



SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32 **APPEAL HEARD:** January 22, 2020
JUDGMENT RENDERED: November 5, 2020
DOCKET: 38613

BETWEEN:

Attorney General of Quebec and Director of Criminal and Penal Prosecutions
Appellants

and

9147-0732 Québec inc.
Respondent

- 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 Constitution Foundation**
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Kasirer J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Brown and Rowe JJ. (Wagner C.J. and Moldaver and Côté
(paras. 1 to 48) JJ. concurring)

CONCURRING REASONS: Abella J. (Karakatsanis and Martin JJ. concurring)
(paras. 49 to 137)

CONCURRING REASONS: Kasirer J.
(paras. 138 to 142)

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QUEBEC (A.G.) v. 9147-0732 QUÉBEC INC.

**Attorney General of Quebec and
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2020 SCC 32

File No.: 38613.

2020: January 22; 2020: November 5.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Scope and purpose of guarantee — Whether s. 12 of Canadian Charter of Rights and Freedoms protects corporations from cruel and unusual treatment or punishment.

A corporation was found guilty of carrying out construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of Quebec's *Building Act*. Pursuant to s. 197.1 of that Act, the penalty for an offence under s. 46 is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation. Applying this provision, the Court of Québec imposed the then minimum fine for corporations of \$30,843. The corporation challenged the constitutionality of the mandatory minimum fine on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the *Charter*. The Court of Québec dismissed the challenge, concluding that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12. On appeal by the corporation, the Quebec Superior Court similarly held that corporations were not covered by s. 12, as the provision's purpose was the protection of human dignity, a notion meant exclusively for natural persons. A majority at the Quebec Court of Appeal, however, allowed the corporation's appeal, concluding that since corporations could face cruel treatment or

punishment through harsh or severe fines, s. 12 could apply to them. The dissenting judge was of the view that s. 12 does not apply to corporations.

Held: The appeal should be allowed and the judgment of the Court of Appeal set aside.

Per Wagner C.J. and Moldaver, Côté, **Brown** and **Rowe JJ.:** Section 12 of the *Charter* does not protect corporations from cruel and unusual treatment or punishment because the text “cruel and unusual” denotes protection that only human beings can enjoy. The protective scope of s. 12 is thus limited to human beings. The Court’s jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, and the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation’s separate legal personality.

To claim protection under the *Charter*, a corporation must establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision. The court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The approach is generous, purposive and contextual and should be done in a large and liberal manner. Within the

purposive approach, the analysis must begin by considering the text of the provision. While constitutional norms are deliberately expressed in general terms, the words used remain the most primal constraint on judicial review and form the outer bounds of a purposive inquiry. Giving primacy to the text prevents an interpretation that overshoots (or undershoots) the actual purpose of the right. It is not the sole consideration, but treating it as the first indicator of purpose is constitutive of the principles of *Charter* interpretation.

The text of s. 12, particularly the inclusion of “cruel”, strongly suggests that the provision is limited to human beings. The ordinary meaning of the word “cruel” does not permit its application to inanimate objects or legal entities such as corporations. The words “cruel and unusual treatment or punishment” refer to human pain and suffering, both physical and mental. An examination of s. 12’s historical origins shows that the *Charter* took a different path from its predecessors, the English *Bill of Rights* and the Eighth Amendment of the United States Constitution, by carving off the right not to be denied reasonable bail without just cause from the right to be free from cruel and unusual punishment and by omitting the protection against excessive fines. The protection against cruel and unusual punishment under s. 12 therefore exists as a standalone guarantee. This is highly significant: excessive fines (which a corporation can sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be so excessive as to outrage standards of decency and abhorrent or intolerable to society. This threshold is, in accordance with the purpose of

s. 12, inextricably anchored in human dignity and cannot apply to treatments or punishments imposed on corporations.

There is agreement with Abella J.'s discussion of related *Charter* rights. However, there is disagreement with the prominence given to international and comparative law in the interpretive process. International and comparative sources play a limited role of providing support or confirmation for the result reached by way of purposive interpretation of *Charter* rights. Their weight and persuasiveness depends on the nature of the source and its relationship to the *Charter*. A principled framework and methodology for considering international and comparative sources in constitutional interpretation is necessary, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants.

