Cruel and Unusual Punishment: Can Corporations Claim Protection Under Section 12 of the Charter?

Corporations in Canada have legal personhood.[1] A corporation is a distinct legal entity that exists perpetually, irrespective of the humans who create it.[2] This shields the human actors behind the corporation from personal liability and allows the corporation to independently enter into agreements and own property.[3]

This raises the question: does the *Charter of Rights and Freedoms* extend protections to entities like corporations — entities which are regarded as "legal" persons but not "natural" or "human" persons? In November 2020, the Supreme Court of Canada (SCC) addressed a specific version of this question in *Quebec (Attorney General) v 9147-0732 Québec Inc* ("*Quebec Inc*"),[4] a case concerning whether section 12 of the *Charter*, which guarantees individuals' protection from cruel and unusual punishment, applies to corporations. This article examines the background to the *Quebec Inc* judgment and explains why the SCC ultimately concluded that section 12 of the *Charter* does not apply to corporations.

Section 12 of the *Charter of Rights and Freedoms*

Section 12 of the *Charter* states:

> *Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.**[5]***

Background: A Corporation is Prosecuted, Convicted, and Fined

In 2016, the construction company 9147-0732 Québec Inc ("Quebec Corporation") was prosecuted and convicted in the Court of Quebec for "performing residential renovations without the appropriate licenses,"[6] in contravention of section 46 of the *Building Act*.[7] Since section 197.1 of the *Building Act* establishes a mandatory minimum fine of $30,842 for offenders,[8] Quebec Corporation was assigned that fine as the penalty for its offence.

However, Quebec Corporation had mistakenly sent the invoices for their work from their own corporation, as opposed to "a co-owned entity that had the appropriate licenses to perform … [the] construction services."[9] The Court of Quebec acknowledged that the commission of the offence was an accident in "administrative error"[10] but nevertheless applied the mandatory minimum fine. Quebec Corporation argued the steep fine in response to a mere error was a violation of the company's section 12 *Charter* rights.[11] In support of its claim, Quebec Corporation cited the SCC case, *R v Boudreault*,[12] in which the Court held that the mandatory "imposition and enforcement of [a victim fine] surcharge on the poorest individuals"[13] constitutes cruel and unusual punishment[14] under section 12 of

the *Charter*. However, the Quebec Corporation's arguments failed both at the Court of Quebec and the Quebec Superior Court. The Court of Quebec concluded that "expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s[ection] 12,"[15] while the Quebec Superior Court remarked that the purpose of section 12 was "the protection of human dignity, a notion clearly meant exclusively for … 'natural persons'."[16]

Quebec Corporation then successfully appealed the Superior Court's decision to the Quebec Court of Appeal (QCCA). The QCCA ruled that harsh fines can indeed constitute cruel and unusual punishment for a corporation, although the QCCA did not address whether the particular fine in question constituted cruel and unusual punishment or treatment (this question was sent back to the Court of Quebec).[17] The QCCA found that corporations "could face cruel treatment or punishment through harsh or severe fines" which cause harm to the human beings behind them.[18] This harm could include employees losing jobs, retired employees losing benefits, and governments losing tax revenue.[19]

Following this, the QCCA's ruling was appealed to the SCC. Accordingly, the SCC had to determine once and for all whether section 12 applied only to natural persons (humans) or if it could encompass purely legal persons (eg corporations) as well. If it encompasses purely legal persons, the mandatory minimum fines might constitute cruel and unusual punishment and might be unconstitutional. If not, then section 12 simply would not apply and the penalty imposed on Quebec Corporation would stand.

The Supreme Court's Analysis

Justices Brown and Rowe, writing for the majority of the Supreme Court, engaged in a purposive interpretation of section 12 of the *Charter* as well as considering the jurisprudence on section 12 and other *Charter* sections, and, finally, offering some commentary on the concept of separate legal personality in Canadian corporate law.

