Court File No. 37427

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

BETWEEN:

ALEX BOUDREAULT

APPELLANT

- and -

HER MAJESTY THE QUEEN
ATTORNEY GENERAL OF QUEBEC

RESPONDENTS

- and -

ATTORNEY GENERAL OF ALBERTA
COLOUR OF POVERTY – COLOUR OF CHANGE
INCOME SECURITY ADVOCACY CENTRE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
ABORIGINAL LEGAL SERVICES
CANADIAN CIVIL LIBERTIES ASSOCIATION
PIVOT LEGAL SOCIETY
YUKON LEGAL SERVICES SOCIETY

INTERVENERS

Court File No. 37774

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

EDWARD TINKER, KELLY JUDGE, MICHAEL BONDOC, AND WESLEY MEADE

APPELLANTS

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ATTORNEY GENERAL OF QUÉBEC
ABORIGINAL LEGAL SERVICES
COLOUR OF POVERTY – COLOUR OF CHANGE
INCOME SECURITY ADVOCACY CENTRE
CRIMINAL LAWYERS ASSOCIATION OF ONTARIO
YUKON LEGAL SERVICES SOCIETY
CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

Court File No. 37782

AND BETWEEN:

GARETT ECKSTEIN

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

COLOUR OF POVERTY – COLOUR OF CHANGE
INCOME SECURITY ADVOCACY CENTRE
CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

Court File No. 37783

AND BETWEEN:

DANIEL LAROCQUE

APPELLANT

- and -

HER MAJESTY THE QUEEN, AND
ATTORNEY GENERAL OF ONTARIO

RESPONDENTS

- and -

COLOUR OF POVERTY – COLOUR OF CHANGE
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CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

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PART I - OVERVIEW

1. This appeal challenges the constitutionality of the mandatory victim surcharge, which s. 737 of the *Criminal Code* imposes on offenders at the time of sentencing. The Canadian Civil Liberties Association ("CCLA") submits that the mandatory victim surcharge constitutes a "punishment" within the meaning of s. 12 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and that the victim surcharge must be struck down insofar as it violates the *Charter*. The CCLA limits its argument in this appeal to two issues: (A) the factors to be considered in determining whether the impugned laws constitute "punishment" so as to engage s. 12 of the *Charter*; and (B) the proper remedy to be imposed if the mandatory victim surcharge is found to violate s. 12. The CCLA takes no position on the facts.

PART II - QUESTIONS AT ISSUE

2. The CCLA's argument in this appeal is limited to the issues identified above.

PART III - ARGUMENT

A. The mandatory victim surcharge constitutes a punishment for the purposes of section 12 of the *Charter*

3. Section 12 of the *Charter* protects the right "not to be subjected to any cruel and unusual treatment or punishment."[1] However, lower courts across Canada have reached conflicting conclusions concerning the appropriate juridical treatment of the victim surcharge. Purposive and consistent interpretation of *Charter* protections is important to ensuring that rights are upheld, and guarantees that recourse to judicial review is available for potential violations. As such, the CCLA argues that this Court should resolve this conflict and give full import to the *Charter's* words by finding that the surcharge is a "punishment" within the meaning of s. 12 of the *Charter*, a finding that follows from the most recent statement of this Court interpreting the meaning of the word "punishment" in the *Charter* context.

(i) The case law diverges on the juridical characterization applicable to the surcharge

4. A notable feature of the judicial treatment of the mandatory victim surcharge has been the absence of consensus among courts concerning its proper juridical characterization.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 12 ["*Charter*"].

5. In *R. v. Michael* ("*Michael*"), Paccioco J. (as he then was) observed that "[i]ncarceration and fines are the two paradigmatic forms of punishment",[2] and concluded that the victim surcharge fell within the meaning of the term "fine" as it is defined in s. 716 of the *Criminal Code*.

