most of the enforcement mechanisms for other types of fines set out under ss. 734 to 734.8. These include the imposition of a deemed period of imprisonment to be calculated in accordance with a specified formula: ss. 734(4) and 734(5). They also include suspending the debtor's licenses and permits and committing the offender for non-payment without reasonable excuse: ss. 734.5 and 734.7. Section 737(9) also adopts s. 736, which allows provinces to establish fine option programs to allow some offenders to do compensatory work in lieu of paying their fines.

[11] The imposition of the surcharge cannot be appealed, unless the sentencing judge ordered the payment of more than the statutory minimum: ss. 687(1) and 822(1) of the *Code*.

III. Facts and Judicial History

[12] In these appeals, seven individuals appeal the rulings from four different applications to challenge the constitutionality of s. 737 of the *Code*.

[13] Alex Boudreault's application was heard in Quebec. He challenged the provision under s. 12 of the *Charter*. The other six appellants brought their applications in Ontario. Edward Tinker, Kelly Judge, Michael Bondoc, and Wesley

James Mead, heard together, challenged the provision under ss. 7 and 12. Garrett Eckstein and Daniel Larocque, in separate applications, challenged the provision under s. 12. While they had mixed results before their sentencing judges, the respective Courts of Appeal rejected the appellants' constitutional challenges.

[14] In what follows, I will set out the facts and decisions below for each of these four cases before turning to the legal analysis that applies to all of them.

A. *Quebec*

(1) Court of Quebec

(a) *Alex Boudreault, 2015 QCCQ 8504*

[15] Alex Boudreault was 21 years old at the date of sentencing. He had no high school education, having quit school at age 15. He had never held a steady job and he had had no income for almost two years. The most serious crimes for which he was sentenced were committed at a time when he was homeless, unemployed, and addicted to marijuana.

[16] Mr. Boudreault pleaded guilty on September 23, 2013 to four summary charges of breach of probation. Four months later, he also pleaded guilty to seven counts of breaking and entering, one count of attempted breaking and entering, one count of sale of stolen goods, one count of assault with a weapon, and one count of

possession of a prohibited weapon. He argued that the mandatory victim surcharge constituted a s. 12 violation either in his own case or in the case of a reasonable hypothetical offender. The sentencing judge determined that he could exercise his discretion with regard to infractions that occurred before the 2013 Amendments. As such, he reduced the surcharge from $4,000 to $1,400. Being of the opinion that the $1,400 did not constitute cruel and unusual punishment, he dismissed Mr. Boudreault's arguments and imposed the surcharge.

(2) Quebec Court of Appeal, 2016 QCCA 1907, 323 C.C.C. (3d) 131

[17] Mainville and Schrager JJ.A. dismissed the appeal, but for separate reasons. Mainville J.A. opined that the various provisions that give impecunious offenders time to pay and that limit the state's collection options leave the surcharge in compliance with s. 12: para. 135. Schrager J.A., concurring, found that the jurisprudence of this Court led to the conclusion that s. 12's high bar could not apply to a non-carceral sentence.

[18] Chief Justice Duval Hesler would have allowed the appeal and struck down s. 737 for non-compliance with s. 12 of the *Charter*: paras. 29-30. Since the now-obligatory surcharge applies to every infraction under the *Code*, the Chief Justice reasoned, a careful examination of possible hypothetical scenarios was required in order to assess the law's effects: paras. 5-6. For the Chief Justice, the most compelling hypothetical scenario was based on the appellant's own circumstances. Had he committed all of his crimes after the 2013 Amendments to s. 737, he would

have owed a surcharge of $4,000. Had the Crown chosen to proceed by way of indictment for all of his offences, the surcharge would have risen to $4,600. In her view, imposing an additional punishment of $4,600 on a person whose total annual income is $4,800 is incompatible with human dignity: para. 109. She concluded that

> . . . such a surcharge would be clearly and grossly disproportionate. In the best of cases, such a surcharge would translate into monthly payments made over the course of six years, five and half weeks of full-time work, or 50 days of imprisonment — in addition to the 36 months of imprisonment already imposed. [Emphasis deleted; para. 124.]

[19] The Chief Justice did not agree with Mainville J.A. that the provision is saved by the fact that truly impecunious offenders can escape prison time in the event of default. She held, rather, that such a system can effectively extend the sentence of an impecunious person indefinitely, as that person is repeatedly detained and brought before a judge to offer up excuses for why they cannot pay. This routine of committal hearings will quickly become grossly disproportionate: Que. C.A. reasons at paras. 105-6.

[20] Having determined that s. 737, without the judicial discretion that used to exist in the repealed s. 737(5), violated the appellant's s. 12 right, the Chief Justice turned to s. 1 of the *Charter*. She found that s. 1 could not save the surcharge, since where it will never be paid, there is no rational connection between the imposition of the surcharge and the objectives that it seeks to achieve, namely to encourage the accountability of offenders and finance victim support services: para. 130. Further, the Chief Justice found that a sentence that violates s. 12 of the *Charter* because it is

grossly disproportionate cannot pass the minimal impairment and proportionality analysis under s. 1: para 131.

B. *Ontario*

(1) Ontario Court of Justice and Superior Court of Justice Proceedings

(a) *Edward Tinker, Kelly Judge, Michael Bondoc and Wesley James Mead, 2014 ONCJ 208, 120 O.R. (3d) 784; 2015 ONSC 2284, 20 C.R. (7th) 174*

[21] Edward Tinker was 55 years old at the time of sentencing. His income, totalling $1,200 per month, came from Canada Pension Plan and Workers' Compensation benefits. He had no savings. After his rent and costs of medication, Mr. Tinker was left with $170 per month to pay for food, clothing, utilities, and incidentals. He pleaded guilty to one count of uttering threats and one count of breach of probation. He was sentenced to 26 days, to be served intermittently, followed by 2 years' probation. He faced a $200 victim surcharge.

[22] Kelly Judge was 51 years old at sentencing. She was legally blind and a recovering alcoholic who also suffered from depression and bipolar disorder. Her monthly income was $831 from Canada Pension Plan Disability Benefits. Her rent of $800 per month left her with $31 per month for other expenses. Ms. Judge pleaded guilty to assault and one count of uttering threats. She was sentenced to a suspended sentence and 18 months' probation, plus a victim surcharge of $200.

[23] Michael Bondoc was, at the date of sentencing, 24 years old and unemployed. He pleaded guilty to two counts of breach of probation for which he was sentenced to 33 days in custody in addition to the 27 he had already spent in detention. He faced a $200 victim surcharge.

[24] Wesley James Mead was 46 years old at the date of sentencing. He struggled with mental illness and supported his spouse and child through Ontario Disability Support Program benefits. Mr. Mead pleaded guilty to one count of possession of a weapon for a purpose dangerous to the public, one count of assault, and one count of assault resisting arrest. He was sentenced to a suspended sentence and probation for a period of 18 months, plus a $300 surcharge.

[25] All four of these appellants challenged s. 737 of the *Code* on the basis of ss. 7, 12, and 15 of the *Charter*. Only their ss. 7 and 12 claims were argued before this Court. Beninger J. for the Ontario Court of Justice found that the mandatory victim surcharge infringed s. 7 by arbitrarily and disproportionately violating the offenders' security of the person. This violation was not saved by s. 1. That holding was overturned on appeal to the Superior Court, per Glass J., who determined that neither s. 7 nor s. 12 were violated by the surcharge.

(b) *Garrett Eckstein, 2015 ONCJ 222, [2015] O.J. No 1869 (QL)*

[26] Garrett Eckstein was 19 years old and unemployed at the time of sentencing. He pleaded guilty to the offences of robbery, conspiracy to commit

robbery, and breach of probation. The Crown proceeded by indictment on all charges. Consequently, in addition to a sentence of 8 months' incarceration and 18 months' probation, the sentencing judge was obliged to impose a $600 mandatory surcharge.

[27] Mr. Eckstein argued that, if not in his own case, the victim surcharge violates the s. 12 right of a reasonable hypothetical offender like the one in *R. v. Michael*, 2014 ONCJ 360, 121 O.R. (3d) 244. *Michael*, which declared the surcharge to be inapplicable because it constituted cruel and unusual punishment, had been decided a few months previously by Eckstein's sentencing judge, Paciocco J. Between that case and the sentencing of Mr. Eckstein, the Ontario Superior Court rendered its decision in *R. v. Tinker*. As set out above, that decision found no violation of s. 7. Paciocco J. made clear that if *Tinker* were only persuasive authority, he would not have followed it. However, as it was binding on him, he rejected the constitutional challenge and imposed the victim surcharge.

(c) *Daniel Larocque, 2014 ONCJ 428; 2015 ONSC 5407*

[28] Daniel Larocque was 22 years old at the time of sentencing. He lived in extreme poverty, suffered from addiction, and had serious mental health issues. He was placed with a children's aid society as a child and had abused alcohol and drugs since he was a teenager. He had never had a full-time job. He paid for his food and housing with disability benefits, leaving him with $136 per month for all other expenses.

[29] He pleaded guilty to seven counts: two counts of mischief, three counts of assault, one count of uttering threats, and one count of possession. He was, therefore, subject to a victim surcharge of $700, which he argued constituted a violation of s. 12 of the *Charter*. Legault J. determined that the s. 12 violation was made out and could not be justified under s. 1.

[30] On appeal to the Ontario Superior Court, Lacelle J. allowed the appeal, holding that the sentencing judge had erred in finding a s. 12 breach. Lacelle J. also reasoned that the sentencing judge had erred in law by speculating on Mr. Larocque's future circumstances, contrary to this Court's holding in *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530.

(2) Ontario Court of Appeal, 2017 ONCA 552, 136 O.R. (3d) 718

[31] This is the decision for all three appeals from Ontario. The court concluded that the victim surcharge regime is constitutional and does not violate s. 7 or s. 12 of the *Charter*.

[32] Pardu J.A. began by outlining the legislative safeguards that, in her view, limit the effects of the surcharge: (1) offenders can apply for extensions of time to pay; (2) provided an offender has such an extension he or she will not be found in default; and (3) according to s. 734.7 of the *Code*, even in the event of default, an offender who lacks the means to pay cannot be sentenced to jail at a committal hearing.

[33] The court then turned to s. 7. It held that although the liberty interest is engaged because offenders may be compelled to appear at a committal hearing, the deprivation of liberty is in accordance with the principles of fundamental justice. Pardu J.A. held that the law is not overbroad because there is a rational connection between compelling even impecunious offenders to appear at a committal hearing and the purpose of holding offenders accountable to victims of crime. She also held it is not grossly disproportionate because the regime's laudable goals outweigh the comparatively minimal effect on the liberty interest.

[34] Pardu J.A. went on to reject the s. 12 claim. She acknowledged that imposing a fine on the offenders would be disproportionate. Relying on *R. v. Pham* (2002), 167 C.C.C. (3d) 570 (Ont. C.A.), however, she held that any negative effects are attenuated by the legislative safeguards set out above. If disproportionate, the law is not grossly disproportionate.

IV. Issues

[35] These appeals raise the following issues:

1. Does the mandatory victim surcharge set out in s. 737 of the *Code* violate s. 12 of the *Charter*?

2. Does the mandatory victim surcharge set out in s. 737 of the *Code* violate s. 7 of the *Charter*?

3. If either s. 12 or s. 7 is violated, is the surcharge saved under s. 1 of the *Charter*?

4. If it cannot be saved, what is the appropriate remedy?

V. Analysis

[36] For the reasons that follow, the mandatory victim surcharge constitutes punishment, engaging s. 12 of the *Charter*. I conclude that the imposition and enforcement of the surcharge on the poorest individuals among us result in cruel and unusual punishment. Consequently, s. 737 of the *Code* violates s. 12 and cannot be saved under s. 1. Given this holding, I do not need to consider whether s. 7 is infringed.

A. *Section 12*

(1) Section 12 Is Engaged — The Victim Surcharge Is Punishment

[37] The respondents do not dispute that s. 12 is engaged. They acknowledge that if the victim surcharge is not punishment, it is at least a form of "treatment". Nonetheless, in my view, it is worth clarifying that the victim surcharge constitutes punishment.

[38] The meaning of punishment has been explored in some detail in this Court's jurisprudence on ss. 11(*h*) and 11(*i*) of the *Charter*: see e.g. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906. The appellants and certain interveners argue forcefully that the test from this jurisprudence should also apply in the s. 12 context. I agree that punishment should be defined consistently across ss. 11 and 12 of the *Charter*.

[39] The most recent articulation of the test for punishment requires the claimant to show that the state action "(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender's liberty or security interests": *K.R.J.*, at para. 41.

