SCC File No.: 38613

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC and
DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

Appellants
(Respondents)

and

9147-0732 QUÉBEC INC.

Respondent
(Appellant)

and

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

Interveners

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ONTARIO
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Courtney Harris
Ellen K. Weis
Ravi Amarnath

Tel.: (416) 455-5186
(416) 818-7604
(647) 649-5623
Fax: (416) 326-4015

Email: courtney.harris@ontario.ca
ellen.weis@ontario.ca
ravi.amarnath@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel.: (613) 369-4795

Fax: (613) 235-4430

Email: kperron@blg.com

Ottawa Agent for the Intervener,
Attorney General of Ontario

ORIGINAL TO:

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

COPIES TO:

Attorney General of Quebec
300 Jean-Lesage Boulevard, Office 1.03
Québec, QC G1K 8K6

Stéphanie Quirion-Cantin
Tel.: (418) 649-3524
Fax: (418) 646-1656
Email: stephanie.quirion-cantin@justice.gouv.qc.ca

Counsel for the Appellant,
Attorney General of Quebec

Noel & Associates
111 Champlain Street
Gatineau, QC J8X 3R1

Pierre Landry
Tel.: (819) 503-2178
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Ottawa Agent for the Appellant,
Attorney General of Quebec

Director of Criminal and Penal Prosecutions
Jules-Dallaire Complex, Tower 1
500 - 2828 Laurier Boulevard
Québec, QC G1V 0B9

Laura Élisabeth Trempe
Tel.: (418) 643-9059 (Ext. 21565)
Fax: (418) 646-5412
Email: laura-elisabeth.trempe@dpcp.gouv.qc.ca

Counsel for the Appellant,
Director of Criminal and Penal Prosecutions

Director of Criminal and Penal Prosecutions
Courthouse
1.230 - 17 Laurier Street
Gatineau, QC J8X 4C1

Emily K. Moreau
Tel.: (819) 776-8111 (Ext. 60412)
Fax: (819) 772-3986
Email: appelgatineau@dpcp.gouv.qc.ca

Ottawa Agent for the Appellant,
Director of Criminal and Penal Prosecutions

Legal Services of APCHQ Inc.
100 - 1720 Père-Lelièvre Boulevard
Québec, QC G1M 3J6

Martin Villa
Tel.: (418) 688-1656 (Ext: 247)
Fax: (418) 682-3304
Email: 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
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Respondent,
9147-0732 Québec Inc.

Director of Public Prosecutions
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

François Lacasse
Tel.: (613) 957-4770
Fax: (613) 941-7865
Email: francois.lacasse@ppsc-sppc.gc.ca

Counsel for the Intervener,
Director of Public Prosecutions

Association des avocats de la défense de Montréal
Davies Ward Phillips & Vineberg LLP
1501 McGill College Avenue
Montréal, QC H3A 3N9

Léon H. Moubayed
Sarah Gorguos
Guillaume Charlebois
Telephone: (514) 841-6461
Fax: (514) 841-6499
E-mail: lmoubayed@dwpv.com

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

Association des avocats de la défense de Montréal
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

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

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

British Columbia Civil Liberties Association
Gib Van Ert Law
148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Jessica Magonet
Telephone: (613) 408-4297
Fax: (613) 651-0304
E-mail: gib@gibvanertlaw.com

Counsel for the Intervenor,
British Columbia Civil Liberties Association

Canadian Civil Liberties
Caza Saikaley LLP
350 - 220 Avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins
Albert Brunet
Penelope Simons
Telephone: (613) 564-8269
Fax: (613) 565-2087
E-mail: atomkins@plaideurs.ca

Counsel for the Intervener,
Canadian Civil Liberties

Canadian Constitution Foundation
McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Brandon Kain
Adam Goldenberg
Sébastien Cusson
Telephone: (416) 601-7821
FAX: (416) 868-0673
E-mail: bkain@mccarthy.ca

Counsel for the Intervenor,
Canadian Constitution Foundation

Canadian Constitution Foundation
Juristes Power
130, rue Albert, bureau 1103
Ottawa, ON K1P 5G4

Darius Bossé

Telephone: (613) 702-5566
Fax: (613) 702-5566
E-mail: DBosse@juristespower.ca

Ottawa Agent for the Intervenor,
Canadian Constitution Foundation

TABLE OF CONTENTS

PART I. OVERVIEW AND STATEMENT FACTS 1
PART II. ONTARIO'S POSITION ON THE QUESTIONS IN ISSUE 2
PART III. STATEMENT OF ARGUMENT 2
A. Extending s. 12 to corporations contradicts fundamental principles of corporate law 2
B. Extending s. 12 to corporations is inconsistent with the purpose of s. 12 6
C. Extending s. 12 to consider third party effects is contrary to established law 8
D. Extending s. 12 to corporations is inconsistent with the jurisprudence interpreting other related *Charter* rights 12
E. Section 12 must be interpreted within the context of regulatory proceedings 16
PART IV. SUBMISSIONS ON COSTS 20
PART V. ORDER SOUGHT 20
PART VII. TABLE OF AUTHORITIES 21

PART I. OVERVIEW AND STATEMENT FACTS

1. This case raises, for the first time, the threshold issue of whether a corporation can claim the protection from cruel and unusual punishment or treatment afforded under s. 12 of the *Canadian Charter of Rights and Freedoms.*[1] Given the artificial nature of corporations, their lack of human dignity, the regulatory context in which most corporate prosecutions take place, and the manner in which analogous *Charter* rights have been interpreted, s. 12 should not be extended to corporations.
2. Section 12 is concerned with the life, liberty, security of the person, and human dignity of the individual and accordingly, must be interpreted coherently with ss. 7, 11(c) and 15 of the *Charter*, none of which protect corporations. A corporation does not share the fundamentally human conditions underlying these human rights. The Court should adhere to these precedents.
3. Punishment for corporations is a purely economic sanction. The *Charter* does not protect a corporation's economic rights. As Dickson C.J. stated in *Irwin Toy*: "To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition."[2] So too, would it stretch s. 12 beyond recognition to extend it to corporations.
4. As a basis to extend s. 12 to corporations, the majority of the court below considered potential consequences of a fine imposed on a corporation to individuals associated with corporations, such as shareholders. This interpretation confounds the primary principle of corporate law that a corporation is distinct from its shareholders and members, neither of which can assert the legal rights and responsibilities of the other. In corporate law, those who choose the benefits of the corporate veil also choose its burdens. The same principle should apply under the *Charter*.
5. The majority's interpretation is also incompatible with the existing s. 12 jurisprudence which does not look beyond the actual or hypothetical offender before the court for impacts on third parties, no matter how closely related. It would trivialize s. 12 to consider the effect on officers, directors, employees or shareholders of a corporation whose company faces an economic sanction when s. 12 does not consider the effect on a spouse or dependent child when a family member is sentenced.

