

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

BETWEEN:

ALEX BOUDREAULT

APPELLANT
(Appellant)

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA and ATTORNEY GENERAL
OF QUEBEC**

RESPONDENTS
(Respondent)

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SERVICES SOCIETY**

INTERVENERS

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

AND BETWEEN:

GARRETT ECKSTEIN

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

**COLOUR OF POVERTY – COLOUR OF CHANGE, INCOME SECURITY
ADVOCACY CENTRE**

INTERVENERS

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

AND BETWEEN:

DANIEL LAROCQUE

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-and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA and ATTORNEY GENERAL
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RESPONDENT
(Respondent)

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ONTARIO, COLOUR OF POVERTY – COLOUR OF CHANGE, INCOME SECURITY
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INTERVENERS

AND BETWEEN:

EDWARD TINKER, KELLY JUDGE, MICHAEL BONDOC and WESLEY MEAD

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS	1
A. Overview	1
B. Statement of Facts	1
PART II – COALITION’S POSITION ON THE ISSUES	2
PART III – STATEMENT OF ARGUMENT	2
A. Equality principles should inform the analysis of the constitutionality of the mandatory victim surcharge	2
B. The mandatory victim surcharge perpetuates inequality	3
C. The impact of the mandatory surcharge on historically disadvantaged groups violates section 12 of the <i>Charter</i>	7
D. The mandatory victim surcharge violates section 7 of the <i>Charter</i>	9
(i) The mandatory victim surcharge deprives people from historically disadvantaged groups living in poverty of their rights to liberty and/or security of the person	9
(ii) The mandatory victim surcharge is contrary to the principles of fundamental justice because it is grossly disproportionate	10
E. The mandatory victim surcharge is not saved by section 1 of the <i>Charter</i>	12
PART IV: COSTS	12
PART V – ORDER SOUGHT	12
PART VI – TABLE OF AUTHORITIES	13

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Colour of Poverty – Colour of Change and the Income Security Advocacy Centre (“the Coalition”) intervene in these appeals in order to bring the perspective of low-income racialized communities and other equality-seeking groups to the question of the constitutionality of the mandatory victim surcharge.

2. Equality principles can and should inform the analysis of sections 12 and 7 of the *Charter*. Historically disadvantaged communities are both more likely to be living in poverty and to be involved with the criminal justice system. As a result, those who are least able to pay the surcharge are also most likely to be subject to it. For those living in poverty, payment requires sacrifices to an already desperately low standard of living. To not pay risks arrest, imprisonment or an indeterminate sentence. As a result, the mandatory victim surcharge has the effect of perpetuating inequality within the criminal justice system on the one hand, while reinforcing the inequality of poverty on the other.

3. The unequal impact of the surcharge upon historically disadvantaged groups “outrages standards of decency” and is therefore contrary to the *Charter*’s section 12 guarantee of freedom from cruel and usual treatment.¹ The mandatory surcharge also violates the rights guaranteed in section 7 of the *Charter*. Its effect of depriving historically disadvantaged groups of their liberty and security of the person is “out of sync” with the law’s purpose of accountability to victims and is therefore grossly disproportionate.

4. By imposing an obligation to pay on those who cannot, the law perpetuates inequality while failing to achieve its stated goal of accountability to victims. The mandatory victim surcharge is therefore not saved by section 1 of the *Charter*.

B. Statement of Facts

5. The Coalition takes no position on the facts.

¹ *Canadian Charter of Rights and Freedoms*, Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11, [s. 12](#) [the “*Charter*”].

PART II – COALITION’S POSITION ON THE ISSUES

6. The mandatory victim surcharge violates sections 12 and 7 of the *Charter*. The law is not saved by section 1 of the *Charter*.