6. In *R. v. Tinker* ("*Tinker*")[3] — albeit outside the context of s. 12 of the *Charter* — the summary conviction appeal court briefly touched upon the antecedent question of whether the surcharge is a "fine", a "penalty", or a "sanction in its own right" and determined that it was none of these. It concluded instead that the surcharge is "quite simply . . . a sum of money established to be a consequence of breaking the law", akin to "requirements for providing DNA samples upon conviction of offences" but falling short of being either a sanction or a penalty.[4]

7. In *R. v. Eckstein* ("*Eckstein*"),[5] the court appeared to distance itself from the conclusion in *Tinker* that the surcharge is not a penalty. It did not need to reach the issue of whether it constituted a "treatment" or "punishment" within the meaning of s. 12 of the *Charter* because it concluded that the holding in *Tinker* "that there is no gross disproportionality arising out of the victim surcharge" for the purpose of s. 7 of the *Charter* was binding on lower courts and determinative of any s. 12 challenge as well.[6]

8. In *R. v. Larocque* ("*Larocque*"),[7] the Attorney General of Ontario appealed the provincial court judge's conclusion that the surcharge was a "punishment" that triggered s. 12 scrutiny, leading the summary conviction appeal court to embark upon a fulsome analysis of the question under the then-leading appellate authorities[8] that yielded the conclusion that the surcharge is a "punishment" and "at a minimum [a] treatment" within the meaning of s. 12.[9]

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[2] 2014 ONCJ 360 at para. 2 ["*Michael*"].
[3] 2015 ONSC 2284 ["*Tinker*"].
[4] *Ibid* at para. 29.
[5] 2015 ONCJ 222 ["*Eckstein*"].
[6] *Ibid* at paras. 17, 28.
[7] 2015 ONSC 5407 ["*Larocque*"].
[8] *Canada (Attorney General) v. Whaling*, [2014] 1 S.C.R. 392 ["*Whaling*"]; *R. v. Rodgers*, [2006] 1 S.C.R. 554 ["*Rodgers*"].
[9] *Larocque, supra* note 7 at paras. 32-33.

9. In its decision on the appeals of *Tinker, Eckstein, and Larocque*, the Court of Appeal for Ontario "assume[d]" without deciding that "that the imposition of the surcharge and the measures available to enforce payment amount to treatment" within the meaning of s. 12.[10]

10. This debate was noted by the Quebec Court of Appeal in *R v. Boudreault* ("*Boudreault*"),[11] however the reasons of Mainville J.A. adopted the holding of the Quebec Court of Appeal in *R. v. Cloud* ("*Cloud*")[12] that the victim surcharge is not a fine:[13]

> However, beyond the question of a discharge, the legal characterisation of the victim surcharge as a "sentence" or a "minimum sentence" is the subject of some controversy due to the constitutional ramifications of such a characterization. **Indeed, in many ways, the victim surcharge resembles an administrative fiscal measures [sic], while in other ways, it resembles a fine**.
>
> This Court put an end to this controversy, at least for Quebec, in the recent decision *R. v. Cloud* where Justice Vauclair adopted the definition of the victim surcharge proposed by Justice Freeman in *R. v. Crowell*:
>
> > The victim fine surcharge is a new concept in restitution: general, rather than specific restitution made by an offender, not to his or her own victim, but to victims of crime generally by creating a fund to provide them with certain services. It is a statutorily imposed deterrent with perhaps a secondary relevance to reformation; its role as a deterrent is incidental to its fund-raising purpose.
> >
> > [. . .]
> >
> > The victim fine surcharge is therefore neither a true tax nor a true fine, but rather a unique penalty in the nature of a general kind of restitution. As such it is penal in its pith and substance and therefore constitutional as a proper matter for parliamentary legislation under s. 91(27) of the Constitution Act, 1867. It must be taken into account by criminal court judges in crafting the sentences they impose.
>
> **The victim surcharge is thus a unique measure (one might also say sui generis, autonomous, freestanding or original), which is neither a fine nor a restitution, but which is closer to a form of general restitution.** And yet, as Justice Vauclair indicated in Cloud, the victim surcharge is included among the provisions of the Criminal Code regarding sentencing and there is no reason why it should not be considered as an integral component of a sentence. This takes away nothing from the unique character of the victim surcharge, but since it is part

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[10] *R. v. Tinker*, 2017 ONCA 552 at para. 125 ["*Tinker* Appeal"].
[11] 2016 QCCA 1907 at paras. 73-75, *per* Duval Hesler C.J.Q ["*Boudreault*"].
[12] 2016 QCCA 567 ["*Cloud*"].
[13] *Boudreault*, *supra* note 11 at paras. 176-78, *per* Mainville J.A.

