

CITATION: *R. v. Larocque*, 2015 ONSC 5407
COURT FILE NO.: FC-13-1346
DATE: 2015/09/29

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

– and –

DANIEL LAROCQUE

Respondent

)
)
)
) Mr. Luc Boucher and Mr. Tim Radcliffe, ,
) Counsel for the Appellant
) (Public Prosecution Service of Canada)
)

)
) Ms. Julie Bourgeois and Mr. Dallas Mack,
) Crown Attorneys
) (Office of the Crown Attorney for the
) Counties of Prescott and Russell)
)

)
) Mr. Yves Jubinville,
) Counsel for the Respondent
)
)
)
)
)
)
)

) **HEARD:** March 30, 2015

OFFICIAL ENGLISH TRANSLATION

On appeal from the decision of Justice Jean Legault of the Ontario Court of Justice dated September 4th, 2014.

REASONS FOR DECISION

LACELLE, J.

[1] This is an appeal from the decision of Legault J. dated September 4th, 2014, finding section 737(1) of the *Criminal Code*, RSC 1985, c C-46, unconstitutional and of no force and effect.

Facts and Background of the Court Proceedings

[2] Mr. Larocque pleaded guilty to seven counts which included the offences of mischief (2 counts), assault (3 counts), uttering threats (1 count), and possession of narcotics (1 count). The Crown had proceeded summarily on all charges. During the sentencing hearing, Mr. Larocque raised the constitutional issue.

[3] The trial judge accepted a joint submission on sentence which resulted in Mr. Larocque being credited for his pre-trial custody and receiving a 6-month conditional sentence followed by probation for 18 months. A five year prohibition order under section 110 of the *Code* was also imposed. In addition, by virtue of the operation of section 737(2) of the *Code*, the trial judge found that a \$700 victim surcharge (\$100 for each of the 7 charges) was to be imposed. Mr. Larocque challenged the constitutionality of section 737(1), which mandates the imposition of the victim surcharge, arguing that it violated his rights under sections 7, 12 and 15 of the *Charter of Rights and Freedoms*. No order was made with respect to the victim surcharge pending the hearing of the constitutional challenge.

The evidence on the constitutional application

[4] The evidence on the *Charter* application presented by Mr. Larocque consisted of several documents, including an affidavit from Mr. Larocque, letters confirming his benefits under Ontario Works and the Ontario Disability Support Program, and two psychiatric assessments completed for the purpose of assessing his criminal responsibility for various offences. No *viva voce* evidence was called.

[5] As summarized by the trial judge at paras. 28-35 of his decision on the *Charter* application, the evidence on the application indicated that Mr. Larocque was 22 years old, impecunious, and that he suffered from addiction and mental health problems. He had been placed with the Children's Aid Society as a child because his mother could not control him. He had a Grade 9 education. He was unemployed, and receiving a disability pension. After lodging and food, he had \$136 per month for his personal expenses, or about \$4.50 per day (while this finding was made by the trial judge, Mr. Larocque's affidavit indicates a total of \$71 per month was available to him for personal expenses). He used this money for dental supplies, deodorant and cigarettes. The cigarettes were used to assist him in controlling his addiction to other substances. Mr. Larocque stated in his affidavit that he was incapable of paying the victim surcharge, and that no extension of the time to pay it would allow him to discharge this financial penalty.

[6] The federal Crown also filed documentary evidence on the hearing. This evidence consisted of a reply from the Honourable Peter MacKay, the Minister of Justice and Attorney General of Canada, to an inquiry directed to Mr. MacKay's ministry from Mr. Irwin Cotler dated December 6, 2013, and reports and other statistical material from the provinces of New Brunswick, the Northwest Territories and Saskatchewan dealing with the victim surcharge.

Section 737 of the *Criminal Code*

[7] The victim surcharge regime was amended on October 24th, 2013. Section 737 of the *Criminal Code* now reads as follows:

Victim surcharge

- (1) An offender who is convicted, or discharged under section 730, of an offence under this Act or *the Controlled Drugs and Substances Act* shall pay a victim surcharge, in addition to any other punishment imposed on the offender.

Amount of surcharge

- (2) Subject to subsection (3), the amount of the victim surcharge in respect of an offence is:
 - a) 30 per cent of any fine that is imposed on the offender for the offence; or
 - b) if no fine is imposed on the offender for the offence,
 - i) \$100 in the case of an offence punishable by summary conviction, and
 - ii) \$200 in the case of an offence punishable by indictment.

Increase in surcharge

- (3) The court may order an offender to pay a victim surcharge in an amount exceeding that set out in subsection (2) if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount.

Time for payment

- (4) The victim surcharge imposed in respect of an offence is payable within the time established by the lieutenant governor in council of the province in which the surcharge is imposed. If no time has been so established, the surcharge is payable within a reasonable time after its imposition.

Amounts applied to aid victims

- (7) A victim surcharge imposed under subsection (1) shall be applied 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.

Notice

- (8) The court shall cause to be given to the offender a written notice setting out
 - a) the amount of the victim surcharge;
 - b) the manner in which the victim surcharge is to be paid;
 - c) the time by which the victim surcharge must be paid;
 and

- d) the procedure for applying for a change in any terms referred to in paragraphs (b) and (c) in accordance with section 734.3.

Enforcement

- (9) Subsections 734(3) to (7) and sections 734.3, 734.5, 734.7, 734.8 and 736 apply, with any modifications that the circumstances require, in respect of a victim surcharge imposed under subsection (1) and, in particular,
 - a) a reference in any of those provisions to “fine”, other than in subsection 734.8(5), must be read as if it were a reference to “victim surcharge”; and
 - b) the notice provided under subsection (8) is deemed to be an order made under section 734.1.

[8] As described by the trial judge in paras. 4-6 of his decision, the victim surcharge regime was amended following the government’s consideration of various statistical studies conducted regarding the victim surcharge:

These studies show that there was a low rate of instances in which the victim surcharge was imposed as well as an absence of documentation indicating that the offender had met his onus of establishing undue hardship.

Through these amendments, the exemption due to undue hardship, previously under subsection 737(5) of the *Criminal Code*, was repealed. Imposing the victim surcharge is now mandatory.

The victim surcharge was increased to 30% of the imposed fine when there was no fine imposed, to \$100 for a summary conviction offence, and to \$200 for an indictable offence.

[TRANSLATION]

The trial judge’s decision

[9] The trial judge had the benefit of submissions from counsel for the respondent, counsel for the Public Prosecution Service of Canada (hereinafter “PPSC” or federal Crown), who are counsel for the Attorney General of Canada, and from counsel for the Attorney General of Ontario (hereinafter “AGO” or provincial Crown). The federal and provincial Crowns took the position that the victim surcharge did not violate any section of the *Charter*. The PPSC submitted that while the victim surcharge constituted punishment, it was not cruel or unusual. The AGO submitted that the victim surcharge was an ancillary order, and not punishment. As a result, the AGO submitted that the victim surcharge could not violate section 12 of the *Charter*, and the constitutional analysis must be done pursuant to sections 7 and 15.

[10] In accordance with the federal Crown's submissions, the trial judge arrived at the conclusion that the victim surcharge under section 737 of the *Criminal Code* constitutes punishment as defined in *R. v. Rodgers*, [2006] S.C.J. No. 15. Having found that the victim surcharge did constitute punishment, the Court found that a constitutional analysis was required pursuant to the principles of section 12 of the *Charter*, and not sections 7 or 15, as argued by the AGO.

[11] The court found that the victim surcharge is a grossly disproportionate punishment following an analysis in accordance with the test laid down by the Court of Appeal for Ontario in *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401, since the Supreme Court's decision in that case had not yet been handed down. The Court dismissed the arguments of the PPSC and the AGO, and concluded that the use of nominal fines to avoid imposing the victim surcharge would frustrate the laudable purpose of the provision. The court held that a reasonable individual would come to the conclusion that imposing the victim surcharge on the respondent would be excessive to the point of being incompatible with human dignity. Further, the court noted that with regard to the "reasonable hypothetical" approach, the facts in the decision of *R. v. Michael*, 2014 ONCJ 360, 121 O.R. (3d) 244 constituted a reasonable hypothetical, and that the victim surcharge was deficient under that approach as well. Consequently, the court held that the victim surcharge violates section 12 of the *Charter*.

[12] With respect to the question of the appropriate remedy for this constitutional violation, the court concluded that the only remedy available was an order holding that subsection 737(1) of the *Criminal Code* is of no force and effect under section 52 of the *Charter*.

Positions of the parties on appeal

[13] The PPSC argues that the Court erred in law in deciding that the victim surcharge violates section 12 of the *Charter*. It says that even though the trial judge correctly found that the victim surcharge does constitute a punishment, he erred in his analysis under on section 12 of the *Charter* by finding a violation of the *Charter*, by misapplying the stringent test set by the Supreme Court of Canada for violations of section 12 of the *Charter*, and by refusing to adopt the nominal fine approach. The PPSC further submits that if the victim surcharge violates section 12 of the *Charter*, the provision is a reasonable limit on that right, and demonstrably justified in a free and democratic society. Finally, the PPSC submits that the judge erred in holding that subsection 737(1) of the *Criminal Code* is of no force and effect since the jurisdiction to grant declaratory relief is a power reserved to courts of inherent jurisdiction.

