S.C.C. File No. 37427

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

BEWTEEN:

ALEX BOUDREAULT

APPELLANT

- AND -

HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF QUEBEC

RESPONDENTS

- AND –

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PART I: OVERVIEW

1. In this appeal, the British Columbia Civil Liberties Association ("BCCLA") submits that the factual findings which establish the "high bar" of a section 12 breach are incompatible with the concept of reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.

2. In particular, the BCCLA submits that a punishment that has been deemed "grossly disproportionate" and excessive to the point that it is "abhorrent to society" could never be justified under section 1 of the *Charter*, as it could never meet the minimally impairing or proportionality aspects of the test set out in *R v Oakes*, [1986] 1 SCR 103 ("*Oakes*"). Moreover, the BCCLA submits that the considerations relevant to the test for justification under section 1 in *Oakes* are subsumed by the section 12 analysis, which should be determinative of both.

3. The BCCLA makes no submission with respect to the result of the case at bar.

PART II: STATEMENT OF POINTS IN ISSUE

4. Are courts required to engage in a separate analysis under section 1 of the *Charter* once the necessary factual findings are made to establish that a breach of section 12 has occurred?

PART III: STATEMENT OF ARGUMENT

Section 12 analysis

5. The BCCLA takes no position on whether the impugned provision in the present case infringes the section 12 right of the appellant, or would infringe the rights of others in a reasonable hypothetical situation. The BCCLA's submissions are confined to section 1, and the section 12 analysis is set out herein solely for the purpose of illustrating the BCCLA's position on section 1.

6. This Court has held that in order for a sentence to violate section 12 of the *Charter*, it must be so grossly disproportionate to a fit and proportionate sentence that Canadians would find

it abhorrent, intolerable and outrageous to standards of common decency. This is a high bar, and the sentence in question must go beyond the "merely excessive".

R v Lloyd, 2016 SCC 13 at paras 23-24

7. As set out by Chief Justice McLachlin in *R v Nur*, the court must first determine what would be a fit and proportionate sentence. In this analysis, the court will consider the sentencing principles set out in s 718 of the *Criminal Code,* including denunciation, deterrence, protection of society, rehabilitation, reparation and promoting responsibility and acknowledgement of harm to victims. Further consideration must be given to aggravating and mitigating factors, and all factors must be reconciled with the underlying principle of proportionality codified in s 718.1.

R v Nur, 2015 SCC 15 ("*Nur*") at paras 38-42

8. Imposing a proportionate sentence is a "highly individualized exercise", which must be responsive to the gravity of the offence, the blameworthiness of the offender and the harm caused by the crime.

Nur, *supra* at para 43

9. Once the court has satisfied itself as to what would be a fit and proportionate sentence, a judge must consider whether the impugned punishment is so far beyond a fit and proportionate sentence that it must be considered "grossly disproportionate" and infringing of the section 12 right. This Court has confirmed on more than one occasion that "the court should be reluctant to interfere with the considered views of Parliament" and it is "only in the clearest of cases" which "outrage standards of decency" that a section 12 breach will be found.

R v Latimer, 2001 SCC 1 at para 77, citing *R v Guiller* (1985), 48 CR (3d) 226 (Ont Dist Ct), at p 238, per Borins Dist Ct J

10. In the Ontario Court of Appeal decision in *Nur,* Justice Doherty set out factors identified in prior jurisprudence that inform the gross disproportionality comparison:

- the gravity of the offence;
- the personal characteristics of the offender;

- the particular circumstances of the case;
- the actual effect of the punishment on the individual;
- the penological goals and sentencing principles reflected in the challenged minimum;
- the existence of valid effective alternatives to the mandatory minimum; and
- a comparison of punishments imposed for other similar crimes.

R v Nur, 2013 ONCA 677 at para 78 ("*Nur* ONCA")

11. The case at bar involves a mandatory requirement to impose victim surcharges on offenders. Such sentences may be found to be grossly disproportionate in one of two ways: in reference to the offender before the court or the impact the law may have upon others.

