This blog examines *R v Boudreault*, 2018 SCC 58, a very recent decision in which a majority of the Supreme Court struck down as unconstitutional the mandatory victim surcharge provision of the *Criminal Code*.[1] The majority found that the provision constituted cruel and unusual punishment for impecunious offenders, contrary to s 12, and that it could not be saved under s 1.[2] Côté J dissented, arguing that the impact of the impugned provision on impecunious offenders does not rise to the level of "cruel and unusual", and that while disproportionate, it accords with the principles of fundamental justice.[3] I argue that the dissent was correct, to the extent that the finding of a s 12 violation was inappropriate, though I dispute the suitability of the established s 12 test. Instead, the majority should have awarded remedy on the basis of a s 7 violation, as s 12 should be understood as addressing a fundamentally different evil from that in the present case.

The Supreme Court in *Boudreault* deals with several offenders, all appealing the mandatory victim surcharge [the surcharge] on the basis that it violates their s 7 and/or s 12 rights. The provision in question is s 737 of the *Criminal Code*, which requires anyone who is discharged or guilty of an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* to pay a fixed sum to the state. This sum is used to support victim services and programs. Offenders must pay $100 per summary offence and $200 per indictable, and courts have no discretion to decrease the amount.[4]

Essentially, the majority found this provision to be cruel and unusual when applied to impecunious offenders because it treats them much more harshly, and their inability to pay can give rise to further disadvantage and stigmatization.[5] The majority seemed particularly concerned that assigning these surcharges to those who will not be in a position to pay in the foreseeable future would result in a continuous threat of imprisonment or detention due to non-payment, and that this

[1] *Criminal Code*, RSC 1985, c C-46, s 737.
[2] *Canadian Charter of Rights and Freedoms*, s 1, 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[3] *R v Boudreault*, 2018 SCC 58 at para 114 [*Boudreault*].
[4] *Ibid* at para 1-2, 7.
[5] *Ibid* at para 3.

effectively creates *de facto* indefinite sentences.[6] The provision was not saved under s 1 of the *Charter*. Unfortunately, the Crown advanced no s 1 arguments, and the issue was not analysed in any depth; the majority dealt with s 1 in a single paragraph, doing little more than stating that s 737 of the *Criminal Code* clearly cannot be saved under the *Oakes* test.[7] Since the majority found that the offenders were entitled to remedy for the s 12 breach, they decided that it was unnecessary to consider the s 7 claim.[8]

The views of Côté J on the matter were decidedly different. While she accepted that the impact of the provision was greater on impecunious offenders, she disagreed that this impact was so severe as to constitute "cruel and unusual" punishment, as it has been defined by past jurisprudence.[9] Côté J notes in particular that impecunious offenders have the opportunity to participate in provincial option programs to work off their debt in some jurisdictions, and can apply for extensions that must be granted if there is inability to pay.[10] She also argues strongly that there is no risk of imprisonment for those who are truly unable to pay due to poverty, as this would be contrary to the wording of the *Criminal Code* section which stipulates imprisonment as a possible consequence of non-payment.[11]

Both the majority and the dissent in this case raise important points, however I do not think that either side is entirely correct in its reasoning. Fundamentally, the disagreement between the majority and the dissent is one of threshold: the majority believes that the impact of the victim surcharge on impecunious offenders rises to the level of gross disproportionality, whereas the dissent believes that, while there is disproportionality, it does not rise to this level. However, I

[6] *Ibid* at para 69, 76.
[7] *Ibid* at para 97.
[8] *Ibid* at para 95.
[9] *Ibid* at para 114.
[10] *Ibid* at para 141, 143.
[11] *Ibid* at para 154.

believe that this entire approach to s 12 is based on an erroneous interpretation of its purpose and place in the greater framework of the *Charter*.

The first step to making out a s 12 claim is to demonstrate that the impugned government action constitutes a punishment or treatment. This was not at issue in the present case. Next, it is determined whether the punishment or treatment is cruel and unusual.[12] In *R v Nur,* 2015 SCC 15, McLachlin CJ stated that this will be the case only if the sentence is "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender".[13] This formed the foundation of the two part test applied by both the majority and dissent in the present case, where the appropriate sentence was first to be determined, and then it was asked whether the surcharge was grossly disproportionate to the appropriate sentence.[14]

However, I fundamentally disagree with McLachlin CJ's iteration of the appropriate test. Section 12 should be understood as targeting those punishments or treatments which are inherently unacceptable by their nature, rather than by their relationship to the circumstances of an offender. Gross disproportionality is an element of this, but s 12 should consider disproportionality between the punishment and the offence. Disproportionality relating to offender circumstance and characteristics is already addressed by s 7 and s 15 of the *Charter*. Principles of interpretation indicate that the legislature does not include redundant provisions, and that each provision must be understood in the wider context of the document. Fundamentally, s 7 deals with situations where government aims conflict with certain primary interests of individuals unfairly. Section 15 deals with situations where a person is negatively impacted disproportionately to others based on a personal characteristic or membership in a defined class. Both of these *Charter* provisions are designed to deal with disproportionality arising from the circumstances of offenders, albeit in different contexts.