[14] The AGO argues that the judge erred in finding that the victim surcharge constitutes punishment, and therefore incorrectly considered its constitutional validity under section 12 of the *Charter*. The AGO also submits that the trial judge committed several errors in his analysis pursuant to section 12 of the *Charter* and in finding that the provision could not be upheld by application of section 1 of the *Charter*. The AGO, like the PPSC, argues that the power of a provincial court to make a finding of unconstitutionality is limited, and that the judge erred in holding that the only remedy for the *Charter* violation was an order holding that subsection 737(1) of the *Criminal Code* was of no force and effect pursuant to section 52 of the *Charter*.

[15] The respondent argues that the trial judge did not commit any error in law in his analysis of the nature of the victim surcharge, nor in his analysis of its cruel and unusual character. The respondent takes the position that the victim surcharge constitutes punishment. Even if the victim surcharge does not constitute punishment, the respondent takes the position that it is “treatment”, and the test remains the same when considering “treatment” under section 12 of the *Charter*. The respondent argues that if this court concludes that the trial judge erred in his analysis under section 12 of the *Charter*, it must conduct a new analysis pursuant to sections 7 and 15 of the *Charter*, as these were raised and argued by the respondent in his application before the trial judge. The respondent submits that this court should dismiss the appeal, confirm that subsection 737(1) constitutes cruel and unusual punishment, and find the provision to be unconstitutional.

Issue #1: Did the trial judge err in finding that the victim surcharge is “punishment” within the meaning of section 12 of the *Charter*?

[16] Section 12 of the *Charter* provides as follows:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[17] Accordingly, the first issue in the analysis of the constitutionality of the victim surcharge pursuant to section 12 of the *Charter* is determining whether it is a “punishment” or “treatment” within the meaning of the section.

[18] The PPSC and the respondent agree that the victim surcharge constitutes punishment, and that the judge properly qualified it as such. According to the AGO, the victim surcharge does not constitute punishment according to the criteria set out in *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392 and *Rodgers*. The AGO also argues that the application of the principles of statutory construction support the conclusion that the victim surcharge does not constitute punishment. Consequently, the AGO maintains that the trial judge erred in finding that the victim surcharge constitutes “punishment” within the meaning of section 12 of the *Charter*.

The Relevant Test

[19] The Supreme Court of Canada considered the meaning of the term “punishment” in *Rodgers*. While the issue considered by the Supreme Court in *Rodgers* was the meaning of the word “punishment” in the context of section 11 of the *Charter*, at paras. 62-63, the court established a general rule for determining whether a consequence of conviction constitutes “punishment”:

In its ordinary sense, “punishment” refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence.

...

This does not mean, however, that “punishment” pursuant to sections 11(h) and 11(i) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether

that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences constitutes a punishment. *As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing.* [emphasis added]

[20] More recently, the term “punishment” in section 11 of the *Charter* was again considered by the Supreme Court in *Whaling*. The trial judge did not have the benefit of this decision, which was released after the judgment in this case. The issue in *Whaling* was whether the retrospective application of the repeal of early parole provisions constituted a “punishment”, thereby infringing section 11(h) of the *Charter*. In *Whaling*, the Court considered its previous jurisprudence in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 and *Rodgers*. It noted that the *Rodgers* test expanded on the *Wigglesworth* approach because “punishment” for the purposes of section 11(h) could be something other than the “true penal consequences” of imprisonment or a heavy fine that had been identified as paradigmatic forms of punishment in *Wigglesworth*. The Court found that even the more expansive approach in *Rodgers* was ill-fit to the circumstances it was considering, and was, in that context, “overly formalistic.” It held at para. 52 that

[t]he problem is that the *Rodgers* test does not assist in identifying situations in which, from a functional rather than a formalistic perspective, the harshness of punishment has been increased. The *Rodgers* test was designed for a different purpose, namely to determine whether a discrete sanction – one that does not modify the original sanction – has the characteristic of a criminal sanction, and thus constitutes “punishment.”

The Court ultimately arrived at a new approach to address issues involving retrospective legislative action. The dominant consideration in those cases will be the extent to which an offender’s settled expectation of liberty has been thwarted by retrospective legislative action, as it is the frustration of an expectation of liberty that constitutes punishment.

[21] In reviewing the jurisprudence, I can see no reason why the approach to the term “punishment” in section 11 of the *Charter* would differ from the approach pursuant to section 12 in the context of the argument here. I find the direction in *Rodgers* applicable to the issue before the trial judge, and that the analysis of the issue before him pursuant to that test was correct. Indeed, all of the parties agree the *Rodgers* test is applicable.

[22] I also find the development of the jurisprudence instructive. In the very recent case of *Whaling*, the Court affirms an approach that eschews formalism, and focuses on the impact of

the legislative change on the offender as the basis for determining whether the definition of “punishment” is met. This functional approach is well-suited to the issue in this case.

The trial judge’s application of the *Rodgers* test to the facts of this case

[23] As indicated above, the trial judge found that the victim surcharge constitutes punishment as defined in *Rodgers*. In its pleadings, the AGO effectively summarized the judge’s findings in support of this conclusion. The trial judge concluded that:

- the victim surcharge is a fine, and fines are a paradigmatic form of punishment;
- the victim surcharge constitutes punishment as defined in *Rodgers*;
- the victim surcharge is compatible with the sentencing principles set out in section 718 (b), (e) and (f) and signals the intention of Parliament to apply these principles;
 - (b) to deter the offender and other persons from committing offences;
 - (e) to provide reparations for harm done to victims or to the community;
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community;
- the comments of Parliament support the position that the victim surcharge constitutes punishment;
- the French version of the victim surcharge supports the position that it constitutes punishment.

[24] With regard to the consistency of the victim surcharge with the objectives of sentencing, the court found in para. 11 that the victim surcharge targets

- (1) deterrence, because it is punitive like a fine, thereby imposing a financial penalty and depriving the offender this sum of money;
- (2) rehabilitation, which promotes a sense of responsibility in offenders, and acknowledgement of the harm done to victims;
- (3) restitution, because the money collected via the victim surcharge is distributed to assist victims of criminal offences.

[25] In the end, the critical finding made by the trial judge was that the victim surcharge constitutes punishment within the meaning of the *Rodgers* test. I agree. In my view, the victim surcharge fits within the *Rodgers* test as to what constitutes “punishment.”

[26] With respect to the first branch of the test, the victim surcharge can be described as “part of the arsenal of sanctions” to which an accused may be liable in respect of a particular offence. It imposes a financial penalty on an accused person. Whether it is understood as a fine within the meaning of section 716 of the *Criminal Code* or not, the effect on the accused person is largely the same. He or she is required to pay a sum of money to the state.

[27] With respect to the second branch of the test, whether the sanction is one imposed in furtherance of the purpose and principles of sentencing, I agree with the trial judge that it is. The victim surcharge addresses the issue of restitution to victims in a broad sense. I agree that the victim surcharge is a mandatory penalty whose primary objective is restitution, since according to section 737(7), the money collected is used to provide assistance to victims of offences.

[28] I further agree with the trial judge that the victim surcharge is also capable of addressing the principles of denunciation and rehabilitation. I agree that subsection 737(1) falls within the sentencing principles set out in section 718 of the *Criminal Code*, particularly paragraphs 718(e) and (f). As argued by the respondent, even the title of the bill, *Increasing Offenders’ Accountability for Victims Act*, is worded according to the specific language of subsection 718(f) of the *Criminal Code* – its main objective targets the principle described in subsection 718(f).

[29] The AGO argues that the victim surcharge is not part of the “arsenal of sanctions to which an accused may be liable upon conviction” because it is a mandatory order. I do not find that the mandatory nature of the surcharge precludes a finding that it is a punishment within the meaning of the *Rodgers* test. I do not take Justice Charron’s language in formulating the test in *Rodgers*, and in particular her use of the word “may” in the phrase “part of the arsenal of sanctions to which an accused *may* be liable in respect of a particular offence” to mean that only discretionary orders may be sanctions. Justice Charron referenced at para. 63 other types of orders that may be made upon conviction, such as orders for forfeiture, and various prohibitions, which might in a later case be assessed as “punishments” within the meaning of section 12. She expressly left open the possibility that these orders might constitute “punishments.” Given that in a number of circumstances, upon conviction, various prohibition and forfeiture orders are a mandatory part of the sentence, it seems to me that the *Rodgers* test may be met even by mandatory sanctions. I also agree with the respondent’s submission that if this logic is to be accepted, it would be tantamount to saying that the mandatory prohibition against driving a motor vehicle subsequent to a conviction pursuant to the 14 sections that require it does not constitute punishment. The same analysis goes for all mandatory minimum sentences of imprisonment in the *Criminal Code*. I do not accept that when a sanction is applicable to several or all offences, it no longer falls within the definition of punishment.