PART III – STATEMENT OF ARGUMENT

A. Equality principles should inform the analysis of the constitutionality of the mandatory victim surcharge

7. The mandatory victim surcharge was ushered into law at the tail end of an era that saw the rapid expansion of mandatory minimum sentences across North America. The resulting over-incarceration of racialized communities in the United States is well known, and many commentators have raised concerns about a similar phenomenon in Canada. Because those in a position of social disadvantage are more likely to come into contact with the criminal justice system, mandatory minimum sentences have a disproportionate impact based on race, Indigenous identity, gender, class, immigration status and disability.²

8. The criminal justice system can and must prevent systemic inequality from tainting the sentencing process. Parliament has taken one step towards this goal with a specific sentencing provision that directs sentencing judges to pay particular attention to the circumstances of Indigenous offenders.³ But this option is not available for mandatory sentences, nor is it available to offenders from other racialized communities.

9. In the absence of other legislative steps to address systemic inequality in the sentencing process, the *Charter* guarantees of freedom from cruel and unusual punishment (section 12) and the rights to life, liberty and security of the person (section 7) play a critical role.

² Elizabeth Sheehy (2010), “The Discriminatory Effects of Bill C-15’s Mandatory Minimum Sentences”, 70 C.R. (6th) 302 at pp. 50-51, 53-56; Faizal R. Mirza (2001), “[Mandatory Minimum Prison Sentencing and Systemic Racism](#)”, *Osgoode Hall Law Journal* Vol. 39(2-3) 491 at 499-500, 503-504, 512; Wendy Chan & Dorothy Chunn (2014), *Racialization, Crime, and Criminal Justice in Canada* (Toronto: University of Toronto Press) at pp. xx-xiv, 14, 89-90, 150-151.

³ *Criminal Code*, RSC 1985, c C-46, at [s. 718.2\(e\)](#); *R. v. Ipeelee*, [2012 SCC 13](#) at paras. 64, 69-70.

10. These two *Charter* rights must be informed by section 15's equality principles.⁴ The equality guarantee applies to, strengthens, and supports all other rights guaranteed by the *Charter*.⁵ Substantive *Charter* rights should be interpreted in a manner that is consistent with equality principles in order to ensure that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of section 15 of the *Charter*.⁶

11. Equality principles have been used in other criminal law contexts, including the interpretation of the mental element for sexual assault,⁷ challenges in jury selection,⁸ and criminal defences such as necessity,⁹ provocation¹⁰ and self-defence.¹¹ These principles can shine a light on the harmful impacts of the mandatory victim surcharge.

B. The mandatory victim surcharge perpetuates inequality

12. The mandatory victim surcharge was established in a context in which discrimination and racism contribute to both economic disadvantage and over-representation in the criminal justice system. Poverty is experienced more frequently by women, Indigenous communities, communities of colour and persons with disabilities.¹² All of these groups are protected by the equality provisions in the *Charter*.¹³

⁴ *Charter*, s. 15(1).

⁵ *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143 at p. 185.

⁶ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46 at paras. 112, 115; *R. v. Williams*, [1998] 1 SCR 1128 at paras. 48-49.

⁷ *R. v. Park*, 1995 CanLII 104 at para. 51.

⁸ *R. v. Williams*, [1998] 1 SCR 1128 at paras. 48-49.

⁹ *R. v. Latimer*, 2001 SCC 1 (CanLII) at para. 34.

¹⁰ *R. v. Tran*, 2010 SCC 58 (CanLII) at para. 34.

¹¹ *R. v. Lavallée*, [1990] 1 S.C.R. 852 at pp. 874-877, 880, 883-884, 889-891.

¹² Wendy Chan & Dorothy Chunn (2014), *Racialization, Crime, and Criminal Justice in Canada* (Toronto: University of Toronto Press) at p. 150; Sheila Block, Grace-Edward Galabuzi, and Alexandra Weiss (2014), "[The Colour Coded Labour Market By the Numbers: A National Household Survey Analysis](#)" (Toronto: Wellesley Institute); Canadian Human Rights Commission (2013), "[Report on the Equality Rights of Aboriginal People](#)" (Ottawa: Canadian Human Rights Commission); Oxfam and the Canadian Centre for Policy Alternatives (2016), "[Making Women Count: The Unequal Economics of Women's Work](#)" (Toronto: Oxfam).