---

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

[2] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003 [*Irwin Toy*].

6. Any interpretation of s. 12 must also consider the regulatory context, which is the domain in which most penal proceedings against corporations arise. Significant financial penalties on corporate wrongdoers are a legitimate tool to deter regulatory non-compliance. Regulatory regimes are in place to protect the public, including employees and shareholders of corporations. Given this context, it is paradoxical to invoke rights held by the very parties injured by an offence as grounds to obviate the punishment.
7. The Attorney General of Ontario ("Ontario") takes no position on the facts.

PART II. ONTARIO'S POSITION ON THE QUESTIONS IN ISSUE

8. Ontario adopts the submissions of the Appellants, the Procureure Générale du Québec and the Directeur des Poursuites Criminelles et Pénales, and makes the following additional submissions:
   - Treating legal persons like natural persons is inconsistent with corporate law;
   - Section 12 is a distinctly human right;
   - Section 12 protects human offenders before the court, not third parties;
   - Including legal persons in s. 12 is incompatible with *Charter* jurisprudence; and
   - Section 12's protection must be interpreted in the context of regulatory law.

PART III. STATEMENT OF ARGUMENT

A. Extending s. 12 to corporations contradicts fundamental principles of corporate law

9. Where, as here, a corporation seeks to avail itself of a *Charter* right previously understood only to be held by humans, it is important to examine the law about what a corporation (legal person) is in comparison to a human (natural person). Corporate law treats corporations differently than humans even when humans are involved in the corporate enterprise as shareholders, owners, directors, management or employees. The fundamental differences between humans and corporations should not be set aside for constitutional purposes.
10. As Lord Thurlow L.C. timelessly observed, a corporation has "no soul to be damned, and no body to be kicked."[3] It cannot be detained or imprisoned. It does not feel shame or stigma.

---

[3] Lord Thurlow LC as quoted by John C Coffee Jr, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich L Rev at 386.

Indeed, it has no feelings. It experiences neither physical nor psychological stress. Its dissolution or bankruptcy is not a death.[4]

11. Unlike humans, corporations do not possess the fundamental rights which natural persons possess as an inherent part of their human dignity. Rather, a foundational principle of corporate law is that the modern corporation is entirely a creature of statute.[5] While certain statutes state that corporations have the capacity, rights, powers and privileges of a natural person,[6] these statutory rights do not confer constitutionally-protected human rights on an artificial construct.

12. The various corporate statutes in Canada reflect the fact that a corporation is a legal fiction or vehicle created to carry out the enterprise of its shareholders or members.[7] These shareholders or members may be natural persons or legal persons such as a holding company. The corporation can exist beyond the tenure and indeed the life of any of these shareholders or members or can be terminated by them. Unlike a human, a corporation can even exist in perpetuity.

13. Moreover, a corporation does not have a mind of its own. It is not self-determining or autonomous. Its acts, omissions and liabilities are determined by the acts and omissions of its officers and directors.[8] Unless a corporation is comprised of a sole shareholder, the

---

[4] *Irwin Toy, supra* note 2 at 1003-1004.

[5] *Canada Business Corporations Act*, RSC 1985, c C-44, s 2(1) [*CBCA*]; *Business Corporations Act*, RSO 1990, c B 16, s 1(1) [*OBCA*]; *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 at 693 [*Canadian Dredge & Dock Co*]; *Oceanex Inc v Canada (Transport)*, 2019 FCA 250 at para 46. Corporations can also be created by Letters Patent (see eg *OBCA, supra* note 5 at ss 1(1) (definition of "articles"), 3(2)). Their powers are also determined by statute.

[6] *CBCA*, *supra* note 5 at s 15(1); *OBCA*, *supra* note 5 at s 15.

[7] See eg *CBCA*, *supra* note 5 at ss 103(2) (shareholder approval to confirm, reject or amend by-laws), 115(3) (limits on director powers), 183(1) (shareholder approval for amalgamation), 189(3) (shareholder approval of a sale, lease or approval of property).

[8] *Canadian Dredge & Dock Co*, supra note 5; *Deloitte & Touche v Livent Inc*, 2017 SCC 63, [2017] 2 SCR 855; *R v Metron Construction Corp*, 2013 ONCA 541 at para 57 [*Metron*] citing *Rhône (The) v Peter AB Widener (The)*, [1993] 1 SCR 497 at 521. The Respondent argues that as potential corporate liability increased with Bill C-45, so too did the risk to the natural persons behind the corporation. On this view, the Respondent argues that the changes in Bill C-45 should correspond to increased constitutional protection for corporations, namely protection from cruel and unusual punishment. This argument has no force. Bill C-45 did not

corporation is not necessarily of one mind. For example, different actors within the corporate structure can seek action by or against other actors through an oppression remedy[9] or through solicitations of proxies by persons other than management.[10] In other words, individuals within a corporation may experience the impacts of corporate sanctions differently depending on their role within the corporation.

14. The majority of the Québec Court of Appeal stated that a more contemporary reality would regard "disproportionate attacks on the economic engines of our society" as cruel and unusual treatment and punishment.[11] It concluded that "a legal person may suffer a fine that manifests cruelty in its harshness, severity and a sort of hostility."[12] The majority of the court below, however, did not explain why it was appropriate to treat corporations as having human rights. Nor did the majority offer any reason to depart from the foundational principles of corporate law stated above.

15. Instead, the majority of the Court of Appeal undertook a "public interest" analysis and shifted its focus to the people behind corporations who may suffer as a result of economic sanctions imposed on a corporation. The majority imagined a legal entity that was the economic engine of its region forced to close its doors, dismiss its employees and cause them to move, affecting the pension fund of retirees because of a disproportionate fine. It imagined a family

---

change the exposure for natural persons behind a corporation. It provided a statutory definition of whose acts and omissions could be attributed to the corporation to impose criminal liability <u>*on the corporation*</u>. It did not increase the liability of the natural persons behind the corporate entity. The corporate veil remains impermeable. See: Parliamentary Research Branch, *Legislative Summary of Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, by David Goetz, Publication No 37-2-LS-457-E (Ottawa: Law and Government Division, 3 July 2003) at 10 ("Essentially, the modifications seek to broaden the range of individuals whose actions and intentions can trigger the criminal liability of organizations they represent").

[9] *CBCA*, *supra* note 5 at ss 238, 241; *OBCA*, *supra* note 5 at ss 245, 248; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 at paras 61-66.

[10] *CBCA, supra* note 5 at s 150; *OBCA, supra* note 5 at ss 111-112; *Koh v Ellipsiz Communications Ltd*, 2017 ONSC 3083 (Div Ct).

[11] Reasons for decision of the Quebec Court of Appeal dated March 4, 2019 (2019 QCCA 373) at para 119 [translation by author], Appellant's Record, vol I [QCCA Reasons].