[40] This test is clearly met in this case. The surcharge flows directly and automatically from conviction. A consequence that Parliament itself describes as punishment will form part of the arsenal of sanctions. Here, s. 737(1) itself sets out that the victim surcharge must apply "in addition to <u>any other punishment</u> imposed on the offender". A plain reading of the words "in addition to", "other" and "punishment" indicates that Parliament intended to create a further punishment that would apply in addition to any other punishment.

[41] Not only does s. 737(9) generally equate the terms "fine" and "surcharge," the victim surcharge functions in substance like a fine — a paradigmatic form of punitive sanction: *Wigglesworth*, at p. 561. It is difficult to understand how a fine could be an established punishment, but a 30 percent mandatory addition to any fine could be something else. Section 716 of the *Code* defines a fine as "a pecuniary penalty or other sum of money" that "does not include restitution." The victim surcharge is clearly a pecuniary penalty that is not restitution even though the programs funded by the surcharge may indirectly benefit victims. The surcharge does not require the offender to pay a specific victim in proportion to damage caused. Rather, every offender must pay a set amount to the state. Its purpose is also to sanction offenders by depriving them of their funds.

[42] Regarding the other two branches of the test, by the respondents' own admission, the victim surcharge is intended to further the purpose and principles of sentencing. The Ontario Crown submits that one objective of the victim surcharge is "increasing offenders' accountability to victims and promoting a sense of responsibility in offenders": R.F., Attorney General of Ontario, at para. 41. Irrespective of whether the surcharge can actually accomplish this goal in respect of impecunious offenders, the goal falls squarely within the purpose of sentencing set out in s. 718(f) of the *Code*: "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."

[43] The above is enough to meet this Court's test for punishment. Nonetheless, as set out in more detail below, the victim surcharge also has a significant impact on the liberty, security, equality, and dignity of those subject to its application.

[44] In short, applying the test from *K.R.J.* to the text, objectives, and effects of the victim surcharge regime leads to the inexorable conclusion that it constitutes punishment.

(2) Section 12 Is Infringed — The Victim Surcharge Is Cruel and Unusual

[45] Since the victim surcharge constitutes a form of punishment, the next step is to determine whether that punishment is cruel and unusual. As this Court has stated many times, demonstrating a breach of s. 12 of the *Charter* is "a high bar": *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24. The impugned punishment must be more than merely disproportionate or excessive. Rather, "[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society": *Lloyd*, at para. 24, citing *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; see also *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. It is only on "rare and unique occasions" that a sentence will infringe s. 12, as the test is "very properly stringent and demanding": *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417.

[46] Where a mandatory minimum sentence is challenged, this Court has set out a two-step inquiry for determining whether that sentence is grossly disproportionate. First, a court must determine what would constitute a proportionate sentence for the offence according to the principles of sentencing in the *Code*. Second, a court must ask whether the mandatory punishment is grossly disproportionate when compared to the fit sentence for either the claimant or for a reasonable hypothetical offender: see *R*. *v*. *Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 46 and 77.

[47] The present appeals do not involve a typical mandatory minimum sentence for a specific offence. Rather, they concern the imposition of a universal punishment that is added without exception to all offences, and for each and every offence, to the other punishment imposed at sentencing. Despite these differences, *Nur* requires us to address, in these appeals, the following ultimate question: does the victim surcharge render the sentences of either the appellants or a reasonable hypothetical offender grossly disproportionate based on its overall impact and effects?

[48] In answering that question in previous decisions, this Court has taken into consideration, among other things, whether the punishment is necessary to achieve a valid penal purpose, the effects of the punishment on the actual or a hypothetical offender, whether the punishment is founded on recognized sentencing principles, and whether there are valid alternatives to the punishment: *R*. *v*. *Smith*, [1987] 1 S.C.R.

1045, at p. 1072; *R*. *v*. *Goltz*, [1991] 3 S.C.R. 485, at p. 500; Ont. C.A. reasons, at para. 130. These possible considerations help us address the ultimate question, but are not required parts of a rigid test. Nor is any one determinative of the outcome: *R*. *v*. *Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 75. While not explicitly labelled as such, the first three of these elements underpinned this Court's analysis in *Nur* (at para. 83) and *Lloyd* (at paras. 26-33). I find some of them useful to consider in these appeals as well. In *Smith*, the Court mentioned another possible consideration: the existence of valid alternatives to the punishment. This consideration has provided less guidance to courts at the breach stage of the analysis and is often treated by this Court as part of the s. 1 analysis under the minimal impairment branch of *R*. *v*. *Oakes*, [1986] 1 S.C.R. 103. I propose to follow that trend below.

(a) *Choosing a Representative Offender*

[49] This Court's decision in *Nur* instructs that the analysis of gross disproportionality should first assess the individual or individuals before the court. If the sentence is not grossly disproportionate in their case, the court must then ask whether the effects on a reasonable hypothetical offender are grossly disproportionate: para. 77.

[50] Of the four appeals, the appellants in *Boudreault* and *Larocque* argued that, in their own particular circumstances, the effects of the victim surcharge are grossly disproportionate. As set out above, Mr. Boudreault lives in poverty. At the time of sentencing he was homeless, unemployed, and addicted to marijuana. He has

never had a steady income and, given that he did not complete high school, his earning potential is likely very low. He faced a surcharge of $1,400.

[51] Mr. Larocque has lived a life of considerable hardship. He grew up in the care of the children's aid society and today suffers from serious drug addiction and mental illness. He has also been deeply impecunious. He has only disability benefits that leave him with $136 per month once he has paid for food and housing. He faced a surcharge of $700.

[52] In *Eckstein*, on the other hand, the appellant did not argue that the victim surcharge would be grossly disproportionate in his case. Instead, he relied on a reasonable hypothetical offender, which was based on the actual individual before the court in *R. v. Michael*. In that case, Paciocco J. found that Mr. Michael is an Inuit man from Iqaluit who lived in Ottawa. He was homeless and lived on a street allowance of $250 per month. He often used that money to buy alcohol, to which he was addicted. He was convicted of multiple simple assaults, mischief damaging property, and breaches of probation. He faced a victim surcharge of $900: *Michael*, at paras. 36-46.

[53] The *Tinker* appellants restricted their submissions to s. 7 and relied on the submissions of the other appellants on s. 12. I would note, however, that these appellants too lived in serious poverty and faced some combination of addiction, mental illness, and disability.

[54] When examined together, the circumstances of the actual appellants, Mr. Boudreault and Mr. Larocque, and the reasonable hypothetical offender, Mr. Michael, reveal striking similarities. All live in serious poverty. All have precarious housing situations. All struggle with addiction. In addition, Mr. Larocque and Mr. Michael grew up under child protection and have physical disabilities. Mr. Michael is Indigenous.

[55] Without a doubt, offenders with some or all of these characteristics appear with staggering regularity in our provincial courts. Given this reality, referring to "hypotheticals" in this case is somewhat of a misnomer. The "reasonable hypothetical" offender urged on this Court is Mr. Michael; not a fabrication, but a real person. In some other cases, the hypotheticals proposed are not living examples, but are the products of reasonably foreseeable applications of the law: of analyzing who might suffer what consequences as the result of a challenged provision. In this case, Mr. Michael's circumstances are "hypothetical" only in the sense that he is not before the Court as an appellant. However, his personal circumstances are representative of many of those who are subject to this mandatory surcharge, or, as Paciocco J. stated, "Mr. Michael is an exemplar of the tragedy of aboriginal offenders that plays itself out on a daily basis in our criminal courts": *Michael*, at para. 46. The reality that Mr. Michael was in fact before a court establishes the reasonableness of using his characteristics and his case to measure the constitutionality of the mandatory surcharge. In my view, when we look at these overwhelming similarities, it is not

necessary to begin with the actual appellants and then consider a proposed reasonable hypothetical. Rather, all can be analyzed together, as follows.

(b) *The Fit Sentence for the Representative Offenders Would Not Include the Surcharge*

[56] At this stage of the analysis, the question is what a fit sentence would be for the representative offenders according to the general principles of sentencing, in the absence of the impugned provision: *Nur*, at paras. 46 and 77. In other words, it asks what sentencing judges would impose if they retained their discretion to consider the individual circumstances of the offenders and the nature of their offences: *Smith*, at p. 1073. In *Nur*, this part of the analysis required determining the fit sentence that would have been imposed instead of a mandatory minimum. Analogously, the question here is whether a judge who had the discretion to do so would impose the surcharge.

[57] Like the Ontario Court of Appeal, I conclude that the sentencing judges for Mr. Larocque, Mr. Boudreault, and Mr. Michael would not have imposed the surcharge unless required to do so by s. 737 of the *Code*: para. 132. Fit and proportionate sentences would not include a surcharge that sentencing judges rightly concluded would cause undue hardship for offenders as impecunious as these.

[58] This is because sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing, while taking into account

the particular circumstances of the offender as well as the nature and number of his or her crimes. When sentencing, the crucial issue on the surcharge is whether or not the particular individuals before the courts are able to pay, and in this case they are not. In a constitutional context, the court is also called upon to consider the rights of particular individuals who may be affected by this punishment in a way that is grossly disproportionate, understanding that people have varied life situations and many are impecunious, impoverished, ill, disabled, addicted and/or otherwise disadvantaged. Given this focus, it is less important that other individuals who are differentially situated may be able to pay, that some other fines set by law may be higher or that the amount of the surcharge depends on the number of offences committed.

[59] The remaining question, then, is whether the mandatory additional punishment of the victim surcharge leads to a grossly disproportionate sentence for the offenders at issue.

(c) *For Certain Appellants and the Reasonable Hypothetical Offender, the Victim Surcharge Is Grossly Disproportionate*

[60] I acknowledge that the victim surcharge is not grossly disproportionate in all cases. For many Canadians, the addition of the surcharge would not render a sentence grossly disproportionate. For an individual with adequate financial capacity, an additional financial punishment of a few hundred dollars per offence could hardly be called grossly disproportionate.

[61] For offenders like Mr. Boudreault, Mr. Larocque, and Mr. Michael, however, the story is very different: the actual imposition, operation, and effects of the mandatory surcharge, when combined, create a grossly disproportionate punishment. In their cases, I conclude that although it advances a valid penal purpose, the mandatory victim surcharge regime creates egregious effects and fundamentally disregards proportionality in sentencing.

(i) Valid Penal Purpose

[62] The respondents advance two justificatory objectives for the surcharge: (1) raising funds for victim support services, and (2) increasing offenders' accountability to both individual victims of crime and to the community generally. I accept that these are valid penal purposes. That the state provide support services to victims of crime is a laudable goal and that offenders contribute funds to that goal is a defensible choice. Indeed, instilling a sense of accountability in offenders and encouraging acknowledgement of harm done to victims or the community are among the objectives of sentencing set out in s. 718 of the *Code*.

[63] However, in the case of offenders like Mr. Boudreault, Mr. Larocque, and Mr. Michael, these objectives are not likely to be realized. Regarding the first objective, no funds can be raised from individuals who have none to spare: Que. C.A. reasons, at para. 130 (per Duval Hesler C.J.Q.). Furthermore, as I will elaborate below in my description of the effects of the surcharge, the enforcement of the surcharge against impecunious or impoverished offenders places a significant burden

not only on these individuals, but on our courts and penal institutions as well. These measures are likely to cost the government much more than it could ever recoup from this group of offenders and to add to the strain of an already overburdened criminal justice system: *R*. *v*. *Cloud*, 2014 QCCQ 464, 8 C.R. (7th) 364, at para. 17; *R*. *v*. *Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

[64] Turning to the second objective, the Ontario Court of Appeal held that the surcharge goes "some way towards achieving the valid penal purpose of holding offenders accountable": para. 142. In my view, however, accountability is best achieved when offenders serve fair, proportionate, and definite sentences. As will be discussed in more detail below, the victim surcharge forces people to endure the possibility of an indeterminate sanction. Imposing a sentence that sets an offender up for failure and prevents them from paying their full debt to society is hardly a means to ensure accountability.

(ii) Effects

[65] The surcharge regime causes four interrelated harms to offenders like Mr. Larocque, Mr. Boudreault, and Mr. Michael. These are (1) the disproportionate financial consequences suffered by the indigent, (2) the threat of detention and/or imprisonment, (3) the threat of provincial collections efforts, and (4) the enforcement of *de facto* indefinite criminal sanctions.

1. *Disproportionate Financial Consequences*

[66] First, judges imposing the victim surcharge can exercise no discretion in the event that the offender is unable to pay. This creates deeply disproportionate effects for those who are the most impoverished among us. Take Mr. Michael as an example. He had a monthly income of $250 and, in addition to his sentence, faced a surcharge of $900. While a $900 debt may sound relatively modest to some, it is a crushing sum for someone like Mr. Michael, representing, as it does, nearly four months of his income. The effects of the same surcharge will be experienced differently by those who are differently situated.