¹³ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 113; *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 CanLII 3176 (NS CA) at paras. 31-34; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

13. Indigenous communities and communities of colour are also over-represented in the criminal justice system,¹⁴ in part because racial profiling brings racialized communities into more frequent contact with police.¹⁵ The over-representation of disadvantaged groups in the criminal justice system is interconnected with over-representation in poverty. As observed in *Ipeelee*, socioeconomic factors such as employment status and level of education may appear to be neutral on their face, but conceal an “extremely strong bias in the sentencing process.” When the social, political and economic aspects of our society place Indigenous people and communities of colour disproportionately in the ranks of the poor, they will be sentenced to jail more frequently: “This is systemic discrimination.”¹⁶

14. The over-representation of poor and marginalized groups in the criminal justice system is reflected in the stories of the Appellants and of the other litigants who have challenged the mandatory surcharge in cases across Canada.¹⁷ They have lives of extreme deprivation. They have histories of addiction, homelessness, mental illness and abuse. They have had repeated involvement with the criminal justice system. They rely on income from social programs for persons with disabilities or have no source of income at all. They get by with very little – from

at para. 56; *R. v. Ipeelee*, [2012 SCC 13](#) at paras. 60-61, 67; *Withler v. Canada (Attorney General)*, [2011 SCC 12](#) at para. 58.

¹⁴ *R. v. Ipeelee*, [2012 SCC 13 \(CanLII\)](#) at paras. 57-63; *R. v. Golden*, [2001 SCC 83 \(CanLII\)](#) at para. 83.

¹⁵ Elizabeth Sheehy (2010), “The Discriminatory Effects of Bill C-15’s Mandatory Minimum Sentences”, 70 C.R. (6th) 302 at p. 51; Faizal R. Mirza (2001), “[Mandatory Minimum Prison Sentencing and Systemic Racism](#)”, *Osgoode Hall Law Journal* Vol. 39(2-3) 491 at pp. 494-500.

¹⁶ *R. v. Ipeelee*, [2012 SCC 13](#) at para. 67.

¹⁷ *R. v. Tinker*, [2017 ONCA 552](#) at paras. 17-25, 34-38; *Boudreault v. R.*, [2016 QCCA 1907](#) at paras. 13, 20-21, 87, 94, 107-109, 220-221; *R. v. Michael*, [2014 ONCJ 360](#) at para. 42; *R. v. Flaro, Travis, Bodin, Ashton, Tiplady*, [2014 ONCJ 2](#) at para. 13; *R. v. Frail*, [2014 ONCJ 744](#) at para. 19; *R. v. Ramsay*, [2014] O.J. No. 2428 (C.J.) at para. 128; *R. v. Shaqu*, [2014] O.J. No. 2426 (C.J.) at para. 50; *R. v. Barinecutt*, [2015 BCPC 189](#) at paras. 32-33; *R. v. Reinke*, [2014 BCSC 1581](#) at para. 10; *R. v. Cloud*, [2014 QCCQ 464](#) at paras. 7-9; *R. v. Tizya*, [2013 YKTC 104](#) at para. 10; *R. v. Robillard*, [2015 ABPC 126](#) at para. 9; *R. v. Sack*, [2014 NSPC 107](#) at para. 5; *R. v. Stevenson*, [2015 BCPC 256](#) at para. 5-8; *R. v. Hussy*, [2015] N.J. No. 278 (C.J.) at paras. 12-15; *R. v. Radacina*, [2015 BCSC 2482](#) at paras. 11-13; *R. v. MacKinnon*, [2016 SKQB 64](#) at para. 10-12; *R. v. Williams*, 2017 NLTD(G) 45 at para. 30; *R. v. Madeley*, [2018 ONSC 391](#) at paras. 2, 39; *R. v. Fedele*, [2017 ONCA 554](#) at para. 3. Since the record does not include evidence respecting Mr. Eckstein’s income or employment, references in this factum to the financial means of the Appellants are with respect to the other Appellants.