[30] The conclusion reached by the trial judge that the victim surcharge constitutes punishment for the purposes of *Charter* analysis is further supported by the analysis of the facts at issue in *Rodgers*. In that case, the issue was whether the collection of DNA samples for data bank purposes from designated classes of convicted offenders was a “punishment” within the meaning of sections 11(h) and 11(i) of the *Charter*. The Court found the DNA provisions to be “no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of photographs or fingerprints.” It is instructive that the Court identified the purpose of the DNA provisions at issue as being investigative in nature. The Court

of Appeal in *R. v. Dyck*, [2008] O.J. No. 1567 arrived at a similar conclusion in its analysis of the constitutionality of *Christopher's Law* pursuant to various provisions, including sections 11 and 12 of the *Charter*. The Court applied the tests pursuant to *Rodgers* and *Wigglesworth* and held that the provisions of *Christopher's Law* were not punitive, but preventive. It held at paras. 80-83:

[t]he requirement to report and register with police is not a sanction imposed in furtherance of the purpose and principles of sentencing for the index offence. Nor is it a “true penal consequence”: see *Wigglesworth* at 559. Rather, it is a protective measure designed to safeguard the public from recidivist sex offenders and to equip the police with an important investigative tool.

...

... *Christopher's Law* is, as I say, preventive not punitive in pith and substance, and the registration requirement does not constitute punishment.

This conclusion is consistent with the law as it has developed in similar areas. For example, a DNA databank order is not punishment: see *Rodgers* at para. 64 and *R. v. Briggs* (2000), 157 C.C.C. (3d) 38 at para. 71 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 31. Neither is an order requiring that a person enter into a recognizance pursuant to s. 810.01 of the *Criminal Code*: see *Budreo* at paras. 29-31.

[31] The victim surcharge requires the payment of money by an offender to the state, and is much closer to being a “true penal consequence” under the *Wigglesworth* test than either the DNA provisions or a sexual offender registry system. The victim surcharge is not a preventive measure. Its objectives are not to increase the arsenal of tools available to police in the investigation of crime, like the provisions considered in *Rodgers* and *Dyck*. The victim surcharge aims instead to ensure that those who are affected by crime may be supported by government programs, and that imposing an obligation to contribute to those programs will serve to foster various penal objectives in sentencing offenders, including instilling a sense of responsibility for their conduct. These objectives are consistent with furthering the principles of sentencing, not preventing and investigating crime.

[32] In summary, the finding made by the trial judge that the victim surcharge is a punishment was open to him on the evidentiary record before him, and in accordance with a functional approach to the definition of “punishment” for *Charter* purposes. In my view, he did not err in finding that the victim surcharge comes within the meaning of “punishment” within section 12 of the *Charter*.

The victim surcharge is, at a minimum, “treatment” within the meaning of section 12 of the Charter

[33] If I am wrong in that regard, I find that the victim surcharge would at a minimum constitute a “treatment” within the meaning of section 12. The jurisprudence compels that conclusion.

[34] For example, in *Rodgers*, the Court also considered the term “treatment” within the context of section 12 of the *Charter*, at para. 63:

In this respect, the protection afforded by section 11 must be contrasted with section 12 of the *Charter* that protects against cruel and unusual “treatment” or punishment. For example, DNA sampling, ordered as a consequence of conviction, would undoubtedly constitute a “treatment” and, if the physical method for obtaining a DNA sample were cruel and unusual, redress could be obtained under section 12.

[35] The Court of Appeal’s comments in *Dyck* at paras. 85-86 about the applicability of section 12 of the *Charter* are also germane, as they also confirm that ancillary orders that are not “punishment” may nevertheless be “treatment” for the purposes of a section 12 analysis:

... Although the application of the Registry to persons in the position of the appellant is not punishment, it may well constitute “treatment” within the meaning of that provision. Justice Charon was of the view in *Rodgers* at para 63, for example, that DNA sampling ordered as a result of conviction would constitute “treatment.” I am prepared to assume for these purposes, without deciding, that the application of *Christopher’s Law* may amount to “treatment.” However, even if it does, section 12 is of no assistance to the appellant here because the requirements of registration and reporting do not constitute “cruel and unusual” treatment.

... To qualify as “cruel and unusual” treatment or punishment, a disposition must be “grossly disproportionate” to what is appropriate in the circumstances. ... Suffice it to say that the requirements of *Christopher’s Law* fall far from the high standard called for by such a test. Section 12 of the *Charter* is therefore not engaged in these circumstances either.

[36] Given these precedents, I find that the victim surcharge would at a minimum constitute a “treatment” within the meaning of section 12. Accordingly, the judge did not err as alleged by the appellant AGO in conducting the *Charter* analysis under section 12 of the *Charter*, which also prohibits “cruel and unusual treatment” by the state, in addition to “cruel and unusual punishment.” Whether the victim surcharge is a “punishment”, or a “treatment”, it is properly analysed under section 12. Moreover, whether it is a “punishment”, or a “treatment” under

section 12, the test for determining whether it is violative of the *Charter* is the same: *R. v. Olson*, [1987] O.J. No. 855 (C.A.) at para. 38, aff'd [1989] 1 S.C.R. 296; see also *R. v. Wiles*, [2005] 3 S.C.R. 895 at paras. 3-5.

Analysis with respect to principles of statutory construction

[37] The AGO accepts that the term “punishment” “has a precise definition in criminal law,” and that this definition was provided by the Supreme Court in *Rodgers*. Nevertheless, the AGO argues that an analysis pursuant to the principles of statutory construction is required. The AGO argues in para. 5 of its factum that “it matters not whether this exercise occurs in the context of the criteria set out in *Rogers*, or whether the definition set out in *Rogers* is part of the analysis. What is critical is to proceed with an appropriate analysis of statutory construction”.

[38] The AGO highlights the following direction from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 as to the approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Further to this direction, in *R. v. Summers*, [2014] 1 S.C.R. 575, the Supreme Court of Canada confirmed at para. 35 that in conducting such an analysis, there are four factors to be considered: (1) the text of the provision, (2) the structure of the section, (3) the intention of Parliament, and (4) the scheme of the legislative regime.

[39] The AGO sets out its analysis of these factors from *Summers* at paras. 12-75 of its factum. With regard to the text of the provision, the AGO argues in paras. 21 and 22 that “even though the victim surcharge does ‘punish’ the offender by imposing a financial burden on him, this is not the purpose of the provision when its grammatical and ordinary meaning are considered,” and that “textual considerations demonstrate that the victim surcharge constitutes an ancillary order the nature of which is general restitution -- not punishment.”

[40] With respect to the structure of the section, the AGO makes several submissions. It proposes that “as a general rule, mandatory application [of the provision] to all offenders is contrary to sentencing principles for an offence and shows [the provision] is an ancillary order made to fulfill other objectives.”

[41] With respect to the intention of Parliament, the AGO cites the Parliamentary Secretary to the Minister of Justice, and suggests that Parliament had two objectives. The AGO argues that one of these objectives is to provide funding for victims’ services, which is consistent with the structure and text of the provision. The second objective is the imposition of a sense of accountability in offenders towards victims. According to the AGO, this is a collateral consequence.

[42] With regard to the scheme of the legislation, the AGO argues that the victim surcharge is not a fine as set out in section 716 of the *Code*, because the definition of “fine” includes a pecuniary penalty or other sum of money, “but does not include restitution.” The AGO makes several submissions to this effect.

[43] On the other hand, the PPSC and the respondent both provide a contrary analysis. The PPSC highlights that section 737 is found in Part XXIII of the *Criminal Code*: Sentencing. The respondent argues that the language of the section itself is significant:

737. (1) Victim surcharge – An offender who is convicted, or discharged under section 730, of an offence under this Act or the *Controlled Drugs and Substances Act* shall pay a victim surcharge, in addition to **any other punishment** imposed on the offender. [emphasis added]

737. (1) Suramende compensatoire – Dans le cas où il est condamné — ou absous aux termes de l’article 730 — à l’égard d’une infraction prévue à la présente loi ou à la *Loi réglementant certaines drogues et autres substances*, le contrevenant est tenu de verser une suramende compensatoire, en plus de **toute autre peine** qui lui est infligée. [mise en valeur ajoutée]

According to the respondent, what is significant is that Parliament deliberately chose to not say “(...) in addition to any other order imposed on him,” or “in addition to any sentence imposed on him.” He says that combining the words ‘other’ and ‘punishment’ is fatal to the position taken by the AGO.

[44] In the end, the Crowns and the accused have marshalled statutory construction arguments in support of their positions, none of which are on their own dispositive of the analysis as to the nature of the victim surcharge for the purposes of a section 12 analysis. I do not see anything in the AGO’s argument based on principles of statutory construction that would undermine the conclusion that the victim surcharge is a punishment within the meaning of section 12 of the *Charter*. The trial judge had the benefit of these arguments, and made findings that were open to him on the record. I do not find that he was required to undertake the fulsome analysis urged by the AGO under each of the factors identified in *Summers*.

[45] The trial judge’s analysis of the issues led him to conclude that even having regard to issues of statutory construction, the victim surcharge was a punishment for the purposes of *Charter* analysis. I find he did not err in doing so.

Issue 2: Did the trial judge err in finding that the victim surcharge was “cruel and unusual punishment” within the meaning of section 12 of the *Charter*?

The trial judge’s decision

[46] The trial judge began the analysis of the alleged violation of section 12 of the *Charter* by considering the direction of the Supreme Court in *Smith*. That is, in considering an alleged violation of section 12, the court must determine “whether the punishment prescribed is so excessive as to outrage standards of decency.” The court also considered the direction in pages 1069-1070 in *Smith* requiring deference to Parliament. The court then analyzed several of the factors set out in *Nur* (C.A.), including the following: i) the severity of the crime; ii) the particular characteristics of the offender; iii) the actual effect of the punishment on the offender; iv) the criminal objectives and sentencing principles of the victim surcharge; and v) the existence of valid alternatives to the sentence actually imposed.