The presumption of conformity is the firmly established interpretive principle that the *Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. Binding international instruments carry more weight in the analysis than non-binding instruments, which should be treated as relevant and persuasive but not determinative interpretive tools, and courts drawing from the latter should be careful to explain why they are drawing on a particular source and how it is being used. In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights* are both binding on Canada, thus triggering the presumption of conformity. However,

neither extends protection from cruel and unusual punishment to corporations. While both the *American Convention on Human Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* have also been found not to extend protection to corporations against cruel and unusual punishment, these instruments are merely persuasive here. International instruments that pre-date the *Charter* can also clearly form part of the historical context of a *Charter* right regardless of whether Canada is a party to such instruments. In this case, the context of the English *Bill of Rights* and the Eighth Amendment is highly relevant as each contained similar but not identical protections as s. 12. As for instruments that post-date the *Charter*, those that do not bind Canada carry much less interpretive weight than those that do. Finally, decisions of foreign and international courts are included among those non-binding sources that are relevant and may be persuasive. However, particular caution should be exercised as the measures in effect in other countries say little about the scope of the rights enshrined in the Canadian *Charter*.

Per Abella, Karakatsanis and Martin JJ.: The purpose of s. 12 of the *Charter* is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Determining the scope of s. 12 requires first determining the purpose of the right, which is to be sought by reference to the character and objectives of the *Charter*

itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and to the principles and values underlying the right. Examining the text of the *Charter* is only the beginning of the interpretive exercise, which is fundamentally different from interpreting a statute. A generous, purposive and contextual approach should be applied so that *Charter* rights can grow and adapt to changing realities. Overemphasizing the plain text of *Charter* rights would make Canadian constitutional law more insular, and creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to protect. Purpose remains the central consideration in interpreting the scope and content of a *Charter* right. While several factors — including the text — can help inform the exercise, the Court has never endorsed a rigid hierarchy among these interpretative guides.

A review of the language used in the Court's s. 12 jurisprudence shows that both the English and French versions capture the same concept, namely, that s. 12 prohibits treatment or punishment that is incompatible with human dignity. Dictionary definitions of "cruel", "cruelty", "cruel and unusual punishment" and "*cruel*" in French, reveal that the ordinary meaning of the words cruel and unusual treatment or punishment in s. 12 centers on human pain and suffering. The fact that the word "everyone" is found in the text of s. 12 cannot, by virtue of its literal meaning, expand the protection to corporations, without any regard for the purpose of the right as protecting human dignity.

The historical origins and values underlying s. 12 of the *Charter* can be traced back to art. 10 of the English *Bill of Rights*, which stipulated that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The provision was incorporated almost verbatim into the Eighth Amendment of the United States Constitution. In both the English and American contexts, protection for corporations was not contemplated. In the United States, the historical purpose of prohibiting cruel and unusual punishment was to protect the inherent worth and dignity of human beings. In Canada, similar language first appeared in s. 2(b) of the *Canadian Bill of Rights*. The wording of that provision and of s. 12 of the *Charter* are almost identical. Like the *Canadian Bill of Rights*, the enactment of the *Charter* was influenced by the events of the Second World War, WWII's shocking indifference to human dignity and the devastating human rights abuses it tolerated resulted in responsive protections in international human rights instruments and in domestic rights guarantees like the *Charter*.

Since Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada's s. 12 prohibition against cruel and unusual treatment with how courts have interpreted the numerous international instruments containing similar provisions. The Court has frequently relied on international and comparative law sources to assist in delineating the breadth and content of *Charter* rights; this is a standard and accepted practice. Both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law. The Court has never required that these

sources be separately weighed, nor has it ever applied a hierarchical sliding scale of persuasiveness, segmenting non-binding international and comparative sources into categories worthy of more or less influence. Considering what and how laws and decisions have been applied on related questions by other countries and institutions is part not only of an ongoing global judicial conversation, but of the epistemological package constitutional courts routinely rely on. Narrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources is a worrying setback.

While s. 12's international siblings vary in language, a common meaning can be ascribed to their various formulations as the phrase "cruel and unusual" is a compendious expression of a norm. The criterion applied to determine whether a punishment is cruel and unusual is whether the punishment prescribed is so excessive as to outrage standards of decency. All of the relevant international sources lead to the irrefutable inference that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering. None of them include protection for corporations. While this international consensus does not dictate the outcome, it provides compelling and relevant interpretive support. A review of foreign domestic law, while not determinative, also supports an interpretation of s. 12 of the *Charter* which excludes protection for corporations. Internationally, it is widely acknowledged that the right to be free from cruel and unusual punishment is

intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering.

