

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)**

B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

- and -

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

Appellants

- and -

9147-0732 QUÉBEC INC.

Respondent

- and -

**DIRECTOR OF PUBLIC PROSECUTIONS and ATTORNEY GENERAL OF ONTARIO,
ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL, BRITISH COLUMBIA
CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION
and CANADIAN CONSTITUTION FOUNDATION**

Interveners

**FACTUM OF THE INTERVENER,
CANADIAN CONSTITUTION FOUNDATION**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

McCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

JURISTES POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

**Brandon Kain
Adam Goldenberg
Sébastien Cusson**

Darius Bossé

Tel.: (416) 601-8320
Fax: (416) 868-0673
E-mail: bkain@mccarthy.ca

Tel.: (613) 702-5560
Fax: (613) 706-1254
E-mail: DBosse@juristespower.ca

**Counsel for the Intervener,
Canadian Constitution Foundation**

**Agent for Counsel for the Intervener,
Canadian Constitution Foundation**

ORIGINAL TO: THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

PROCUREURE GÉNÉRALE DU QUÉBEC
300, boul. Jean-Lesage, Bureau 1.03
Québec, QC G1K 8K6

Stéphanie Quirion-Cantin
Anne-Sophie Blanchet-Gravel
Sylvain Leboeuf
Julie Dassylva

Tel.: (418) 649-3524 ext. 42612
Fax: (418) 646-1656
E-mail: stephanie.quirion-cantin@justice.gouv.gc.ca

**Counsel for the Appellant,
Attorney General of Quebec**

**DIRECTEUR DES POURSUITES
CRIMINELLES ET PÉNALES DU QUÉBEC**
Complexe Jules-Dallaire, Tour 1
2828, boul. Laurier, bureau 500
Québec, QC G1V 0B9

Laura Élisabeth Trempe

Tel.: (418) 643-9059 ext. 21565
Fax: (418) 646-5412
E-mail: laura-elisabeth.Trempe@dpcp.gouv.qc.ca

**Counsel for the Appellant,
Director of Criminal and Penal Prosecutions**

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry

Tel.: (819) 503-2178
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

**Agent for Counsel for the Appellant,
Attorney General of Quebec**

**DIRECTEUR DES POURSUITES
CRIMINELLES ET PÉNALES DU QUÉBEC**
Palais de justice
17, rue Laurier, Bureau 1.230
Gatineau, QC J8X 4C1

Emily K. Moreau

Tel.: (819) 776-8111 ext. 60412
Fax: (819) 772-3986
E-mail: appelgatineau@dpcp.gouv.qc.ca

**Agent for Counsel for the Appellant,
Director of Criminal and Penal Prosecutions**

**SERVICES JURIDIQUES DE
L'APCHQ INC.**
1720, boul. Père-Lelièvre, Bureau 100
Quebec, QC G1M 3J6

Martin Villa

Tel.: (418) 688-1656, ext. 247
Fax: (418) 682-3304
E-mail: martin.villa@apchq.com

**Counsel for the Respondent,
9147-0732 Québec Inc.**

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Respondent,
9147-0732 Québec Inc.**

**DIRECTEUR DES POURSUITES
PÉNALES DU CANADA**
160, rue Elgin, 12ième étage
Ottawa, ON K1A 0H8

François Lacasse

Tel.: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

**Counsel for the Intervener,
Director of Public Prosecutions**

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

**Courtney Harris (
Ravi Amarnath**

Tel.: (416) 455-5186
Fax: (416) 649-4105
E-mail: courtney.harris@ontario.ca

**Counsel for the Intervener,
Attorney General of Ontario**

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel.: (613) 369-4795
Fax: (613) 235-4430
E-mail: kperron@blg.com

**Agent for Counsel for the Intervener,
Attorney General of Ontario**

DAVIES WARD PHILLIPS & VINEBERG LLP

1501 McGill College Avenue
Montréal, QC H3A 3N9

Léon H. Moubayed
Sarah Gorguos
Guillaume Charlebois

Tel.: (514) 841-6461
Fax: (514) 841-6499
E-mail: lmoubayed@dwpv.com

**Counsel for the Intervener,
Association des avocats de la défense de Montréal**

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

Tel.: (613) 786-0197
Fax: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

**Agent for Counsel for the Intervener,
Association des avocats de la défense de
Montréal**

GIB VAN ERT LAW

148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Jessica Magonet

Tel.: (613) 408-4297
Fax: (613) 651-0304
E-mail: gib@gibvanertlaw.com

**Counsel for the Intervener,
British Columbia Civil Liberties Association**

CAZASAIKALEY LLP

350-220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins
Albert Brunet
Penelope Simons

