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ARTICLE

Supreme Court of Canada Strikes down the Mandatory Victim Surcharge

The [Supreme Court of Canada](#) has struck down the mandatory victim surcharge in section 737 of the *Criminal Code* on the grounds that it is a cruel and unusual punishment prohibited by section 12 of the *Charter*. This is an important decision that could impact the constitutional validity of other mandatory minimum sentences.

The victim surcharge required everyone who was discharged, pled guilty to, or was found guilty of an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* to pay an amount equal to 30% of any fine imposed, or where no fine was imposed, \$100 for each offence punishable by summary conviction and \$200 for each offence punishable by indictment. Consequences for a failure to pay the surcharge included the threat of imposition of a deemed period of imprisonment, and committing the offender for non-payment without a reasonable excuse.

In October 2013, amendments to the *Criminal Code* removed judicial discretion to waive or vary the surcharge if it resulted in undue hardship, making it mandatory in all cases.

The appellants before the Supreme Court of Canada were individuals who had challenged the constitutional validity of the mandatory victim surcharge at sentencing. After experiencing mixed success in the lower courts, the Ontario Court of Appeal and Quebec Court of Appeal found that the mandatory victim surcharge were constitutionally valid.

On appeal to the Supreme Court of Canada, the appellants challenged the mandatory victim surcharge under sections 7 and 12 of the *Charter*. A majority of the Supreme Court found that it constituted cruel and unusual punishment because a fit sentence for certain of the appellants and other offenders would not include the surcharge, and that for those appellants and similar offenders who have no ability to pay, the effects of the surcharge – including disproportionate financial consequences, the threat of detention or imprisonment, the threat of provincial collections efforts, and the enforcement of *de facto* indefinite criminal sanctions – were egregious and fundamentally disregarded proportionality in sentencing. The Supreme Court found that the breach of section 12 of the *Charter* could not be saved under section 1 because the respondents had not put forward argument or evidence to justify the surcharge.

In addition to finding the mandatory victim surcharge violated section 12 of the *Charter*, the Supreme Court clarified that it fell within the definition of "punishment" in section 12 of the *Charter*, and that the appropriate remedy for the constitutional violation was to strike down section 737 of the *Criminal Code* with immediate effect.

The Court also left open the possibility that individuals already subject to surcharge amounts that they cannot pay and can no longer challenge could obtain relief from the unconstitutional effects of the surcharge, either by seeking an individual remedy under section 24(1) of the *Charter* or through administrative or legislative intervention by the government or Parliament.

[Christopher D. Bredt](#), [Pierre N. Gemson](#), and Alannah Fotheringham of BLG represented the [Canadian Civil Liberties Association](#) as an intervener in this appeal, both in the Supreme Court of Canada and in the Ontario Court of Appeal.

By: Christopher D. Bredt, [Pierre N. Gemson](#), Alannah Fotheringham

Services: [Disputes](#), [Appellate Advocacy](#)