Looking at the meaning and purpose of the other specific rights and freedoms with which s. 12 is associated, ss. 7 to 14 of the *Charter* are grouped under the heading “Legal Rights”. The broad purposes of these legal rights are to preserve the rights of detained individuals, by ensuring they are dealt with fairly and humanely, and to maintain the repute and integrity of the system of justice. Significantly, corporations have been found not to be included under both ss. 7 and 11(c).

The purpose of s. 12 is to confer protection on a singularly human level. It is meant to protect human dignity and respect the inherent worth of individuals. Just as corporations cannot experience human reactions such as stress or anxiety, neither can they experience suffering. It would strain the interpretation of cruel and unusual treatment or punishment under s. 12 if a corporation, an artificial entity, could be said to experience it. Since corporations do not fall within the purpose of s. 12, they do not fall within its protective scope.

Per Kasirer J.: There is agreement with Abella, Brown and Rowe JJ. that the protection offered by s. 12 of the *Charter* does not extend to corporations. *Charter* rights must be given a large, liberal and purposive interpretation. Starting from the language of s. 12, particularly the word “cruel”, the dissenting Court of Appeal judge correctly found that it would distort the ordinary meaning of the words to say that it is possible to be cruel to a corporate entity. Although the scope of s. 12 has been

broadened over the years, its evolution is still concerned only with human beings. In his analysis, the dissenting judge relied on sources drawn from domestic, international and English law and on the *Civil Code of Québec*. In this case, it is unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further.

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Applied: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; **referred to:** *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Re B.C. Motor*

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Bélanger and Rancourt JJ.A.), 2019 QCCA 373, [2019] AZ-51573754, [2019] J.Q. n° 1443 (QL), 2019 CarswellQue 1425 (WL Can.), setting aside a decision of Dionne J., 2017 QCCS 5240, [2017] AZ-51443312, [2017] J.Q. n° 16310 (QL), 2017 CarswellQue 10451 (WL Can.), which affirmed a decision of Ratté J.C.Q., 2017 QCCQ

1632, [2017] AZ-51373092, [2017] J.Q. n° 2085 (QL), 2017 CarswellQue 1930 (WL Can.). Appeal allowed.

Stéphanie Quirion-Cantin, Sylvain Leboeuf, Julie Dassylva and Anne-Sophie Blanchet-Gravel, for the appellant the Attorney General of Quebec.

Laura Élisabeth Trempe and Marie-Pier Champagne, for the appellant the Director of Criminal and Penal Prosecutions.

Martin Villa and Niki Galanopoulos, for the respondent.

François Lacasse and Mathieu Stanton, for the intervener the Director of Public Prosecutions.

Courtney Harris, Ellen Weis and Ravi Amarnath, for the intervener the Attorney General of Ontario.

Léon H. Moubayed, Sarah Gorguos and Guillaume Charlebois, for the intervener Association des avocats de la défense de Montréal.

Gib van Ert and Jessica Magonet, for the intervener the British Columbia Civil Liberties Association.

Alyssa Tomkins, Albert Brunet and Penelope Simons, for the intervener the Canadian Civil Liberties Association.

Brandon Kain, Adam Goldenberg and Sébastien Cusson, for the intervener the Canadian Constitution Foundation.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

BROWN AND ROWE JJ. —

I. Overview

[1] This appeal requires this Court to decide whether s. 12 of the *Canadian Charter of Rights and Freedoms* protects corporations from cruel and unusual treatment or punishment. Like our colleagues, we conclude that it does not, because corporations lie beyond s. 12’s protective scope. Simply put, the text “cruel and unusual” denotes protection that “only human beings can enjoy”: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1004. The protective scope of s. 12 is thus limited to human beings.

[2] This Court’s jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, as our colleagues have noted. And the existence of human beings behind the corporate veil is insufficient to ground a s. 12

claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality. Like our colleagues, and contrary to the majority at the Court of Appeal, we therefore reject the proposition that the effect of a corporation's bankruptcy on its stakeholders should be considered in determining the scope of s. 12.

[3] Despite our agreement in the result, we find it necessary to write separately in order to assert the proper place in constitutional interpretation of foreign and international sources such as those upon which our colleague Abella J. relies in her analysis. If these sources are to be accorded a persuasive character, it must be done by way of a coherent and consistent methodology. Coherence and consistency in a court's reasons are important, because they are critical means by which it may account to the public for the manner in which it exercises its powers. This is particularly so on a matter so fundamental as constitutional interpretation. As Professor Stéphane Beaulac notes, a consistently defined methodology of interpretation is a means of promoting the rule of law, notably through legal predictability: “‘Texture ouverte’, droit international et interprétation de la Charte canadienne” (2013), 61 *S.C.L.R.* (2d) 191, at pp. 192-93.