Tel.: (613) 564-8269
Fax: (613) 565-2087
E-mail: atomkins@plaideurs.ca

**Counsel for the Intervener,
Canadian Civil Liberties Association**

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PART I - OVERVIEW

1. Section 12 of the *Canadian Charter of Rights and Freedoms* provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment”. This appeal turns on whether the word “[e]veryone” in s. 12 includes legal persons as well as natural ones.

2. How the Court addresses this issue will be consequential in two ways. First, and most obviously, the Court will decide whether legal persons — and, through them, their human stakeholders — enjoy the *Charter*’s protection when facing fines or other punishments that are grossly disproportionate and so excessive as to be outrageous. Second, and more significantly, the methodology that the Court uses to answer this question will inform how courts across the country determine the scope of Canadians’ constitutional rights and freedoms in future disputes concerning novel questions of constitutional law.

3. The Canadian Constitution Foundation (the “**CCF**”) directs its intervention submissions to the second kind of precedential impact. It proposes a methodology for constitutional interpretation that it submits can and should be used to resolve novel questions of *Charter* interpretation, in this Court and others. The CCF’s objective is to articulate a principled and practical constitutional method that, if endorsed here, would not only aid in the disposition of this appeal, but would also provide guidance that could be applied consistently in future disputes across Canada about the *Charter*’s scope.

4. To advance this objective, the CCF makes two submissions.

5. First, when faced with a novel question of *Charter* interpretation, courts should ground their analysis in the text and context of the constitutional provision at issue. While a provision’s purpose will ultimately control its interpretation, that purpose must be discerned through careful consideration of the provision’s text and context. An interpretation that is not grounded in the text and context of the *Charter* will lack legitimacy and expose courts to claims that they have overstepped the limits of the judicial role.¹

¹ See: *R. v. Poulin*, 2019 SCC 47 [**Poulin**], ¶57; *R. v. Stillman*, 2019 SCC 40 [**Stillman**], ¶21.

6. Second, the Court should use the CCF’s proposed methodology to decide the constitutional issue in this appeal. While the CCF takes no position on the outcome, it submits that the choice by the *Charter*’s drafters to include the word “[e]veryone” in s. 12, read and interpreted in light of the full text and context of the provision, should inform the judicial determination of s. 12’s purpose, and thus its ambit. Because the CCF’s proposed approach is sensitive to the text and context of the particular provision being interpreted, applying it in this case would not necessarily invite a broader extension of constitutional protections to legal persons. This will be so even if this Court were to conclude that s. 12 of the *Charter* protects both legal and natural persons against grossly disproportionate, excessive, or outrageous treatment or punishment.²

PART II - STATEMENT OF FACTS

7. The Court of Appeal of Québec concluded that s. 12 of the *Charter* protects both legal and natural persons.³ The majority held that, while the right has its roots in the protection of natural persons, its purpose has evolved and its scope should now extend to protect legal persons, as well.⁴ Notably, the majority found that nothing in the words used by the *Charter*’s drafters in s. 12 indicates that its protection should be limited to natural persons.⁵

8. Chamberland J.C.A. disagreed. He concluded that there must necessarily be an infringement of human dignity (“*la dignité humaine*”) for s. 12 to be engaged. Non-human persons thus cannot, in the dissenting judge’s view, claim s. 12’s protection.⁶

PART III - STATEMENT OF ARGUMENT

1. In Constitutional Interpretation, Courts Should Examine the Text and Context of a *Charter* Right To Determine Its Purpose

9. *Charter* interpretation is not statutory interpretation.⁷ Statutory interpretation aims to

² **See:** *R. v. Lloyd*, 2016 SCC 13 [*Lloyd*], ¶24.

³ 9147-0732 *Québec inc. v. Directeur des poursuites criminelles et pénales*, 2019 QCCA 373 [“**Court of Appeal Judgment**”], ¶89.

