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The Right Not to Be Subjected to Cruel and Unusual Treatment or Punishment: The Case of Minimum Fines

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The Court of Appeal of Québec (CAQ) handed down its decision in *Bédard c. Directeur des poursuites criminelles et pénales* on 4 March 2021 (*Bédard*).¹ The judgment contains an interesting consideration of section 12 of the *Canadian Charter of Rights and Freedoms* (Charter), which provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” The CAQ analyzed the constitutionality of a minimum fine prescribed in the penal regime of the *Building Act*² (Act). It did so in light of the decision rendered by the Supreme Court of Canada (SCC) in the *Boudreault*³ appeal and articulated instructive distinctions.

Context and Facts

Raynald Bédard (Appellant) operated a project management and interior design business with his spouse. He was convicted of having contravened section 46 of the Act for having acted as a building contractor without holding a license for that purpose. As a result, he was sentenced to pay the minimum fine of \$10,481 pursuant to section 197.1 of the Act.⁴

A justice of the peace tried the Appellant’s case. She held that though the Appellant had breached the Act, he had acted in good faith, declared his work, paid his taxes and, since committing the offence, obtained a valid license. The trial court ruled that, in light of the circumstances, imposing the minimum fine would be grossly disproportionate and would constitute cruel and unusual punishment. On appeal, the Superior Court of Québec (SCQ) overturned the trial court decision and sentenced the Appellant to the minimum fine imposed by the Act.

The *Boudreault* Decision in a Nutshell

After the SCQ decision, but before Mr. Bédard’s case reached the CAQ, the SCC delivered its majority judgment in *Boudreault* holding that the victim surcharge regime then prescribed under the *Criminal Code*⁵ contravened section 12 of the Charter.

The victim surcharge is an amount set by law and payable by any person who is discharged, pleads guilty to, or is found guilty of, an offence under the *Criminal Code* or various other federal laws. At the time of *Boudreault*, the imposition of the victim surcharge was mandatory irrespective of the objective seriousness of the offence committed, the effects of the offence on the victim or the individual characteristics of the offender.

The majority of the SCC held that the mandatory victim surcharge was cruel and unusual punishment for particularly impecunious offenders who were unable to pay the surcharge in the foreseeable future and who were therefore exposed indefinitely to a range of penal and administrative sanctions for non-payment, including incarceration.

Boudreault remains the first SCC decision to have recognized that a purely economic punishment, a fine in that case, could breach section 12 of the Charter.

The CAQ Decision

The CAQ first stated that a punishment is not unconstitutional unless, in light of all the circumstances and relevant factors, it is “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society. It concluded that the minimum fine of \$10,481 did not meet that threshold and was therefore constitutionally valid.

The CAQ rejected what it characterized as an out-of-context application of *Boudreault*, stating that the minimum fine of \$10,481 applied solely to precisely identified conduct, whereas the mandatory victim surcharge applied [TRANSLATION] “to all offences, from the most benign to the most serious”. It also noted the differences between criminal law, which is generally aimed at sanctioning past conduct, and regulatory penal regimes, such as that of the Act, which are rather aimed at protecting the public by preventing harmful conduct. In regulatory matters, the various factors taken into account by the legislator in creating and setting the minimum fine must be considered.

The CAQ found that the National Assembly’s increase of the minimum fine prescribed by section 197.1 of the Act [TRANSLATION] “purported to make breaches of the requirement to hold a valid license to carry out construction work economically uninteresting, the previously prescribed fine having not succeeded in deterring the prohibited conduct”. The CAQ held that the offence committed by the Appellant was not inconsequential as the obligation to hold a license to act as a building contractor was one of the fundamental aspects of the Act.

The CAQ also took into consideration the existence of options to mitigate the effects of the fine, including the possibility of an extension of time for payment, the possibility of payment by instalment, or the replacement of the fine with compensatory work or alternative measures. While in *Boudreault*, there was evidence which led the majority to conclude that these options were simply not viable alternatives for the appellants or other offenders, the CAQ held that, in this case, there was no such evidence.

While the CAQ dismissed the constitutional challenge in this case, it did not completely shut the door on future challenges of minimum fine provisions.

The *Bédard* decision is currently the subject of an application for leave to appeal to the SCC.

¹ 2021 QCCA 377.

² CQLR c. B-1.1.

³ *R. v. Boudreault*, 2018 SCC 58 (*Boudreault*).

⁴ Taking into account inflation, the minimum fine is today of \$11,682.

⁵ RSC 1985, c. C-46.

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