[47] The court noted at para. 20 that the analysis of these factors surrounding the victim surcharge “is awkward, because this sanction is imposed in the case of all offences, from causing a disturbance to murder. The exercise of determining the proportionality between the crime and the punishment is difficult.”

[48] With regard to the actual effect that the punishment has on the applicant, the court found that “the issue to determine is the following: would the imposition of the \$700 victim surcharge, in addition to this sentence, make the punishment as a whole cruel and unusual?” (at para. 36). The court then made several important findings. First, the court concluded that “on a balance of probabilities, [the respondent] cannot pay this victim surcharge at present, and would not be able to pay it in the future” (at para. 38). Second, the court agrees “that [the respondent] will never be incarcerated because of his inability to pay victim surcharges because issuing a warrant of committal is a matter of judicial discretion, and is protected under the *Charter*. Issuing a warrant of committal is a last resort, and applicable only if the offender refuses, without reasonable excuse, to pay the victim surcharge. The inability to pay the victim surcharge due to poverty is a reasonable excuse” (at para. 39). Third, the court found that granting the respondent “a grace period to pay the victim surcharge or suspending payment are not remedies for an individual who has but \$4.50 per day in his pocket to meet his needs.” The court writes at paras. 41-44:

As Justice Paciocco highlights in paragraph 81 in *Michael*:

In my view, extending time to pay for someone who will not be able to pay in the foreseeable future is nothing more than a promise of ongoing legal obligation, with all of the stress and risks that this implies, only that stress is compounded by the imposition of impending deadlines that are apt to be unrealistic from the start.

Any sentence imposed must terminate, with the exception of a sentence of life imprisonment, or an indeterminate sentence in the context of a dangerous offender designation. A probation order cannot exceed 3 years. A sentence of incarceration has a fixed term. A fine is imposed only if an offender has the ability to pay it. The victim surcharge as punishment does not end for the applicant and this has long-term effects.

Justice Paciocco describes the long-term effects of the victim surcharge in paragraphs 74 and 75 in *Michael*, and I adopt them since they also apply to the applicant:

A person told that they could be incarcerated for not paying can be expected to find that threat stressful. They are apt to find it stressful even if told this will not happen if they are truly unable to pay. It cannot be disputed that the factual/legal question of when someone is sufficiently poor that a failure to pay will qualify as an innocent inability to pay rather than committable “refusal to pay” comes with no clear definition. Anyone on the margin who owes outstanding criminal levies and who attends to their obligations will be left to wonder whenever spending any money on themselves or their families whether that expenditure was necessitous enough to justify, or whether spending that money in this way could bring them to jail. In my view, I cannot ignore the effects of the risk of jail, when the sanction of jail has been established by the legislation precisely to intimidate individuals into paying. That is a stressor that must be taken to affect everyone who owes an unpaid victim surcharge.

Exposing those who are poor such as Mr. Michael to perpetual, unsatisfied, sentencing obligations also deprives them of the ability to repay their debt to society. Because they do not have the means to repay, they lose the opportunity to be restored. I do accept that many offenders lack the sophistication to delve into deep questions of legal philosophy and moral responsibility, and that is probably true of Mr. Michael. Still, the notion of just punishment has long carried the promise that after the eye is given for the eye, the offender has discharged their debt and reconciliation can begin. The whole idea of restorative justice legislatively endorsed in the *Criminal Code* and recognized to be of cultural significance to aboriginal offenders such as Mr. Michael, depends on reconciliation. Indeed, some legal philosophers have justified punishment on the basis that it is a kindness to offenders to punish them since it permits them to heal. Whether this is persuasive or not, the flip side is. It is a cruelty in some measure to tell an offender that they must discharge an impossible sentence before their debt is expunged. Reducing all of this to a less ethereal plane, the point is that so long as Mr. Michael fails to pay the victim surcharge he remains indebted and criminalized. He has not paid the price for his crime and remains unrequited because he is poor. It is worth noting in my view that when it comes to the sentence of discretionary fines the law avoids this consequence by prohibiting fines from being used to punish offenders who cannot pay. In the case of victim surcharges, imposing unpayable monetary penalties is a legislatively accepted

consequence. If it proves to be true that Mr. Michael never gets out from under the debt the impugned legislative scheme seeks to impose, it is a consequence that would befall him. He will remain indebted to society with all of the stigma and stress that imposes.

The actual impact of imposing a victim surcharge on the applicant is the fact that he must – to pay the amount in question – prevent himself from looking after his health, hygiene and clothing. The actual impact results in a lower quality of life for an already very disadvantaged person, and an increase in financial stress, as described by Dr. Mathias. Justice Schnall highlights this impact in *Flaro*, 2014 ONCJ 2:

This results in a sentence which is not only beyond excessive; the mandatory provisions impose a crushing debt on an individual who has no reasonable expectation of ever being able to pay; this constitutes cruel and unusual punishment. In those cases it forces a person to have to choose between buying food and paying the VFS.

[49] With respect to the criminal objectives and sentencing principles underlying the victim surcharge, the court concluded that the victim surcharge did not conform to the basic principle that punishment must be proportionate to the offence “because it is applicable to each and every offence...” (at para. 46).

[50] On the issue of the existence of valid alternatives to the sentence imposed, the court once again cites *Michael* and writes:

I am objectively convinced that a reasonable person would arrive at the conclusion that imposing a total of \$700 in victim surcharges on the applicant, who is impecunious, drug-addicted, and struggles with mental illness, would provoke the long-term effects described above, making this excessive to the point of being inconsistent with human dignity. The effect of this punishment is grossly disproportionate to what would have been appropriate (at para. 50).

As for the argument that the use of nominal fines might prevent cruel and unusual punishment, the court rejected this argument since it would frustrate the laudable purpose of the victim surcharge, and because this method could not be applied in each and every case, “for instance when imposing a conditional discharge or in circumstances whereby the Court imposes a custodial sentence followed by probation” (at para. 52).

[51] Notwithstanding that given these findings, an analysis of the reasonable hypothetical was not strictly required, the court considered the facts in *Michael* in addition to the respondent’s

circumstances, and confirmed that the victim surcharge “fails the reasonable hypothetical analysis, and as a result, violates section 12 of the *Charter*” (at para. 55).

The parties’ positions

[52] The PPSC argues that the trial judge erred in accepting the respondent’s economic interests and the financial stress created by the imposition of the victim surcharge as a sufficient basis for finding that the victim surcharge violated a constitutional right. Further, the PPSC argues that the trial judge erred in law by failing to strictly apply the demanding test at issue, in finding that the victim surcharge regime was inconsistent with the basic principle of proportionality set out in section 718.1 of the *Criminal Code*, and in finding that using the nominal fine approach would frustrate parliamentary intent.

[53] The AGO’s position is set out in paras. 17-21 of its Notice of Appeal. First, it argues that the victim surcharge is not a punishment giving rise to a grossly disproportionate effect. Second, it notes that there is no evidence to support the finding by the court at para. 50 that “the victim surcharge as a punishment does not have an end for the applicant, and this has long-term effects.” Third, the court did not consider allowing an extension of time to pay the victim surcharge as a way to mitigate the grossly disproportionate effect of the victim surcharge, a method approved by the Supreme Court in *R. v. Wu*, [2003] 3 S.C.R. 530. Fourth, having found that the victim surcharge constitutes punishment, the court ought to have considered the objectives and principles of section 718 of the *Criminal Code*, particularly the principles of totality and proportionality. Because it did not, the court did not consider reducing the period of incarceration or probation or imposing a nominal fine as ways to mitigate the grossly disproportionate effect of the imposition of the surcharge.

[54] The respondent submits that the judge did not err in his section 12 analysis.

Analysis

[55] For the reasons that follow, I find that the trial judge erred in finding that the victim surcharge violates section 12 of the *Charter*. I make this finding for two reasons. First, I agree with the PGO that there was an insufficient evidentiary record to found the conclusions made about the consequences of the victim surcharge for this offender and others. Second, the basis for finding that the victim surcharge constitutes cruel and unusual punishment is so broad as to dilute the stringent nature of the test.

The Relevant Test

[56] The test for assessing alleged violations of section 12 of the *Charter* has been recently re-affirmed in *R. v. Nur*, [2015] S.C.J. No. 15. In that case, the court was considering the constitutionality of s. 95(2) of the *Criminal Code*, and the mandatory minimum terms of imprisonment it created for the offence of possession of a loaded prohibited firearm contrary to s. 95(1) of the *Criminal Code*, where the Crown proceeded by indictment.

[57] The court re-affirmed several principles that had emerged in its previous jurisprudence. It noted that a high bar had been set for what constitutes cruel and unusual punishment under section 12 of the *Charter*. It re-iterated the test of gross disproportionality first articulated in *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1072. It confirmed the directive in *Smith* that the test of gross disproportionality “is aimed at punishments that are more than merely excessive”, and courts “should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.” It confirmed that “a prescribed sentence may be grossly disproportionate as applied to the offender before the Court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional”: see *Nur* at para. 39.

[58] The court summarized the approach to be taken in analyzing a mandatory minimum sentence as follows at para. 46:

To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under section 12 of the *Charter* involves two steps. First, the Court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the Court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with section 12 and will fall unless justified under section 1 of the *Charter*.