⁴ Court of Appeal Judgment, ¶111-123.

⁵ Court of Appeal Judgment, ¶127.

⁶ Court of Appeal Judgment, ¶59-64, 71.

⁷ **See:** *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at pp. 520-21, per Iacobucci J.

“discern[] legislative intent”.⁸ *Charter* interpretation, by contrast, seeks to ascertain the meaning of a right or freedom “by an analysis of the purpose of such a guarantee” and “in the light of the interests it was meant to protect”.⁹

10. To determine the purpose of a constitutional right or freedom, however, a court must begin with the text and context of the *Charter* provision that guarantees it; “[t]he language, structure, and history of the constitutional text” all “constrain[]” the scope of the protected right or freedom.¹⁰ In other words, the court must use essentially the same tools that it does when it discerns the legislature’s intent in enacting a statutory provision. As this Court recently affirmed in *Poulin*:

[G]uidance about a right’s purposes “can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the *Charter*, from the pre-*Charter* history of the right and from the legislative history of the *Charter*”.¹¹

11. Above all, the “written text of the Constitution” governs the analysis.¹² For purposive interpretation to maintain its legitimacy, courts must begin with the language and context of the *Charter* provision itself — *i.e.*, the constitutional text that Parliament and the provincial legislatures have enacted — rather than with “judicial elaborations” on the *Charter* guarantee endorsed in the jurisprudence — *i.e.*, the constitutional law that judges have made.¹³

12. Courts employ “a broad, purposive analysis, which interprets specific provisions of a constitutional document in light of its larger objects”,¹⁴ in order to solve problems of “textual underdeterminacy”; the judge’s task is to “take[] language that might plausibly support a range of possible meanings and pick[] from among them through an investigation into the purposes

⁸ *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, ¶17.

⁹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [**Big M**], at 344, *original emphasis*.

¹⁰ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, ¶151.

¹¹ *Poulin*, *supra* note 1, ¶57, *emphasis added*, quoting P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.) vol. 2, at 36-30. **See also**: *Stillman*, *supra* note 1, ¶21; *Big M*, *supra* note 9, at 344.

¹² *Caron v. Alberta*, 2015 SCC 56, ¶36-37. **See also**: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, ¶65; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶53.

¹³ **See**: P.J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987), 21 U.B.C. L. Rev. 87, at 122. **See**: Respondent’s Factum, ¶31-35.

¹⁴ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 156

underlying the guarantees”.¹⁵ Thus, “[p]urposes do not eclipse or supersede the language chosen; they are used to delimit the meaning of the text in a way that ensures the achievement of the purpose of the right or freedom but within the reasonable bounds of the language as written”.¹⁶

13. When it is grounded in the *Charter*’s text and structure, purposive interpretation ensures that the judicial enforcement of *Charter* protections reflects Canada’s constitutional architecture, *i.e.*, “the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts”.¹⁷ That “interpretive role” is to ensure the protection of the particular interests that it was each provision’s “original purpose” to guarantee — as determined through careful analysis of the provision’s text and context.¹⁸

2. Text and Context Should Guide the Purposive Interpretation of Section 12 of the *Charter*

14. Section 12 of the *Charter* guarantees “[e]veryone ... the right not to be subjected to any cruel and unusual treatment or punishment”. Other *Charter* rights and freedoms are also guaranteed to “[e]veryone”. This Court has held that “[e]veryone” includes legal persons with respect to the freedom of expression under s. 2(b),¹⁹ the right against unreasonable searches and seizures in s. 8,²⁰ and the right to be tried within a reasonable time under s. 11(b).²¹ It has held that a corporation may challenge a law as an unreasonable limit on the freedom of religion guaranteed in s. 2(a).²² It has also held that “[e]veryone” does not include legal persons with respect to the

¹⁵ B. Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*” (2015), 65 U.T.L.J. 239 [Oliphant], at 248-49, *emphasis omitted*.

¹⁶ Oliphant, *supra* note 15, at p. 262. **See also:** *Caron, supra* note 12, ¶¶36-38; *R. v. Blais*, 2003 SCC 44 [Blais], ¶40; *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 499; *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, at 88; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, ¶¶314-19, per La Forest J. (dissenting).

¹⁷ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶132, *emphasis added*.