[67] A full understanding of the adverse effects of the surcharge is fostered by asking what the equivalent levy of four months' salary would be for others in Canada. Looking purely at income, without regard to overall financial status, for someone earning the median income in Canada at 2015 levels ($70,336), an equivalent fine, calibrated to that income, would be more than $23,000 (Statistics Canada, *Household income in Canada: Key results from the 2016 Census*, September 13, 2017 (Online)). For those earning more than the national median income, the equivalent fine could be several times greater. While these fines are exorbitant, they could still leave these higher earners with the likely ability to pay for the basic necessities of life. The same cannot be said of the representative appellants whose basic living costs are closer to or exceed their income. As the Chief Justice of the Quebec Court of Appeal observed in her reasons, at paragraph 109, a fine that deprives a person of this much of their livelihood "is excessive to the point of being incompatible with human dignity." Indeed, it can only be described as grossly disproportionate.

[68] Moreover, these severe punishments will be shouldered by offenders like Mr. Boudreault, Mr. Larocque, and Mr. Michael regardless of the extent of their moral culpability. Not infrequently, criminal acts are not committed by dangerous offenders, but rather by desperate, addicted, and marginalized individuals: see e.g. *Michael*, at para. 46. The surcharge must be imposed even if an offender's moral culpability was so low that the sentencing judge decided that they ought to be absolutely or conditionally discharged: s. 737(1) of the *Code*. The surcharge is also imposed in cases where the offences are committed against the administration of justice — crimes that some would consider "victimless" — such as breaches of probation or being illegally at large. That such a severe financial punishment could be imposed in such cases only deepens the depth and degree of disproportion.

2. *Threat of Imprisonment or Detention*

[69] Second, the surcharge is more than a debt owed to the state. As far as impecunious offenders not being incarcerated for non-payment, I recognize that s. 734.7(1)(b) prohibits the issuance of a committal warrant where the offender has a reasonable excuse. Pursuant to this Court's decision in *Wu*, inability to pay constitutes a reasonable excuse. However, offenders who are poor, homeless, and addicted will live with the threat of incarceration, and it is reasonably likely that they will spend at least some time in detention as a result of the surcharge. The threat of prison for non-payment of the surcharge is made black and white for offenders when they are sentenced. In Ontario, when the surcharge is imposed, offenders receive a form

created by the province entitled “Fine Order/Victim Surcharge”. The form sets out the amount owing and the modalities of payment. Almost half of the front of the form is dedicated to threatening the offender with imprisonment if he or she fails to pay the amount; the form includes space for the court to calculate the amount of time to be served in default.

[70] Beyond the threat of prison, it is reasonably likely that these offenders will be detained for at least a short time if they default on the surcharge. In the event of default, the court must hold a committal hearing. A police officer may arrest and detain an offender if the officer is convinced that this is necessary in order to ensure his attendance at the hearing: ss. 495 and 734.7(3) of the *Code*. Since the risk of non-attendance may be higher for individuals who live on the street and/or who suffer from serious addiction, many of whom may have multiple prior convictions for non-attendance at court, there is a reasonable likelihood that they will be detained pending their committal hearings. Detention is also more likely where people have prior convictions for non-attendance at court. People who are poor, have unstable housing and/or transportation issues and suffer from addictions or other disabilities face difficulties attending court and often have accumulated numerous such prior convictions. Eventually proving a person has a reasonable excuse at the conclusion of the committal hearing, however, does nothing to prevent individuals from being detained in advance of that hearing.

[71] Once at those hearings, it may be difficult for judges to draw the line between an inability to pay and a refusal to pay. We need only look at the decisions below in these appeals to understand that judges will address this issue differently. While some judges focussed more on the appellants' overall circumstances, one judge held that where an offender does not set aside money, "the individual becomes the author of their own misfortune when they come to the end of the period given to pay the surcharge": *Tinker*, Ont. S.C.J., at para. 41. Given the inability to predict whether a particular person can prove a reasonable excuse, it is not correct, in my view, to argue that impoverished offenders do not live under at least a *threat* of imprisonment. While the stress caused by the threat of jail may not, on its own, create gross disproportionality, I reject the respondents' contention that the stress caused by the surcharge is the same as that caused by any other debt. Most debts do not raise even the possibility of jail; this one does in two separate and compounding ways — detention before committal hearings and imprisonment if found in default. The stress that this might cause contributes to the disproportionality of the surcharge.

[72] In addition to pointing out that the scheme does not allow truly impecunious offenders to be imprisoned on default, the respondents make two counterarguments in relation to potential imprisonment. First, they argue that where an offender is unable to pay, they can avoid imprisonment by working off the fine through participation in a fine option program. The obvious problem with this purported solution is that fine option programs are not available in all provinces. Notably, there is no fine option program in Ontario, so none of the appellants from

Ontario had this possibility. More to the point, however, even in jurisdictions where a fine option program is available, it is not a realistic option for all offenders, whether due to serious mental illness, disability, or age.

[73] The respondents also argue that the threat of incarceration is significantly mitigated because offenders can apply for an extension in the time to pay (s. 734.3) and the scheme does not allow truly impecunious offenders to be imprisoned even in the event of default. This possibility, however, offers impecunious offenders little, if any, relief. While the Crown characterizes an application for extension of time as a routine administrative matter, preparing and filing a written application to a court is daunting for many, especially for someone living on the street. In addition, this is a task for which a person cannot obtain state-funded legal counsel. Even if such an offender manages to receive an extension of time, for reasons explored in more detail below, it is difficult to see how the extension does anything other than prolong the punishment.

3. *Provincial Collection Efforts*

[74] Third, offenders may find themselves targeted by collections efforts endorsed by their province of residence. The funds raised from the surcharge go to the lieutenant governor in council of the province in which the offence was committed and provinces are tasked with the enforcement of those surcharges. While the *Code* does not speak to collection, it is a direct and known consequence of the surcharge it mandates. In terms of what actually occurs, trial judges have noted with

concern that responsibility for the collection of these funds is sometimes delegated to private collection agencies. There is no evidence that these private agencies hold off on trying to collect funds from those who are unable to pay: see e.g. *Michael*, at para. 72.

[75] While not directly applicable to the appellants or Mr. Michael, I would also note that the intervener Pivot Legal Society suggested that offenders in British Columbia may have their wages and even social assistance payments retained by the province in order to collect the amount of the victim surcharge.

4. *De Facto Indefinite Sentences*

[76] Finally, the ultimate effect of the surcharge is that it creates a *de facto* indefinite criminal sanction for some offenders. In numerous sentencing decisions involving the surcharge, judges have found that there is no foreseeable chance that the offender will be able to pay the surcharge: *Michael*, at para. 65; *Cloud* (C.Q.), at para. 15; *R*. *v*. *Barinecutt*, 2015 BCPC 189, 337 C.R.R. (2d) 1, at para. 34; *R*. *v*. *Bateman*, 2015 BCSC 2071, at para. 40 (CanLII); *R*. *v*. *Flaro*, 2014 ONCJ 2, 7 C.R. (7th) 151, at para. 47; *R*. *v*. *Shaqu*, [2014] O.J. No. 2426 (Ont. C.J.) (QL), at para. 83. The respondents argue that it is not open to sentencing judges to make such a finding. This argument again relies on *Wu*, in which this Court held that "[i]t is wrong to assume . . . that the circumstances of the offender at the date of the sentencing will necessarily continue into the future": para. 31. *Wu*, however, must be read in its specific context. Most importantly, it did not involve a *Charter* challenge. Where a

violation of the *Charter* is alleged, finders of fact are required in the course of the constitutional inquiry to determine the foreseeable effects of the law on affected individuals. The object of the constitutional inquiry is the validity of the impugned law, while the object of the sentencing inquiry is cardinal proportionality within the bounds of parliamentary intent. Accordingly, *Wu* does not stand for the proposition that the possibility of extensions of time to pay will automatically immunize any mandatory fine from constitutional challenge, or that an offender's ability to pay the surcharge cannot form part of an assessment of whether there has been a breach of the offender's rights. Given that the debt endures until paid, the inquiry into the constitutional validity of the surcharge may include an assessment of whether payment can or will likely be possible in the future.

[77] In my view, in the specific circumstances of some offenders, the inference that the offender will not be able to pay the surcharge may be the only reasonable one. Some offenders are grappling with severe addiction and mental illness. While the hope is always that these individuals will undertake successful treatment for these issues, the experience is often that such treatment does not occur or is not immediately successful. Other offenders have a permanent disability or are of such an age that the prospect of a significant increase in income is unrealistic. For all of these offenders, the effect of the victim surcharge is that they must live with a criminal sanction that they are unable to acquit for the foreseeable future, if ever. These offenders face repeated appearances before a court to explain their inability to pay the surcharge — even if that inability is rooted in mental illness or physical

disability. This ritual, which will continue indefinitely, operates less like debt collection and more like public shaming.

[78] On a related point, an offender will not be able to seek a record suspension until such time as: (1) the surcharge has been paid in full or jail time for default has been served (see *Criminal Records Act*, R.S.C. 1985, c. C-47, at s. 4) and (2) the necessary record suspension fee is paid. Requiring both payments before a record suspension is even available adds to the gross disproportionality imposed on impecunious offenders. Nor does the possibility of applying for a conditional pardon (s. 748) or a remission order (s. 748.1), which have strict conditions and are discretionary, alter the real life impacts of the surcharge.

[79] The inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system. Sentencing in a free and democratic society is based on the idea that offenders will face a proportionate sentence given their personal circumstances and the severity of the crime. Criminal sanctions are meant to end: *R*. *v*. *Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 53 and 55. Indeterminate sentences are reserved for the most dangerous offenders. Imposing them in addition to an otherwise short-term sentence flouts these fundamental principles and is grossly disproportionate.

(iii) Recognized Sentencing Principles

[80] I acknowledge the link between the objectives of the victim surcharge regime and the objective of promoting responsibility in offenders set out in s. 718(f) of the *Code*. While this objective may be relevant, it does not "sanitize a sentence against gross disproportionality": *Nur*, at para. 45.

[81] The problem with the victim surcharge regime is that it elevates this one objective above all other sentencing principles. Most obviously, it ignores the "fundamental principle" of proportionality set out in s. 718.1 of the *Code*. Relatedly, it does not allow sentencing judges to consider mitigating factors or to look to the appropriate sentences received by other offenders in similar circumstances: see *Michael*, at para. 91.

[82] Moreover, it utterly ignores the objective of rehabilitation: s. 718(d) of the *Code*. Rehabilitation must be designed with the specific offender in mind and is best advanced by appropriate treatment and/or punishment aimed at reintegration and future success. In my view, an insurmountable criminal sanction does little or nothing to foster this objective.

[83] Finally, the surcharge also undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison: s. 718.2(e) of the *Code*. This Court has recognized the need to adapt criminal sentencing given "the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system": *R*. *v*. *Gladue*, [1999] 1 S.C.R. 688, at para. 34. As a result, any criminal sanction that falls disproportionately on the marginalized and

vulnerable will likely fall disproportionately on Indigenous peoples: *R*. *v*. *Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 61-62 and 77. Just as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order.

[84] The respondents counter these concerns over a marked departure from normal sentencing principles with four arguments. I have not been convinced by any of them.

[85] First, they contend that since the victim surcharge increases according to the number of separate offences committed by an offender, it is consistent with s. 718.1. However, a fundamental principle of sentencing is cardinal proportionality, which is different from mathematical predictability. This argument confuses adding with analysis and ignores the simple fact that the *Code* and the *CDSA* catalogue a broad spectrum of offences, from the comparatively innocuous to the most egregious. Indeed, it is tantamount to saying that an offender convicted of five counts of mischief deserves a more serious sentence than someone convicted of one count of murder. According to the principles of sentencing, such a result is absurd and, yet, it is what the victim surcharge requires.

[86] If anything, the cumulative charge-by-charge basis on which the victim surcharge is imposed increases the likelihood that it will disproportionately harm offenders who are impoverished, addicted, and homeless. These circumstances will often bring them into conflict with the law: *Michael*, at para. 1. This reality alone will

result in higher total amounts owing. Furthermore, any conditions attached to discharge or probation for these offenders would likely include a prohibition against consuming alcohol and drugs. It is lawful to place an addicted offender under such a condition: s. 732.1(3)(c) of the *Code*; *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, at para. 17. However, addiction is not cured merely by threatening state sanction. As the Yukon Legal Services Society argued, people suffering from addiction routinely accumulate numerous breaches without causing serious harm to anyone. If their addiction does not improve during their probationary period, the amount of victim surcharges for breaches imposed over that period could be in the thousands of dollars: see also *Michael*, para. 87, footnote 18. In this way, for individuals like Mr. Boudreault, Mr. Larocque, and Mr. Michael, the cumulative charge-by-charge nature of the scheme does not reduce disproportionality, but may in fact exacerbate it.