Purposive Interpretation

The Court began with a purposive interpretation of section 12.[20] In summary, purposive interpretation requires the words of a provision to be interpreted in light of the law's broader context and purposes. However, when taking this approach, the majority emphasized that "the analysis *must begin* by considering the text of the provision."[21]

The Court accordingly proceeded to examine the text of section 12, focusing in particular on the words "cruel and unusual punishment." Citing *Black's Law Dictionary*,[22] the *Oxford English Dictionary*,[23] and Justice Chamberland's dissent in the Quebec Court of Appeal's decision,[24] the Court concluded that "cruel and unusual" punishment refers to physical and mental pain and suffering by humans.[25] The Court found that section 12's purpose is therefore to "protect human dignity" by "prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment"[26] and, in so doing, "respect[ing] the inherent worth of individuals."[27] The Court noted that the "intended beneficiaries" of section 12 are accordingly humans and not

purely legal entities such as corporations.[28]

The Court also examined the meaning of the word "everyone"[29] in section 12. The Court stated that the literal meaning of "everyone" cannot be expanded to include corporations without factoring in the "purpose of the right as protecting human dignity."[30] The Court then cited the case of *Irwin Toy Ltd*, where "everyone" was meant to include "only human beings"[31] — not corporations and other non-human entities that are "incapable of enjoying life, liberty or security of the person."[32] In sum, the Court regarded the text of section 12 as inseparable from human elements and feelings, of which corporations are devoid.[33]

Section 12 Jurisprudence

After considering section 12's text, the Court turned to the section's "historical origins"[34] and jurisprudence, finding that they also turn on "the concept of human dignity."[35] The Court noted that most section 12 jurisprudence involves "minimum and indeterminate sentences and the harmful effects of incarceration."[36] Combined, these cases establish a "threshold test" where punishment is cruel and unusual if it is "grossly disproportionate … outrages the standards of decency … and [is] abhorrent or intolerable."[37] The Court held that this threshold is "inextricably anchored in human dignity [and, as such,] … is a constitutional standard that cannot apply to treatment or punishments imposed on corporations."[38] Reinforcing this conclusion, it also noted that the types of punishments section 12 has dealt with in the past involve mental or physical suffering and pain, which corporations cannot experience.[39]

Section 12 Compared to Other *Charter* Sections

The Court also looked at when the "legal rights" sections of the *Charter* — which run from section 7 to section 14 — have been applied to corporations and when they have not. Most of the *Charter* protections in sections 7 to 14 protect a "detained individual" and guarantee integrity and fairness in the administration of justice.[40] For the Court, each of these protections is rooted in the notion of human dignity.[41] Only section 8, the right against unreasonable search and seizure, and 11(b), the right to a timely trial, have been applied to corporations.[42] In *Hunter v Southam*, for example, the Supreme Court reasoned that an unlawful search and seizure (section 8) "could have a significant [and direct] impact on the privacy rights of individuals within a corporation"[43] and on that basis accepted that section 8 applied to corporations.[44] However, the Court distinguished *Hunter* from the case at hand; a *direct* impact on individuals, it said, "is not logically available under section 12,"[45] given that the individuals behind a corporation are not personally subject to penalties assigned to corporations.

The Corporate Veil

As the Court put it, a corporation is a "separate legal personality,"[46] with the human actors behind a corporation benefitting from a "corporate veil"[47] that shields them from personal liability; for example, if the corporation is sued, the personal assets of the

shareholders will not be affected.[48] Citing *R v Wholesale Travel Group*, the Court reasoned that the corporate veil confers benefits such as limited liability, and that the veil cannot be selectively lifted where it becomes detrimental to actors who would otherwise benefit from it.[49] Thus, in this case, the human actors behind Quebec Corporation could not selectively use "separate legal personality" to benefit them via limited liability but disregard it when it prevents them from relying on section 12 of the *Charter*.

The Court therefore held that the "existence of human beings behind the corporate veil is insufficient to ground a s[ection] 12 claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality."[50] For this reason, the Court rejected the notion that the suffering of human actors behind the corporation "should be considered when determining the scope of [s]ection 12."[51]

Conclusion: Corporations Are Not Protected by Section 12

The Supreme Court's ruling has confirmed that section 12 of the *Charter* applies only to human beings, and not purely "legal" persons such as corporations. Section 12 is rooted in human dignity and is a reminder that not all *Charter* rights are equally applicable to humans and corporations. While some other sections of the *Charter* may protect purely legal persons like corporations, section 12 cannot.