¹⁸ *Caron, supra* note 12, ¶37, quoting *Blais, supra* note 16, ¶40.

¹⁹ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1050.

²⁰ *Southam Inc. v. Hunter* (1982), 136 D.L.R. (3d) 133 (Alta. Q.B.), at 141, appeal allowed on other grounds, (1983), 147 D.L.R. (3d) 420 (Alta. C.A.), *aff’d*, [1984] 2 S.C.R. 145.

²¹ *R. v. CIP Inc.*, [1992] 1 S.C.R. 843 [CIP], at 859.

²² *Big M, supra* note 9, at 314.

right to life, liberty and security of the person in s. 7,²³ or the right not to be compelled as a witness against oneself in s. 11(c).²⁴

15. “Everyone” does not have a fixed meaning in the *Charter*. As such, the use of this term is not sufficient to establish that a specific *Charter* protection applies to natural and legal persons. Rather, whether “[e]veryone” includes legal persons with respect to a particular *Charter* right turns on the purpose of that specific guarantee, as determined by the full text and complete context of the provision that guarantees it. As Stevenson J. held in *CIP*, “whether or not a corporate entity can invoke a *Charter* right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision”.²⁵

16. Legal persons are excluded from rights and freedoms that the *Charter* guarantees to “[e]veryone” when the applicable provisions describe those rights and freedoms in terms that indicate that their purpose is to protect natural persons only. The meaning of “[e]veryone” must, in each case, be derived from its particular context.

17. In *Irwin Toy*, for example, Dickson C.J. and Lamer and Wilson JJ. concluded that “[e]veryone” in s. 7 of the *Charter* does not include legal persons. That determination turned not on the *Charter*’s use of the word “[e]veryone”, but rather on its use of the words “life” (because “[t]o say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition”), “liberty” (because “it is nonsensical to speak of a corporation being put in jail”), and “security of the person” (because “[t]he intentional exclusion of property from s. 7, and the substitution therefore of ‘security of the person’ leads to a general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee”).²⁶

18. Similarly, in *Amway*, Sopinka J. held that “[e]veryone” in s. 11(c) does not include legal persons because, “by using the word ‘witness’, the framers of the *Charter* preserved th[e]

²³ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*], at 1004, per Dickson C.J. and Lamer and Wilson JJ.

²⁴ *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 [*Amway*], at 40.

²⁵ *CIP*, *supra* note 21, at 852.

²⁶ *Irwin Toy*, *supra* note 23, at 1003-1004.

principle” of the common law that corporations do not enjoy the “right against compellability at trial at the instance of the Crown”.²⁷ Sopinka J. thus used the provision’s text and context (“it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness”) to discern the purpose of the right, which he held was “to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth”.²⁸ This purpose, in turn, required the exclusion of legal persons from the “[e]veryone” to whom s. 11(c) refers.

19. The word “[e]veryone” in s. 12 must therefore take its meaning from the purpose of that provision, which in turn should be determined according to the provision’s text and context. The Court undertook this analysis more than three decades ago, in *Smith*:

[T]he protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed.... The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is ... whether the punishment prescribed is so excessive as to outrage standards of decency. In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.²⁹

20. More recently, in *Boudreault*, the Court held that the word “punishment” in s. 12 of the *Charter* refers to state action that “(1) ... 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, and either (2) ... is imposed in furtherance of the purpose and principles of sentencing, or (3) ... has a significant impact on an offender’s liberty or security interests”.³⁰ As noted above, *Irwin Toy* teaches that legal persons do not have “liberty or security interests” in the manner contemplated by the *Charter*. Yet, legal persons can be subject to sanctions upon conviction “in furtherance of

²⁷ *Amway*, *supra* note 24, at 40-41. **See also:** *Re PPG Industries Canada Ltd. and Attorney General of Canada* (1983), 3 C.C.C. (3d) 97 (B.C. C.A.), at 103 (Nemetz C.J.B.C.), 108 (Seaton C.J.), 115 (Anderson J.A.).

²⁸ *Amway*, *supra* note 24, at 39-40.