[59] The court confirmed at paras. 57-62 and 76 that this approach should consider not just the offender before the court, but other reasonably foreseeable situations:

The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some people’s situations, resulting in a violation of section 12. The terminology of “reasonable hypothetical” may be helpful in this regard, but the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases.

...

The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. The judge may wish to start with cases that have actually arisen ... and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable. Fanciful or remote situations must be excluded: *Goltz*, at p. 506. To repeat, the exercise must

be grounded in experience and common sense. Laws should not be set aside on the basis of mere speculation.

[60] Finally, the Court confirmed at para. 76 that “the inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples.”

[61] It has been remarked elsewhere that the approach set out in the cases dealing with mandatory minimum sentences, such as in *Nur*, is an ill-fit in the present context: *Michael* at para. 21 and *R. v. Novielli*, 2015 ONCJ 192 at para. 57. While the victim surcharge may be a punishment (or treatment) within the meaning of that term in section 12 of the *Charter*, it is not a minimum sentence. The case law which has developed interpreting the scope of section 12 of the *Charter* is largely in the context of consideration of the constitutionality of mandatory minimum sentences, and sets out factors for consideration which do not apply here. Indeed, the trial judge noted the difficulty in applying the test. It is impossible, for instance, to engage in the first step of the analysis set out in *Nur*, and to determine “what constitutes a proportionate sentence for the offence.”

[62] In my view, while the analysis cannot mirror the approach set out in *Nur*, it may be guided by the core principles set out in that case. That is because while a particular *approach* has been endorsed in determining whether a mandatory minimum sentence violates section 12 of the *Charter*, the *test* is the same whether the Court is considering a mandatory minimum sentence or some other provision that is either “treatment” or “punishment” for the purposes of section 12 of the *Charter*. This also accords with the general summary given by the court in *Nur* as to the questions to be answered in the analysis: see *Nur* at para. 77. I agree with Paciocco J.’s conclusion in *Michael* at para. 21 that ultimately, the issue for the court is whether the victim surcharge is a grossly disproportionate punishment.

[63] Further support for that approach is found in the decision of the Court of Appeal for Ontario in *Olson* when considering the applicability of the test enunciated in *Smith* to an assessment of whether a specific “treatment” (in that case, the confinement of the offender in administrative or protective segregation within a penitentiary) was cruel and unusual. The court held that the same test was applicable with respect to punishment as with respect to treatment, and stated: “The question comes down to whether or not the continued confinement of the appellant ... is treatment that is so excessive as to outrage standards of decency.” Similarly here, the question is ultimately whether the victim surcharge is so excessive as to outrage standards of decency, either as applied to this offender, or in a reasonably foreseeable situation involving another offender.

[64] In this instance, the trial judge addressed these fundamental issues in the analysis. As indicated above, with respect, I find that he erred because there was an insufficient evidentiary record to found his conclusions about the impact of the victim surcharge for this offender and others, and because the basis for finding that the victim surcharge is cruel and unusual punishment is so broad as to dilute the stringent nature of the test. I turn now to a consideration of the first error.

The trial judge erred in speculating about the accused's future circumstances, including any psychological impact of the victim surcharge upon him

[65] Several Canadian courts have held that it is improper when sentencing an accused person to assume his or her current circumstances will continue into the future.

[66] Importantly, this direction has been given by the Supreme Court of Canada. In *Wu*, the Court considered the correctness of a conditional sentence imposed in lieu of a minimum fine of \$9, 600 under the *Excise Act*. The trial judge found that the offender “was not now and would not in the foreseeable future be able to pay such a heavy fine.” In determining that the trial judge should have imposed the minimum fine, Binnie J. wrote for the eight member majority: “It is wrong to assume, as was done in this case, that the circumstances of the offender at the date of the sentencing will necessarily continue into the future”: para. 31. Later in the judgment, at para. 33, he cautioned that it “is often difficult to predict with certainty whether an offender will in future acquire the means to pay the fine, whether through his or her own labour, or perhaps a windfall”: para. 33.

[67] The court held at paras. 31-33 that where an offender does not have the means to pay immediately, he or she should be given time to pay. Further, it directed that that time should be what is reasonable in all the circumstances. It noted that an “offender’s inability to pay is precisely the reason why time is allowed.”

[68] The court also considered the limits of the remedies available if the fine were not paid or otherwise satisfied through a “fine option program.” It noted that the Crown had a number of civil remedies, including licence suspension and revocation (section 734.5), filing the criminal court order in a court of civil jurisdiction and obtaining civil law collection remedies (section 734.6), and committal to jail for default (section 734.7). The court considered the impact of each of these options.

[69] The court acknowledged the Crown’s option of pursuing a civil judgment could carry on “indefinitely.” It appeared to endorse the logic of this regime at para. 59 by again stating that the “fact the Respondent was impoverished on the day of his sentencing does not mean he will be ever thus.”

[70] With respect to the possibility of committal to jail for default, the court considered the language of section 734.7 (b)(ii) which addresses the refusal of an offender “without reasonable excuse” to pay the fine or discharge it under section 736. It held that an offender’s poverty would be a reasonable excuse not to pay the fine, as the provision clearly indicated that the offender must be making a choice not to pay. An inability to pay was not a choice (see *Wu* at paras. 60-66; *R. v. Lavigne*, [2006] 1 S.C.R. 392 at para. 47). Accordingly, the law is clear that any default in payment because of an offender’s poverty will not result in the incarceration of the offender.

[71] While *Wu* is not a *Charter* case, I can see no reason why the trial judge would not be bound by the direction from the Supreme Court that it is wrong to assume an offender’s circumstances at the date of sentencing will continue into the future. I appreciate that the experience of trial judges is that offenders like Mr. Larocque continue to live in similar

circumstances more often than not. And there can be no doubt that the hesitation in imposing a fine or “surcharge” on a person who cannot pay it reflects a fundamental concern for fairness and proportionality. At the same time, sentencing is often a difficult exercise, and a blunt instrument of social policy in many individual cases. Judges must still give effect to relevant statutes and legal precedents when sentencing offenders.

[72] In that regard, the decision of the Court of Appeal for Ontario in *R. v. Shahnawaz*, [2000] O.R. (3d) 29 is also instructive. In that case, Charron J.A. (as she then was) considered whether the psychological impact of a sentence was an appropriate factor to be considered in sentencing an offender. The accused in that case had been diagnosed and treated for post-traumatic stress disorder subsequent to being tortured in prison in Afghanistan over a period of three years because he was a rebel fighter with the Mujahadeen. The accused had been convicted of trafficking, and sentenced to a conditional sentence by the trial judge in view of the significant evidence called at the sentencing hearing which established the adverse psychological impact a jail sentence would have upon him. The Crown appealed.

[73] The record before the Court of Appeal included testimony from two psychiatrists at the sentencing hearing who testified about the effect of incarceration on the offender’s psychiatric condition. It also included the trial judge’s own observation that she was “shocked by the deterioration in [Mr. Shahnawaz’s] appearance” between the time his bail was revoked after trial and the time his sentencing hearing occurred. The trial judge found that incarceration was “causing intense psychological suffering for Mr. Shahnawaz.”

[74] Writing for the majority, Charron J.A. allowed the Crown’s appeal and substituted a sentence of 6 years’s imprisonment. She found the “extreme effect” that imprisonment would have on the offender could only result in an adjustment of the sentence so as to ensure it did not become disproportionate to his crime. She wrote that “the Court must not lose sight of the fact, however, that it is difficult to predict Mr. Shahnawaz’s future condition and that the state of any prisoner’s health while in custody is largely a matter for the correctional authorities”: *Shahnawaz* at paras. 32-34.

[75] *Shahnawaz* was a case with a rich evidentiary record which established that the appropriate range of sentence for this offender would cause him intense psychological suffering. There was evidence specific to the accused about the psychological impact of a jail sentence. The evidence was not limited to an opinion based on his antecedents, but included consideration of the actual impact of imprisonment on the offender up until the sentencing hearing. The impact on the offender, it appears, was plain to the trial judge.

[76] In this case, far more limited evidence was before the trial judge. Mr. Larocque filed an affidavit outlining his circumstances. This included information about his finances and his mental health. The judge also had two psychiatric reports relating to Mr. Larocque, both of which were prepared as assessments of his criminal responsibility for various offences. The more recent report of Dr. Mathias, which was prepared in relation to the offences for which Mr. Larocque was being sentenced, indicated that he suffered from impulse control problems and that he had antisocial personality issues. It also disclosed that he had substance abuse issues. The Axis IV diagnosis included “psychosocial problems”, and referenced his finances. No evidence

was led with respect to the impact of the victim surcharge upon Mr. Larocque. There was no evidence to support the trial judge's findings 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.

[77] Even if there is no evidentiary record with respect to the stress likely to be suffered by Mr. Larocque should he remain unable to pay the victim surcharge, the analysis under section 12 requires consideration of the reasonably foreseeable circumstances of other offenders. I do not consider it appropriate to impute the consequence of intolerable stress as a reasonably foreseeable one for a hypothetical offender. First, the direction in *Wu* indicates that even for the hypothetical offender, it would be wrong to assume his or her circumstances will continue into the future. Second, as will be indicated below, and as is reinforced by the facts in *Shahnawaz*, I do not agree that any stress caused by being unable to pay the victim surcharge can rise to the level of being cruel and unusual punishment.