[4] We also make a preliminary and more general point on constitutional interpretation. Our colleague Abella J. applies the primacy of constitutional text and considerations of purpose in accordance with the purposive approach adopted in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, recently affirmed in *R. v. Poulin*, 2019 SCC 47, at para. 32. In doing so, however, she makes several remarks which risk

minimizing the primordial significance assigned by this Court’s jurisprudence to constitutional text in undertaking purposive interpretation.

[5] Having regard to the decision under appeal, that of the Quebec Court of Appeal, we find Justice Chamberland’s dissenting reasons difficult to improve upon. His analysis belies any perceived need to dispose of this matter by referring extensively to international and comparative law. And his textual analysis — notably on the meaning of “cruel” — is compelling. As he put it, [TRANSLATION] “[i]t would completely distort the ordinary meaning of the words . . . to say that it is possible to be cruel to a corporate entity”: 2019 QCCA 373, at para. 53 (CanLII). His discussion of the other *Big M Drug Mart* factors was also in keeping with this Court’s direction on the proper methodology of *Charter* interpretation.

II. Analysis

[6] A summary of relevant facts and judicial history is found in the reasons of Abella J., and we are content to rely on it.

[7] To claim protection under the *Charter*, a corporation — indeed, any claimant — must establish that “it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision”: *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, “by reference to the character and the larger objects of the *Charter* itself, to the

language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*”: *Big M Drug Mart*, at p. 344; see also *Poulin*, at para. 32. The approach is “generous, purposive and contextual” and should be done in a “large and liberal manner”: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.

A. *Preliminary Observations on Purposive Interpretation*

[8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 (“*Vancouver Island Railway*”), “[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question”: p. 88. This was reiterated in *Grant*, where the Court stated that “[a]s for any constitutional provision, the starting point must be the language of the section”: para. 15 (emphasis added). Recently, in *Poulin*, the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.

[9] This is so because constitutional interpretation, being the interpretation of *the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed

in general terms, the words used remain “the most primal constraint on judicial review” and form “the outer bounds of a purposive inquiry”: B. J. 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, at p. 243. The Constitution is not “an empty vessel to be filled with whatever meaning we might wish from time to time”: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Re PSERA*”), at p. 394; *Caron*, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted “the primacy of the written text of the Constitution”: para. 36; see also para. 37.

[10] Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53 and 55; *R. v. Stillman*, 2019 SCC 40, at paras. 21 and 126; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; *Big M Drug Mart*, at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.

[11] While acknowledging, at para. 71, that language is part of the analysis, and that “the text of the *Charter* matters”, our colleague Abella J. stresses the direction in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 that the task of interpreting a constitution is fundamentally different from interpreting a statute, and that courts ought “not to read the provisions of the Constitution like a last will and testament lest it become one”:

p. 155. This felicitous phrase cannot, however, be taken as minimizing the primordial significance of constitutional text as it has since, and repeatedly, been recognized in this Court’s jurisprudence: see, e.g., *Caron*, at para. 36; *Vancouver Island Railway*, at p. 88. It is not the sole consideration, but treating it as the first indicator of purpose is not in the least inconsistent with the principles of *Charter* interpretation; it is in fact constitutive of them.

[12] We pause here to emphasize that recognizing the importance of the text in interpreting a *Charter* right purposively does *not* translate into advocating for what our colleague Abella J. calls a “[p]urely textual interpretation” of the Constitution: para. 76, quoting A. Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002), 116 *Harv. L. Rev.* 19, at p. 83. The notion of “textualism” to which she looks for support diverges substantially from the idea — embodied in our jurisprudence and in our reasons — that the purposive inquiry must begin by examining the text. For instance, the “new textualism” denounced by Aharon Barak is a “system [which] holds that the Constitution and every statute should be understood according to the reading of a reasonable reader at the time of enactment” and in which “[r]eference to the history of the text’s creation . . . is not allowed”: pp. 82-83. Similarly, the kind of interpretation Lorne Neudorf characterizes as “a purely textual reading” is one where the analysis is strictly restricted to the text of the Constitution: “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” (2018), 41 *Dal. L.J.* 519, at p. 544. These conceptions of constitutional interpretation are not remotely consistent with that which we apply and which our law demands.