²⁹ *R. v. Smith*, [1987] 1 S.C.R. 1045 [*Smith*], at 1072, *citations and quotation marks omitted*, quoting *Miller and Cockriell v. The Queen* [*Miller and Cockriell*], [1977] 2 S.C.R. 680, at 688-689, per Laskin C.J. **See also:** *Lloyd*, *supra* note 2, ¶¶22-24; *R. v. Nur*, 2015 SCC 15 [*Nur*], ¶39.

³⁰ *R. v. Boudreault*, 2018 SCC 58 [*Boudreault*], ¶39, *emphasis added*, quoting *R. v. K.R.J.*, 2016 SCC 31, ¶41.

the purpose and principles of sentencing”.³¹ Such sanctions will thus constitute “punishment” within the meaning of s. 12 when they are imposed on legal persons.

21. If, as *Boudreault* confirms, “punishment” in s. 12 of the *Charter* includes “sanctions ... in respect of a particular offence” that are “imposed in furtherance of the purpose and principles of sentencing”, then s. 12 protects “[e]veryone” against “sanctions ... in respect of a particular offence” that are “imposed in furtherance of the purpose and principles of sentencing” and that are “cruel and unusual”. Since legal persons can be subject to “sanctions” that are “imposed in furtherance of the purpose and principles of sentencing”, it follows that “[e]veryone” should include legal persons unless there is something in the meaning of “cruel and unusual” that prevents those adjectives from applying to sanctions imposed on legal persons. Put differently, if a purposive interpretation of s. 12 must be governed by its text and context, and if the word “punishment” in s. 12 does not limit “[e]veryone” to natural persons, then no such limit can legitimately be recognized unless the words “cruel and unusual” impose it.

22. To determine the implications of the words “cruel and unusual” in the purposive interpretation of s. 12 of the *Charter*, the court must start with the text, in its context. As noted above, *Irwin Toy* excluded legal persons from “[e]veryone” — and thus from the protection of s. 7 — because the Court could not “conceive of a manner in which a corporation could be deprived of its ‘life, liberty or security of the person’”.³² Similarly, in *Amway*, it was s. 11(c)’s use of the word “witness” that excluded legal persons from “[e]veryone”; the Court reasoned that “witness”, in s. 11(c), means “the person charged to supply ... evidence out of his or her own mouth”.³³ Legal persons lack mouths, just as they cannot be deprived of life, liberty, or security of the person.

23. But can they be punished cruelly and unusually? This Court considers punishment to be “cruel and unusual” when it is “so excessive” or “grossly disproportionate” as “to outrage standards of decency” and be “abhorrent or intolerable to society”.³⁴ The Respondent notes that,

³¹ See, e.g.: *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.21.

³² *Irwin Toy*, *supra* note 23, at 1003.

³³ *Amway*, *supra* note 24, at 39-40.

³⁴ *Boudreault*, *supra* note 30, ¶45-46, quoting *Lloyd*, *supra* note 2, ¶24, and citing *Nur*, *supra* note 29, ¶46.

though the Court has translated “so excessive as to outrage standards of decency” as “*excessive au point de ne pas être compatible avec la dignité humaine*”, this originates not in the text of s. 12 but in an arguably erroneous French translation of Laskin C.J.’s reasons in *Miller and Cockriell*, which concerned s. 2(b) of the *Bill of Rights*.³⁵ There is otherwise no “hook” in the Court’s jurisprudence to limit the description “cruel and unusual” to punishments imposed on natural persons.

24. On this basis — and without even considering that the punishment of a legal person will have consequences for the legal person’s human stakeholders — the Court can conclude that “[e]veryone” in s. 12 of the *Charter* includes legal persons. Legal persons can be subject to “sanctions” that are: (1) “imposed in furtherance of the purpose and principles of sentencing”; and (2) “so excessive” or “grossly disproportionate” as “to outrage standards of decency” and be “abhorrent or intolerable to society”. The text and context of s. 12 thus support a purposive interpretation that protects legal persons against “cruel and unusual treatment or punishment”.