\$0 to \$1,200 each month – and the mandatory victim surcharges imposed represent a significant portion of their income. For example, in Alex Boudreault’s case, the mandatory victim surcharge of \$1,400 represented 30% of his \$4,800 yearly income.¹⁸

15. The lens of equality highlights the severe impacts of the mandatory victim surcharge. These impacts flow from two features of the victim surcharge: first, it is mandatory, and second, the amount of the surcharge cannot take into account a person’s ability to pay.

16. While the amounts of the surcharge may seem small to those with financial means, payment would cause significant hardship to those living in poverty, particularly when they face convictions for multiple offences. For those living in deep poverty with no money to spare, payment requires sacrifices to an already desperately low standard of living and places them at further risk of homelessness, food insecurity and illness. It deepens their disadvantage and undermines whatever efforts they may make to escape poverty

17. Inability to pay the surcharge is the reality for almost any offender who relies upon social assistance. It is also the reality for those who have no income because they are imprisoned both before and after trial – a group that is disproportionately racialized, as racialized persons are more likely to serve pre-trial detention and to serve custodial sentences.¹⁹

18. Fine option programs are posed as an alternative for those who cannot pay. These programs allow offenders to work in the community to pay off criminal fines at an hourly rate.²⁰ However, fine option programs are not available in all provinces or to those who have barriers to working due to disability.²¹ Offenders who cannot work off the fine must either pay or bear the consequences of non-payment, including the risks of imprisonment and indeterminate sentences.

19. While section 734.7 of the *Criminal Code* is supposed to prevent courts from imprisoning

¹⁸ *Boudreault v. R.*, [2016 QCCA 1907](#) at paras. 13, 20-21, 87, 94, 107-109, 220-221.

¹⁹ David M. Tanovich (2008), “[The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System](#)” 40 S.C.L.R. (2d) 655 at 664; Elizabeth Sheehy (2010), “The Discriminatory Effects of Bill C-15’s Mandatory Minimum Sentences”, 70 C.R. (6th) 302 at pp. 54-56.

²⁰ *Boudreault v. R.*, [2016 QCCA 1907](#) at para. 38. In Québec, the rate starts at \$10 per hour for the first \$500 of debt and rises to \$20 for the remainder.

²¹ *Criminal Code*, RSC 1985, c C-46 at [s. 736\(1\)](#).

individuals who have a “reasonable excuse” for refusing to pay a fine,²² a number of sentencing judges have imposed jail time in default of payment, upon the request of offenders who knew that they would never be able to pay the mandatory surcharge.²³ In Alex Boudreault’s case, Justice Schragger of the Québec Court of Appeal suggested that imprisonment would be a suitable “alternative” to “the burden of an unpaid fine hanging over him.”²⁴

20. Because of the ways that structural racism and economic disadvantage intersect, the threat of jail affects some more than others: for example, fine default played a major role in the imprisonment of women, especially Indigenous women in the Prairie provinces.²⁵

21. Extensions of time are available to keep people who cannot pay out of prison, but they are not a solution to the hardships created by the surcharge. Rather, extensions of time simply create a different kind of hardship. Extensions of time mean longer sentences with no predictable end and the ongoing requirement for offenders to present themselves before a court to prove that they are still poor enough to escape incarceration. They may remain criminalized for the rest of their lives with no access to a record suspension.²⁶

22. Apart from the stigma of criminalization, a lack of access to record suspension creates serious barriers for poor people to find employment, reintegrate and improve their lives. The lingering criminal debt can only feed the already negative stereotypes linking criminality to specific disadvantaged groups, for example, on the basis of race or disability.²⁷

23. The consequences of the surcharge may in some cases be more severe than the sentence itself. In short, the mandatory victim surcharge exacerbates poor people’s stigmatization and social exclusion. These consequences engage the rights and freedoms guaranteed by section 12

²² *Criminal Code*, R.S.C., 1985, c. C-46, s. 734.7.