Nur, *supra* at para 39

Section 1 analysis

12. Per *Oakes*, *supra*, in order to justify the infringement of a *Charter* right the government must establish that it enacted the law pursuant to a pressing and substantial objective, and the impugned law is proportionate to that objective. Proportionality has three aspects: (1) the means chosen must be rationally connected to the objective, (2) the law must minimally impair the right in question, and (3) there must be proportionality between the deleterious and salutary effects of the law.

Oakes, *supra* at 138-140

13. With respect to minimal impairment, the court will assess "whether there are less harmful means of achieving the legislative goal". This Court has described the proportionality aspect of section 1 as one which "weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good".

Nur, *supra* at paras 116 and 118, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 53

14. Under section 1, the government bears the burden to justify limitations on the rights of the citizen on the balance of probabilities. In *Oakes*, Dickson CJ described the onus as a "very

high degree of probability" commensurate with the occasion. This approach is no longer followed, as the only applicable standard of proof in a civil case is balance of probabilities.

Oakes, *supra* at 138; *FH v McDougall*, 2008 SCC 53 at paras 29-31, 40

Existing jurisprudence on the role of section 1 following a section 12 breach

15. In the Ontario Court of Appeal decision in *Nur*, Justice Doherty arrived at the following conclusion with respect to the section 1 analysis following a finding of a section 12 breach:

> [178] The format of the s. 1 analysis is well known: e.g. see *Smickle* (reasons of Molloy J.), at paras. 97-123. I do not propose to go through the steps of that analysis. Given the very high bar set for a finding that a sentence constitutes cruel and unusual punishment, I find it very difficult to imagine how a sentence that clears that high bar could ever qualify as a reasonable limit demonstrably justified in a free and democratic society.
>
> [179] In essence, s. 1 permits what would otherwise be infringements of individual constitutional rights where the societal benefits flowing from the state action that infringes individual rights can "demonstrably" justify that infringement. In my view, the basic quid pro quo underlying s. 1 does not exist where the state imposes punishment that is "so excessive as to outrage standards of decency" and so disproportionate as to be "abhorrent or intolerable" to Canadians: *Ferguson*, at para. 14. What possible societal benefit could render such punishment "demonstrably justified in a free and democratic society?"
>
> [180] No system of criminal justice that would resort to punishments that "outrage standards of decency" in the name of furthering the goals of deterrence and denunciation could ever hope to maintain the respect and support of its citizenry. Similarly, no system of criminal justice that would make exposure to a draconian mandatory minimum penalty, the cost an accused must pay to go to trial on the merits of the charge, could pretend to have any fidelity to the search for the truth in the criminal justice system.
>
> [181] If an argument can be made that could justify sheltering a sentence that amounted to cruel and unusual punishment under s. 1, I have not heard it. The mandatory minimum penalty of three years imposed under s. 95(2)(a) cannot be saved by s. 1.

Nur ONCA, *supra* at paras 178-181

16. The majority of this Court in *Nur* upheld Justice Doherty's conclusion that the impugned provision of the *Criminal Code* in that case breached section 12 and was not justified under section 1. The Chief Justice, writing for the majority, echoed Justice Doherty's statement that it was "very difficult to imagine" a breach of section 12 being justified under section 1:

> It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.

Nur, *supra* at para 111

17. In dissent in the decision below, Duval-Hesler CJ adopted the same approach to the application of section 1 following a section 12 breach, stating that "it seems obvious to me that a sentence which is grossly disproportionate is incapable of respecting either the requirements of minimal impairment or proportionality" [emphasis in original].

R v Boudreault, 2016 QCCA 1907 at para 131

18. In recent years, many Canadian trial courts have bypassed or truncated the section 1 analysis after finding a section 12 breach for substantially the same reasons as those set out by Justice Doherty in *Nur*.