25. Moreover, it is a legal person’s human affiliates who ultimately suffer the consequences of punishment. The severity of these consequences, “relative to the offence involved”, may be measured to determine “whether the punishment ... is so excessive as to outrage standards of decency” in the s. 12 analysis.³⁶ As Stevenson J. noted in *CIP*, “corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals.... Extending *Charter* guarantees to corporations will, in some circumstances, afford a measure of protection to these individuals”.³⁷ That includes protection against financial hardship; as the Court recognized in *Boudreault*, “a fine that deprives a person of this much of their livelihood is [*excessive au point de ne pas être compatible avec la dignité humaine*]. Indeed, it can only be described as grossly disproportionate”.³⁸

26. Unlike with respect to the guarantees in s. 7 or s. 11(c) of the *Charter*, a purposive

³⁵ *Miller and Cockriell*, *supra* note 29, at 688, per Laskin C.J. **See:** Respondent’s Factum, ¶31-35.

³⁶ *Smith*, *supra* note 29, at 1089, per McIntyre J. (dissenting), quoting *Miller and Cockriell*, *supra* note 29, at 688, per Laskin C.J.

³⁷ *CIP*, *supra* note 21, at 855, citing *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, at 675.

³⁸ *Boudreault*, *supra* note 30, ¶67, quotation marks omitted, quoting *Boudreault c. R.*, 2016 QCCA 1907, ¶109.

interpretation of s. 12, guided by its text and context, does not mandate the exclusion of legal persons from its protection. This is so even though, in applying the CCF's proposed framework, the text, context, and purpose of particular *Charter* provisions will limit legal persons' constitutional rights in other contexts.³⁹ The question, in each case, is not whether the *Charter* protects legal persons generally, but rather whether a particular provision of the *Charter*, interpreted purposively in light of its particular text and context, extends a particular guarantee to legal persons. In deciding this appeal, the Court should say so.

3. What Is “Cruel and Unusual Treatment or Punishment” May Be Different for a Legal Person than for a Natural Person

27. In his dissenting reasons below, Chamberland J.C.A. opined that extending the protection of s. 12 of the *Charter* to cases in which human dignity is not compromised would trivialize the s. 12 right.⁴⁰ With respect, this statement overlooks the patent qualification embedded in the text of the provision, *i.e.*, the adjectives “cruel and unusual”. These words impose a “high bar”, as this Court has repeatedly recognized.⁴¹ Interpreting s. 12 purposively, in light of its text and context, may support setting a qualitatively different bar when the “cruel and unusual treatment or punishment” is of a legal person, rather than a natural one.

28. This appeal invites the Court to consider whether, when a *Charter* right protects both legal and natural persons, the threshold at which state action limits that right may be different when the claimant is a legal person than when the claimant is a natural person. The Court should confirm that this is so.

29. Crucially, the Court should emphasize that this distinction is to be drawn in the interpretation of the *Charter* provision, rather than as part of the justification analysis under s. 1.

³⁹ One would expect that the text and context of s. 2(c) (the freedom of peaceful assembly), s. 9 (the right not to be arbitrarily detained or imprisoned), s. 10 (rights on arrest or detention), and s. 17 (the rights to use English or French in legislative proceedings in s. 17) of the *Charter* would not support including legal persons in the word “[e]veryone” in each of these provisions.

⁴⁰ Court of Appeal Judgment, ¶64.

⁴¹ *Boudreault*, *supra* note 30, ¶45, quoting *Lloyd*, *supra* note 2, ¶24.

This Court has recognized that “[i]t will be difficult to show that a ... 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”.⁴² Ensuring that constitutionality turns primarily on the scope of the engaged *Charter* rights, rather than on a court’s more subjective, “fact-specific”,⁴³ assessment of whether a limit on that right is reasonable and demonstrably justifiable, also affords better protection to Canadians’ rights and freedoms and better respects the judicial role in our constitutional order.⁴⁴

30. In view of the stringent textual qualification (“cruel and usual”) contained in s. 12, courts should use the interpretation of those words in that provision, rather than the proportionality inquiry under s. 1, to distinguish legal persons from human offenders in the extent of the *Charter*’s protection. This, too, reflects the outcome of purposive analysis, informed by the provision’s text and context, and the scheme of the *Charter* as a whole.

PART IV - SUBMISSIONS CONCERNING COSTS

31. The CCF requests that no costs be awarded for or against it.

PART V - ORDER SOUGHT

32. The CCF takes no position with respect to the disposition of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2020.

Brandon Kain / Adam Goldenberg / Sébastien Cusson

⁴² *Nur*, *supra* note 29, ¶111.