²³ *R. v. Bailey*, [2013 BCPC 326](#) at para. 6 (1 day); *R. v. Forsey*, [2014 ABPC 204](#) at para. 97 (1 day); *R. v. Tasker*, [2014 BCPC 223](#) at para. 6 (1 day); *R. v. Kaneza*, [2015 ABQB 658](#) at para. 60 (time as prescribed by law); *R. v. Schur*, [2015 BCSC 1406](#) at para. 88 (1 day); *R. v. MacKinnon*, [2016 SKQB 64](#) at para. 80 (6 days).

²⁴ *Boudreault v. R.*, [2016 QCCA 1907](#) at para. 225.

²⁵ *R. v. Wu*, [\[2003\] 3 S.C.R. 530](#) at paras. 34-35.

²⁶ *Criminal Records Act*, RSC 1985, c C-47, s. 4(1).

²⁷ *R. v. Williams*, [\[1998\] 1 S.C.R. 1128](#) at paras. 27-28; *R. v. Brown*, [2003 CanLII 52142 \(Ont. C.A.\)](#) at paras. 9, 94.

and 7 of the *Charter*.

C. The impact of the mandatory surcharge on historically disadvantaged groups violates section 12 of the *Charter*

24. Section 12 of the *Charter* is a critically important legal tool for assessing the legality of mandatory minimums because it provides the opportunity to address unequal impacts that reach the level of “cruel and unusual punishment.”

25. A sentence is grossly disproportionate contrary to section 12 of the *Charter* when it is “so excessive as to outrage standards of decency.”²⁸ Grossly disproportionate punishment includes sentences that go “far beyond what is necessary to protect the public, far beyond what is necessary to express moral condemnation of the offender, and far beyond what is necessary to discourage others from engaging in such conduct.”²⁹ In other words, the effects of the punishment grossly exceed the purpose of imposing punishment in the first place.

26. Thus, “cruel and unusual” punishment is intimately tied to community norms about what is a just or unjust response to criminal conduct. A law that requires a court to impose a punishment that has unnecessarily harsh impacts on historically disadvantaged groups without advancing a penal purpose is one that violates standards of decency. The mandatory victim surcharge does just that.

27. Here, the stated object of the *Increasing Offender’s Accountability to Victims Act* is to increase offenders’ accountability to victims of crime. It does so by requiring a contribution to the cost of victim services.³⁰ However, imposing a mandatory victim surcharge without permitting the sentencing judge to consider ability to pay does not increase accountability to victims, because it results in the surcharge being imposed on people who cannot, and may never, be able to pay.

28. As a result, the severe hardships that are experienced by those who cannot pay serve no

²⁸ *R. v. Lloyd*, [2016] S.C.J. No. 13 at para. 24.

²⁹ *R. v. Nur*, 2015 SCC 15 at para. 104.

³⁰ [Bill C-37, An Act to Amend the Criminal Code, 1st Sess. 41st Parl., 2013 \(alternative title: *Increasing Offender’s Accountability to Victims Act*\)](#).

purpose whatsoever. Instead, the actual effect of the law is to deepen the disadvantage suffered by those living in poverty.

29. Here lies the cruelty of this law. Systemic inequality within the Canadian criminal justice system and the Canadian economy means that members of Indigenous and racialized communities are more likely to be subject to the mandatory victim surcharge yet are less likely to have the ability to pay. They are doubly penalized. The mandatory scheme perpetuates racism within the criminal justice system on the one hand, while reinforcing the racialization of poverty on the other.

30. In contrast, record suspensions are privileges that offenders with financial means can take for granted. Their sentences will have an end point. They are not at risk of jail for failure to pay. Their sentences are wholly different in character from the experiences of those in poverty for reasons that are utterly unconnected to the underlying crimes.

31. The unequal impact of the mandatory victim surcharge upon historically disadvantaged groups living in poverty must outrage standards of decency.