[87] What is more, that the surcharge attaches to each offence will often put impecunious offenders, who are more likely to be self-represented, at an additional disadvantage. The surcharge is levied based on two main variables: the number of charges and the type of offence (summary or indictable). Both variables are subject to prosecutorial discretion. Defence counsel often work with prosecutors to minimize the number of charges and to proceed by summary conviction instead of indictment for hybrid offences. Unrepresented people, who often plead guilty to all offences charged, may not know that they may negotiate the terms of their plea.

[88] Second, the respondents argue that judges can maintain proportionality through creative sentencing options. They urge that, following *R*. *v*. *Cloud*, 2016 QCCA 567, 28 C.R. (7th) 310, judges must take the victim surcharge into account when crafting a total sentence that is fit and proportionate: paras 73 and 75. Still, in other provinces, trial judges interpreted Parliament's statement that the surcharge was to be imposed "in addition to any other punishment" by first determining what a fit and proportionate sentence would be, and then adding the surcharge at the end of the sentencing decision, when dealing with any corollary orders. Under this interpretation, there would be a greater disproportion because the surcharge would always be an "add-on" to what was already determined to be the proportionate sentence. The approach of the Quebec Court of Appeal sought a way to reduce that disproportion and respect cardinal proportionality by building the mandatory surcharge into the overall sentence, when possible.

[89] In my view, it is not necessary to decide whether the mandatory surcharge is an add-on at the end of sentencing or a platform that cannot be lowered, which must be built into the sentence. Even accepting that *Cloud* (Que C.A.) is the preferable approach, the mandatory imposition of the surcharge still leads to gross disproportion. Reducing some other part of the sentence may minimize disproportion, but it cannot eliminate the specific and extensive harms caused by the surcharge. When the source of a problem is a fixed and mandatory penalty, the harms caused by it cannot be fully remedied while leaving it in place. Further, such a reduction is impossible in the case of a discharge or a mandatory minimum sentence. The severe

punishment that the victim surcharge imposes on some offenders cannot be called proportionate in any way to an offence that merits a discharge and in some circumstances, like the ones at hand, the imposition of the victim surcharge would amount to gross disproportionality.

[90] Thus, even if judges must, as the Quebec Court of Appeal held, take the victim surcharge into consideration when sentencing, in some circumstances they will be unable to impose a proportionate sentence and, in other cases, judges will be forced to impose grossly disproportionate sentences because of the victim surcharge. Judicial attempts to lessen the disproportion may be salutary, but they cannot insulate a grossly disproportionate punishment from constitutional review. In *Cloud*, the Quebec Court of Appeal acknowledged, at para. 74, that "the legislative choice gives rise to difficulties that could be discussed in another context." The constitutional challenge before this Court is precisely that context.

[91] Once again, then, the respondents' argument, if helpful in some cases, provides little assistance to the offenders with whom we are most concerned in these appeals. In these cases, the effects of the imposition and enforcement of the surcharge on the representative appellants are grossly disproportionate.

[92] Third, the respondents say that judges could impose a nominal fine, which would have the effect of reducing the amount of the surcharge. Since the surcharge is 30 percent of any fine, a nominal fine of, say, one dollar, would reduce the surcharge from $100 to 30 cents. This interpretation of s. 737 risks obscuring the

objective of the provision. Where a fine would be an appropriate part of a fit sentence before the imposition of the surcharge, it would be open to the sentencing judge to take the surcharge into account in establishing the fine to be imposed. However, to impose a nominal fine for the sole purpose of lowering the amount of the surcharge is to ignore the legislature's intent that the surcharge, in its full amount, would apply in all cases as a mandatory punishment: *Cloud* (Que C.A.), at para. 65. Ultimately, it is more principled for this Court to either strike down the victim surcharge as unconstitutional, or to uphold its constitutionality and require judges to impose it in all cases as Parliament clearly intended.

[93] Finally, the respondents, much like the Ontario Court of Appeal, at paras. 138-40, also point to *Pham*, a case in which a mandatory fine much larger than the victim surcharge was challenged constitutionally, but was held not to violate s. 12 of the *Charter*. In that case, the offenders faced a fine of $154,000 under the *Excise Act*, R.S.C. 1985, c. E-14, for possession of 1,200 kilograms of contraband tobacco. In my view, the mandatory fine in *Pham* is easily distinguished from the victim surcharge. In that case, the amount of the fine was tightly linked to the specific offence. An economic offence, in which the accused possessed illegal goods of value, is balanced with an economic punishment. The goal is to recoup the state's lost tax revenue. As Goudge J.A. put it in *Pham*, "the most important consideration in the s. 12 analysis is the direct connection between the quantity of the illegal substance possessed and the size of the fine": para. 19. The victim surcharge, by contrast, is a blanket financial penalty that applies to everyone no matter the offence at issue. A court must impose it

regardless of whether there was economic gain and regardless of whether there was even harm to an individual victim. The utter lack of proportion in this pure levy requires a very different s. 12 analysis from the one that was at play in *Pham*.

(iv) Conclusion on Gross Disproportionality

[94] I conclude that the victim surcharge scheme, although intended to achieve a valid penal purpose, violates s. 12 in the case of offenders like Mr. Boudreault, Mr. Larocque, and Mr. Michael. It leaves sentencing judges with no choice. They must impose the surcharge in every case. They cannot consider the most marginalized offenders' inability to pay, the likelihood that they will face a repeated deprivation of liberty for committal hearings, or the indefinite nature of the punishment. They cannot apply the fundamental principles of sentencing, seek to foster rehabilitation in appropriate cases, or adjust the sentence for Indigenous offenders. To return to the ultimate question in these appeals, the impact and effects of the surcharge, taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable. Put differently, they are cruel and unusual, and, therefore, violate s. 12.

B. *Section 7*

[95] Given my conclusion on s. 12, it is not necessary to address whether the victim surcharge is a violation of s. 7.

C. *Section 1*

[96] In many cases where a *Charter* breach has been established, the state seeks to justify the infringement under s. 1 of the *Charter*. In such cases, it must articulate a pressing and substantial objective and must demonstrate that the impugned law is proportional to that objective. Proportionality requires that (1) the means adopted are rationally connected to the objective; (2) the law is minimally impairing of the right; and (3) the salutary effects outweigh the deleterious effects of the law: *Oakes*; *Nur*, at para. 111.

[97] In this case, the respondents did not put forward any argument or evidence to justify the mandatory surcharge if found to breach *Charter* rights. It is, therefore, unnecessary and unwise to engage in a s. 1 analysis, especially considering that only in exceedingly rare cases can a s. 12 infringement be justified under s. 1: *Nur*, at para. 111. Indeed, it seems clear that the mandatory surcharge is not minimally impairing of the s. 12 right because Parliament had open to it multiple valid alternatives to achieve its aims, most obviously by granting judges residual discretion to waive the surcharge in some cases. Consequently, the mandatory surcharge is not justified under s. 1.

D. *Remedy*

(1) Invalid with Immediate Effect

[98] I would declare s. 737 to be of no force and effect immediately, pursuant to s. 52(1) of the *Constitution Act, 1982*. I reject the respondent federal Crown's argument that this Court ought to suspend its declaration of invalidity for a period of 6 to 12 months in order to give Parliament time to adopt conforming legislation. The respondents have not met the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the rule of law: *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 167. Rather, in my opinion, a suspended declaration in this case would simply cause more offenders to be subject to cruel and unusual punishment.

[99] I also reject the argument, advanced by the *Tinker* appellants, the Attorney General of Ontario, and (in the alternative) Mr. Eckstein, that this Court simply ought to read back in the judicial discretion to waive the surcharge that was abrogated in 2013. This is the wrong approach in this case for two reasons.

[100] First, in 2013, Parliament clearly expressed its desire to eliminate judicial discretion to waive the surcharge. In relation to mandatory minimum sentences, this Court held that Parliament is presumed to intentionally remove any discretion to order a sentence that is less than the mandatory minimum: *R. v. Ferguson*, at para. 54. For this reason, constitutional exemptions from unconstitutional mandatory minimum sentences are considered a highly intrusive remedy: *Ferguson*, at paras. 50-51; *R. v.*

Seaboyer, [1991] 2 S.C.R. 577, at p. 628. The same logic militates against this Court reading the terms of the prior discretion back into s. 737 today.

[101] The second reason why reading in is an inappropriate remedy in the instant case is that Parliament ought to be free to consider how best to revise the imposition as well as the enforcement of the surcharge. Section 737 is invalid by reason of all of its effects, from mandatory imposition on a charge-by-charge basis through committal hearings, threats of imprisonment, and the denial of rehabilitation. Because of this, a number of possible legislative options, that do not replicate the previous provision, are open to Parliament to bring s. 737 into compliance with s. 12.

[102] For example, at the time of writing, legislation is before Parliament that would amend s. 737. Without commenting on the constitutional validity of those proposed amendments, I note that the government has proposed restoring judicial discretion to waive the imposition of the surcharge, but on terms different than those of the former s. 737(5). Parliament chose another route and will likely assess whether further revisions are necessary in light of this decision.

(2) Remedial Options for Offenders No Longer "in the System"

[103] For the appellants before this Court, the above declaration will invalidate the surcharge from the date of the 2013 Amendments: *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 7 S.C.R. 429, at para. 82. For other individuals who are still "within the judicial system" an appeal from their sentence on constitutional

grounds may lie. These individuals include those who challenged the constitutionality of the surcharge at sentencing and whose appeals are pending, whose rights of appeal have not yet elapsed, or who may be granted an extension of time to appeal based on the criteria that normally apply in such cases: *R. v. Thomas*, [1990] 1 S.C.R. 713, at p. 716.

[104] However, my conclusion on the invalidity of s. 737 is of little help to individuals already subject to surcharge amounts that they cannot pay and are attached to sentences that they can no longer challenge. In *Thomas*, this Court concluded that a person with no remaining recourse to challenge a conviction cannot re-open their file if the applicable offence provisions are later declared unconstitutional.

[105] The reason for that ruling is that, in general, declarations of invalidity have only prospective effects with regard to non-parties: *Schachter*, at p. 720. Moreover, as a general rule, court orders are protected from challenge by the doctrine of *res judicata* — one of the pillars of the rule of law in Canadian society — even when the legislation on which they are based is later invalidated: *Reference re Manitoba Language Rights*, at p. 757; *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 26.

[106] However, the rule of law will also not suffer the continued infliction of cruel and unusual punishment that cannot be justified in a free and democratic society. The mandatory victim surcharge violates s. 12 when it is imposed and when it is enforced. Each time a convicted person shows up to court or is arrested and

brought to court to provide an update on their financial status, the presiding judge is, in effect, confirming the operation of the victim surcharge. That confirmation is contrary to the Court's finding in this case. Similarly, each appearance sets in motion an additional period of uncertainty, which is, again, contrary to this Court's finding in this case. At each appearance, the presiding court is put in the position of having to affirm the very elements of the law that render it cruel and unusual punishment. The offender placed in this position will also remain unable to seek a record suspension, even if the surcharge represents their only outstanding debt to society.

[107] The fact that, at any moment in the cycle of enforcement, the *current state of affairs* may constitute a s. 12 violation means that *res judicata* ought not operate to bar an application for relief from that state of affairs. As this Court found in *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 630, a "continuing current violation" of a *Charter*-protected interest could give rise to a successful application for a *Charter* remedy, even where the violation began with a valid order that is legally unassailable.

[108] The difficulty is in determining what the remedy for this ongoing violation ought to be. Only the *Tinker* appellants and the intervener the Criminal Lawyers' Association addressed in their pleadings the need for a specific constitutional remedy for the individuals described above. Without the benefit of more robust submissions from the parties on this issue, it would be inappropriate to grant a remedy for a class of individuals who are not parties to this litigation.

[109] Though unable to order a specific remedy for this class of offenders, I would note that a variety of possible remedies exist. Private parties may be able to seek relief in the courts, notably by recourse to s. 24(1) of the *Charter*. Government and Parliament also have options to attend to their responsibility to ensure that *Charter* rights are protected. The government could proceed administratively, while Parliament may act to bring a modified and *Charter*-compliant version of s. 737 back into the *Code* and to resolve the outstanding *Charter* concerns identified here.

VI. Conclusion

[110] Ultimately, for both several of the appellants and the reasonable hypothetical offender, the mandatory victim surcharge is unmoored from its legitimate objectives. Judges are forced to impose a one-size-fits-all punishment which does not take into account the individual's ability to pay. In this context, the resulting indeterminate punishment results in a grossly disproportionate public shaming of disadvantaged offenders. It is what most Canadians would call an abhorrent and intolerable punishment. Put simply, in our free and democratic society, it is cruel and it is unusual.