[12] QCCA Reasons, *supra* note 11 at para 122 [translation by author].

business built after many years of work going bankrupt or a large company passing on a fine to consumers of an essential good.[13] The majority reasoned that legal persons should be seen as having the same rights as the humans interested in the corporation when those humans would suffer negative consequences if the corporation were not protected by s. 12.[14] This reasoning, however, is contrary to at least a century of jurisprudence on corporate law.

16. Since *Salomon v. Salomon & Co*., it has been the law that incorporation protects the individuals interested in the corporation from liability by creating a legal entity separate from the corporate stakeholders involved in the enterprise. This "corporate veil" protects the corporation's shareholders or members, whether natural persons or other legal persons such as a holding company by ensuring they bear no liability for an action attributable to a corporation.[15] This remains the governing principle in Canadian corporate law.[16]

17. Not only are individual shareholders protected from the corporation's liability, they cannot sue on behalf of the corporation if it is wronged. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation. The legal rationale for this rule was re-iterated by this Court in *Hercules Managements Ltd.* as follows:

> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his

---

[13] QCCA Reasons*, supra* note 11 at para 133.

[14] QCCA Reasons*, supra* note 11 at para 120.

[15] *Salomon v Salomon Co*, [1897] AC 22 (PC (Eng)); *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 at 10 [*Kosmopoulos*] cited in *Brunette v Legault Joly Thiffault, sencrl*, 2018 SCC 55, [2018] 3 SCR 481 at para 39 [*Brunette*]. Note that the corporate veil can only be pierced in the rare circumstance where a corporation is completely dominated and controlled by another entity and being used as a shield for fraudulent or improper conduct. See: *Pita Royale Inc (Aroma Taste of the Middle East) v Buckingham Properties Inc*, 2019 ONCA 439 at para 32, leave to appeal ref'd [2019] SCCA No 37.

[16] *Rea v Wildeboer*, 2015 ONCA 373 at para 15 citing *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165 at para 59 [*Hercules*] and *Meditrust Healthcare Inc v Shoppers Drug Mart*, [2002] OJ No 3891 at paras 12-14.

> investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting.[17]

18. This Court has repeatedly affirmed that individuals must take the drawbacks with the benefits of incorporation. As Wilson J. stated in 1987: "[h]aving chosen to receive the benefits of incorporation, [an individual] should not be allowed to escape its burdens. He should not be permitted to 'blow hot and cold' at the same time."[18] In 2018, this Court affirmed this principle again in the civil law context: "The corporate veil is impermeable on both sides; just as shareholders cannot be liable for faults committed by the corporation, so too are they barred from seeking damages for faults committed against it."[19]
19. The majority of the Court of Appeal offered no reason as to why they departed from these basic principles of corporate law to pierce the corporate veil and consider the hypothetical impacts on human stakeholders. If the purpose of incorporation is to protect the humans interested in an enterprise from liability for the corporation's actions, then the *Charter* rights of these humans cannot be a reason to refuse to impose penal liability on the corporation for its actions. Those penalties are imposed on the corporation, not the humans.

B. Extending s. 12 to corporations is inconsistent with the purpose of s. 12

20. The nature of the right under s. 12 – not just the nature of a corporation – compels the result that s. 12 does not protect legal persons. The protection s. 12 affords has historically and conceptually been concerned with the infliction of cruel and unusual treatment and punishment (implying infliction on the corporeal body) and the right to be free from inhumane and degrading treatment or punishment.[20] In *R. v. Smith*, Lamer J. (as he then was) drew from the description of cruel and unusual treatment and punishment made by Borins Co. Ct. J. in *R. v. Shand*:

> Thus, two factors to be taken into consideration in determining whether the mandatory minimum sentence in this case constitutes "cruel and unusual treatment or punishment" are *the effect of the severity or excessiveness of the penalty in relation to the "dignity and worth of the human person" and the potential for the*

---

[17] *Hercules*, *supra* note 16 at para 59, quoting *Prudential Assurance Co v Newman Industries Ltd (No 2)*, [1982] 1 All ER 354 at 367.
[18] *Kosmopoulos*, *supra* note 15 at 11, cited recently in *Brunette, supra* note 15 at para 39.
[19] *Brunette*, *supra* note 15 at para 27.
[20] *R v Smith*, [1987] 1 SCR 1045 at 1061 [*Smith*].

absence of "equality before the law" resulting from the exercise of prosecutorial discretion resulting, in turn, in an arbitrary punishment.[21]

21. In *Smith*, Lamer J. provided the following examples of punishment that rose to the level of being cruel and unusual: the infliction of excessive and unusual physical pain,[22] conditions of imprisonment or the treatment of detainees,[23] corporal punishment (such as the lash), and the lobotomization of certain dangerous offenders or the castration of sexual offenders.[24] All of these punishments are unique to the human body and cannot apply to a corporation.

22. The majority of the court below reasoned that punishment and sentencing are constantly evolving.[25] Torture no longer exists in Canada and imprisonment is not the only cruel and unusual treatment in the 21st century.[26] A more contemporary approach to s. 12, according to the majority's reasons, would be to recognize that a fine can be cruel to a legal person: "A legal person may suffer a fine that manifests cruelty in its harshness, severity and a sort of hostility."[27]

23. The fact that capital punishment and corporal punishment for crimes have not existed in Canada in a generation does not justify expanding s. 12 to corporations. The jurisprudence of this Court has consistently reaffirmed the stringent and demanding test set down in *Smith*.[28] A merely excessive sentence is not sufficient to be cruel and unusual. Rather, a sentence "must be disproportionate to the point of being 'abhorrent or intolerable', such that it is incompatible with *human* dignity."[29] Corporations lack human dignity and cannot suffer or be degraded in the way a human being can.

24. Contrary to the Respondent's submissions, this Court's decision in *R. v. Boudreault* does not alter the threshold for s. 12 protection. The focus in *Boudreault* remained on the distinctly

---

[21] *Smith*, *supra* note 20 at 1064, quoting *R v Shand* (1976), 29 CCC (2d) 199 [emphasis added].
[22] *Smith*, *supra* note 20 at 1062.
[23] *Smith*, *supra* at note 20 at 1061.
[24] *Smith*, *supra* note 20 at 1073-1074.
[25] QCCA Reasons, *supra* note 11 at paras 104-110.
[26] QCCA Reasons, *supra* note 11 at paras 109 and 119.
[27] QCCA Reasons, *supra* note 11 at para 122 [translation by author].
[28] *Steele v Mountain Institution*, [1990] 2 SCR 1385 at 1417; *R v Goltz*, [1991] 3 SCR 485 at 501-502 [*Goltz*]; *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 at para 39; *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para 60 [*Lloyd*]; *R v Boudreault*, 2018 SCC 58, [2018] 3 SCR 599 at para 45 [*Boudreault*].
[29] *Boudreault*, *supra* note 28 at para 126, Côté J dissenting, citing *Lloyd*, *supra* note 28 at para 24 [emphasis added]. See also *Boudreault*, *supra* note 28 at para 67.

human indignity and suffering that the victim fine surcharge imposed on the offender. The concern in *Boudreault* was the impact of the victim fine surcharge on impecunious, marginalized persons living with severe addiction and mental illness, permanent disability or age that led to their inability to pay the surcharge. In the circumstances, the punishment became a *de facto* indefinite criminal sentence grossly disproportionate to the severity of the offence.[30] This Court concluded that "the impact and effects of the surcharge, taken together create circumstances that … violate s. 12."[31] The effects of the punishment critical to the finding of a s. 12 breach were impacts specific to humans: (1) an inability to pay for the basic necessities of life; (2) the threat of detention and/or imprisonment; and (3) the psychological toll and repeated public shaming due to the indefinite nature of the punishment.[32] It was the combination of these impacts on the person in relation to the gravity of the offence that were so excessive the Court found the victim fine surcharges to be abhorrent and incompatible with human dignity.