32. A finding that the mandatory victim surcharge is unconstitutional would not doom the mandatory fines that are common in provincial and regulatory settings. These types of offences do not carry the same stigma as the criminal process. Nor would a finding of unconstitutionality doom fines that are specifically calibrated to particular offences.³¹ Each mandatory fine must be assessed in its own context. The mandatory victim surcharge is unique because it applies to every single *Criminal Code* offence and because the hardships it imposes on those living in poverty are disconnected from its objective. The *Charter* violation in this case is tied to the fact that the mandatory victim surcharge is entrenched in every criminal sentencing process, is not tailored to the particular offence, fails to achieve its stated purpose and perpetuates inequality.

33. Imposing the victim surcharge universally, irrespective of undue hardship stemming from an inability to pay, aggravates historical disadvantage. The mandatory victim surcharge punishes

³¹ See, for example, *R. v. Pham*, [2002 CanLII 41969 \(ON CA\)](#) at para. 19, in which the Court of Appeal for Ontario upheld an *Excise Act* fine of \$154,000 because there was a direct connection between the quantity of the illegal substance possessed and the size of the fine.

the poor as a group more harshly than the wealthy and deepens inequality in a manner that is not necessary to achieve the purpose of the law. It is therefore grossly disproportionate contrary to section 12 of the *Charter*.

D. The mandatory victim surcharge violates section 7 of the *Charter*

(i) The mandatory victim surcharge deprives people from historically disadvantaged groups living in poverty of their rights to liberty and/or security of the person

34. When the courts have no option but to impose victim surcharges upon those who cannot pay, these individuals are faced with three choices, each of which engages their rights to liberty or security of the person: sacrifice their already desperate standard of living in order to pay the surcharge, face possible incarceration by not paying, or face the threat of an indeterminate sentence and a life of criminalization by seeking an extension of time.

35. First, with the threat of incarceration looming as a consequence of non-payment, the mandatory victim surcharge compels those living in deep poverty to sacrifice their health and well-being in order to pay the mandatory surcharge. Given their low incomes, every dollar is crucial to their survival.

36. The repercussions of payment by impoverished persons have the effect of depriving them of security of the person. Security of the person is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering. A law can be said to be the "cause" of the deprivation where there is a "sufficient causal connection." This standard does not require the impugned law to be the only or the dominant cause of the prejudice. It is satisfied by a "reasonable inference, drawn on a balance of probabilities."³²

37. Second, for those who fail to comply with the order to pay the surcharge, their very liberty is under threat. Non-payment places them at risk of detention in order to be brought before a court to explain their default.³³ And, as argued above, imprisonment for non-payment is

³² *Carter v. Canada (Attorney General)*, [2015 SCC 5](#) at para. 64; *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) at paras. 75-76.

³³ *R. v. Tinker*, [2017 ONCA 552](#) at para. 70.

a real possibility. As a result, the mandatory victim surcharge contributes to the over-incarceration of historically disadvantaged groups, such as racialized and Indigenous communities living in poverty.

38. Lastly, extensions of time to pay the fines do not alleviate these deprivations. Rather, they lead to another deprivation of security of the person: indeterminate sentences. There are those who will likely never be able to pay the fine and therefore remain criminalized for the remainder of their lives. There are both material and psychological repercussions of this ongoing stigmatization. It creates serious barriers for deeply poor people to obtain a record suspension, find employment, and reintegrate with society. It reinforces stereotypes of criminality for racialized offenders and those with mental illness who are unable to finish their sentences for the sole reason that they are poor.