[111] I conclude, therefore, that the victim surcharge violates s. 12 of the *Charter*. It cannot be justified under s. 1. I would allow the appeals.

The reasons of Côté and Rowe JJ. were delivered by

CÔTÉ J. —

I. Introduction

[112] Section 737 of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that individuals who are convicted or discharged of offences under that statute, or under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"), pay a minimum amount of money to the state as a "victim surcharge". At issue in these appeals is whether this provision violates ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be justified under s. 1.

[113] My colleague, Martin J., concludes that s. 737 of the *Criminal Code* violates the constitutional right not to be subjected to cruel and unusual punishment, as set out in s. 12 of the *Charter*, and that this violation cannot be saved by s. 1. She would therefore declare the impugned provision invalid with immediate effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Since she allows the appeals on this basis, my colleague finds it unnecessary to address the s. 7 argument advanced by several of the appellants.

[114] I respectfully disagree. While I accept that the mandatory imposition of the victim surcharge may have a particularly negative impact on impecunious offenders, I cannot accept that it amounts to treatment or punishment that is truly "cruel and unusual", as that phrase has been interpreted in this Court's jurisprudence.

Moreover, I am of the view that the impugned provision does not deprive impecunious offenders of their security of the person, and that any deprivation of liberty that may result from the application of s. 737 of the *Criminal Code* accords with the principles of fundamental justice. For these reasons, I discern no violation of either ss. 12 or 7 of the *Charter*, and I would dismiss the appeals accordingly.

II. Overview of the Victim Surcharge Regime

[115] Section 737(1) of the *Criminal Code* provides that "[a]n offender who is convicted, or discharged under s. 730, of an offence under [that] Act or the [*CDSA*] shall pay a victim surcharge, in addition to any other punishment imposed on the offender". Subsection (2) sets out the framework for calculating the minimum amount of the surcharge: 30 percent of any fine that is imposed for a given offence, or if no fine is imposed by the sentencing judge, $100 for each offence punishable by summary conviction and $200 for each offence punishable by indictment. Pursuant to subs. (3), however, the court has the authority to order that an offender pay a victim surcharge exceeding these minimums if it "considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount". All amounts collected in victim surcharges are to be applied for the purpose of providing such assistance to victims of crimes as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time (s. 737(7)).

[116] Prior to 2013, the court had the discretion to exempt an offender from the requirement to pay the surcharge if "the offender establishe[d] to the satisfaction of

the court that undue hardship to the offender or the dependants of the offender would result from the payment of the victim surcharge" (s. 737(5), since repealed). The passage of the *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c. 11 (the "*IOAVA*"), among other things, did away with this partial discretion — thus making the surcharge mandatory in all cases.

[117] The time within which an offender will be required to pay a victim surcharge is established by the lieutenant governor in council of the province in which the surcharge is imposed (s. 737(4)). In Quebec, the victim surcharge is due 45 days after the date on which it was imposed, or if a fine is imposed, on the date the fine is due (see: *Time limit to pay the victim surcharge*, O.C. 154-2016, 2016 G.O. II, at p. 1335). In Ontario, an offender has 30 days to pay a surcharge in respect of a summary conviction offence and 60 days in respect of an indictable offence, starting the day on which the surcharge is first imposed (see: O.C. 2173/99). Extensions are available, however: ss. 737(9) and 734.3 of the *Criminal Code* provide that the court may change any term of its order except the amount of the surcharge, on application by or on behalf of an offender. Section 737(8) requires that an offender be given written notice of the amount of the victim surcharge, the manner in which it is to be paid, the time by which it must be paid, and the procedure for applying for a change in the terms of the order in accordance with s. 734.3.

[118] Section 737(9) incorporates into the operation of the victim surcharge regime most of the enforcement provisions applicable to the payment of fines:

ss. 734(3) to (7), 734.3, 734.5, 734.7, 734.8 and 736 of the *Criminal Code*. These provisions give the state a number of tools to compel payment by offenders who are "in default" — that is, who fail to pay the surcharge in full by the prescribed time (s. 734(3)). For example, a province may refuse to issue or renew, or may suspend, any licence or permit in relation to a defaulting offender until any outstanding surcharge is paid in full (s. 734.5(a)).

[119] One important enforcement tool that is *not* incorporated into the victim surcharge regime (by s. 737(9)) is the procedure for civil enforcement set out in s. 734.6 of the *Criminal Code*. What this effectively means is that an unpaid surcharge cannot be entered as a civil judgment against a defaulting offender.

[120] Conversely, imprisonment *is* a possible consequence of non-payment. Section 734(4) provides that "a term of imprisonment . . . shall be deemed to be imposed" upon an offender who defaults in paying the surcharge. However, the court's authority to commit an offender to jail for non-payment is circumscribed by s. 734.7(1): the Crown must establish both that suspending or refusing to issue or renew a licence (pursuant to s. 734.5) is inappropriate in the circumstances *and* that the offender has refused to pay or otherwise discharge the surcharge "without reasonable excuse". As this Court explained in *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 61, both of these elements must be present before a defaulting offender can be committed, despite the use of the word "or" at the end of s. 734.7(1)(b)(i).

[121] If the court issues a warrant for the committal of a defaulting offender, the term of imprisonment is to be set at the lesser of (a) the number of days that corresponds to the outstanding amount of the surcharge (plus the costs and charges associated with committing and conveying the defaulter to prison), divided by eight times the minimum hourly wage in the applicable province at the time of default, and (b) the maximum term of imprisonment that the court could itself impose upon conviction for the underlying offences (s. 734(5)).

[122] Pursuant to s. 736, a province may choose to establish a "fine option program", through which offenders may discharge amounts owing under s. 737 by earning credits for work performed during a period not greater than two years. At the time of hearing, only some provinces (including Quebec, but not Ontario) had established such a program.

[123] The Ontario Court of Appeal, in its reasons in *R. v. Tinker*, 2017 ONCA 552, 136 O.R. (3d) 718 ("Ontario Court of Appeal Reasons"), identified, at para. 86, two purposes of the victim surcharge regime and of the removal of discretion in 2013:

> (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 accountable to victims of crimes and to the community by requiring a contribution by them to these funds at the time of sentencing.

None of the parties dispute this characterization of the regime's purposes (see: A.F. (*Tinker et al*.), at para. 35; A.F. (*Boudreault*), at para. 31; R. F., Attorney General of Quebec (*Boudreault*), at para. 15; R.F., Attorney General of Ontario (*Tinker et al*., *Eckstein* and *Larocque*), at para. 41). I therefore agree with my colleague that this is the proper way to view the purposes of the victim surcharge and of the 2013 *IAOVA* amendments (Martin J. Reasons, at para. 62).

III. Analysis: Section 12

[124] Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment". To make out a violation of s. 12, a claimant must establish two things: first, that the state measure at issue constitutes "treatment or punishment"; and second, that the treatment or punishment in question is "cruel and unusual".

[125] The respondents accept that s. 12 is engaged in these circumstances, since the victim surcharge is, at a minimum, a "treatment". I agree with my colleague that the victim surcharge constitutes a punishment under s. 12, pursuant to the test set out in *R*. *v*. *K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906 (Martin J. Reasons, at para. 44). Section 12 is therefore engaged.

[126] This Court has recognized that treatment or punishment will rise to the level of being cruel and unusual where it "is so excessive as to outrage standards of decency" (*R*. *v*. *Smith*, [1987] 1 S.C.R. 1045, at p. 1072, citing *Miller v*. *The Queen*,

[1977] 2 S.C.R. 680). In *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, McLachlin C.J. explained that a sentence will offend s. 12 only where it is "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender" (para. 39). It is therefore not sufficient that a sentence be "merely excessive"; to be cruel and unusual, it must be disproportionate to the point of being "abhorrent or intolerable", such that it is incompatible with human dignity (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24; *Smith*, at p. 1072; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26).

[127] The standard for what constitutes cruel and unusual treatment or punishment must necessarily be high. As stated by Cory J. in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417:

> It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.

The stringency of this test is evidenced by the fact that, to date, there have been only three occasions on which this Court has found that specific mandatory minimum jail sentences violate s. 12 (*Smith*, *Nur* and *Lloyd*). With respect to treatments or punishments relating to property rights, the Newfoundland Court of Appeal had the following to say in *R. v. Lambe*, 2000 NFCA 23, 73 C.R.R. (2d) 273, at para. 69:

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

[128] In *Nur*, where the issue was the constitutionality of a three-year mandatory minimum custodial sentence for the unlawful possession of a loaded or readily loaded prohibited or restricted firearm contrary to s. 95(1) of the *Criminal Code*, this Court established a two-step inquiry for determining whether a statutory provision that prescribes a mandatory minimum sentence violates s. 12 (para. 46). First, the court must determine what would constitute a fit and proportionate sentence for the offender, taking into account his or her circumstances as well as the nature of the offence. Second, the court must consider whether the mandatory minimum sentence is grossly disproportionate to what would otherwise be a fit sentence.

[129] A court undertaking an inquiry under the framework set out in *Nur* need not limit itself to the individual(s) bringing the s. 12 challenge; it may also look to "other reasonably foreseeable situations where the impugned law may apply" to determine whether the requisite gross disproportionality would exist in such cases (*Nur*, at para. 58). Any hypotheticals considered in this respect must nevertheless be *reasonable*, such that "far-fetched or marginally imaginable cases" cannot factor into the analysis (*R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 505-6). Simply put, the court's approach to reasonable hypotheticals "must be grounded in common sense and

experience" so that the reach of the law and its reasonably foreseeable impact can properly be understood (*Nur*, at para. 75; see also para. 61).

[130] Section 737 requires that courts impose a minimum victim surcharge on all offenders who are convicted or discharged of offences under the *Criminal Code* or the *CDSA*, regardless of the nature of the offence or the offender's financial means. Because it necessarily forms part of an offender's sentence, the surcharge can therefore be treated as a type of mandatory minimum for the purpose of this analysis.

[131] For this reason, I agree with my colleague that the ultimate question in these appeals is whether the victim surcharge renders a sentence grossly disproportionate based on its overall impact and effects, either for the appellants before this Court or for a hypothetical offender (Martin J. Reasons, at para. 47).

A. *A Fit and Proportionate Sentence, Either for the Individual Appellants or for a Hypothetical Impecunious Offender, Would Most Likely Not Include a Victim Surcharge*

[132] For many offenders, a victim surcharge of either $100 or $200 per offence may form part of a fit and proportionate sentence. The two objectives of the victim surcharge — to promote a sense of responsibility in offenders and to raise revenues for victim services — are closely related to two of the purposes of sentencing recognized under s. 718(e) and (f) of the *Criminal Code*. It is therefore incumbent on sentencing judges to consider the surcharge and the impact of the payment obligation on the offender in order to craft a sentence that is consistent with

the principles of proportionality and totality (see: *R*. *v*. *Cloud*, 2016 QCCA 567, 28 C.R. (7th) 310, at para. 75). For those who have the means to pay, the court can account for the effect of the surcharge by adjusting other components of the sentence (for example, by reducing the length of a term of imprisonment or the amount of a fine) to ensure that the sentence is altogether fit and appropriate in the circumstances. In other words, the surcharge need not be *added on top* of an already proportionate sentence; rather, it should *form part* of such a proportionate sentence.

[133] I would also pause at this juncture to note that s. 737(2) sets out the *minimum* amounts that must be imposed by way of a victim surcharge. It is therefore open to judges, in crafting an appropriate sentence, to order that the offender pay a higher amount where appropriate. In *R*. *v*. *Mikhail*, 2015 ONCJ 469, for example, the sentencing judge imposed a victim surcharge of $2,000 for each of the four counts of robbery of which the offender had been convicted (for a total of $8,000), after taking into account the offender's income, cost of living, prospects for rehabilitation, and work ethic (para. 34 (CanLII); see also: *R*. *v*. *Bao*, 2018 ONCJ 136, at paras. 20 and 22 (CanLII); and *R*. *v*. *Willett*, 2017 ABPC 68, at paras. 87-92 (CanLII)).

[134] However, some offenders who live below the poverty line cannot reasonably be expected to pay even the minimum surcharge amounts without undue hardship and personal sacrifice. Among these offenders are several of the appellants in the present cases. For example, Mr. Boudreault was unemployed and homeless when he committed the offences of which he was convicted (which related to

breaking and entering), and the sentencing judge found that he had committed them in order to feed himself and to satisfy his marijuana dependence. The evidence indicated that his only source of income was a government aid payment of $400 per month (*R. v. Boudreault*, 2016 QCCA 1907, 343 C.C.C. (3d) 131, at para. 107 ("Quebec Court of Appeal Reasons")). Mr. Boudreault had not completed high school, and his earning prospects were limited. Similarly, Mr. Larocque was impecunious, drug-dependent, and suffered from mental health issues at the time of sentencing. He had never had a full-time job, and his housing and food expenses were paid directly from his disability benefits. He used the remaining amount — somewhere between $71 and $136 per month — to pay his other living expenses.[1] There is nothing to suggest that their respective circumstances have since changed.