> of the sentence, it engages the analysis under section 12 of the *Charter*. (Emphasis added.)

11. In these appeals, the responding parties agree that s. 12 is engaged by the victim surcharge, although for slightly different reasons. The Attorney General of Quebec, in *Boudreault*, describes the surcharge as constituting "une peine", which is the word that corresponds to "punishment" in the French version of the *Charter*.[14] The Attorney General of Ontario in *Tinker*, *Eckstein*, and *Larocque* submits that the debate over whether the surcharge is a "punishment" is not germane to this case, as it must comply with the *Charter* irrespective of whether it is a "treatment" or "punishment" within the meaning of s. 12.[15] The Crown in *Larocque* takes a similar position in substance, noting various characterizations that the victim surcharge has been given in the lower court case law, but agreeing that the surcharge is captured by s. 12 because it constitutes a "treatment" or a "punishment", and is evaluated on the same constitutional standard notwithstanding its characterization.[16]

12. The CCLA submits that the divergent characterization of the surcharge across various lower courts for the purposes of *Charter* analysis — and the debate it has engendered — requires clarification of its juridical nature by this Court.

(ii) This Court should evaluate whether the surcharge is a punishment using the framework employed in *R. v. K.R.J.*

13. The cases referred to in the preceding discussion were decided without reference to the Supreme Court's most recent pronouncement about the meaning of the word "punishment" under the *Charter* delivered in *R. v. K.R.J.* ("*K.R.J.*").[17] To eliminate the divergent characterizations of the surcharge and to determine whether it is a "punishment" within the meaning of s. 12 of the *Charter*, the CCLA submits that this Court should employ the test synthesized in *K.R.J.*

(iii) The surcharge is a punishment within the meaning of section 12 of the *Charter*

14. In *K.R.J.*, Karakatsanis J. re-synthesized the test for a punishment in the context of interpreting s. 11(i) of the *Charter*, stating that a measure constitutes punishment if it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be

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[14] Factum of the Attorney General of Quebec at para. 35.
[15] Factum of the Attorney General of Ontario at para. 23.
[16] Factum of Her Majesty the Queen at paras. 43-47.
[17] *R. v. K.R.J.*, 2016 S.C.R. 571 ["*K.R.J.*"].

liable in respect of a particular offence; and either (i) it is imposed in furtherance of the purpose and principles of sentencing; or (ii) it has a significant impact on an offender's liberty or security interests.[18] Applying this test to the victim surcharge, whether it is analyzed under the first or the second branch, results in the same conclusion: the surcharge is a punishment within the meaning of that word in s. 12 of the *Charter*.

a. The victim surcharge forms part of the arsenal of sanctions to which the accused may be liable

15. The first part of the *K.R.J.* test asks whether a measure "is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence".[19] A plain reading of s. 737(1) of the *Criminal Code* provides grounding for the conclusion that the surcharge is a "consequence of conviction". The surcharge is mandatory and it "*shall*" be paid by any offender "who is *convicted, or discharged* . . . of an offence"[20] (emphasis added). As to whether the surcharge forms part of the "arsenal of sanctions to which an accused may be liable in respect of a particular offence", the text of s. 737(1) also supplies an answer: it shall be paid "in addition any *to any* ***other*** *punishment* imposed on the offender"[21] (emphasis added), indicating that victim surcharge is one measure in the arsenal of sanctions, including a custodial sentence, a fine, or a probation order. Thus, as a textual matter, both components of this branch of the test are satisfied.