> See, for example, *R v Michael*, 2014 ONCJ 360 at para 116; *R v Morrell*, 2017 ONSC 5606 at paras 49-51; *R v EJB*, 2017 ABQB 726 at para 89; *R v McGee*, 2017 BCSC 594 at paras 25-27

19. Moreover, in the recent case of *R v JLM*, the British Columbia Court of Appeal appears to have moved beyond the *Nur* position that it would be merely "difficult" for a breach of section 12 to be justified under section 1. In that case, Justice Bennett, writing for the majority, concluded that "where a sentence is found to be grossly disproportionate, it cannot be said that the legislation imposing it meets the proportionality test [under section 1]".

R v JLM, 2017 BCCA 258 at para 80

20. The bright line approach taken in *JLM* reflects the approach of Madam Justice Wilson to section 7 in *Re BC Motor Vehicle Act*:

> If...the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice...the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society".
>
> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 523

21. The above analysis from Justice Wilson's dissent in *Re BC Motor Vehicle Act* has not been adopted by this Court to date. Although the jurisprudence does not permit courts to dispense entirely with the section 1 analysis after finding an infringement of section 7, this Court has never found an infringement of section 7 to be justified under section 1. To date there have only been two cases in which individual judges of this Court have reached that conclusion.

> *R v Penno*, [1990] 2 SCR 865 at 881-885 (Lamer CJC concurring in the result); *R v Hess; R v Nguyen*, [1990] 2 SCR 906 at 950-951 (McLachlin J, as she then was, dissenting); see also *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 702-712, in which L'Heureux Dubé J did not find a section 7 violation, but in the alternative would have upheld a section 7 violation under section 1

The BCCLA's position

22. The BCCLA's position in this appeal is that a challenge to the constitutionality of punishment under section 12 ultimately requires a binary determination. An individual is either free from any cruel and unusual punishment or they are not. There is no degree of cruel and unusual punishment that is demonstrably justifiable in a free and democratic society. The corollary of this must also be true - a punishment that is demonstrably justifiable in a free and democratic society is not cruel and unusual.

23. The BCCLA submits that the above-noted statement of Justice Bennett in *R v JLM* is a correct statement. In fact, the BCCLA's position goes beyond this statement, as it submits that a punishment which runs afoul of section 12 is not just incompatible with the proportionality aspect of the *Oakes* test, it is also incompatible with the minimal impairment aspect of the *Oakes* test. The BCCLA submits that any law which infringes section 12 is bound to fail at both the second and third stages of the *Oakes* analysis.

24. The inquiries into whether an impugned punishment is minimally impairing or proportionate are implicitly, if not explicitly, determined within the section 12 analysis. If the impugned measure is minimally impairing or proportionate, it would not then be grossly disproportionate and could not have breached section 12.

25. To characterize the analytical framework any other way is to divorce the legal analysis from reality - a reasonable and justifiable punishment that is both minimally impairing and proportionate cannot be cruel and unusual at first instance. The factual findings that are necessary for a finding that section 12 has been breached are necessarily incompatible with justification under section 1. Further, the considerations inherent in the test for justification under section 1 in *Oakes* are subsumed by the section 12 analysis, which is determinative of both.

A. Minimal impairment

26. In order to pass the minimal impairment threshold following a section 12 breach, the government must establish that the only reasonable and minimally impairing way to achieve the pressing and substantial objective in question is to levy a grossly excessive and disproportionate sentence. The BCCLA submits that there are no governmental objectives in a free and democratic society which require this level of extreme sentencing. There is no degree to which cruel and unusual punishment can be minimally impairing. Cruel and unusual punishment by its name and nature is "beyond merely excessive".

27. In *Nur,* Chief Justice McLachlin found that a three-year mandatory minimum sentence for what was "essentially...a licensing infraction" was "totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society" under section 12. In particular, she held that there was a disconnect between the moral blameworthiness of the offence and the gravity of the punishment. The punishment imposed was grossly disproportionate to a fit and proportionate sentence.