[135] As my colleague points out, many of these characteristics are shared by the other appellants (Martin J. Reasons, at paras. 53-54). Mr. Tinker, Ms. Judge, Mr. Bondoc, Mr. Mead (collectively, the "*Tinker* appellants"), and Mr. Eckstein have low monthly incomes derived from social assistance. Several of them suffer from physical and cognitive disabilities, live in precarious housing, and were given relatively modest sentences for the offences of which they were convicted. The same is true of Mr. Michael, the reasonable hypothetical offender put to this Court by Mr. Eckstein (see: Martin J. Reasons, at para. 52, and *R. v. Michael*, 2014 ONCJ 360, 121 O.R. (3d) 244).

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[1] The sentencing judge found that, after paying for his lodging and food, Mr. Larocque had $136 per month available to him for his personal expenses (see: *R. v. Larocque*, 2014 ONCJ 428 (CanLII), at para. 30)). However, Mr. Larocque's affidavit indicates that that this figure is only $71 (see: A.R. (*Larocque*), Tab 9, at paras. 10-14; see also: *R. v. Larocque*, 2015 ONSC 5407 (CanLII), at para. 5).

[136] For the individuals before this Court, and for Mr. Michael, I therefore accept that a fit and proportionate sentence would not include the surcharge (see: R.F. Ontario (*Tinker et al*., *Eckstein* and *Larocque*), at para. 38). This is consistent with some of the decisions below: the judge sentencing Mr. Boudreault waived the surcharge for the offences committed before the 2013 amendments to s. 737 (*R*. *v*. *Boudreault*, 2015 QCCQ 8504, at para. 55 (CanLII)), and the Ontario Court of Justice in *R*. *v*. *Tinker* would have exercised the same discretion for each of the *Tinker* appellants if it had been possible to do so (2014 ONCJ 208, 120 O.R. (3d) 791, at para. 12; see also Ontario Court of Appeal Reasons, at para. 132). Indeed, if the surcharge were treated like a fine under s. 734 of the *Criminal Code*, it could be imposed only if the Crown established that the offender had the ability to pay it (see: s. 734(2)). In cases where the offender was impecunious, the Crown would be unable to do so.

[137] That said, I would note that the obligation to pay a $100 or $200 surcharge for each conviction is not exorbitant in and of itself, and many Canadians would not find payment to be particularly onerous. In fact, these amounts are considerably lower than the $1,000 minimum fine that attaches to a first conviction for impaired driving (*Criminal Code*, ss. 253 and 255(1)(a)(i)), or the $1,000 minimum fine for failing to file a tax return under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 238, 239 and 243. Similarly, a number of provincial offences carry with them mandatory minimum fines that can be quite hefty; in Ontario, for example, the minimum fine for driving without insurance is $5,000 (*Compulsory*

Automobile Insurance Act, R.S.O. 1990, c. C. 25, s. 2(3); see: R.F., Attorney General of Ontario (*Tinker et al., Eckstein* and *Larocque*), at para. 32). Although some offenders — including several of the appellants in this case — have been ordered to pay relatively significant amounts in surcharges, this is attributable to the fact that they committed numerous offences, particularly in cases where the Crown proceeded by indictment. The total amount that an offender must pay in surcharges depends both on how many offences were committed and on whether those offences were punishable by indictment or by summary conviction. That some offenders commit a number of serious offences, and therefore incur higher amounts by way of surcharges, cannot on its own be determinative of our conclusion as to whether or not s. 737 of the *Criminal Code* violates s. 12 of the *Charter*.

B. *In Cases Where the Mandatory Victim Surcharge Would Render an Impecunious Offender's Sentence Disproportionate, It Nevertheless Does Not Rise to the Level of Being Grossly Disproportionate*

[138] I agree with my colleague that the mandatory imposition of the victim surcharge may have negative effects for some impecunious offenders — particularly those who might spend the rest of their lives with the surcharge hanging over their heads. The surcharge can represent a significant portion of an impecunious offender's already meager income, meaning that the payment obligation cannot be satisfied without significant hardship. While some disproportionality may result, this alone is not sufficient under the s. 12 analysis; the victim surcharge can be

characterized as cruel and unusual only if the effects it produces are *grossly* disproportionate.

[139] In my respectful view, this high bar has not been met in the present case. I base my conclusion on six interrelated considerations, which I will examine in turn.

(1) Impecunious Offenders Can Avoid the Negative Consequences Associated with Failing to Pay a Victim Surcharge Either by Participating in a Fine Option Program or by Seeking Extensions of Time to Pay

[140] As indicated above, an offender who fails to pay the victim surcharge within the allotted time may become subject to certain enforcement measures available to the state under the "Fines and Forfeiture" division of the *Criminal Code*, which has been incorporated into the victim surcharge regime by s. 737(9). Section 734.5 provides that a defaulting offender can be prevented by the province in which the surcharge was imposed from participating in certain licensed activities. In addition, ss. 734(4) and 734.7(1) contemplate the possibility that some defaulting offenders may be imprisoned for non-payment in certain instances.

[141] That said, offenders with unpaid surcharges can avoid these enforcement measures in one of two ways. First, they may earn credits toward the payment of the surcharge by participating in a provincial fine option program established under s. 736. Second, given that not all provinces have implemented such programs, offenders can also avoid defaulting simply by seeking extensions of time to pay.

[142] A court's authority to extend the time an offender has to pay a surcharge is conferred by ss. 734.3 and 737(9) of the *Criminal Code*. Together, they authorize a court, or a person designated by that court, to "change any term of the order except the amount of the [victim surcharge]" (s. 737(9)) on application by or on behalf of an offender.

[143] Both the Ontario Court of Appeal and the Quebec Court of Appeal correctly noted that offenders who are unable to pay the surcharge by the date stipulated in their payment orders are *entitled* to reasonable extensions of time. The Ontario Court of Appeal stated that "if an impoverished offender applies to the court to extend the time to pay a surcharge to which he or she is subject, the court must give the offender reasonable time to pay" (para. 58 (emphasis in original); see also: Quebec Court of Appeal Reasons, at para. 188, per Mainville J.A.). This is consistent with this Court's decision in *Wu*, where Justice Binnie stated that an offender who "does not have the means to pay immediately . . . should be given time to pay" and that the length of the extension "should be what is reasonable in all circumstances" (para. 31; see also *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at para. 47).

[144] A careful reading of the applicable provisions makes clear that the court has a broad power to vary an order requiring the payment of a victim surcharge. First, the statute imposes no restrictions on the number of extensions an offender can seek over a given period. This means that an impecunious offender whose financial situation does not improve can conceivably avoid defaulting throughout his or her

lifetime by routinely seeking extensions. By doing so, he or she will never become subject to the enforcement mechanisms set out in ss. 734.5 and 734.7.

[145] Second, there is no limit to the possible length of an extension. Indeed, *Wu* makes clear that the time an offender is given to pay a fine or a surcharge must be "reasonable in all the circumstances" (para. 31). There is thus nothing in the statute that would prevent a judge from granting a particularly long extension where it appears unlikely that an offender's impecuniosity will change in the foreseeable future. In *R*. *v*. *Ridley*, 2017 ONSC 4672, for example, the sentencing judge imposed the minimum surcharge for each of the nine offences of which Mr. Ridley had been convicted (for a total of $900) — but nevertheless extended the time to pay to account for the fact that he was employed in a relatively low-paying job and had also been ordered to pay restitution installments of not less than $100 per month as part of his sentence. Because it was not reasonable to expect Mr. Ridley to be in a position to pay the surcharge before 2050, a 33-year extension was granted (para. 9 (CanLII)).

[146] Third, extensions may be granted either *before* or *after* the offender defaults. What this means is that, at the sentencing hearing, the judge can extend the time to pay beyond the timelines established by the lieutenant governor in council in the applicable province (as was the case, for example, in *Ridley*). Extensions can likewise be granted to an offender after the prescribed deadline for payment has passed, in which case the offender will no longer be in default.

[147] Given the wording of the applicable *Criminal Code* provisions, I also agree with the Ontario Court of Appeal that "[o]btaining an extension should not be onerous or procedurally difficult" (para. 58). Indeed, s. 734.3 says that an application for an extension may be brought either by an offender *or* by some other person on his or her behalf — which would include his or her lawyer, a family member, a friend, or a support person. Similarly, such an application may be adjudicated either by the court that imposes the surcharge *or* "by a person designated . . . by that court".

[148] Furthermore, s. 737(8) *requires* that offenders be informed in writing of (among other things) the procedure for applying for an extension of time to pay in accordance with s. 734.3. This ensures that they are not left in the dark as to how to obtain such extensions.

[149] These *Criminal Code* provisions therefore encourage both flexibility and accessibility in the process for seeking extensions. To the extent that a province establishes procedures that are complex to the point of being inaccessible for many offenders, this cannot be attributed to the impugned *Criminal Code* provisions themselves but rather to the manner in which that province implements these procedural rules and requirements.

[150] In short, offenders can avoid enforcement measures under ss. 734.5 and 734.7 of the *Criminal Code*, either by participating in a fine option program or by periodically seeking extensions from the court so as never to fall into default, or to be relieved of their default.

(2) Impecunious Offenders Who Are in Default Will Never Be Imprisoned for their Inability to Pay the Surcharge

[151] In her reasons, my colleague rightly observes that only a few provinces have established fine option programs and that, in any event, participation therein "is not a realistic option for all offenders, whether due to serious mental illness, disability, or age" (para. 72). She also says that, for many offenders, the task of "preparing and filing a written application is daunting", especially since it "is a task for which a person cannot obtain state-funded legal counsel" (para. 73). While these difficulties do not flow from the law itself (since s. 737 of the *Criminal Code* is not the source of this), I accept that some offenders may in practice be unable to seek an extension.

[152] However, and *even if* an offender does not (or is unable to) participate in a fine option program or obtain an extension of time to pay, the court cannot commit the offender to jail for defaulting if the reason he or she failed to pay the surcharge within the allotted time was a lack of means, notwithstanding the fact that a term of imprisonment, determined in accordance with s. 734(5), is "deemed" to be imposed on such an offender under s. 734(4). Recognizing this is absolutely crucial for the purposes of this appeal, and it bears reiterating in simple terms: *a defaulting offender cannot actually be imprisoned under s. 737 — that is, his or her liberty will not be taken away — merely because of poverty*. This is consistent with s. 734.7(1), which reads as follows:

> 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
>
> **(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.

[153] Although the disjunctive "or" is used at the end of subpara. (1)(b)(i), this Court's decision in *Wu* clarifies that the elements listed in subparas. (i) and (ii) must both be present before a warrant can be issued for the committal of a defaulting offender. As a result, a court can only order the imprisonment of an offender who *actively refuses* to pay or discharge the surcharge "without reasonable excuse". This evidently excludes offenders who do not pay simply because they are too poor; these offenders cannot be described as actively "refusing". In *Chaussé v. R.*, 2016 QCCA 568, Justice Vauclair explained that [TRANSLATION] "[t]he refusal to pay contemplated by paragraph 734.7(1)(b) *Cr. C.* implies the making of a choice and, in principle, impecuniosity does not leave any choice" (para. 69 (CanLII)).

[154] The result is therefore that impecunious offenders who do not (or cannot) avoid defaulting will still *not* be committed to jail as long as their failure to pay can be attributed to their lack of means. In this respect, however, my colleague says that "it may be difficult for judges to draw the line between an inability to pay and a refusal to pay" (para. 71). With respect, the fact that judges *might* misapply the law

to a particular set of facts cannot render the victim surcharge provisions unconstitutional, particularly since there is no suggestion that s. 734.7 establishes an overly vague standard that cannot properly be applied by trial judges. And to the extent that there is a perceived need for guidance on exactly where to draw the line between inability and refusal, it falls on this Court to make clear to lower courts that offenders need not sacrifice their basic necessities in order to pay the surcharge (see: *Michael*, at para. 74; *R. v. Flaro*, 2014 ONCJ 2, 7 C.R. (7th) 151). This is why the statute provides that only individuals who actually have the means to pay, *and for whom non-payment is a deliberate choice*, risk being committed to jail (see: s. 734.7(1), as interpreted in *Wu*, at para. 61, and in *Chaussé*, at para. 69). Judges must therefore determine whether genuine poverty is the reason for non-payment; if it is, they cannot issue a warrant of committal, and must instead grant an extension to the defaulting offender.