The trial judge erred in finding that the victim surcharge was a grossly disproportionate punishment that would outrage standards of decency

[78] While the number of challenges to the victim surcharge since the 2013 amendments suggests that other mandatory fine provisions, such as the mandatory fine imposed under s. 255 of the *Criminal Code* for offences of impaired driving and "over 80", may have attracted similar scrutiny at one time, there is very little jurisprudence addressing the combined operation of section 12 and mandatory fines.

[79] The authorities that do exist are instructive. There appear to be no cases involving the mandatory imposition of fines which have been found to violate section 12. There is authority, however, that considers the impact of an offender's inability to pay the fine imposed (and the attending consequences for the offender) in the context of a section 12 analysis.

[80] The decision in *R. v. Pham*, (2002), 161 O.A.C. 80 involved a challenge to a minimum fine provision under the *Excise Act*. At trial, the offenders had been convicted of possessing contraband tobacco and sentenced to the minimum fine of \$154, 000. The Court of Appeal for Ontario held that it was not satisfied that the minimum fine was cruel and unusual punishment, notwithstanding the finding by the trial judge that the offenders had no ability to pay a fine of that amount. The court noted that the same result had been obtained in three other appellate courts: *R. v. Zachary*, [1996] A.Q. No. 2970 (Que. C.A.); *R. v. Desjardins* (1996) 182 N.B.R. (2nd), 321 (N.B.C.A.) and *R. v. MacFarlane*, (1997), 157 Nfld. & P.E.I.R. 208 (P.E.I. C.A.).

[81] In its analysis of the mandatory fine provision, the court reiterated at para. 12 "that it will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate as to offend section 12." In this instance, the court held at para. 19 that the "most important consideration in the section 12 analysis is the direct connection between the quantity of the illegal substance possessed and the size of the fine." In so holding, the court considered whether this finding would hold for a "mule" in the operation, rather than the "brains", who presumably would profit from the operation far more significantly than the "mules." It held at para. 19:

To hypothesize that the accused may be merely the “mules” but not the “brains” of the criminal operation simply suggests not that the minimum fine is grossly disproportionate, but that the “brains” should receive more than the minimum fine.

In sum, to paraphrase Bastarache J.A. in *R. v. Desjardins*, *supra* at p. 337, Parliament’s decision to try to deter smuggling of contraband tobacco by establishing proportionality between their illegal profits and the amount of the fine imposed is a legislative scheme that is not apt to outrage the public conscience.

[82] The proportionality of the fine imposed to the amount of contraband possessed, and hence to the seriousness of the offence, distinguishes *Pham* from the circumstances being considered here to some extent. As was noted by the trial judge in this case, the amount of the victim surcharge may be exactly the same for an offender charged with a minor offence as one charged with murder (at least where the Crown has proceeded by indictment on the minor offence).

[83] At the same time, the reasoning in *Pham* was not held to apply *only* to those offenders who had actually profited from their offending. Further, the sums involved in the imposition of the victim surcharge are far removed from the sums being imposed as fines under the *Excise Act*. In the instant case, the amount of the fine is \$700. While this figure is derived from a formula which may be less sensitive in ensuring its proportionality to the offence(s) committed, it does bear some proportionality to the offending behaviour which resulted in its imposition. The amount of the victim surcharge is based on the number of counts resulting in convictions, and whether the offence was a summary conviction or indictable offence. In some rough measure, then, the more offences committed, and the more serious the offences, the more significant the victim surcharge. In any case, a finding of “gross disproportionality” would seem far more likely when considering a fine in excess of \$100,000 for an offender who may not have profited significantly from his offending and who had no ability to pay, than the sums at issue in any of the cases that have considered the constitutionality of the victim surcharge. This is so even allowing for the finding that the mandatory fine scheme under the *Excise Act* reflected some proportionality between the illegal profits obtained and the fine imposed. So, it is not clear that the result in *Pham* is based on such wholly different facts and principles as to make the result in that case irrelevant to the instant analysis.

[84] In my view, at the very least, *Pham* provides important guidance in its treatment of the issue of the offender’s inability to pay a fine in the context of a section 12 analysis. Goudge J.A. wrote as follows at para. 17:

Nor is the appellants’ apparent inability to pay the fine of much weight in the section 12 analysis. Indeed in R. v. Desjardins, supra, at p. 338 Bastarache J.A. (as he then was) said that this factor is immaterial to the analysis in light of the obvious illegal profits to be derived from such an operation. Although the fines represent a very substantial financial liability for the appellants,

any impact on the section 12 analysis is attenuated by their right under section 734.3 of the Criminal Code to apply for an extension of time beyond the two-year period imposed by the judge. Moreover, while the term of imprisonment which the judge elected to impose in default of payment is not, strictly speaking, a part of a minimum fine provision, section 734.7 of the Code attenuates its impact as well by permitting a warrant for committal to be issued only where the offender has refused to pay the fine without reasonable excuse. [emphasis added]

[85] I can see no reason why the impact of the victim surcharge is not similarly attenuated in the section 12 analysis here by sections 734.3 and 734.7 of the *Code*. This authority was not referenced by the trial judge in the instant case. As noted by the Court of Appeal for Ontario, the right to apply for an extension of time to pay the fee imposed directly affects the section 12 analysis. In this instance, it permits the “punishment” imposed in the form of the victim surcharge to be held in abeyance. There is no limit to the number of times an offender might apply to delay payment if his or her circumstances prevent payment of the fine in full.

[86] In *R. v. Wiles*, [2005] 3 S.C.R. 895, the Supreme Court of Canada considered whether the mandatory firearms prohibition order which followed upon convictions for the production of cannabis under section 7(1) of the *Controlled Drugs and Substances Act* violated section 12 of the *Charter*. The court found at paras. 8-10 that the trial judge’s failure to consider the “ameliorative effects” of a provision modifying the operation of the mandatory weapons prohibition was an error in the section 12 analysis. That logic applies here. While the ordinary Canadian might find that the current section 737 regime ought to be more responsive to the circumstances of disadvantaged offenders and their genuine inability to pay the victim surcharge, giving full consideration to the impact of section 734.3, the “ameliorative” provision here, I am not satisfied that Canadians would find the victim surcharge is so odious as to be “abhorrent” or “intolerable.”

[87] Nevertheless, the trial judge here found that this standard was met. As indicated in the trial judge’s reasons, that was because notwithstanding the safeguard in section 734.3 for an offender who is unable to pay the fine, the victim surcharge would expose the offender to such significant stress as to make the victim surcharge cruel and unusual punishment. The type of stress cited in support of this position was the stress identified in *Michael*: the stress of creating an ongoing legal obligation, “compounded by the imposition of impending deadlines that are apt to be unrealistic from the start.” What was found to outrage the standards of decency was the creation of the stress of a legal obligation without end, and the stigma and stress of remaining indebted to society.

[88] In my view, this basis for finding that the victim surcharge is cruel and unusual punishment cannot be reconciled with the jurisprudence. The test of gross disproportionality first articulated in *R. v. Smith*, [1987] 1 S.C.R. 1045 at p. 1072 bears repeating. The clear directive in *Smith*, and re-affirmed in *Nur*, is that the test of gross disproportionality “is aimed at punishments that are more than merely excessive.” *Smith* further cautioned that courts “should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional

violation.” The Supreme Court in *R. v. Morrisey*, [2000] 2 S.C.R. 90 further clarified at para. 26 that in order to found a section 12 violation, the sentence must be disproportionate to the extent that Canadians “would find the punishment abhorrent or intolerable.”

[89] When considering the circumstances of offenders like Mr. Larocque or Mr. Michael, it is an easy conclusion that imposing additional financial burdens upon them is at least excessive. But that does not necessarily render the imposition of that burden unconstitutional. As stated in *R. v. Novielli*, at para. 61, another case where the Court was considering the constitutionality of the victim surcharge, “cruel” is not synonymous with “petty”, or “overbroad” or “rigid” or “ill-considered” or “mean.”

[90] The analysis of the trial judge in this instance concludes that what raises this particular punishment from being disproportionate and excessive to unconstitutional is the long-term psychological and financial stress it will have on the Appellant and others like him. As indicated above, I find that that analysis is faulty because it is speculative, and ignores persuasive if not binding authority on the issue. As outlined above, the decision of the Supreme Court of Canada in *Wu* considered the impact of a fine on an offender who was found to have no ability to pay it. The court considered that offenders without an ability to pay would be given time to do so. It then considered the indefinite nature of the civil remedies available to the Crown if the fine remained unpaid. The indefinite nature of that regime for an offender with an ongoing inability to pay the fine attracted no negative commentary. While the issue before the Court was not framed as a section 12 analysis, the court’s analysis indicates it viewed the provisions in s.734 as remedial for an offender with no ability to pay the fine.

[91] The basis upon which the trial judge found that the victim surcharge was cruel and unusual punishment, and not merely an excessive and disproportionate one, is also flawed because, as suggested by the PPSC, it is an insufficiently rigorous application of the test. If the victim surcharge is cruel and unusual punishment because of the stress it may cause offenders, the test has assumed such broad application as to effectively dilute its meaning.

[92] I say this in consideration of the results in other cases involving the assessment of a punishment or treatment against section 12 of the *Charter*. As indicated above, a review of the cases indicates there has never been a case involving a fine which has met the test set out in *Smith*.