16. The result of the textual analysis is reinforced when the victim surcharge is viewed in the context of the broader statutory scheme "of sanctions to which an accused may be liable in respect of a particular offence" established by the *Criminal Code*. Properly characterized, the mandatory victim surcharge is a fine, and fines are one of the "paradigmatic forms of punishment" recognized in this Court's precedents.[22]

17. First, the surcharge resides within Part XXIII of the *Criminal Code* entitled "Sentencing", in the section entitled "Fines and Forfeiture", and comes immediately after the section providing for the imposition and administration of fines (ss. 734-736). In addition, s. 737 provides that the

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[18] *Ibid* at para. 41.
[19] *Ibid* at para. 41.
[20] *Criminal Code,* R.S.C. 1985, c. C-46, s. 737(1) ["*Criminal Code*"].
[21] *Ibid.*
[22] See *Michael, supra* note 2 at para. 5 (citing *R. v. Wigglesworth,* [1987] 2 S.C.R. 541 at 561; *Rodgers, supra* note 8 at para. 59.)

manner and time for paying the surcharge may be varied employing the same mechanisms applicable to fines (s. 737(8)(d)) and further provides that the enforcement of the surcharge employ the same methods as are applicable to fines (s. 737(9)). Significantly, the consequences of non-payment — including their impact on the individual — can be the same, as discussed further below.

18. Second, the term "fine" is defined in s. 716 of the *Criminal Code* and the victim surcharge falls squarely within that definition. The *Criminal Code* defines a fine as consisting of "a pecuniary penalty or other sum of money, but does not include restitution."[23] The surcharge clearly meets the initial part of this definition because (i) it is by its nature a "sum of money", and as seen above, (ii) it is imposed as a mandatory pecuniary[24] penalty[25]—supplementary to "any other punishment"—upon "conviction" of, or "discharge" from, an offence.[26]

19. The second part of the definition of "fine" in s. 716 excludes "restitution" from the defined term. Sections 737.1–742.2 of the *Criminal Code*, under the heading "Restitution", explicitly create a standalone provision for restitution. As a result, the word "restitution" within the meaning of s. 716 of the *Criminal Code* is best characterized as a "term of art",[27] whose definition is supplied by the provisions of the *Criminal Code* establishing a statutory scheme for restitution, and which does not capture the victim surcharge. As Paciocco J. observed in *Michael*: "section 716 was enacted in 1999 four years after victim fine surcharges were legislated. Obviously, if Parliament intended the 'restitution' exception to include victim fine surcharges, it would have either described the surcharge as 'restitution' or used a clear term in the exception part of the fine definition that would encompass the victim fine surcharge."[28]

20. In that regard, the Quebec Court of Appeal erred in *Cloud* by following the pre-1999 decision of the Nova Scotia Court of Appeal in *Crowell* to reach the following conclusion:

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[23] *Criminal Code*, *supra* note 20 at s. 716.
[24] *Black's Law Dictionary*, 8th Ed., *sub verbo* "pecuniary" is defined as "Of or relating to money; monetary".
[25] *Black's Law Dictionary*, 8th Ed., *sub verbo* "penalty" includes "esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)."
[26] *Criminal Code*, *supra* note 20 at s. 737(1).
[27] *Michael*, *supra* note 2 at para. 12.
[28] *Ibid*.

> The surcharge is a unique measure, one that is neither a fine nor restitution within the meaning of section 738 [of the *Criminal Code*]. I concur with the Nova Scotia Court of Appeal in its conclusion [in *R. v. Crowell*] that the surcharge is a unique penalty in the nature of a general kind of restitution.
>
> In short, I see no obstacle to the surcharge being neither a fine nor restitution, but rather a pecuniary sanction, an independent and original measure. While the legislator clearly determined that, in many ways, it must be administered as a fine, this does not change its unique character and true nature.[29]

21. Of particular note, this description is not restitution as understood by the *Criminal Code*. The impact on an individual required to pay the surcharge is punitive, and potentially includes punitive consequences for non-payment, as further discussed below.