(ii) The mandatory victim surcharge is contrary to the principles of fundamental justice because it is grossly disproportionate

39. A law is grossly disproportionate, and therefore contrary to the principles of fundamental justice, where its effects on life, liberty or security of the person are “totally out of sync with the objective of the measure” and “outside the norms accepted in our free and democratic society.”³⁴

40. Equality considerations can and should inform the analysis of whether a particular law is grossly disproportionate. For example, in *JG*, an impoverished mother argued that it was a violation of her section 7 rights for the state to deny her legal representation when she was at risk of losing custody of her children to a child protection agency. She relied upon social assistance for her survival and could not afford a lawyer. The Honourable Justice L’Heureux-Dubé expressed concern about the disproportionate impact of denying legal representation to parents from disadvantaged groups living in poverty:

Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women’s perspectives. As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other

³⁴ *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) at paras. 120-122.

disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled.³⁵

41. As in *JG*, the mandatory victim surcharge visits its most negative consequences upon those who are too poor to pay the surcharge, and therefore necessarily disproportionately affects protected groups who are overrepresented in poverty.

42. By subjecting some offenders to harsher punishment for their crimes simply because they are poor, the mandatory surcharge deepens inequality. Those who can never pay – a group that already faces inequality due to their Indigenous identity, race, gender, and/or disability – are trapped in the criminal justice system for the rest of their lives.

43. These harms are “out of sync” with the objective of the surcharge: accountability to victims by making payment towards the cost of victim services. These harms are not necessary in order for the purposes of the mandatory victim surcharge to be achieved.

44. Indeed, the mandatory nature of the victim surcharge undermines its own objective, because it requires courts to impose the surcharge on those who cannot and may never be able to pay, and who are therefore not held “accountable” according to the law’s stated purpose. If courts had the option of considering an offender’s ability to pay, they could set the surcharge at an amount low enough that the offender could pay while also high enough to ensure that the goals of accountability are met.

45. Thus, the mandatory victim surcharge subjects impoverished individuals to deprivations of their liberty and security person for no purpose whatsoever. Instead, it contributes to increased inequality and poverty for *Charter*-protected groups in circumstances in which the desired accountability to victims cannot be achieved. These are the hallmarks of a grossly disproportionate law.

³⁵ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paras. 113-114.

E. The mandatory victim surcharge is not saved by section 1 of the *Charter*

46. It is a rare law that, having been found to be grossly disproportionate, will be saved by section 1. The mandatory victim surcharge is not one of them. The mandatory victim surcharge does not meet the section 1 requirements established in *R. v. Oakes*: a sufficiently important objective; a rational connection; minimal impairment and proportional effects.³⁶

47. Assuming that accountability to victims is a “sufficiently important objective,” the mandatory victim surcharge fails the *Oakes* test in three ways. First, imposing a victim surcharge on people who cannot pay is not rationally connected to the objective of accountability to victims. Second, the objective could easily be achieved in a minimally impairing way: by giving sentencing judges’ discretion over the amount of the surcharge so that it could be appropriately tailored to an offenders’ ability to pay.

48. Finally, the effects of the surcharge are not proportional to its impact. Accountability to victims should not be bought at the expense of increasing systemic inequalities within the criminal justice system.

PART IV: COSTS

49. The Coalition does not seek costs and asks that no costs be awarded against its members.

PART V – ORDER SOUGHT

50. The Coalition has been granted permission by this Honourable Court to present oral argument and therefore does not seek an order from this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 28th day of March 2018



Jackie Esmonde, Avvy Go, Shalini Konanur, Daniel Rohde: Counsel for the Interveners, Colour of Poverty – Colour of Change and Income Security Advocacy Centre

³⁶ *R. v. Oakes*, [1986 CanLII 46](#) (SCC) at para. 70.