[1] Shannon O'Byrne, Anna Lund & Tamar Meshel*, Corporations Law: Law 451 Cases and Materials 2020-2021 Edition* (Edmonton, AB: University of Alberta Faculty of Law, 2021) at 3 [O'Byrne].

[2] *Ibid.*

[3] *Ibid.*

[4] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 .

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

[6] Ranjan Agarwal et al, "Corporations are not Entitled to the Constitutional Right Against Cruel and Unusual Punishment" (10 November 2020), online (blog): *Bennett Jones* <https://www.bennettjones.com/Blogs-Section/Corporations-are-not-Entitled-to-the-Constitutional-Right-Against-Cruel-and-Unusual-Punishment> [Agarwal].

[7] *Building Act*, CQLR c B-1.1, s 46.

[8] *Ibid.*

[9] Agarwal, *supra* note 6.

[10] *Ibid*.

[11] *QC Numbered Co, supra* note 4 at para 55.

[12] *Ibid* at para 66.

[13] *R v Boudreault*, 2018 SCC 58 at para 36 .

[14] *Ibid* at para 94.

[15] *QC Numbered Co, supra* note 4 at para 56.

[16] *Ibid* at para 57; Elizabeth Raymer, "Corporations Cannot be Subjected to Cruel and Unusual Punishment" (5 November 2020), online: *CanadianLawyerMag*

<https://www.canadianlawyermag.com/practice-areas/litigation/corporations-cannot-be-subjected-to-cruel-and-unusual-punishment-scc-rules/334929> [Raymer].

[17] *QC Numbered Co, supra* note 4 at para 58.

[18] Centre for Constitutional Studies: "Online Charter Series — Corporations and Section 12 Protection From Cruel and Unusual Punishment" (24 June 2021) at 00h: 16m: 23s — 00h: 16m: 30s, online (video): *YouTube* <https://youtu.be/-Fv1ikkImIk> [CCS].

[19] *Ibid* at 00h: 16m: 30s — 00h: 16m: 40s.

[20] *QC Numbered Co*, *supra* note 4 at para 8.

[21] *Ibid* at para 8 (emphasis in original).

[22] *Ibid* at para 82.

[23] *Ibid* at paras 83-84

[24] *Ibid* at paras 85-86

[25] *Ibid* at para 123.

[26] *Ibid* at para 51.

[27] *Ibid.*

[28] *Ibid*.

[29] *Ibid* at paras 15, 87.

[30] *Ibid* at para 87.

[31] *Ibid* at para 15.

[32] *Ibid* at paras 87, 15.

[33] *Ibid* at para 131.

[34] Sebastien Cusson, "Supreme Court of Canada Holds that the Constitutional Protection

Against Cruel and Unusual Treatment or Punishment does not Extend to Corporations" (16 November 2020), online: *McCarthy Tetrault* <https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/supreme-court-canada-holds-constitutional-protection-against-cruel-and-unusual-treatment-or-punishment-does-not-extend-corporations>.

[35] *QC Numbered Co*, *supra* note 4 at para 2.

[36] *Ibid* at para 63.

[37] *Ibid.*

[38] *Ibid* at para 17.

[39] *Ibid* at para 131.

[40] *Ibid* at para 127.

[41] *Ibid* at para 126.

[42] *Ibid* at para 128.

[43] *Ibid* at para 128.

[44] *Ibid.*

[45] *Ibid* at para 129.

[46] *Ibid* at paras 2, 129.

[47] *Ibid* at para 2.

[48] O'Byrne, *supra* note 1 at 8.

[49] *QC Numbered Co*, *supra* note 4 at para 129.

[50] *Ibid* at para 2.

[51] Jennifer Quaid, "Supreme Court Dismisses Company's Cruel and Unusual Punishment Claim" (24 November 2020), online: *The Conversation* <https://theconversation.com/supreme-court-dismisses-companys-cruel-and-unusual-punishment-claim-149346>.