22. For the reasons given in *Michael*, the Nova Scotia Court of Appeal's decision in *Crowell* cannot compel the result that the victim surcharge is not a "fine" as that term is defined in s. 716 of the *Criminal Code*:

> First, the ratio of *R. v. Crowell* is its conclusion that the victim fine surcharge, as it then was, was not a tax. Any reference linking the victim fine surcharge to restitution was *obiter dictum* in that case, uttered by a court that did not have to come to a formal characterization of the juridical nature of the victim fine surcharge to resolve the case. It was enough to dispose of the litigation to find it was not a tax. Moreover, I agree with Mr. Mack for the Crown that even when the Court referred to the concept of restitution this *obiter dictum* was not a definitive expression that the victim fine surcharge was restitution *per se*. When the *Crowell* Court described the pre-amendment form of section 737 as "a unique penalty in the nature of a general kind of restitution" it was struggling to characterize it given that a victim fine surcharge, legally, is idiosyncratic – a novel form of sanction. **Third, Crowell has since been overtaken by legislation. It is not at all clear that the 1992 decision would have offered the same conclusion, that the victim surcharge is not a fine, had the Court had the benefit of the definition of "fine" now in section 716, passed in 1999.**[30] (Emphasis added.)

23. In sum, the *Criminal Code* defines the word "fine" and the victim surcharge falls within that definition: it is a "pecuniary penalty or other sum of money" but *not* "restitution". This bolsters the conclusion that the surcharge satisfies the first branch of the definition of a "punishment" in *K.R.J.*

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[29] *Cloud*, *supra* note 12 at paras. 55-56.
[30] *Michael*, *supra* note 2 at para. 14.

b. The victim surcharge is imposed in furtherance of the purpose and principles of sentencing

24. The second branch of the *K.R.J.* test first asks whether a measure "is imposed in furtherance of the purpose and principles of sentencing."[31] The purposes of sentencing are set forth in s. 718 of the *Criminal Code*, and courts have recognized that the victim surcharge advances several of these purposes.

25. In *Larocque*, Lacelle J. endorsed the findings of the lower court that the victim surcharge "is . . . imposed in furtherance of the purpose and principles of sentencing", in particular restitution, denunciation, and rehabilitation.[32] Similarly, in *Michael*, Paciocco J. concluded that a central purpose of the victim surcharge is "holding offenders accountable for [the costs of providing 'important victim services']" by making "offenders pay for their crimes", thereby falling within s. 718(f) of the *Criminal Code* as well.[33]

26. Parliament has chosen a measure that meets the definition of a fine while deploying this "paradigmatic" form of punishment for a purportedly novel purpose — aiming to achieve rehabilitation, restitution, and accountability by adding a specific pecuniary sum to the sentence imposed on every offender found guilty of an offence and directing that its proceeds be directed towards a general fund furthering the goal of making reparations available to the victims of crime.[34] As the victim surcharge is imposed in furtherance of these objectives set forth in the *Criminal Code*, it satisfies the second branch of the *K.R.J.* test.

c. The victim surcharge has a significant impact on the offender's security interests and liberty

27. The second part of the *K.R.J.* test will also be satisfied if the measure under scrutiny has a significant impact on the offender's security interests and liberty.[35] Because the *Charter* guarantees rights to security of the person and liberty in s. 7, the interests protected by that right should also inform whether a measure affects the offender's security interests and liberty for the purpose of the *K.R.J.* test.

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[31] *K.R.J.*, *supra* note 17 at para. 41.
[32] *Larocque*, *supra* note 9 at paras. 24-28 (citing *Criminal Code*. ss. 718(e) & (f)).
[33] *Michael*, *supra* note 2 at para. 8; *accord, Larocque*, *supra* note 8 at para. 28.
[34] See *Criminal Code*, s. 737(7).
[35] *K.R.J.*, *supra* note 17 at para. 41.

28. Starting with the s. 7 right to liberty, this Court has held that "the availability of imprisonment" as a penalty for an offence "is sufficient to trigger s. 7 scrutiny".[36] Regarding security of the person, this Court "has held on a number of occasions that the right to security of the person protects 'both the physical and psychological integrity of the individual'".[37] In an early decision discussing s. 7, the Supreme Court also endorsed the view that a measure "*likely*" to impair the subject's health was "sufficient to constitute a deprivation of the right to security of the person under the circumstances."[38] This Court should conclude – in accordance with its precedents – that the victim surcharge affects *both* an offender's liberty and security for the purposes of the *K.R.J.* test.