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[12] *Ibid* at para 124.
[13] *Ibid* at para 126.
[14] *Ibid* at para 46.

This suggests that s 12 was intended to fulfill a different role. I would assert that it is intended for situations where a punishment is grossly disproportionate to the crime it addresses, or where a punishment or treatment is somehow unconscionable by its very nature, rather than relative to an individual it is applied to. On this construction, the issue at bar would be whether the surcharge is disproportionate to the crime committed, *ie*: is a mandatory $100 surcharge grossly disproportionate to the summary offence committed. While this approach may seem overly technical, it recognises the subtle differences in evils that the *Charter* is intended to address, allowing for more precise argumentation and clearer law. While many might argue that disregarding offender circumstance renders this construction too narrow, this view fails to recognise that s 12 operates as part of a larger framework that provides other tools for dealing with such situations.

The present case demonstrates these subtle differences perfectly. Part of the issue that I have with this case is that, intuitively, a $100-$200 victim surcharge simply does not feel like cruel or unusual punishment. The wording of s 12 conjures up much more severe images, such as sentencing someone to life in prison for shoplifting, or cutting off an offender's hand for theft. While these examples are extreme, to say the least, this sentiment is reinforced by the emphasis the jurisprudence places on the high bar set by s 12, an emphasis that is noted by both the majority and the dissent.[15] The reason that s 12 feels like a poor fit for the present facts is because it is: a claim under s 7 or s 15 would be more appropriate.

The core of the majority's reasoning was that the surcharge punishes impecunious offenders to a greater extent than others. It was found unconstitutional because it has a disproportionate effect on persons due to their membership in an already disadvantaged group in society.[16] This is precisely the type of evil that s 15 of the *Charter* is intended to prevent. Given, however, that the offenders did not raise s 15 claims, the court can hardly be blamed for not applying the provision. Yet, the

[15] *Ibid* at para 45, 126.
[16] *Ibid* at para 110.

majority did make findings which could have supported a s 7 claim. They found that an inability to pay the surcharge could cause an offender to live under constant threat of imprisonment, that an offender could likely be arrested or detained prior to a hearing to determine the matter, and that while imprisonment due to poverty alone should not be legally possible, judicial application of this rule has been inconsistent.[17] All of this clearly represents a threat to an offender's liberty interest. Since gross disproportionality is a principle of fundamental justice, the majority could have found a breach of s 7 on the same findings.

Under both s 7 and s 15, the ultimate conclusion of the majority could have fit quite comfortably. This is because the victim surcharge is not an inherently unjust punishment; it is merely a punishment which may become unjust when applied to a particular offender, as it either it punishes them in a grossly disproportionate way because of their pre-existing societal disadvantage, or causes a grossly disproportionate impact on their liberty interest. While both of these problems are captured by the victim surcharge provision, each is a distinct evil that is prevented by a specific *Charter* provision. To construct s 12 as addressing either would be redundant and undesirable. It is undesirable because not only does it muddle the root of the issue, it also risks losing the protection of s 12 for the distinct evil that it was intended to protect against. That evil should be understood as a punishment or treatment that is inherently wrong, because it imposes a burden that is disproportionate to the crime committed, regardless of the circumstances of the offender. For example, a $1,000,000 fine for stealing a pack of gum would be wrong, even if the offender in question were a billionaire. Accepting McLachlin CJ's inclusion of offender circumstance in the s 12 test would dilute the power of this provision in such a case, and render the entire provision redundant. Such a result could hardly have been intended. This construction of s 12 also rests comfortably with the intuitive understanding of cruel and unusual punishment.

[17] *Ibid* at para 69-73.

Thus, while I do not necessarily disagree with the result of the decision in *Boudreault*, I do disagree with the manner in which the Supreme Court arrived at it. To apply s 12 as the court did here is to render it redundant, a result which is both counter intuitive and which dilutes the protections the *Charter* was intended to provide. This approach fails to recognise that each *Charter* provision is supposed to protect against a fundamentally different evil, even if that evil looks similar to others at first glance. Section 12 is better applied to those situations where punishment or treatment is inherently wrong, either because it is disproportionate to the crime it seeks to address, or due to some other aspect of its nature. In cases such as *Boudreault*, where the punishment is not wrong in itself, but may result in a wrong in light of the circumstances of certain offenders, other provisions of the *Charter* provide more appropriate grounds for remedy, such as s 7 or s 15.