PART VI – TABLE OF AUTHORITIES

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Case	Paragraph(s)
1. <i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72 .	36, 39
2. <i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5 .	36
3. <i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624 .	12
4. <i>Law Society of British Columbia v. Andrews</i> , [1989] 1 S.C.R. 143 .	10
5. <i>New Brunswick (Minister of Health and Community Services) v. G. (J.)</i> , [1999] 3 S.C.R. 46 .	10, 12, 40
6. <i>R. v. Bailey</i> , 2013 BCPC 326	19
7. <i>R. v. Barinecutt</i> , 2015 BCPC 189	14
8. <i>Boudreault v. R.</i> , 2016 QCCA 1907(CanLII)	14, 18, 19
9. <i>R v. Brown</i> , 2003 CanLII 52142 (Ont. C.A.)	22
10. <i>R. v. Cloud</i> , 2014 QCCQ 464	14
11. <i>R. v. Fedele</i> , 2017 ONCA 554	14
12. <i>R. v. Flaro, Travis, Bodin, Ashton, Tiplady</i> , 2014 ONCJ 2	14
13. <i>R. v. Forsey</i> , 2014 ABPC 204	19
14. <i>R. v. Frail</i> , 2014 ONCJ 744	14
15. <i>R. v. Golden</i> , 2001 SCC 83 (CanLII)	13
16. <i>R. v. Hussy</i> , [2015] N.J. No. 278 (C.J.).	14
17. <i>R. v. Ipeelee</i> , 2012 SCC 13	8, 12, 13
18. <i>R. v. Kaneza</i> , 2015 ABQB 658	19
19. <i>R. v. Latimer</i> , 2001 SCC 1 (CanLII)	11
20. <i>R. v. Lavallée</i> , [1990] 1 S.C.R. 852	11
21. <i>R. v. Lloyd</i> , [2016] S.C.J. No. 13	25
22. <i>R. v. MacKinnon</i> , 2016 SKQB 64	14, 19
23. <i>R. v. Madeley</i> , 2018 ONSC 391	14
24. <i>R. v. Michael</i> , 2014 ONCJ 360	14
25. <i>R. v. Nur</i> , 2015 SCC 15	25
26. <i>R. v. Oakes</i> , 1986 CanLII 46 (SCC)	46
27. <i>R. v. Park</i> , 1995 CanLII 104	11
28. <i>R. v. Pham</i> , 2002 CanLII 41969 (ON CA)	32
29. <i>R. v. Radacina</i> , 2015 BCSC 2482	14
30. <i>R. v. Ramsay</i> , [2014] O.J. No. 2428 (C.J.)	14
31. <i>R. v. Reinke</i> , 2014 BCSC 1581	14
32. <i>R. v. Robillard</i> , 2015 ABPC 126	14
33. <i>R. v. Sack</i> , 2014 NSPC 107	14
34. <i>R. v. Schur</i> , 2015 BCSC 1406	19
35. <i>R. v. Shaqu</i> , [2014] O.J. No. 2426 (C.J.)	14
36. <i>R. v. Stevenson</i> , 2015 BCPC 256	14
37. <i>R. v. Tasker</i> , 2014 BCPC 223	23
38. <i>R. v. Tinker</i> , 2017 ONCA 552	14, 37

39.	<i>R. v. Tizya</i> , 2013 YKTC 104	14
40.	<i>R. v. Tran</i> , 2010 SCC 58 (CanLII)	11
41.	<i>R. v. Williams</i> , [1998] 1 S.C.R. 1128	10, 11, 22
42.	<i>R. v. Williams</i> , 2017 NLTD(G) 45	14
43.	<i>R. v. Wu</i> , 2003 SCC 73	20
44.	<i>Sparks v. Dartmouth/Halifax County Regional Housing Authority</i> , 1993 CanLII 3176 (NS CA)	12
45.	<i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12 .	12

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LEGISLATION

Legislation	Paragraph(s)
53. Bill C-37, An Act to Amend the Criminal Code, 1st Sess. 41st Parl., 2013 (alternative title: Increasing Offender’s Accountability to Victims Act)	27
54. <i>Canadian Charter of Rights and Freedoms</i> , Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 1 , s. 12 , s. 15	3, 4, 6, 9, 10, 13, 23, 24, 25, 33
55. <i>Criminal Code</i> , RSC 1985, c C-46, s. 718.2(e) , s. 734.7 , s. 736(1)	8, 18, 19
56. <i>Criminal Records Act</i> , RSC 1985, c C-47, s. 4(1)	21