29. Beginning with the liberty interest, the fact that (i) imprisonment, and (ii) "the possibility of being compelled to appear at a committal hearing", are *available* in event of non-payment of the surcharge[39] should be dispositive of the question of whether the surcharge "affects" an offender's liberty for the purpose of the *K.R.J.* test.

30. With respect to an offender's security interests, in *Michael*, Paciocco J. found that chronic stress is visited upon offenders who are unable to pay by the risk of jail associated with non-payment of the surcharge.[40] For a person who is genuinely unable to pay the surcharge, the stress induced by the persistent spectre of incarceration associated with non-payment is compounded by other attendant legal and personal consequences which an impecunious offender will never realistically hope to escape, including the (i) stigma associated with being indebted to society but unable to repay the debt and take even the first step down the road to rehabilitation;[41] (ii) ineligibility to apply for a record suspension (*i.e.* a pardon), with associated effects on an

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[36] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 84 (citing *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486).
[37] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 58 (quoting *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 173).
[38] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 48 (quoting *Collin v. Lussier*, [1983] 1 F.C. 218) (emphasis added).
[39] See *Criminal Code*, s. 737(9) ("enforcement" of victim surcharge referring to *Criminal Code*, s. 734(4) "imprisonment in default of payment for fines"); *Tinker* Appeal, *supra* note 10 at para. 70.
[40] *Michael*, *supra* note 2 at para. 74 ("A person told that they could be incarcerated for not paying can be expected to find that threat stressful").
[41] *Ibid* at para. 75.

offender's prospects for employment, rehabilitation, and reintegration into society;[42] and (iii) indefinite disqualification for government-issued licenses.[43]

31. It follows from the foregoing that the surcharge entails "serious psychological effects" that threatens an offender's "psychological integrity" severely enough to engage s.7 of the *Charter*; the surcharge therefore also has a sufficiently significant impact on an offender's security interests to satisfy the third branch of the *K.R.J.* test.

B. If the mandatory victim surcharge violates the *Charter*, it should be struck down

32. The second issue on which the CCLA has been granted leave to intervene is the appropriate remedy that this Court should order if the victim surcharge is found to violate the *Charter*. The CCLA submits that the only remedial option available to this Court is to strike down s. 737(1) in its entirety and leave the task of repairing its constitutional defects to Parliament. This conclusion flows from this Court's decision, interpreting s. 52 of the *Constitution Act, 1982* in *R. v. Ferguson*,[44] that a constitutional exemption from the effects of a law that violates s. 12 of the Charter for only a subset of offenders is not an available remedy. As McLachlin C.J.C. wrote for a unanimous Court in *Ferguson*: "[t]he usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s. 12 of *the Charter* is a declaration that the law is of no force and effect under s. 52 of the *Constitution Act, 1982*."[45] Chief Justice McLachlin further clarified that when "a court . . . concludes that a mandatory minimum sentence imposes cruel and unusual punishment"— even "in an exceptional case" — "it is compelled to declare the provision invalid."[46]

33. The alternative remedy proposed by certain parties and the Attorney General of Ontario, reading in discretion to waive the surcharge on a case by case basis — or any equivalent measure — cannot be reconciled with the unequivocal direction of this Court that the only remedial avenue available upon finding that a mandatory punishment runs afoul of s. 12 due to the absence of judicial discretion to moderate the penalty is to declare that the law is of no force and effect.

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[42] *Ibid* at paras. 60, 77.
[43] *Ibid* at para. 60.
[44] *R. v. Ferguson*, [2008] 1 S.C.R. 96 ("*Ferguson*") at para. 34.
[45] *Ibid* at para. 36.
[46] *Ibid* at paras. 56-57.

34. Nor is *Ferguson*— nor the rule it enunciated — distinguishable, or somehow inapplicable, with respect for the contrary submissions by the Attorney General of Ontario.