25. The circumstances of a corporation – even an insolvent one – do not include the homelessness, addiction, or mental and physical infirmities endured by the offenders in *Boudreault*. Nor can a corporation experience detention, imprisonment or the psychological impact of public shaming that the Court in *Boudreault* found to be critical to the s. 12 analysis. Section 12 should remain, as it always has been, limited to protecting the dignity and worth of human beings, not the profits of corporations.

C. Extending s. 12 to consider third party effects is contrary to established law

26. The Respondent argues that human stakeholders with an interest in a corporation are analogous to the individuals who were before this Court in *Boudreault*. A key difference, of course, is that no individual is before the Court today – only a corporation is. The corporate veil prevents any of the corporation's human stakeholders from being parties to the s. 12 proceeding.

27. Critically, the focus of s. 12 has never been on third parties. Like all *Charter* rights, s. 12 is a personal right.[33] It protects the individual offender and no one else. The majority of the Court

---

[30] *Boudreault*, *supra* note 28 at paras 76-77.
[31] *Boudreault*, *supra* note 28 at para 94.
[32] *Boudreault*, *supra* note 28 at paras 67, 69 and 76-77.
[33] See: *R v Edwards*, [1996] 1 SCR 128 at 145.

of Appeal erred when it extended s. 12 to protect against the impact of a punishment or treatment on persons not before the court: employees, retirees, owners, and even customers of the corporate offender.[34] This position is problematic for three reasons: (1) it is inconsistent with the language of s. 12; (2) it is contrary to established precedent; and (3) it raises significant policy concerns.

28. First, the majority's reasoning fails to reflect the plain language of s. 12 and the phrase "subjected to" within it. The words of s. 12 protect a claimant from being "subjected to any cruel and unusual punishment or treatment."[35] The phrase "subjected to" specifies that s. 12 has an individualized focus. The right extends to those in direct receipt – "subjected to" – a state action. The right does not look beyond the individual offender to protect against collateral consequences for third parties who are not "subjected to" a punishment or treatment. The ancillary effect on an employee, for example, from a sentence imposed on a corporate offender falls outside of the purview of s. 12 because that employee is not directly "subjected to" the sentence.

29. Second, the majority's approach is inconsistent with long-standing jurisprudence. For more than 30 years, this Court's s. 12 framework has analyzed "the challenged penalty or sanction from the perspective of the *person actually subjected to it*" and then, if no breach is apparent, from the perspective of "imaginary *offenders*" in reasonable hypotheticals.[36] At no stage does the established s. 12 inquiry consider whether a punishment or treatment that is not cruel and unusual vis-à-vis an offender (whether actual or hypothetical) could be rendered so due to its potential collateral impact on third parties.

30. Indeed, this Court has declined to incorporate third party effects in its s. 12 analyses even when given the opportunity. In *Rodriguez*, this Court ruled that a dying patient could not

---

[34] QCCA Reasons, *supra* note 11 at paras 119-120, 130-134.

[35] *Charter*, *supra* note 1 s 12.

[36] *Goltz*, *supra* note 28 at 498 [emphasis added]; *R v Morrisey*, 2000 SCC 39, [2000] 2 SCR 90 at para 26 ("The court's inquiry is focussed not only on the purpose of the punishment, but also on its effect *on the individual offender*" [emphasis added]); *Smith*, *supra* note 20 at 1072 ("the protection afforded by s. 12 … is concerned with the effect that the punishment may have on the person *on whom it is imposed* [emphasis added]). See also *R v Montague*, 2014 ONCA 439 at para 40, leave to appeal ref'd [2014] SCCA No. 330 [*Montague*].

challenge the criminalization of physician-assisted suicide under s. 12. Justice Sopinka, writing for the majority, explained that, although the appellant experienced suffering as a result of the ban, only the physician – not the patient – was "subjected to … treatment" at the hands of the state, as s. 12 requires.[37]

31. Other courts have followed suit. In *Canadian Foundation for Children, Youth & the Law*, the Ontario Court of Appeal rejected a challenge by a children's rights group under s. 12 to a law permitting corporal punishment by teachers and caregivers because, although children were obviously impacted by corporal punishment, there was no "active state process … involving an exercise of state control over the child as there must be if s. 12 is to be engaged."[38] And in *R. v. Montague*, the same court found that the impact on a spouse from a forfeiture order arising out of her husband's criminal conduct had no bearing on a s. 12 challenge to the forfeiture provision because "the forfeiture is not from her, as much as she may suffer the consequences of her spouse's actions."[39]

32. Even these special relationships – doctor-patient, parent-child, and husband-wife – have not been enough to displace the rule that s. 12 prohibits the state from imposing cruel and unusual treatment on a claimant, but does not protect third parties from collateral consequences.[40] This rule must be even more firmly enforced in the context of a corporation, whose human stakeholders remain firmly separated from it due to the corporate veil.

---

[37] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at pp 611-612 ("[T]he appellant is simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to 'treatment' at the hands of the state."). In *Rodriguez*, the Court also found that s 7 applied but was not violated. The Court has since reversed that decision and struck down the assisted-suicide ban under s 7: *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

[38] *Canadian Foundation for Children, Youth & the Law v Canada*, [2002] OJ No 61 (CA) at para 54, aff'd on other grounds, 2004 SCC 4.

[39] *Montague*, *supra* note 36 at paras 56, 58 ("This is unfortunately the case when a spouse is left to pick up the pieces after the other spouse commits a crime, and is convicted and sentenced.").