Nur, *supra* at para 83

28. In her conclusions with respect to minimal impairment, Chief Justice McLachlin held that the legislature could have achieved its objective by imposing a punishment that better reflected

the degree of moral blameworthiness of the offence in question. This reflected the Chief Justice's above-noted findings with respect to what would be a fit and proportionate sentence.

Ibid at para 117

29. *Nur* is an excellent example of the significant overlap between a finding under section 12 that an impugned punishment is grossly disproportionate to a fit and proportionate sentence and the minimal impairment analysis under section 1. Implicit in the section 12 analysis is consideration of whether there is a more minimally impairing way to achieve the government's underlying legislative objective – namely, the imposition of a fit and proportionate sentence.

30. In assessing what would be a fit and proportionate sentence, the court must consider sentencing principles such as denunciation and deterrence, as well as the gravity of the offence and the harm caused by the crime. This effectively necessitates a consideration of the legislative goal underlying the impugned punishment, followed by an analysis of whether the impugned punishment is fit and proportionate.

31. The BCCLA submits that the fit and proportionate sentence against which an impugned punishment is judged represents in itself a less harmful alternative that meets the legislative objective. Section 12 cannot be infringed without a finding that the impugned punishment is grossly disproportionate to a fit and proportionate sentence, which is fundamentally incompatible with a finding that the impugned punishment minimally impairs the offender's section 12 right.

B. Salutary versus deleterious effects

32. The BCCLA submits that there is no circumstance in which the salutary effects of an abhorrent and grossly disproportionate sentencing scheme would outweigh the significant deleterious effect on Canadians sentenced under that scheme. The negative impacts of incarceration on Canadians, and in particular vulnerable Canadians, are well-known, and such effects would only be exacerbated by an excessively harsh and cruel sentencing scheme.

33. This sentiment appeared to similarly direct the finding of the majority of this Court in *Nur*. In that case, the Chief Justice concluded that the impugned punishment was not

proportionate under section 1 solely in light of the fact that it was grossly disproportionate to a fit and proportionate sentence.

Nur, supra at para 118

34. Further, the BCCLA submits that the accepted analytical approach to determining whether there has been a section 12 breach subsumes and precludes a section 1 analysis. In these circumstances, the substantive *Charter* analysis should focus on where the line should be drawn – between what is "cruel and unusual" and what is not – an analysis properly confined within the parameters of section 12. Impugned legislation that runs afoul of section 12 is determinative of, and therefore precludes, a section 1 analysis.

C. Judicial economy

35. The position taken by the BCCLA on this appeal would assist in the efficient resolution of section 12 cases and result in increased judicial economy. If, as the BCCLA submits above, no grossly disproportionate punishment which infringes section 12 could be justified under section 1, submissions on the section 1 analysis in this context are a waste of scarce judicial resources and an unnecessary cost burden for litigants to bear.

36. This Court has repeatedly recognized judicial economy as a guiding principle in many different areas of the law. In particular, avoiding redundancy is key to maximizing the efficient use of judicial resources. The BCCLA submits that its position on this appeal would reduce the amount of court time spent entertaining redundant arguments with no chance of success.

See, for example, *R v Sciascia*, 2017 SCC 57 at para 33; *CIBC v Green*, 2015 SCC 60 at paras 59-60, 72; *R v Khela*, 2009 SCC 4 at para 93; *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 40

37. Finally, the BCCLA submits that, on a principled level, it is inappropriate in a free and democratic society for the government to engage in attempts to justify the cruel and unusual punishment of its citizens. Peter W. Hogg has mused that section 12 "may be an absolute right. Perhaps it is the only one". The BCCLA's position is that section 12 must be upheld as an absolute right, which precludes a section 1 analysis. As Justice Doherty so aptly opined in *Nur*

above, a criminal justice system which seeks to impose cruel and unusual punishments risks losing the respect and support of the very citizens whose values it should reflect.

Hogg, Peter W. *Constitutional Law of Canada,* 5th ed. Supp. Toronto: Carswell, 2007 (updated 2015, release 1) at 38-52.

