

TOP FIVE 2019

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2019 cases were selected and discussed by Mr. Justice Lorne Sossin of the Ontario Superior Court of Justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v BOUDREAU, 2018 SCC 58 (CANLII)

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<https://www.canlii.org/en/ca/scc/doc/2018/2018scc58/2018scc58.html>

Facts

Under section 737 of the *Criminal Code of Canada* ("The Code"), everyone who is guilty of a crime has to pay a mandatory victim surcharge (a fine). This case addresses whether this surcharge is constitutional or whether it is a "cruel and unusual punishment" under s. 12 of the Charter.

The victim surcharge was introduced in 1988 to help fund programs and services for victims of crimes. At that time, judges could choose not to impose the surcharge if an offender could not afford to pay it. In 2013, the federal government passed the *Increasing Offenders' Accountability for Victims Act*, which made the surcharge mandatory and doubled the cost. The surcharge was 30% of any other fine imposed, or where no fine was imposed, \$100 for every summary conviction and \$200 for every indictable conviction. Under this legislation, the surcharge amount could not be waived or decreased by the sentencing

judge or appealed by the offender. It had to be paid.

Many people involved in the criminal justice system are low-income, live with addiction and other mental health issues, or are otherwise disadvantaged or marginalized. If they could not pay the surcharge, a criminal conviction for even a relatively minor offense could result in them being imprisoned, prevented from seeking a pardon, and targeted by collection agencies.

Seven individuals challenged the constitutionality of the surcharge, arguing that it violated the *Canadian Charter of Rights and Freedoms* in that it amounted to cruel and unusual punishment (s. 12 of the Charter), or that the surcharge infringed on the individual's right to liberty and security (s. 7 of the Charter). In each case, the offenders said they could not afford to pay the surcharge. All of them lived in poverty, and struggled with various barriers, including homelessness,



addiction, unemployment, and health issues. One of the offenders had only \$136 each month after they had paid for food and housing. Sentencing judges even made comments on the record saying that they suspected the offenders could not afford to pay the surcharge, but that they were still bound by law to impose it.

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 of the Charter is violated, is the surcharge justified under s. 1 of the Charter?
4. If the surcharge is not justified, what is the appropriate remedy?

Procedural History

The Quebec and Ontario Courts of Appeal both held that the surcharge did not breach sections 7 and 12 of the Charter and was therefore constitutional. The applicants appealed to the Supreme Court of Canada (SCC).

Decision

A majority of the SCC ruled that the imposition and enforcement of the surcharge amounted to cruel and unusual

punishment. This s. 12 breach was not justified under s. 1 of the Charter. Since s. 12 was breached, the SCC stated that it was not necessary to consider whether the surcharge also violated s. 7 of the Charter.

Ratio

The surcharge constituted a punishment because it flowed directly and automatically from conviction. It constituted a “cruel and unusual” punishment, in violation of s. 12 of Charter, because having a surcharge created circumstances for offenders who live in serious poverty that are grossly disproportionate, outrage the standards of decency, and are abhorrent and intolerable.

Reasons

For a punishment to be cruel and unusual, it must be so excessive as to outrage standards of decency, so much that society could not tolerate it.

The SCC also found that the surcharge, in practice, posed a constant, indirect threat of imprisonment or detention for marginalized offenders. Many of the people involved in the criminal justice system are low-income, live with addiction and other mental health issues, and are otherwise disadvantaged or marginalized. As a result, if they could not pay the mandatory victim surcharge, a criminal conviction for even a relatively minor offense could result in many harmful real life impacts.



The harmful effects of the surcharge included deeply disproportionate financial consequences, the threat of prison for failure to pay, being targeted by private collection agencies, and being prevented from seeking a record suspension. The surcharge also ignored the rule that sentences should be made for the individual, because it did not allow judges to consider an individual's circumstances, or the best way to help them back into society.

The surcharge did have the objectives of raising funds for victim support services, as well as helping offenders give back to individual victims and the general community. However, in the case of marginalized offenders, these objectives were unlikely to be met. At the time of sentencing, Mr. Boudreault was homeless, unemployed, and addicted to marijuana. The other applicants shared similar circumstances. They all were in serious poverty, precarious housing situations, and struggling with addiction. Since they had no way to pay the surcharge, the goals of the surcharge would not be met.

Even after a Charter breach has been established, the state can still argue that the breach was justified by a pressing and substantial objective under s. 1 of the Charter. This means that the government respondents could have argued that even though the surcharge is a cruel and unusual punishment, it should still be allowed for a very important reason. However, the government respondents did not put

forward any argument or evidence under s. 1, so the SCC held that that the surcharge was not justified.

The SCC held that the appropriate remedy was to declare s. 737 of the Code to be invalid, effective immediately. This meant that the surcharges of the seven offenders who challenged the law were invalidated. The SCC also stated that it was open to other offenders with surcharges to go to court and seek a remedy. It was also open to the government and Parliament to make changes to resolve the Charter concerns that the SCC had identified, for example by making changes to the Code.



DISCUSSION

1. What kinds of services might victims of crime need access to?
2. What did the applicants say was cruel and unusual about the surcharge?
3. Should judges be able to choose whether or not to impose a surcharge?
4. Instead of charging offenders, can you think of other ways to raise funds for victims of crime?
5. What changes could be made to the Code to resolve the SCC's Charter concerns?