⁴³ *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, ¶133, per McLachlin J. **See also:** *R. v. Michaud*, 2015 ONCA 585, ¶85.

⁴⁴ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, ¶¶186 and 189, per Rowe J. **See also:** G. Huscroft, “Proportionality and the Relevance of Interpretation”, in G. Huscroft et al., eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), at 188-89; P.W. Hogg, “Interpreting the *Charter of Rights: Generosity and Justification*” (1990), 28 Osgoode Hall L.J. 817, at 819; J.B. Kelly, “The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999), 37 Osgoode Hall L.J. 625, at 661-62

PART VI — TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Factum
Jurisprudence	
9147-0732 <i>Québec inc. v. Directeur des poursuites criminelles et pénales</i> , 2019 QCCA 373	
<i>An Act respecting the Vancouver Island Railway (Re)</i> , [1994] 2 S.C.R. 41	
<i>Boudreault c. R.</i> , 2016 QCCA 1907	
<i>British Columbia (Attorney General) v. Canada (Attorney General)</i> ●	
<i>British Columbia v. Imperial Tobacco Canada Ltd.</i> , 2005 SCC 49	
<i>British Columbia v. Philip Morris International, Inc.</i> , 2018 SCC 36	
<i>Canadian Dredge & Dock Co. v. The Queen</i> , [1985] 1 S.C.R. 662	
<i>Caron v. Alberta</i> , 2015 SCC 56	
<i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	
<i>Law Society of British Columbia v. Trinity Western University</i> , 2018 SCC 32, [2018] 2 S.C.R. 293	
<i>Miller and Cockriell v. The Queen</i> , [1977] 2 S.C.R. 680	
<i>R. v. Amway Corp.</i> , [1989] 1 S.C.R. 21	
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	
<i>R. v. Blais</i> , 2003 SCC 44	
<i>R. v. Boudreault</i> , 2018 SCC 58	
<i>R. v. CIP Inc.</i> , [1992] 1 S.C.R. 843	
<i>R. v. K.R.J.</i> , 2016 SCC 31	
<i>R. v. Lloyd</i> , 2016 SCC 13	
<i>R. v. Michaud</i> , 2015 ONCA 585	
<i>R. v. Nur</i> , 2015 SCC 15	
<i>R. v. Poulin</i> , 2019 SCC 47	
<i>R. v. S. (R.J.)</i> , [1995] 1 S.C.R. 451	
<i>R. v. Smith</i> , [1987] 1 S.C.R. 1045	
<i>R. v. Stillman</i> , 2019 SCC 40	

Authority	Paragraph(s) Referenced in Factum
<i>Re BC Motor Vehicle Act</i> , [1985] 2 S.C.R. 486	
<i>Re PPG Industries Canada Ltd. and Attorney General of Canada</i> (1983), 3 C.C.C. (3d) 97 (B.C. C.A.)	
<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , [1987] 1 SCR 313	
<i>Reference re Remuneration of Judges of the Provincial Court (P.E.I.)</i> , [1997] 3 S.C.R. 3	
<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	
<i>RJR—MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 S.C.R. 199	
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 S.C.R. 1038	
<i>Southam Inc. v. Hunter</i> (1982), 136 D.L.R. (3d) 133 (Alta. Q.B.), at 141, appeal allowed on other grounds, (1983), 147 D.L.R. (3d) 420 (Alta. C.A.), aff'd, [1984] 2 S.C.R. 145	
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493	
Legislation	
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 718.21	
Doctrine	
B. Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the <i>Canadian Charter of Rights and Freedoms</i> ” (2015), 65 U.T.L.J. 239	
G. Huscroft, “Proportionality and the Relevance of Interpretation”, in G. Huscroft et al., eds., <i>Proportionality and the Rule of Law: Rights, Justification, Reasoning</i> (2014), at 188-89	
J.B. Kelly, “The <i>Charter of Rights and Freedoms</i> and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999), 37 Osgoode Hall L.J. 625, at 661-62	
P. W. Hogg, <i>Constitutional Law of Canada</i> (5th ed. Supp.) vol. 2, at 36-30	
P.J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987), 21 U.B.C. L. Rev. 87	
P.W. Hogg, “Interpreting the <i>Charter of Rights</i> : Generosity and Justification” (1990), 28 Osgoode Hall L.J. 817, at 819	