[155] In its intervener factum, Pivot Legal Society states that "[British Columbia]'s judges routinely sentence impoverished offenders to incarceration in immediate default of surcharge payment" (para. 3). This is apparently done in an effort to relieve offenders of the obligation to pay the surcharge without any practical consequences, since the term of imprisonment for non-payment is typically served concurrently with a prison sentence already imposed. Such a practice, however, is clearly inconsistent with the principles emerging from *Wu*, namely that an offender who cannot pay immediately must be given time to pay, and that effectively substituting a financial deprivation with a deprivation of liberty thwarts Parliament's

intention. "An offender's inability to pay is precisely the reason why time is allowed, not a reason why it should be altogether denied" (*Wu*, at para. 33).

[156] To summarize this point, I can do no better than to reaffirm what this Court held in *Wu*: "[g]enuine inability to pay a fine" — or in this case, a surcharge — "is not a proper basis for imprisonment" (para. 3; see also para. 61).

(3) For the Purpose of Compelled Attendance at a Committal Hearing, the Applicable *Criminal Code* Provisions Seek to Ensure Minimal Interference with a Defaulting Offender's Physical Liberty

[157] An offender in default can be imprisoned only if, at the conclusion of a committal hearing, the Crown has proven that each of the elements in s. 734.7(1) is present. Section 734.7(3) of the *Criminal Code*, which is incorporated into the victim surcharge regime by s. 737(9), provides that a defaulting offender may be compelled to attend a committal hearing in accordance with the provisions of Parts XVI and XVIII.

[158] Most of the parties submit that defaulting offenders would typically be compelled to attend their committal hearings through either a summons or a warrant of arrest issued under s. 507 of the *Criminal Code*. It should be noted that s. 507(4) requires a justice to compel attendance by way of a summons — which constitutes a lesser deprivation of liberty — unless there are "reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused".

Such necessity might exist, for example, where a defaulting offender does not have a fixed address for service of a summons.

[159] Moreover, a justice issuing a warrant in accordance with this provision is permitted to authorize the release of the defaulting offender from custody after arrest "by making an endorsement on the warrant" (s. 507(6)). Where the arrest warrant is so endorsed, an officer in charge may release the defaulting offender after he or she has been taken into custody, in accordance with s. 499 of the *Criminal Code*.

[160] The Ontario Court of Appeal also suggested the possibility that a defaulting offender could be arrested without a warrant under s. 495(1) of the *Criminal Code* (para. 113). Assuming (without deciding) that warrantless arrest can properly be used as a means to compel attendance in these circumstances, I note that this can occur *only* if the peace officer has reasonable grounds to believe that it is in the public interest to arrest the person *and* that the person will fail to attend court (in accordance with s. 495(2)). In determining whether arrest is in the public interest, the peace officer must consider whether arrest is necessary to establish the identity of the person, to secure or preserve evidence, or to prevent the continuation of the offence or the commission of future offences. Given that non-payment of a victim surcharge is not an offence, it is difficult to imagine instances where the public interest would justify the warrantless arrest of a defaulting offender pending a committal hearing. Moreover, the detention of a person arrested without a warrant can continue only if there are reasonable grounds to believe that continued detention is in the public

interest *or* will serve the purpose of ensuring attendance at court (see: ss. 497 and 498 of the *Criminal Code*).

[161] If a defaulting offender is arrested and not released, s. 503(1) of the *Criminal Code* requires that he or she be taken before a justice within 24 hours, or otherwise as soon as possible. At this stage, the justice will hold a hearing to determine whether the offender should be released pending the committal hearing, in accordance with s. 515 of the *Criminal Code*. In the intervening time, both the arresting officer and the officer in charge have the authority to release the arrestee either with or without conditions under s. 503.

[162] At the committal hearing,[2] the Crown bears the burden of demonstrating that continued interim detention is justified — and if it fails to discharge this burden, the justice will be obliged to release the defaulting offender. Section 515(10) sets out the three grounds on which detention can be justified: (a) to ensure attendance, (b) to protect public safety, and (c) to maintain confidence in the administration of justice. I observe that these factors would not typically weigh in favour of detention pending a defaulting offender's committal hearing, since failure to pay a victim surcharge is not an offence. In any event, this Court in *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, affirmed that "an unconditional release on an undertaking is the default position when granting release" (para. 67).

[2] I would note that there does not seem to be anything in the statute to prevent the presiding justice from granting an extension to the offender at this s. 503 hearing.

[163] Together, these provisions indicate that the likelihood of an impecunious offender being arrested and detained pending a committal hearing is low; continued detention is reserved for those instances where it is *necessary* to ensure that the accused will attend to explain the reason for non-payment. Furthermore, there is no evidence in the record to suggest that impecunious offenders are in fact being detained unnecessarily pending their committal hearings on a routine basis.

[164] Where service of a summons is proved or a promise to appear has been confirmed and the offender still fails to attend court, or where a summons cannot be served because the offender is evading service, a justice may issue an arrest warrant (s. 512(2) of the *Criminal Code*) — and again, may authorize the offender's release after arrest by making an endorsement on the warrant under s. 507(6). As a final point, the Attorney General of Ontario has indicated that a committal hearing can take place *ex parte*, but *only* if the defaulting offender consents or is found to have absconded, as provided for in ss. 537 and 544 of the *Criminal Code* (Hearing Transcript, Day 2, p. 60).

[165] Compelled attendance at a committal hearing will necessarily deprive a defaulting offender of his or her liberty interest to some degree (see: Ontario Court of Appeal Reasons, at para. 70). As the foregoing indicates, however, the scheme is designed to protect such an offender from pre-hearing detention except where there is a substantial reason for it (see: R. E. Salhany, *Canadian Criminal Procedure* (6th ed.

(loose-leaf)), at para. 3.60). This serves to minimize the deleterious effects of the operation of the victim surcharge regime for offenders who are in default.

(4) Civil Enforcement Mechanisms Cannot Be Used to Collect Outstanding Amounts Owing in Victim Surcharges

[166] While the enforcement mechanisms set out in ss. 734.5 and 734.7 of the *Criminal Code* can be exercised against defaulting offenders, civil enforcement under s. 734.6 is not available, since the latter provision is not incorporated into the victim surcharge regime by s. 737(9) or otherwise. What this means is that the Attorney General of Canada or of a province lacks the statutory authority to enter as a judgment in a civil court any amounts owing by way of surcharges — and hence that civil remedies cannot be exercised as a means of recovering unpaid surcharges from offenders. This feature distinguishes the surcharge from regular fines; while an unpaid fine can attract the same financial consequences as an ordinary debt, an unpaid surcharge cannot.

[167] I would also note that some provinces have adopted the practice of employing collection efforts (whether internal to government or external) against defaulting offenders. Such a practice, however, is neither required nor authorized by the *Criminal Code*. It is therefore not an effect of the impugned surcharge provisions.

(5) There Is Insufficient Evidence to Conclude that the Stress Caused by the Mandatory Application of the Victim Surcharge to Impecunious Offenders Is Severe Enough to Make the Punishment Imposed Under Section 737 "Cruel and Unusual".

[168] Several of the appellants also submit that the inability to pay a victim surcharge, and the consequences of non-payment, cause stress to impecunious offenders and that this contributes to the disproportionality of the surcharge. I agree that some degree of stress will likely arise in these circumstances. Indeed, we should expect that *all* punishments — including the victim surcharge — will be stressful for the persons subject to them. Many individuals will likewise find the obligation to pay ordinary debts stressful. For the purposes of s. 12 of the *Charter*, however, the key question is whether the psychological stress associated with the inability to pay a surcharge is so severe that it makes the imposition of the surcharge on impecunious offenders cruel and unusual.

[169] In my respectful view, there is nothing in the record to suggest that this is so. In its written submissions, the Attorney General of Ontario observes that the appellants have not adduced any evidence to support the existence of severe stress associated with the threat or possibility of imprisonment — and adds, in this respect, that any such stress would not be caused by s. 737, "which does not truly threaten imprisonment for those who cannot pay" (R.F., Attorney General of Ontario (*Tinker et al*., *Eckstein* and *Larocque*), at para. 63).[3] Similarly, there is no evidence that impecunious offenders forego spending on the necessaries of life to pay the surcharge (thereby compromising their health, welfare and safety), that non-payment attracts a significant degree of social stigma, or that the requirement to pay the surcharge has significant negative effects on rehabilitation (R.F., Attorney General of Ontario

[3] It would nevertheless be prudent for sentencing judges to advise offenders that they cannot be committed to jail for non-payment if they are genuinely unable to pay, in order to dispel any misconceptions that might exist in this regard.

(*Tinker et al*., *Eckstein* and *Larocque*), at para. 63). None of the first instance courts in *Tinker*, *Eckstein* or *Boudreault* made any such factual findings, and the Summary Conviction Appeals Court in *R*. *v*. *Larocque* specifically held that "[t]here was no evidence to support the . . . findings [of the sentencing judge in that case] that the victim surcharge, if left unpaid as expected, would create an ongoing stress for the accused such as to render it cruel and unusual punishment" (para. 76).

[170] Although there is no dispute that the victim surcharge will most probably produce psychological stress for some impecunious offenders that would not be felt by offenders with greater financial means, there must be a factual basis for concluding that this stress is severe enough to support a s. 12 *Charter* violation. With respect, neither the record before this Court, nor common sense, provides a sufficient basis for such a conclusion (see: *R*. *v*. *Larocque* (Ont. S.C.J.), at paras. 72-76; see also *Kahkewistahaw First Nation v*. *Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 34). As explained by Justice Cory in *MacKay v*. *Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the

> impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not . . . a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. . . . *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

(6) The Fact that the Victim Surcharge Might in Some Cases Frustrate Attempts at Rehabilitation and Reintegration Does Not Make the Punishment Imposed Under Section 737 Cruel and Unusual

[171] As a final point, it is said that the mandatory imposition of the victim surcharge impedes the rehabilitation and reintegration of impecunious offenders, since their inability to pay can keep them tethered to the criminal justice system indefinitely and prevent them from seeking a pardon.

[172] Rehabilitation is undoubtedly an important principle in the *Criminal Code*'s sentencing regime (see: s. 718(d)). However, it is not the only one. And while the victim surcharge does not necessarily promote efforts at rehabilitation (because it is aimed at different sentencing objectives), the same can be said about other criminal sanctions that have been imposed on the appellants in these cases, and that continue to be imposed on impecunious persons daily. This point was made by the Summary Conviction Appeals Court in *R. v. Larocque*, at para. 95:

> [W]hat was at issue in *Michael* and another case concerning the constitutionality of the victim surcharge, *R. v. Cloud*, 2014 QCQC 464, was the cruel and unusual nature of the victim surcharge, when in both

> instances, these offenders were placed on lengthy probation orders as part of their sentences. The impact of that order for an offender like Mr. Michael, who as described in *Michael* engages largely in nuisance type behaviour, is significant: any time he commits an offence while bound by that order, he will in all likelihood be sentenced to further imprisonment than otherwise warranted by his conduct because he will have violated a court order and hence face sentencing for that offence too. Arguably, every month an offender like [Mr. Larocque] or offenders like Mr. Michael and Mr. Cloud are on probation creates a real prospect of further incarceration, on the assumption accepted in those cases in considering the victim surcharge, that is, that their circumstances will not change. This assumption must then hold for the circumstances leading to their offending behaviour, rendering the prospect of further incarceration as a result of the probation order a live one. The prospect of further incarceration is surely more psychologically stressful than the consequences which may flow from the imposition of the victim surcharge. And yet lengthy probation orders are nevertheless imposed on these offenders and others like them to comply with legal principles and precedents, notwithstanding the stress that may result to the offender.

[173] I would add this. If the principles by which courts sentence offenders in Canada are premised on the notion that individuals generally have the capacity to move beyond their criminal past and improve their lives for the better, and if rehabilitation is a fundamental purpose of sentencing, then it is counterproductive for courts to treat some impecunious offenders as being incapable of *ever* lifting themselves out of a cycle of poverty and criminality by finding that they will *never* be able to pay the surcharge (see, for example, Quebec Court of Appeal Reasons, at para. 205, per Mainville J.A.). While it is likely that some will face great difficulty in doing so, Justice Binnie in *Wu* directed Canadian courts not simply to accept that "the circumstances of the offender at the date of sentencing will necessarily continue into the future" (para. 31). Not only are findings to this effect pessimistic in nature, but they also undermine the very basis for the principle of rehabilitation.

[174] It seems correct to say that the non-payment of a victim surcharge renders a person ineligible to seek a record suspension under s. 4(1) of the *Criminal Records Act*, R.S.C. 1985, c. C-47. That provision states that an offender may apply for a record suspension only if a certain period of time "has elapsed after the expiration according to law of any sentence". The term "sentence" presumably captures the payment of a victim surcharge (see: M.A. Law, *The Federal Victim Surcharge: The 2013 Amendments and their Implementation in Nine Jurisdictions*, 2016 (online), at p. 37, cited in the I.F., Attorney General of Alberta, at p. 70).