[40] Contrary to the majority's view, Parliament's decision to require a judge sentencing an

33. Third, as a matter of policy, it would be highly problematic to extend s. 12's protections to third parties. Mandating a third-party analysis would "essentially change the focus of the *Charter* inquiry from the protection of individual rights to a more general and at-large inquiry into all aspects of a given [state action]."[41] It would lead to protracted hearings that would not only be lengthy, but also speculative. The financial future of a corporate offender can be "impossible to predict with any degree of certainty."[42] An assessment of a third party's prospects is even less feasible.[43]

34. This expansive and speculative s. 12 analysis would not be limited to the sentencing of corporate offenders. Its effects would extend throughout the criminal justice system as it would apply to human offenders as well. Consider, for example, a human who is denied bail or is imprisoned under a mandatory minimum sentence regime. By definition, that person has been separated from society, including any loved ones who might experience hardship from their absence. And yet, neither the sentencing provision nor the judicial interim release regime[44] that authorized the detention consider how that separation might adversely impact those third parties. Under the reasoning of the majority below, these orders might be subject to challenge under s. 12 not because the detention or sentence is cruel and unusual to the actual offender, but because of the potential impact on others not before the court.

---

organization to consider, under s. 718.21 of the *Criminal Code*, the impact of the sentence on the economic viability of the organization and the continued employment of its employees does not change the scope of s. 12. To hold otherwise would give Parliament's sentencing guidelines constitutional status – which this Court has repeatedly refused to do. See: *Lloyd, supra* note 28 at paras 41-47.

[41] *R v Nguyen*, 2013 BCSC 950 at para 34 (concerning whether the court should, in a *Garofoli* review, permit the accused to litigate the *Charter* rights of third parties and thus seek excision of information obtained in violation of those other persons' rights).

[42] *Metron, supra* note 8 at para 110.

[43] *R v Wu*, 2003 SCC 73, [2003] 3 SCR 530 at para 31 ("It is wrong to assume, as was done in this case, the circumstances of the offender at the date of the sentencing will necessarily continue into the future.").

[44] See: *Criminal Code*, RSC 1985, c C-46, s 515(10) (detention is justified if (a) necessary to ensure the accused's attendance at court, (b) necessary for the protection or safety of the public, or (c) necessary to maintain confidence in the administration of justice).

35. These policy concerns underscore the errors in the "public interest" analysis of the majority below. This Court should follow the language of s. 12 and the established case law to find that s. 12's protections are limited to the effect of a state action on the person before the court and do not include consideration of collateral consequences on third parties.

D. Extending s. 12 to corporations is inconsistent with the jurisprudence interpreting other related *Charter* rights

36. *Charter* interpretation must be coherent across all rights. Determining if a *Charter* right applies to a corporation depends on 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.[45] It is the purpose of the provision that is paramount to the analysis. For the same purposive reasons that other related *Charter* rights have been held not to apply to corporations, neither should s. 12.

37. The purpose of s. 12 most closely aligns with that of s. 7. Section 7 jurisprudence has strongly rejected the proposition that s. 7 protections should be extended to corporations. This rejection should equally apply to s. 12 for the following reasons: (1) the sections both confer protection on a singularly human level; (2) the corporate veil has not been pierced to engage the interests at issue in either section; (3) both sections protect against grossly disproportionate treatment or punishment; and (4) corporate economic rights, such as protection from monetary penalties, find no constitutional protection in s. 7.

38. First, this Court has held that only humans can enjoy the right to life, liberty and security of the person under s. 7.[46] Just as s. 7 "was intended to confer protection on a singularly human level,"[47] so too does s. 12. Certain punishments that engage s. 7 interests such as capital punishment (life), grossly disproportionate mandatory minimum prison terms (liberty), castration, lobotomies and the lash (security of the person) are also understood to be cruel and unusual. These punishments all refer to suffering unique to humans.

---

[45] *R v CIP Inc*, [1992] 1 SCR 843 at 852 [*CIP*].

[46] *Irwin Toy, supra* note 2 at 1002, 1004. Similarly, s 9 (right to be free of arbitrary detention or imprisonment) and s 10 (rights that arise on "arrest or detention") do not apply to corporations or other legal persons because they cannot be detained, imprisoned or arrested: *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at 183.

[47] *Irwin Toy*, *supra* note 2 at 1004.

39. The majority of the Court of Appeal pointed to the possible bankruptcy of a corporation resulting from a fine as cruel and unusual punishment.[48] Corporate bankruptcy may be harsh, but it does not engage the right to life under s. 7.[49] Nor does it rise to the level of the circumstances of the offenders in *Boudreault*, whose s. 12 rights were engaged because of the likelihood of detention and imprisonment, as well as the stigma and psychological stress they experienced.[50]

40. Second, this Court has previously rejected transferring the s. 7 interests of natural persons interested in a corporation to the corporate offender. In *Irwin Toy*, Dickson C.J. noted that both corporations and their directors or representatives could be convicted under the law, but only the directors or representatives were subject to imprisonment. The Court held that the liberty interest of the directors or representatives could not be transferred to the corporation for the sake of asserting a corporate right to s. 7 protection.[51]

41. In *Wholesale Travel*, this Court again rejected attaching the rights of natural persons to the corporation for purposes of s. 7 no matter how closely tied they may be:

> With the possibility of imprisonment removed, and the stigma which attaches to a conviction effectively reduced to the loss of *money*, the corporation is in a completely different situation than is an individual. While it might be argued that in closely held corporations, where there are only two or three shareholders who themselves manage the company, the stigma which attaches to the corporation will carry over to those individuals and will, therefore, affect human interests, it is my view that this consideration should not alter the analysis. The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).[52]

42. Third, both s. 7 and s. 12 protect individuals from treatment or punishment that is grossly disproportionate. This Court has repeatedly held that the principle of fundamental justice embedded in s. 7 must be interpreted consistently with the gross and excessive

---

[48] QCCA Reasons, *supra* note 11 at para 135.
[49] *Irwin Toy*, *supra* note 2 at 1003.
[50] *Boudreault, supra* note 28 paras 67, 69-70, 76-77.
[51] *Irwin Toy*, *supra* note 2 at 1002-1003.
[52] *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 182-183 [emphasis in original] [*Wholesale Travel*].

disproportionality of punishment required to make out a claim under s. 12.[53] The two-part s. 7 test requires a protected interest to be engaged before moving to the second step of assessing whether the limitation of the engaged interest is in accordance with the principles of fundamental justice.[54] In other words, consideration of the principles of fundamental justice is contingent on first showing an infringement of one of the interests s. 7 protects. It would be incoherent to find that the gross disproportionality principle of fundamental justice is available under s. 12 even though the same principle cannot apply under s. 7 because life, liberty and security of the person have not been engaged.

43. Fourth, this Court has stated that corporate economic rights can find no constitutional protection in s. 7.[55] They should also find no protection in s. 12. With the possibility of imprisonment removed for corporations, the corporation facing only a loss of money is in a completely different situation than an individual facing a loss of their human dignity.[56] Financial penalties on their own are just that: money.

44. More generally, the *Charter* does not protect property[57] or the right to engage in regulated businesses or activities.[58] The economic consequences of a fine may be identical to the economic consequences of a tax or a forfeiture or a property encumbrance or a civil judgment or the loss of a licence or privilege. Such sanctions can result in a loss of livelihood, but the law does not protect the property rights of these *individuals* from such an outcome. There is no reason why a property right of a corporation should be treated any differently. In short, the reasons why s. 7 does not apply to corporations apply in equal measure to s. 12.