35. First, both these appeals and *Ferguson* involved commensurate fact patterns: the substitution of a court's sentencing discretion by Parliament with a mandatory minimum penalty. In that regard, *Ferguson* is indistinguishable: although the legislative history was not at issue before this Court, the mandatory minimum sentence for manslaughter with a firearm challenged in *Ferguson* had been introduced to s. 236 of the *Criminal Code* by Parliament in 1995, before which there was no minimum sentence, and the courts had discretion to impose a sentence for manslaughter up to and including life imprisonment.[47]

36. Second, striking down the victim surcharge is consistent with this Court's mandate in *Ferguson* that reading in should only be employed when it is "a lesser intrusion on Parliament's legislative role than striking down."[48] If the victim surcharge is struck down, "[t]he ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects."[49] A declaration of invalidity will confront Parliament with several decisions, including: (i) whether to reintroduce the victim surcharge as it existed pre-Bill C-37 or in some alternative form, (ii) the degree of judicial discretion to incorporate into a new victim surcharge to render it *Charter*-compliant, and (iii) the manner in which that discretion should be exercised by judges deciding whether to impose it in a given case. Apparently mindful of the *Charter* vulnerability of the mandatory victim surcharge, Parliament is currently considering Bill C-28, which would amend s. 737 to restore judicial discretion to waive the surcharge in appropriate instances.[50] The amendment contemplated by the initial draft of Bill C-28 incorporates several features, which include:

- Discretion not to impose the surcharge on certain offenders if the surcharge would cause them undue hardship and guidance with respect to the interpretation of "undue hardship";

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[47] Compare s. 236 of the *Criminal Code*, R.S.C. 1985, c. C-46 as it appeared in 1994 with s. 142 of Bill C-68, *An Act respecting firearms and other weapons*, 1st Sess., 35th Parl., 1994 (amending s. 236 of the *Criminal Code*, assented to 5 December 1995), S.C. 1995, c. 39.
[48] *Ferguson*, *supra* note 40 at para. 50.
[49] *Ibid* at para. 65.
[50] Bill C-28, *An Act to amend the Criminal Code (victim surcharge*), 1st Sess., 42nd Parl., 2016, cl. 2–3.

- Discretion not to impose the surcharge for certain administration of justice offences if the surcharge amounts to a disproportionate sanction; and

- An obligation that courts waiving the victim surcharge provide reasons for so-deciding.[51]

The draft bill shows that Parliament's options in modifying the surcharge to bring it into *Charter* compliance involve more than simply reading in discretion to waive the surcharge. For instance, it can extend to specifying parameters within which that discretion should be exercised. By specifying such parameters, Parliament may seek to advance one of original the purposes of Bill C-37 —reducing the frequency at which the surcharge is waived by courts[52] — by structuring the courts' discretion to waive it, while also bringing the surcharge into constitutional compliance. Simply "reading in" discretion "to cure the constitutional defect of" the mandatory victim surcharge could "defeat the purpose of the [impugned] legislation" in the same manner as this Court rejected in *Trial Lawyers Association v. British Columbia (Attorney General)* deciding instead to strike down the offending legislation rather than reading in discretion to waive its effects — even if the loss of an important source of public funds ensued from the result.[53]

37. Finally, curing the defect in the mandatory surcharge by reading in the equivalent of a constitutional exemption could set a high bar which would have to be interpreted and applied by the courts on a case by case basis for each accused person. This would place an undue burden on individuals to make out the case for a constitutional exemption, a burden that will be particularly acute for those who are marginalized, impecunious, unrepresented or under-represented, and which may differ from the standard Parliament would enact if the legislation is struck down.

PART IV - SUBMISSIONS ON COSTS

38. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

39. By orders dated November 2, 2017 and March 7, 2018, the Court granted the CCLA permission to present oral argument not exceeding five minutes at the hearing of the appeal.

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[51] *Ibid* cl. 3.
[52] See Factum of the Attorney General of Ontario at para. 41; Factum of the Intervener Attorney General of Alberta, Schedule "A" at 34.
[53] [2014] 3 S.C.R. 31 at para. 66.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of April, 2018:

for **Christopher D. Bredt**

Pierre N. Gemson

for **Alannah M. Fotheringham**

Counsel for the Intervener,
Canadian Civil Liberties Association

PART VI - TABLE OF AUTHORITIES

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