[93] The court in *Smith* provided one guidepost for assessments under section 12 when it held at p. 1073 that “some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.” Other circumstances which constitute “cruel and unusual punishment” have been identified since.

[94] Appellate courts have found that certain mandatory jail sentences of significant lengths violate section 12 of the *Charter* because imposing this sentence in some circumstances would be so disproportionate to the offending behaviour as to outrage standards of decency. For instance, the court in *Smith* was considering a mandatory seven year penitentiary sentence for an

offender who had pleaded guilty to importing seven and a half ounces of cocaine into Canada, a sentence which the Court found would be mandatory even for a young person who was caught entering the country with ‘his or her first “joint of grass”’ (p. 1053). The court found this mandatory minimum sentence violated section 12 of the *Charter*. Most recently in *Nur*, the majority of the court held that the potential for a mandatory minimum three year penitentiary sentence for offenders convicted of possessing a loaded prohibited firearm where the Crown proceeded by indictment, and the mandatory five year sentence for a second or subsequent offence, also violated section 12. This was because this sentence would be mandatory upon a Crown election to proceed by indictment in circumstances that essentially involved a licensing infraction, such as a person who “inherits a firearm and before she can apprise herself of the licence requirements commits an offence”, or a spouse who “finds herself in possession of her husband’s firearm” (at para. 83). The appellate cases where no violation of section 12 has been found are also instructive: see *Olson* (use of administrative or protective segregation for an offender in a penitentiary), *Goltz* (minimum sentence of 7 days jail and a \$300 fine for driving while prohibited under BC’s *Motor Vehicle Act*), *Morrisey* (minimum sentence of four years imprisonment for the offence of criminal negligence causing death with use of a firearm), *Pham* (minimum fine provisions of the *Excise Act*), *Wiles*, (mandatory firearms prohibition order upon convictions for the production of cannabis under section 7(1) of the *Controlled Drugs and Substances Act*), *R. v. Ferguson*, [2008] 1 S.C.R., 96 (mandatory minimum four year sentence for the offence of manslaughter committed with use of a firearm), *R. v. Perry*, [2013] QCCA 212 (combined operation of sections 742.1 and 752 of the *Criminal Code*, resulting in the unavailability of a conditional sentence for the offence of “street racing”), and *R. v. Montague*, [2014] ONCA 439 (mandatory firearms forfeiture pursuant to s. 491(1)(b) of the *Criminal Code* following convictions for firearms related offences resulting in a confiscation of \$100 000 worth of property). While it is clear that the analysis in the instant case must be responsive to the facts in issue here, the results in previous cases provide some guidance as to what it means to “outrage standards of decency.”

[95] There is some irony that what was at issue in *Michael* and another case considering 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 the Appellant 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.

[96] It is curious too that offenders like Mr. Larocque and others who are impecunious have long been subjected to the minimum fine provisions in s. 255 of the *Code*, and yet there appears to be no authority relating to a challenge of that regime on the basis of the offender's inability to pay such a significant and mandatory fine. The mandatory minimum fine for a first offence of impaired driving is currently \$1000. With the amendments to the victim surcharge, an additional victim surcharge of \$300 would be imposed. As noted by Brophy J. in *R. v. Frail*, [2014] ONCJ 744 at para. 37, "the fellow who cannot pay the \$300 fine surcharge in that case already cannot pay the \$1000 fine." In this circumstance, if the victim surcharge is cruel and unusual punishment because of the stress it creates for an impecunious offender, it is hard to see how that conclusion would not follow for the mandatory sentence itself. While that issue is to be determined in an appropriate case, all the same, it is a reasonably foreseeable case that highlights the difficulties presented by a section 12 analysis that is met by the stressful consequences that may flow from the victim surcharge, and in particular, the stress caused by an unpaid fine.

The use of nominal fines

[97] Both Attorneys General argued that it would be permissible for a court to use the nominal fine approach to ensure that the victim surcharge remained sufficiently proportionate to avoid violation of section 12 of the *Charter*. That approach and the rationale for it has been described and endorsed elsewhere and I will not review it here: see for instance *Michael*, *supra* at paras. 101-112, *R. v. Javier*, [2014] O.J. No. 3725 (O.C.J.). While that approach has some attraction, for the reasons outlined above, I find it unnecessary to resort to it to avoid a violation of section 12 of the *Charter*.

[98] In so finding, I consider the direction given by the Supreme Court in *Ferguson* at para. 74 that if a law violates section 12 of the *Charter*, the only remedy is to declare it inconsistent with the *Charter* and hence of no force and effect under s. 52 of the *Constitution Act, 1982*: see also *Montague*, at para. 53. There can be no reliance on the nominal fine approach to avoid violations of section 12, as this approach in essence endorses constitutional exemptions as a remedy for individual offenders. Requiring judges to engage in a section 12 analysis and to utilise the nominal fines approach to remedy any potential violations of section 12 of the *Charter* would create uncertainty in the law's application. As stated by McLachlin C.J.C. at para. 71, in support of comments by LeDain J. in *Smith*, writing for a unanimous court in *Ferguson*, "constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable."

[99] At the same time, it is not clear that the nominal fine approach could not be used by a sentencing judge in fashioning what he or she finds to be a proportionate and fit sentence. On a plain reading of section 737, there is no language in the provision as amended in 2013 that would prevent that approach. There is also significant support in the jurisprudence for an approach that ensures that the totality of the sentence imposed reflects the fundamental principle of proportionality: see *R. v. Wust*, [2000] S.C.J. No. 19 and *R. v. Safarzadeh-Markhali*, [2014] ONCA 627. The appropriateness of the use of nominal fines in achieving a proportionate sentence will no doubt be addressed in future cases.

Conclusion on the section 12 analysis

[100] For the reasons given above, I find the judge erred in holding that section 737(1) of the *Code* violates section 12 of the *Charter*.

Issue 3: Does section 737(1) violate section 7 of the Charter

[101] Mr. Larocque submits that if the court finds the trial judge erred in finding that section 737(1) of the *Code* breaches section 12 of the *Charter*, then an analysis under sections 7 and 15 of the *Charter* must follow, as both of these alleged violations were raised before the trial judge.

[102] Having found that section 737(1) violated section 12 of the *Charter*, the trial judge was not required to conduct an analysis under either section 7 or section 15. Accordingly, what follows is not a review of his decision, but an analysis in the first instance. While the parties did not make oral submissions on these issues before me, their *facta* in the proceedings below were made exhibits and fully set out their positions on these issues.

Section 7 of the Charter and its interrelationship with section 12

[103] As indicated above, in my view the issues raised in this application were properly analyzed under section 12 of the *Charter*. Whether recourse to section 7 of the *Charter* is required or appropriate following a section 12 analysis in these circumstances is unclear.

[104] Section 7 of the *Charter* provides:

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.

[105] The relationship between sections 7 and 12 of the *Charter* has been commented on briefly by various courts (see *Smith* at p. 1060), with some suggesting that an analysis of a treatment or punishment under section 7 of the *Charter* is unnecessary where that treatment or punishment does not violate section 12. Writing a dissenting opinion in *Smith*, McIntyre J. clearly set out at p. 1107 the constitutional difficulties which arise from the interrelationship of sections 7 and 12: “[if] section 7 were found to impose greater restrictions on punishment than section 12 – for example by prohibiting punishments which were merely excessive – it would entirely subsume section 12 and render it otiose. For this reason, I cannot find that section 7 raises any rights or issues not already considered under section 12.”

[106] Some years later, in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, the Supreme Court gave additional consideration to the issue of the interrelationship of sections 7 and 12. In the context of finding that where there is no minimum mandatory sentence, the mere availability of imprisonment on a charge of marijuana possession does not violate the section 7 principle against gross disproportionality, the court held at para. 169:

... the proportionality argument made by the appellants is broader than the mere disproportionality of penalty. They are correct to point out that interaction by an accused with the criminal justice system brings with it a number of consequences, not least among

them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice recognized in *Burns* and *Suresh* is not exhausted by its manifestation in section 12. The content of section 7 is not limited to the sum of ss. 8 to 14 of the *Charter*. See, for instance, *R. v. Hebert*, [1990] 2 S.C.R. 151; *Thomson Newspapers*, *supra*. We thus accept that the principle against gross disproportionality under section 7 is broader than the requirements of section 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under section 7, as under section 12, remains one of *gross* disproportionality. In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and section 7 of the *Charter*.

[107] The history of this issue was more recently considered by the Court of Appeal for Quebec in *Perry* at paras 134-145. The court in that case noted that in *Reference re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, the Supreme Court held at paras. 28-29 that sections 8 to 14 of the *Charter* are specific deprivations of the “right to life, liberty and security of the person” that violate the principles of fundamental justice. The court reasoned that it could not be that an impugned provision found not to be grossly disproportionate within the meaning of section 12 of the *Charter* could be invalid because it was held to be disproportionate and violative of section 7. It noted the comment in *Smith* by Lamer J. that “any comments on the meaning of section 12 must be made with section 9 in mind and, as whenever sections 8 to 14 are at issue, in light of section 7.” The court also observed that the interrelationship amongst the various guarantees in sections 7-14 of the *Charter* were considered in *Malmo-Levine*, which accepted the rationale of McIntyre J. in *Smith*: “To find that gross and excessive disproportionality of punishment is required under section 12 but a lesser degree of proportionality suffices under section 7 would render incoherent the scheme of interconnected “legal rights” set out in sections 7 to 14 of the *Charter* by attributing contradictory standards to sections 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.” Accordingly, the court in *Perry* held at para. 144 that for a “section 7 challenge to succeed, the applicant must therefore demonstrate that the arbitrariness or the cruel and unusual nature of the sentence is due to elements that have not yet been considered under sections 9 and 12.”