45. Section 7 is not the only *Charter* provision limited to human beings. Section 15 is as well – and its jurisprudence lends further support to the view that s. 12 must be similarly limited. The value of substantive equality protected in s. 15 is closely tied to the concept of human

---

[53] *R v Safarzadeh-Markhali***,** 2016 SCC 14, [2016] 1 SCR 180 at para 72; *Lloyd, supra* note 28 at paras 41-43; *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 160.

[54] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 47 [*Blencoe*].

[55] *Irwin Toy*, *supra* note 2 at 1003-1004.

[56] *Wholesale Travel, supra* note 52 at 182.

[57] *Irwin Toy*, *supra* note 2 at 1003-04; *Reference re ss 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1170-71, Lamer J concurring; *R v Lambe*, 2000 NFCA 23 at para 71.

[58] *Siemens v Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 SCR 6 at paras 45-46; *Mussani v College of Physicians & Surgeons of Ontario*, [2004] OJ No 5176 at paras 39-43.

dignity.[59] Because s. 12 protects individuals from treatment and punishment that is so disproportionate to the point of being "abhorrent or intolerable", such that it is incompatible with human dignity,[60] it should be interpreted coherently with s. 15 of the *Charter*.

46. In the rich s. 15 jurisprudence, human dignity is understood as being concerned with physical and psychological integrity and empowerment.[61] Values of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, are integral to the values of dignity and freedom underlying the equality guarantee.[62]

47. Section 15 does not include corporations. This Court has held that a legal person, such as an estate, has no human dignity that may be infringed.[63] Like an estate, a corporation cannot pretend to have personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied. A coherent reading of the *Charter* requires that s. 12 not be interpreted as providing corporations with a right to human dignity that they simply do not possess.

48. The Respondent relies on the application of s. 11(b) to corporations in *R. v. CIP* as support to extent s. 12 to protect the interests of legal persons.[64] Most of the guarantees in s. 11, however, do not apply to corporations. The few that do are procedural protections extended to all offenders, not rights based on protecting human dignity that are specific to humans.

---

[59] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 52 and 54 [*Law*]; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 21 and *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 138 per Lebel J [*Quebec v A*].

[60] *Boudreault, supra* note 28 at paras 43, 45, 67, 94.

[61] *Law*, *supra* note 59 at para 53. It is also important to note that values of physical and psychological integrity also compose the security of the person interest in s 7. See *Carter*, *supra* note 37 at paras 66-67; and *Blencoe*, *supra* note 54 at paras 81-86.

[62] *Quebec v A*, *supra* note 58 at para 139.

[63] *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429 at para 73.

[64] The Respondent points to *CIP*, *supra* note 45. While *CIP* did extend s 11(b) rights to corporations, it distinguished between the presumed prejudice specific to humans such as stigma, loss of privacy, possible disruption of family, social life and work that could not logically befall a corporation and the actual prejudice to trial fairness imperiled by the passage of time, which applied to all accused. Ultimately, the framework of presumed and actual prejudice was rejected by this Court in *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

49. A more relevant s. 11 example for this case is this Court's decision in *R v. Amway Corp.* This Court rejected including corporations in s. 11(c) (the legal right of a person not to be compelled to be a witness in a criminal proceeding against the person) holding: "it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness."[65] This finding is consistent with the legal separation of the corporate entity from the human stakeholders in corporate law. The stakeholders called to testify could not derivatively assert the corporation's right in the proceeding as their own. Moreover, the purpose of s. 11(c) "was intended 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,"[66] a distinctly human experience.

E. Section 12 must be interpreted within the context of regulatory proceedings

50. The judgment of the majority of the Court of Appeal also fails to take into account the context of the charges at issue: regulatory proceedings under the Québec *Building Act*. Regulatory proceedings pursuant to public welfare statutes constitute the vast majority of penal proceedings against corporations. In Ontario, over 400 regulatory provisions provide a minimum fine penalty under various public welfare statutes, such as the *Highway Traffic Act,*[67] the *Tobacco Tax Act,*[68] and the *Ontario Water Resources Act.*[69]

51. Regulatory regimes are in place to protect the public, including employees, from the pervasive risks associated with industry. Effective measures such as the consistent application of minimum fines are necessary to keep those risks in check and achieve the purposes of public welfare regulation.[70] Fines with deterrent effects are imposed to encourage compliance and maintain standards to help keep people safe, underpin the fair and efficient operation of the economy, ensure an equitable distribution of tax burdens, and promote high levels of lawful and professional conduct among regulated actors. Regulatory statutes "protect those

---

[65] *R v Amway Corp*, [1989] 1 SCR 21 at 39 [*R v Amway*].
[66] *R v Amway*, *supra* note 65 at 40.
[67] *Highway Traffic Act*, RSO 1990, c H 8 at s 7.2(2).
[68] *Tobacco Tax Act*, RSO 1990, c T10 at s 29(13).
[69] *Ontario Water Resources Act*, RSO 1990, c O 40 at ss 109(2)(a), 109(3)(a). See also *Ontario (Environment, Conservation and Parks) v Henry of Pelham Inc*, 2018 ONCA 999 at paras 35-36 [*Henry of Pelham*].
[70] *Henry of Pelham*, *supra* note 69 at para 38.

who are unable to protect themselves," ensure standards of conduct, performance and reliability by various economic groups, and "make life tolerable for all."[71]

52. A contextual approach to *Charter* analysis requires this Court to consider the public welfare purpose of regulatory offences when interpreting the scope of the s. 12 right in the regulatory context. This Court has consistently recognized that the different purposes of criminal and regulatory offences require different approaches to *Charter* interpretation.[72] As stated by Cory J. in *Wholesale Travel*:

> [A] *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one.
>
> Under the contextual approach, constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences. Rather, the content of the *Charter* right must be determined only after an examination of all relevant factors and in light of the essential differences between the two classes of prohibited activity.[73]

53. These statements were adopted by a unanimous Court in *R. v. Fitzpatrick* when interpreting the right against self-incrimination in the regulatory context.[74] In *R. v. Richard,* the Court acknowledged that the regulatory context "can be taken into consideration in determining both the scope and extent of [*Charter*] rights."[75] Recently, this Court averted to the difference between punishment for criminal offences and fines imposed in the regulatory context when it distinguished *R. v. Pham* in the *Boudreault* decision.[76]

54. These decisions reflect the fact that regulatory statutes, in contrast to the criminal law, create "public welfare offences" and "cover all facets of life ranging from safety and consumer protection to ecological conservation."[77] As stated by the Ontario Court of Appeal in *Cotton Felts,* "[i]n our complex interdependent modern society such regulatory statutes are accepted

---

[71] *Wholesale Travel*, *supra* note 52 at 217.

