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COUNSEL EDITION**

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**The Honourable Justice Marc Rosenberg**

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- Reference should be had to *R. v. Boudreault*, 2018 SCC 58, in which the Supreme Court struck down the victim fine surcharge in s. 737 as amounting to cruel and unusual punishment contrary to s. 12 of the *Charter of Rights and Freedoms*. An immediate declaration to that effect was made, such that the surcharge can no longer be imposed until and unless Parliament legislates a constitutionally compliant replacement.
- Practitioners should also have regard to recent conflicting provisions on the “faint hope” regime for offenders convicted of first degree murder. In *R. v. Dell* (2018), 364 C.C.C. (3d) 419 (Ont. C.A.), the court held that retroactive application of the s. 745.61 judicial pre-screening mechanism to people who committed murder prior to its enactment on January 9, 1997, unjustifiably infringes s. 11(i) of the Charter. Such offenders are entitled to a hearing before

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a jury. By contrast, in *R. v. Simmonds* (2018), 362 C.C.C. (3d) 215 (B.C.C.A.), the court held that the infringement of s. 11(i) was justified under s. 1.

- Conflicting jurisprudence has also emerged on the constitutionality of s. 33.1, which removes self-induced intoxication as a defence to general intent offences involving assaultive conduct. The provision has been held to unjustifiably infringe ss. 7 and 11(d) of the Charter in *R. v. McCaw*, 2018 ONSC 3464, but upheld as a reasonable limit in *R. v. Chan*, 2018 ONSC 3849, 365 C.C.C. (3d) 376.