[175] It must be noted, however, that the *Criminal Code* authorizes the Governor in Council to grant *conditional* pardons (s. 748) and to order the remission of fines and other pecuniary penalties (s. 748.1) through the royal prerogative of mercy. Although a conditional pardon will not be granted unless, among other things, there is "substantial evidence of undue hardship, out of proportion to the nature of the offence and more severe than for other individuals in similar circumstances" (Canada, Parole Board of Canada, *Royal Prerogative of Mercy: Ministerial Guidelines*, October 2014 (online)), such a pardon nevertheless has the same effect as a record suspension under the *Criminal Records Act*. A remission order does not have that same effect, but instead eliminates the obligation to pay a victim surcharge — and thus allows an otherwise eligible offender to apply for a record suspension under s. 3(1) of the *Criminal Records Act*.

[176] Therefore, even though conditional pardons and remission orders are not perfect alternatives, an offender who is ineligible for a traditional record suspension due solely to the inability to pay the victim surcharge is not left without recourse.

[177] Moreover, an application to the Parole Board for a record suspension costs $631 — a fee that the Parole Board will not waive, even for impecunious applicants (Canada, *Got a question about your application?*, last updated November 15, 2018 (online)). In addition to this fee, individuals applying for a record suspension under the *Criminal Records Act* are responsible for paying any costs associated with obtaining fingerprints, a copy of their criminal record, police checks, and the court documents that are required (*Record Suspension Guide*). For offenders whose sole barrier to seeking a record suspension is an outstanding victim surcharge, the fees associated with making such an application may be more onerous than paying the surcharge itself. Indeed, the cost of the application on its own exceeds the minimum surcharge that would be imposed on an individual who was found guilty of six summary conviction offences or three indictable offences.

[178] Although the victim surcharge may not be particularly conducive to attempts by some offenders to achieve rehabilitation and reintegration into society, my view is that this alone is not sufficient to meet the high bar for establishing a s. 12 *Charter* violation.

C. *Section 737 Therefore Does Not Impose Cruel and Unusual Punishment Either on the Offenders Before this Court or on the Reasonable Hypothetical Offender*

[179] There is no dispute that the surcharge will create some degree of hardship for offenders. As a punishment, this is to be expected. I also accept that impecunious offenders may experience such hardship in more acute ways. For many, it may be years before they will be in a position to pay off the surcharge, and not without a substantial degree of sacrifice and hardship. Others may never be in a position to make payment in full within their lifetimes, given the unfortunate state of their financial circumstances or health.

[180] For these offenders, the effects of the surcharge are, at a minimum, "frustrating"; the Attorney General of Ontario conceded as much during the oral hearing. Whether the positive aspects of the victim surcharge outweigh the negative effects it may produce is debatable — indeed, s. 737 is currently the subject of debate in Parliament (Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42th Parl., 2018, s. 304).

[181] What matters under the s. 12 analysis, however, is whether the negative effects associated with the mandatory victim surcharge rise to the level of *gross* disproportionality in relation to impecunious offenders. Can it be said that these effects are "abhorrent", "intolerable", or "so excessive as to outrage standards of decency"?

[182] In my view, the answer is no. While I accept that a proportionate sentence for impecunious offenders would not include a victim surcharge, there are a

number of components to the regime set out in s. 737 of the *Criminal Code* that attenuate the particularly severe impact the surcharge may have on an offender who is simply not able to pay. In particular, as explained above:

- Offenders who are unable to pay the surcharge within the prescribed time will not be subject to the enforcement mechanisms set out in ss. 734.5 and 734.7 if they either participate in a fine option program or seek an extension of time to pay. Once an extension is granted — and it *must* be granted if the offender cannot pay by the prescribed time due to a lack of means — then the offender will no longer be in default.

- An offender will not be imprisoned if he or she defaults due to poverty. Only offenders who have the means to pay, but who *choose* not to, risk being imprisoned following a committal hearing.

- While it is possible that a defaulting offender might be detained for some period of time ahead of a committal hearing, the scheme for compelling attendance set out in Part XVI of the *Criminal Code* ensures that a deprivation of liberty in these circumstances will occur only where it is necessary in the public interest. Such cases will likely be very rare, especially given that non-payment is not a criminal offence.

- A province cannot enter an unpaid surcharge order as a civil judgment. Therefore, an offender who defaults in paying a surcharge will not face the

same financial consequences as an offender who defaults in paying a fine — or, indeed, in paying any ordinary debt.

- There is insufficient evidence to support the proposition that the inability to pay a surcharge causes psychological stress severe enough to make the punishment imposed under s. 737 cruel and unusual.

- The victim surcharge does not interfere with the rehabilitation of impecunious offenders to such a degree that it amounts to cruel and unusual punishment.

[183] In *Smith*, this Court identified several forms of treatments and punishments that will *always* violate s. 12: the lash, the lobotomisation of certain dangerous offenders, and the castration of sexual offenders (pp. 1073-74). Similarly, in *Nur* and *Lloyd*, certain mandatory minimum custodial sentences were considered to be *grossly* disproportionate and were therefore struck down as cruel and unusual. Bearing in mind the considerations listed above, my view is that the requirement that all offenders pay a surcharge of only $100 or $200 per offence — a surcharge which cannot be enforced against the liberty or property of an offender who is simply too poor to pay — does not rise to this level. I would also point out that a finding of unconstitutionality with respect to the victim surcharge may have the effect of calling into question the constitutionality of other mandatory fines imposed on offenders who may or may not have the means to pay. As observed by Schrager J.A. in his reasons in the Quebec Court of Appeal Reasons, at para. 227):

> . . . 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.

[184] Given the foregoing, I therefore disagree with my colleague that the appellants have met the high burden of establishing that s. 737 of the *Criminal Code* infringes s. 12 in respect of impecunious offenders — either the individuals before this Court, or the reasonable hypothetical.

IV. Analysis: Section 7

[185] I turn now to the question of whether s. 737 of the *Criminal Code* violates s. 7 of the *Charter*, which reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[186] In order to make out a s. 7 violation, a claimant must therefore establish two things: first, that the impugned law or state action deprives him or her of the right to life, liberty or security of the person; and second, that any such deprivation does not accord with the principles of fundamental justice (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 57).

[187] The *Tinker* appellants say that this is the case for s. 737 of the *Criminal Code*. In their submission, the mandatory victim surcharge deprives them of their right to liberty and security of the person in a manner that is overbroad and thus contrary to s. 7 of the *Charter*.

A. *Only the Tinker Appellants' Liberty Interest is Engaged, Insofar as Defaulting Offenders Can Be Compelled to Attend a Committal Hearing; the Victim Surcharge Regime Does Not Engage Their Security of the Person Interest*

[188] The *Tinker* appellants submit that the operation of s. 737 of the *Criminal Code* engages the right to liberty in two ways.

[189] Their first argument on this point is that the availability of imprisonment as a consequence of non-payment (pursuant to ss. 734(4) and 734.7) can deprive impecunious offenders of their physical liberty. This submission can be easily rejected: as explained at length above, offenders will *not* be imprisoned if they fail to pay the surcharge because they are financially unable to do so.

[190] Second, the *Tinker* appellants submit that impecunious offenders who are in default of payment will suffer a deprivation of their physical liberty if and when they are compelled to attend a committal hearing. The Ontario Court of Appeal held that "the possibility of being compelled to appear at a committal hearing", whether by the issuance of a summons or by pre-hearing arrest and detention, "deprives the *Tinker* appellants of liberty" (para. 70). The respondent Attorney General of Ontario concedes this at paragraphs 74 and 82 of her written submissions. I agree, and would

therefore conclude that s. 737 of the *Criminal Code* engages the *Tinker* appellants' liberty interest only insofar as non-payment of the victim surcharge triggers the possibility of being compelled to attend a committal hearing.

[191] However, I cannot accept the *Tinker* appellants' submission that the impugned provision engages their security interest due to the stress caused by: (a) having a significant fine imposed, which the person has no ability to pay; (b) being threatened with imprisonment for non-payment; (c) having to request extensions of time in order to avoid being arrested or imprisoned; and (d) knowing that one will have to continue making such requests on an ongoing basis in order to remain out of prison (A.F. (*Tinker et al*.), at para. 27).

[192] State-imposed psychological stress may amount to interference with the right to security of the person, but only where it has "a serious and profound effect on a person's psychological integrity" (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 57). As observed by Lamer C.J. in *G. (J.)*:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected (at para. 59).

[193] Accepting that the mandatory imposition of the surcharge can conceivably be stressful for some offenders of modest means, the question for the purpose of s. 7 is whether the stress felt by such offenders is serious enough to engage their security interest. As observed by McLachlin C.J. and Major J. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, "[t]he task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence" (para. 150). This is consistent with the perspective adopted by the *Tinker* appellants themselves: "the question is not whether the surcharge may have some theoretical impact from an objective perspective; the question is whether it is having a real impact from a subjective perspective of the actual impecunious persons who are being forced to pay" (A.F. (*Tinker et al.*), at para. 47).

[194] Respectfully, neither common sense nor the evidence provides a basis on which I can conclude that the actual stress that impecunious offenders may experience as a result of having to pay a surcharge — albeit in circumstances where non-payment due to poverty will not result in a deprivation of either liberty or property — is serious enough that it exceeds the requisite threshold (see: *Blencoe*, at para. 57; *G.(J.)*, at para. 59). My view is thus that the *Tinker* appellants have not demonstrated that s. 7 is engaged due to the stress that may be associated with the imposition of the surcharge.

B. *The Deprivation of Liberty Associated with Being Compelled to Attend a Committal Hearing Accords with the Principles of Fundamental Justice*

[195] The next stage in the s. 7 framework requires the court to determine whether the deprivation of life, liberty or security of the person accords with the principles of fundamental justice. The principle of fundamental justice identified by the *Tinker* appellants is overbreadth, which deals with instances where the effect of a law on a person's right to life, liberty and security is rationally connected to the law's purpose in *some* respects, *but not all* (*Bedford*, at paras. 101 and 112-13). Such a law will be unconstitutional to the extent that it overreaches in its effects, in that it deprives some persons of their right to life, liberty and security of the person in a manner unconnected to its objective in some, though not all, respects.

[196] This is key. For a law to be unconstitutional under s. 7 based on the overbreadth principle, it is not enough to simply say that there is an absence of any rational connection between the law's purpose and some of its general effects. In other words, a law is not overbroad just because its scope is broader than necessary to carry out its purpose. To succeed on this basis, a claimant must instead establish that the law *interferes with the right to life, liberty or security of the person* in some ways that are unconnected to its objective (*Carter*, at para. 85). What matters, therefore, is the relationship between the law's purpose and the manner in which it deprives a person of life, liberty or security.

[197] Having found that s. 737 of the *Criminal Code* interferes with an offender's liberty interest, but only to the extent that the offender can be compelled to attend a committal hearing after defaulting, the question is therefore whether this

deprivation of liberty is rationally connected to the purpose underlying the impugned provision in cases involving offenders who simply lack the means to pay. Does that deprivation of liberty go further than necessary to achieve the law's purpose, such that it is overbroad in relation to the impecunious *Tinker* appellants?

[198] I agree with the Ontario Court of Appeal that this question should be answered in the negative: "[t]he end result of a committal hearing is not to collect on an outstanding surcharge payment but to determine whether a warrant for the defaulting offender's committal should be issued by inquiring into the offender's excuse for refusing to pay" (para. 104). It is therefore necessary to compel a defaulting offender to attend a committal hearing — which will necessarily entail some deprivation of personal liberty — in order to determine whether the offender has the funds to pay the victim surcharge and to give him or her an opportunity to explain (or provide a "reasonable excuse" for) non-payment. By requiring the offender to account to the state in this fashion, the process can also serve "as a reminder of the offender's accountability to victims of crime" (Ontario Court of Appeal Reasons, at para. 103).

[199] My conclusion, therefore, that the deprivation of liberty associated with committal hearings under s. 737 is not overbroad in relation to impecunious offenders; it has at least *some* rational connection to the dual purposes of the surcharge regime, both for offenders who have refused to pay without reasonable

excuse and for those who have not paid simply due to poverty. For this reason, I discern no violation of s. 7.

V. Conclusion

[200] Having found that s. 737 of the *Criminal Code* does not violate the constitutional protection against cruel and unusual punishment (s. 12 of the *Charter*) or the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice (s. 7 of the *Charter*), I am of the view that the appeals should be dismissed. Therefore, I dissent.

Appeals allowed, CÔTÉ *and* ROWE JJ. *dissenting*.

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