[108] Most recently, the Supreme Court adverted to the relationship between sections 7 and 12 in *Nur* and confirmed at para. 110 that despite the jurisprudence that has developed under section 12 of the *Charter*, “situations may arise requiring recourse to section 7 of the *Charter*.”

[109] In view of this direction, and in order to ensure the fullest consideration of Mr. Larocque’s *Charter* rights, I turn to an analysis of section 737(1) pursuant to section 7 of the *Charter*.

The positions of the parties

[110] Mr. Larocque says that section 737(1) of the Code violates his section 7 *Charter* rights because the effects of the law deprive him of his rights to liberty and security of the person in a manner inconsistent with the principles of fundamental justice. He says his right to liberty is affected by the potential for incarceration if he fails to pay the victim surcharge. He says his security of the person is affected because if he is required to pay the victim surcharge, he will be unable to pay for the necessities of life.

[111] Mr. Larocque argues that these deprivations are contrary to the principles of fundamental justice. In particular, he argues that the law and its effects are arbitrary, overbroad, disproportionate, and there is insufficient individualisation in the penalty imposed.

[112] For their part, the Attorneys General maintain that section 737(1) does not breach Mr. Larocque's section 7 rights. The PPSC notes that Mr. Larocque has cited no authority which analyzes a punishment under section 7 of the *Charter* instead of or in addition to section 12. The provincial Attorney General, which maintains that the victim surcharge is not punishment, says that Mr. Larocque's section 7 interests are not engaged by the application of the impugned provision.

Analysis

[113] As confirmed by the Supreme Court in *Canada (A.G.) v. Bedford*, [2013] 3 S.C.R. 1101 at para. 58, the first question in a section 7 analysis is whether the impugned law negatively impacts or limits the applicant's right to life, liberty or security of the person, thus "bringing them within the ambit of, or engaging, section 7 of the *Charter*." If section 7 is engaged by the impact of the law, then the analysis turns to determining whether the deprivation caused is in accordance with the principles of fundamental justice: *Bedford* at para 93. In this instance, given Mr. Larocque's position, the first issue to be determined is whether either his liberty interest or security of the person is engaged by the law's impact upon him.

[114] With respect to the argument that his liberty interest is compromised by section 737(1), as outlined above, the law interpreting section 734.7 of the *Code* ensures that Mr. Larocque will never be incarcerated for failing to pay the victim surcharge by reason of his inability to pay it. Consequently, this interest is not genuinely at issue as a result of the law's application to him.

[115] Insofar as the impact on the security of the person is concerned, in my view, for the reasons indicated above, that analysis must proceed with consideration of the impact of section 734.3 on impecunious offenders such as Mr. Larocque. Consequently, I consider that if Mr. Larocque remains unable to pay the victim surcharge because he requires any funds he may have to pay for the necessities of life, he will be able to apply for extensions of time to pay it.

[116] The parties agree that in Ontario, the combined operation of the law with provincial regulations means an offender may be given up to two years to pay, which time period may be extended upon application under section 734.3. In this case, the Crown is consenting to a two year period for payment of the victim surcharge by Mr. Larocque. If he continues to be unable to pay in two years' time, and if he applies for an extension of that time period, he will not be considered in default of his payment obligations. If he is not found to be in default of paying the

victim surcharge, he will be unaffected by the remedies available to the Crown for an offender in default of payment of a fine, such as licence or other permit suspensions, because of the combined operation of sections 737(9), 734.5 and section 734.7 of the *Code*.

Conclusion on the section 7 analysis

[117] When the attenuating effects of the entirety of the victim surcharge regime are considered, I find that Mr. Larocque has not demonstrated that section 737(1) engages the security of the person. Accordingly, there is no need for further analysis of the law's conformity to the principles of fundamental justice. The argument under section 7 must fail.

[118] Before leaving this issue, I pause to say that I appreciate the argument made by Mr. Jubinville on behalf of Mr. Larocque about the inefficiency of a regime that would require offenders like Mr. Larocque to repeatedly apply to the court for relief under section 734.3 if, as anticipated, his inability to pay the victim surcharge continues into the future. It may be that there is greater expense in administering this regime than revenue to be collected from it. I appreciate too that offenders with some of the challenges faced by Mr. Larocque may not be well-placed to ensure timely application for relief under section 734.3, with the risk that some of these persons may come to be found in default of their payment obligations. Regrettably, these difficulties are likely to be present for these offenders in many aspects of their interactions with government, including in other aspects of the administration of a sentence following a criminal conviction. I find that in those cases, there is not a sufficient causal connection to demonstrate that it is the impugned provision which leads to any prejudicial impact upon the offender: see *Bedford* at paras. 73-92. Section 734.3 may be relied upon by all offenders unable to pay the victim surcharge. If there are circumstances that affect an offender's ability to apply for that remedy, it cannot be said that the prejudice which may result was caused by the law.

Issue 4: Does section 737(1) violate section 15 of the Charter?

The parties' positions

[119] According to Mr. Larocque, the evidence shows that he is part of a class of individuals suffering from a mental disability, an enumerated ground set out in section 15. He argues that the application of sections 734.5 and 734.6 of the *Criminal Code* when enforcing the victim surcharge is discriminatory and violates section 15 of the *Charter* since the law has a disproportionately negative effect on individuals suffering from a mental disability.

[120] For their part, the PPSC and the AGO take the position that no violation of section 15 is caused by the imposition of the victim surcharge.

Analysis

[121] Section 15 of the *Charter* provides that:

Equality before and under law and equal protection and benefit of law

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[122] The analysis to determine whether the victim surcharge violates section 15 of the *Charter* is governed by a two-part test. First, the court must determine whether the law creates a distinction based on an enumerated or an analogous ground. Second, if there is such a distinction, the court must assess whether that distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 30). The applicant must prove that the differential treatment discriminates by withholding a benefit or imposing a burden on him in a way that reflects the stereotypical application of presumed group or personal characteristics (*Miron v. Trudel*, [1995] 2 S.C.R. 418).

[123] In the case at bar, I conclude that Mr. Larocque has not demonstrated that the law creates a distinction based on an enumerated or an analogous ground. I will explain.

[124] The victim surcharge does not on its face create a distinction based on an enumerated or an analogous ground. Mr. Larocque argues that section 15 is violated by the enforcement of the victim surcharge because its enforcement has a disproportionately negative impact upon individuals suffering from a mental disability as compared to other individuals.

[125] I agree with the PPSC that it “is not sufficient to show that individuals with a mental disability are economically disadvantaged ... The applicant must show how the imposition of the victim surcharge aggravates/perpetuates this disadvantage for individuals suffering from a mental disability when compared to other groups of society.” Here, as indicated above, Mr. Larocque argues that sections 734.5 and 734.6 of the *Criminal Code* have a disproportionate negative impact upon persons who have mental disabilities.

[126] Since section 734.6 does not apply to the enforcement of the victim surcharge under subsection 737(9), the effect of section 734.5 is the only one that might produce the negative effects alleged by Mr. Larocque.

[127] Mr. Larocque says that the discriminatory effect of this provision impacts individuals suffering from a mental disability. However, he does not show how refusing to issue, renew or suspend a driver’s license treats individuals suffering from a mental disability differently than other individuals. He has not shown that the law creates a distinction based on an enumerated or analogous ground.

[128] Moreover, there is nothing in the arguments or the evidence demonstrating that the alleged differential treatment establishes any discrimination against Mr. Larocque, or any other individual suffering from a mental disability, by withholding a benefit or imposing a burden in a way that perpetuates the stereotypical application of presumed group or personal characteristics.

Conclusion on the analysis under section 15 of the *Charter*

[129] The application to find the victim surcharge unconstitutional pursuant to section 15 of the *Charter* is dismissed.

Issue 5: Jurisdiction of the Ontario Court of Justice to grant declaratory relief

[130] Given the conclusions reached above on the *Charter* issues, it is not necessary to address this ground of appeal.

Conclusion and orders

[131] For the reasons indicated above, the appeal is allowed. The decision of the trial court is overturned.

[132] With respect to the imposition of the victim surcharge, the trial judge found that the total sum to be imposed was \$700. That figure is not in dispute. There is no need for the matter to be remitted back to the trial judge for its imposition.

[133] Mr. Larocque will be required to pay the victim surcharge of \$700. Upon consent of the Crown, and in view of his financial circumstances, he will be given 2 years to pay the victim surcharge.

[134] The written notice required by section 737 (8) of the *Code* will be provided to Mr. Larocque through his counsel. The appropriate form (CSO-734-1) will be prepared by the Court office for the Ontario Court of Justice in L'Orignal and provided to counsel.

Madam Justice Laurie Lacelle

Released: September 29, 2015

CITATION: *R. v. Larocque*, 2015 ONSC 5407

COURT FILE NO.: FC-13-1346

DATE: 2015/09/29

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

DANIEL LAROCQUE

Respondent

REASONS FOR DECISION

Madam Justice Laurie Lacelle

Released: September 29, 2015