[72] *Wholesale Travel, supra* note 52 at 224-227; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1355-1356.

[73] *Wholesale Travel, supra* note 52 at 226.

[74] *R v Fitzpatrick,* [1995] 4 SCR 154 at para 30.

[75] *R v Richard*, [1996] 3 SCR 525 at para 29. See also *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)*, [1990] 1 SCR 425 at 505-507, La Forest J and at 592-593, L'Heureux-Dubé J.

[76] *Boudreault*, *supra* note 28 at para 93.

[77] *R v Cotton Felts Ltd,* [1982] OJ No 178 at para 19.

as essential in the public interest."[78]

55. Following this approach, this Court should have regard to the regulatory context of this provincial offence prosecution when interpreting the scope of s. 12. Specifically, when interpreting the phrase "cruel and unusual treatment and punishment" in the regulatory context, this Court must be aware of the different purposes of sentencing in the criminal and regulatory regimes and the fact that deterrence, not punishment, is the paramount factor in sentencing under public welfare statutes. Regulatory fines of considerable magnitude are typically the only method by which to deter regulatory non-compliance.[79]

56. It is plainly legitimate for a regulatory scheme to seek to deter non-compliant conduct by regulated actors. The often substantial fines available under regulatory statutes are designed to induce compliance with those rules for the overall benefit of society. Minimum fines imposed in regulatory proceedings operate within the context of an ongoing relationship between the regulator and the regulated actor. Indeed, a regulatory scheme that did not deter non-compliance would be futile.

57. Regulated actors typically vastly outnumber regulatory officials. It is impossible as a practical matter to detect every instance of non-compliance. A high level of voluntary compliance by regulated actors is a practical necessity for virtually every kind of regulatory system. It follows that compliance measures that promote general and specific deterrence are critical components of modern regulatory regimes.

58. Regulatory fines and their magnitude are a legitimate method to deter non-compliance with public welfare statutes.[80] Regulatory fields such as securities market regulation and environmental protection rely on sizeable fines to counteract significant economic incentives that often exist for breaching the law. The sentence ensures compliance to regulatory rules and maintenance of internal discipline within a limited sphere of activity.[81]

59. If complying with regulation imposes a cost (as it invariably does), then failing to comply must also impose a cost; otherwise, regulated persons will have an incentive not to comply and an unfair competitive advantage over other regulated persons who have incurred the costs

---

[78] *Cotton Felts*, *supra* note 77 at para 19.
[79] *Cotton Felts*, *supra* note 77 at paras 19-20.
[80] *Cotton Felts*, *supra* note 77 at paras 19-20.
[81] *R v Wigglesworth*, [1987] 2 SCR 541 at 560-61; *Martineau v MNR*, 2004 SCC 81, [2004] 3 SCR 737 at paras 57-60.

necessary to comply. It is well-recognized in the regulatory field that non-compliance breeds non-compliance as compliance costs and competition favours those whose costs are lowest.[82]

60. Nor should the poorly and recklessly run corporation that skates the margin of solvency and disregards regulatory compliance be rewarded by invoking s. 12 because of its bankruptcy while a well-run corporation dutifully pays a fine imposed for regulatory compliance inadvertence. Such an outcome would disincentivize responsible business operation, which is the hallmark of most businesses in Canada.

61. A concern underlying the majority's judgment in the court below is the injury to economic engines that close their doors due to the cost of regulatory compliance.[83] This concept is known as "too big to fail" and it has no place in the *Charter*. Economic concerns fall squarely in the realm of the government and legislature. Legislators and regulators are in a better position than this Court to determine the appropriate balance between regulatory penalties and economic concerns about the cost of compliance with a regulatory welfare regime.

62. Moreover, mandatory minimums can be, and ought to be, very high when corporations have grossly violated regulatory standards. An example of this scenario arose in *R. v. Metron Construction Corporation*, a sentencing decision of a corporation convicted for criminal negligence following the workplace death of four workers and catastrophic injuries to a fifth worker on December 24, 2009. The Ontario Court of Appeal held that if appropriate, the prospect of bankruptcy should not be precluded.[84]

63. In interpreting and applying the *Charter*, this Court must be cautious to ensure that the *Charter* does not simply become an instrument by which legal persons can diminish the consequences of regulatory legislation which has as its object the improvement of the condition of less advantaged persons (such as the workers harmed or deceased in *Metron*).[85]

---

[82] Sidney A Shapiro & Randy S Rabinowitz, "Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA", (1997) 49:4 Admin L Rev 713 at 722-724.

[83] QCCA Reasons, *supra* note 11 at para 133.

[84] *Metron*, *supra* note 8 at paras 104, 107-110.

[85] Extending constitutional rights to a corporation can also diminish the human rights of people employed by the corporation. As Bader Ginsburg J noted in *Burwell v Hobby Lobby Stores, Inc*, 573 US 682 (2014) the majority's decision to extend a human right (religious freedom) to a corporation to refuse to fund contraceptive coverage that the *Affordable Care Act* would otherwise secure for its employees impacted the equal participation rights of women in

64. Regulators have every legitimate reason to seek to deter intentional or reckless non-compliance with public welfare legislation. The company that provides faulty equipment that endangers its workers,[86] the company that mishandles dangerous and hazardous materials causing emergency evacuation of residents,[87] or the company that insufficiently maintains its commercial vehicles that share roads and highways with Canadians,[88] are all the proper subjects of substantial economic penalties. Section 12 should not protect these companies by looking beyond them to invoke the rights of the very people injured by their recklessness.

65. Corporations are fundamentally different than human beings. They are artificial constructs designed to shield their stakeholders from liability. They cannot set aside the corporate veil when it suits their interests to claim the benefit of a *Charter* right intended to protect purely human rights. Nor can they claim s. 12 protection by relying on the indirect impact that an economic sanction against them has on third parties. Third party impacts have never been considered relevant to the s. 12 analysis and, as the interpretation of other related *Charter* rights demonstrates, s. 12 does not protect against purely economic harm. To bring corporations under the protection of s. 12 would be to disregard established *Charter* jurisprudence and the unique context of regulatory proceedings. For all of these reasons, s. 12 should not be extended to apply to corporations.

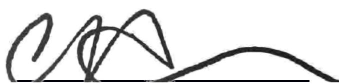
PART IV. SUBMISSIONS ON COSTS

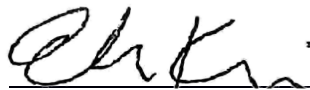
66. Ontario does not seek costs in relation to its intervention in these appeals.

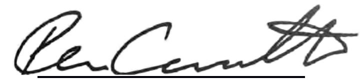
PART V. ORDER SOUGHT

67. Ontario requests permission to present oral argument not exceeding five (5) minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JANUARY, 2020.


Courtney Harris


Ellen K. Weis


Ravi Amarnath

---

economic and social life of the nation.

[86] *Metron, supra* note 8 at para 114.