Nur ONCA, *supra* at para 180

Conclusion

38. In determining whether a section 12 infringement has taken place, a court already considers questions of proportionality and minimal impairment. Were the salutary effects of a punishment to outweigh its deleterious effects, or were a law to minimally impair the rights of Canadians, it could not meet the "high bar" of a section 12 infringement. To render a grossly disproportionate sentence justified under section 1 would be to engage in a duplicative and inconsistent rebalancing of these same considerations.

39. The BCCLA's position is that section 12 is an absolute right. There cannot be a retroactive justification of cruel and unusual punishment in a free and democratic society. Cruel and unusual punishment by its very nature is not justifiable.

PART IV: COSTS

40. The BCCLA seeks no costs and asks that no costs be awarded against it.

PART V: NAUTRE OF ORDER SOUGHT

41. Pursuant to the Order of Justice Abella dated November 2, 2017, the BCCLA has been granted permission to present oral argument at the hearing of this appeal for 5 minutes. As noted above, the BCCLA takes no position on the outcome of the appeal.

DATED: December 12, 2017 Greg J. Allen Nicole C. Gilewicz

Counsel for the intervener, British Columbia Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

Jurisprudence	Paragraph(s)
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PART VII – LEGISLATON AT ISSUE

Criminal Code, RSC 1985, c C-46

Victim surcharge

737 (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

Code criminel (LRC (1985), ch C-46)

Suramende compensatoire

737 (1) 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.

Montant de la suramende

(2) Sous réserve du paragraphe (3), le montant de la suramende compensatoire représente :

a) trente pour cent de l'amende infligée pour l'infraction;

b) si aucune amende n'est infligée :

(i) 100 $ pour une infraction punissable sur déclaration de culpabilité par procédure sommaire,

(ii) 200 $ pour une infraction punissable sur déclaration de culpabilité par mise en accusation.

Montant supérieur

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.

(3) Le tribunal peut, s'il estime que les circonstances le justifient et s'il est convaincu que le contrevenant a la capacité de payer, ordonner à celui-ci de verser une suramende compensatoire supérieure à celle prévue au paragraphe (2).

Time for payment

Échéance de paiement

(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.

(4) La suramende compensatoire est à payer à la date prévue par le lieutenant-gouverneur en conseil de la province où la suramende est imposée ou, à défaut, dans un délai raisonnable après l'imposition de la suramende.

(5) and (6) [Repealed, 2013, c. 11, s. 3]

(5) et (6) [Abrogés, 2013, ch. 11, art. 3]

Amounts applied to aid victims

Affectation des suramendes compensatoires

(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.

(7) Les suramendes compensatoires sont affectées à l'aide aux victimes d'actes criminels en conformité avec les instructions du lieutenant-gouverneur en conseil de la province où elles sont infligées.

Notice

Avis

(8) The court shall cause to be given to the offender a written notice setting out

(8) Le tribunal fait donner au contrevenant un avis écrit établissant, en ce qui concerne la suramende compensatoire :

(a) the amount of the victim surcharge;

a) le montant;

(b) the manner in which the victim surcharge is to be paid;

b) les modalités du paiement;

(c) the time by which the victim

c) l'échéance du paiement;

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.

(10) [Repealed, 2013, c. 11, s. 3]

d) la procédure à suivre pour présenter une demande visant à modifier les conditions prévues aux alinéas b) et c) en conformité avec l'article 734.3.

Exécution

(9) Les paragraphes 734(3) à (7) et les articles 734.3, 734.5, 734.7, 734.8 et 736 s'appliquent, avec les adaptations nécessaires, aux suramendes compensatoires infligées aux termes du paragraphe (1) et, pour l'application de ces dispositions :

a) à l'exception du paragraphe 734.8(5), la mention de « amende » vaut mention de « suramende compensatoire »;

b) l'avis donné conformément au paragraphe (8) est réputé être une ordonnance rendue par le tribunal en application de l'article 734.1.

(10) [Abrogé, 2013, ch. 11, art. 3]