[87] *R v Sunrise Propane Energy,* 2013 ONCJ 358, 2016 CarswellOnt 3399 (OCJ); aff'd 2017 ONSC 6954; leave to appeal ref'd 2018 ONCA 461.

[88] *R v Transport Robert (1973) Ltée*, 2003 CanLII 7741 (CA).

PART VII. TABLE OF AUTHORITIES

JURISPRUDENCE	**Paragraph(s) Referred to in Factum**
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927	10, 38-40
Canadian Dredge & Dock Co v The Queen, [1985] 1 SCR 662	11, 13
Oceanex Inc v Canada (Transport), 2019 FCA 250	11
Deloitte & Touche v Livent Inc, 2017 SCC 63, [2017] 2 SCR 855	13
R v Metron Construction Corporation, 2013 ONCA 541	13, 33, 62, 64
Rhone (The) v Peter AB Widener (The), [1993] 1 SCR 497	13
BCE Inc v 1976 Debentureholders, 2008 SCC 69, [2008] 3 SCR 560	13
Koh v Ellipsiz Communications Ltd, 2017 ONSC 3083 (Div Ct.)	13
9147-0732 Québec inc c Directeur des poursuites criminelles et pénales, 2019 QCCA 373	14-15, 22, 27, 39, 61
Salomon v Salomon Co, [1897] AC 22	16
Kosmopoulos v Constitution Insurance Co, [1987] 1 SCR 2	16, 18
Brunette v Legault Joly Thiffault, sencrl, 2018 SCC 55, [2018] 3 SCR 481	16, 18
Pita Royale Inc (Aroma Taste of the Middle East) v Buckingham Properties Inc, 2019 ONCA 439, leave to appeal ref'd [2019] SCCA No 37	16
Rea v Wildeboer, 2015 ONCA 373	16
Hercules Management Ltd v Ernst & Young, [1997] 2 SCR 165	16-17
Meditrust Healthcare Inc v Shoppers Drug Mart, 2002 CanLII 41710 (CA)	16
Prudential Assurance Co v Newman Industries Ltd (No 2), [1982] 1 All ER 354	17
R v Smith, [1987] 1 SCR 1045	20-21, 29
R v Shand, (1976), 29 CCC (2d) 199	20

Steele v Mountain Institution, [1990] 2 SCR 1385	23
R v Nur, 2015 SCC 15, [2015] 1 SCR 773	23
R v Goltz, [1991] 3 SCR 485	23, 29
R v Lloyd, 2016 SCC 13, [2016] 1 SCR 130	23, 42
R v Boudreault, 2018 SCC 58, [2018] 3 SCR 599	23-24, 39, 45, 53
R v Edwards, [1996] 1 SCR 128	27
R v Morrisey, 2000 SCC 39, [2000] 2 SCR 90	29
R v Montague, 2014 ONCA 439, leave to appeal ref'd [2014] SCCA No 330	29, 31
Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519	30
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331	30, 46
Canadian Foundation for Children, Youth & the Law v Canada, [2002] OJ No 61 (CA), aff'd on other grounds, 2004 SCC 4	31
R v Nguyen, 2013 BCSC 950	33
R v Wu, 2003 SCC 73, [2003] 3 SCR 530	33
R v CIP Inc, [1992] 1 SCR 843	36, 48
Canadian Egg Marketing Agency v Richardson, [1998] 3 SCR 157	38
R v Wholesale Travel Group Inc, [1991] 3 SCR 154	41, 43, 51, 52
R v Safarzadeh-Markhali, 2016 SCC 14, [2016] 1 SCR 180	42
R v Malmo-Levine; R v Caine, 2003 SCC 74, [2003] 3 SCR 571	42
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307	42, 46
Reference re ss 193 & 195.1(1)(c) of the Criminal Code, [1990] 1 SCR 1123	44
R v Lambe, 2000 NFCA 23	44

Siemens v Manitoba (Attorney General), 2003 SCC 3, [2003] 1 SCR 6	44
Mussani v College of Physicians & Surgeons of Ontario (2004), 74 OR (3d) 1 (CA)	44
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497	45-46
R v Kapp, 2008 SCC 41, [2008] 2 SCR 483	45
Quebec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61	45-46
Canada (Attorney General) v Hislop, 2007 SCC 10, [2007] 1 SCR 429	47
R v Jordan, 2016 SCC 27, [2016] 1 SCR 631	48
R v Amway Corp, [1989] 1 SCR 21	49
Ontario (Environment, Conservation and Parks) v Henry of Pelham Inc, 2018 ONCA 999	50-51
Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326	52
R v Fitzpatrick, [1995] 4 SCR 154	53
R v Richard, [1996] 3 SCR 525	53
Thomson Newspapers Ltd v Canada (Director of Investigation and Research), [1990] 1 SCR 425	53
R v Cotton Felts Ltd, [1982] OJ No 178	54-55, 58
R v Wigglesworth, [1987] 2 SCR 541	58
Martineau v MNR, 2004 SCC 81, [2004] 3 SCR 737	58
Burwell v Hobby Lobby Stores, Inc, 573 US 682 (2014)	63
R v Sunrise Propane Energy, 2013 ONCJ 358, 2016 CarswellOnt 3399 (OCJ); aff'd 2017 ONSC 6954; leave to appeal ref'd 2018 ONCA 461	64
R v Transport Robert (1973) Ltée, 2003 CanLII 7741 (CA)	64

LEGISLATION	Paragraph(s) Referred to in Factum
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 (English): s 12 (French): s 12	1
Canada Business Corporations Act, RSC 1985, c C-44 (English): ss 2(1), 15(1), 103(2), 115(3), 150, 183(1), 189(3), 238, 241 (French): ss 2(1), 15(1), 103(2), 115(3), 150, 183(1), 189(3), 238, 241	11-13
Business Corporations Act, RSO 1990, c B 16 (English): ss 1(1), 3(2), 15, 111-112, 245, 248 (French): ss 1(1), 3(2), 15, 111-112, 245, 248	11-13
Criminal Code, RSC 1985, c C-46 (English): ss 515(10), 718.21 (French): ss 515(10), 718.21	32, 34
Highway Traffic Act, RSO 1990, c H 8 (English): s 7.2(2) (French): s 7.2(2)	50
Tobacco Tax Act, RSO 1990, c T10 (English): s 29(13) (French): s 29(13)	50
Ontario Water Resources Act, RSO 1990, c O 40 (English): ss 109(2)(a), 109(3)(a) (French): ss 109(2)(a), 109(3)(a)	50

SECONDARY SOURCES	Paragraph(s) Referred to in Factum
John C Coffee Jr, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich L Rev 386	10
Parliamentary Research Branch, *Legislative Summary of Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, by David Goetz, Publication No 37-2-LS-457-E (Ottawa: Law and Government Division, 3 July 2003)	13

Sidney A Shapiro & Randy S Rabinowitz, "Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA", (1997) 49:4 Admin L Rev 713	59