[13] Moreover, our colleague Abella J. draws a false dichotomy between the purposive approach and beginning that analysis with the text of the provision. Indeed, beginning with the text is precisely what the precedents of this Court direct us to do. Her assertion that “considering the text as prime [is] unhelpful in interpreting constitutional guarantees” (at para. 75) discards these precedents and the role they have assigned to the text in delimiting an analysis which, we repeat, must also be conducted by reference to the historical context, the larger objects of the *Charter*, and, where applicable, the meaning and purpose of associated *Charter* rights.

[14] Returning to the case at bar, the text of s. 12, particularly the inclusion of “cruel”, strongly suggests that the provision is limited to human beings. Justice Chamberland quite rightly emphasized that the ordinary meaning of the word “cruel” does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] “[o]ne would not say, it seems to me, that a group of workers who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business’s products, creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business”: para. 56, fn. 32. We therefore agree with Justice Chamberland (at paras. 51-56), as with our colleague (Abella J.’s reasons, at para. 86), that the words “cruel and unusual treatment or punishment” refer to *human* pain and suffering, both physical and mental.

[15] We note that, in refusing to apply s. 7 of the *Charter* to corporations in *Irwin Toy*, Dickson C.J. and Lamer and Wilson JJ. reasoned in a similar manner, observing that the text of the provision did not permit corporations to be included within its protective scope:

In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its “life, liberty or security of the person”. We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition.

...

... A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. [Emphasis added; pp. 1002-4.]

[16] Relatedly, we also largely agree with our colleague Abella J.’s analysis of s. 12’s historical origins, subject to our discussion below on the proper role of international and comparative law in the analysis. We would add that an examination of s. 12’s historical origins shows that the *Charter* took a different path from its predecessors. Following an early, related protection in *Magna Carta* (1215), Article 10 of the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2 provided that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Using almost identical text, the Eighth Amendment of the

Constitution of the United States provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”. In Canada, however, the right not to be denied reasonable bail without just cause was carved off from the right to be free from cruel and unusual punishment, and placed in s. 11(e) of the *Charter*. Even more significantly, the protection against “excessive fines” was not retained at all, neither in the *Charter* nor in the *Canadian Bill of Rights*, S.C. 1960, c. 44, as noted by Justice Chamberland: para. 66.

[17] The protection against cruel and unusual punishment under s. 12 of the *Charter* therefore exists as a standalone guarantee. Viewed in light of the historical background noted above, this is highly significant, if not determinative: excessive fines (which a corporation *can* sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paras. 45 and 94. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity. It is a constitutional standard that cannot apply to treatments or punishments imposed on corporations.

[18] Finally, we agree with our colleague’s discussion of related *Charter* rights.

B. *The Proper Role of International and Comparative Law in Charter Interpretation*

[19] We differ fundamentally from our colleague Abella J. on the prominence she gives to international and comparative law in the interpretive process. We see this

as a significant and unwarranted departure from this Court's jurisprudence. Specifically, her claim that all international and comparative sources have been "indispensable" to Canadian constitutional interpretation (at para. 100) does not hold true when considering this Court's jurisprudence and the varying role and weight it has assigned to different kinds of instruments.

[20] As a constitutional document that was "made in Canada" (Prime Minister Pierre Elliot Trudeau, *Federal-Provincial Conference of First Ministers on the Constitution* (morning session of November 2, 1981), at p. 10), the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history.

[21] This remains unchanged by the purposive approach developed in *Big M Drug Mart*. That judgment makes no reference to international and comparative law, except inasmuch as it relates to the historical origins of the concepts enshrined in the *Charter*.

[22] While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain:

[TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.

...

... even though international normativity is not binding in domestic law, what it can and, indeed, should do in appropriate circumstances is to influence the interpretation and application of domestic law by our courts. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of “persuasive authority”.

(S. Beaulac and F. Bérard, *Précis d'interprétation législative* (2nd ed. 2014), Chapter 5, at paras. 5 and 36 (emphasis added; footnotes omitted).)

[23] Furthermore, even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution. The reason for this is the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty. As this Court cautioned in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, “[t]he interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy”: para. 150.

[24] Although this Court has been careful to attach the appropriate weight to international and comparative law in *Charter* interpretation, it has not always explained

how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion, to which, we say with respect, our colleague Abella J. adds by indiscriminately drawing from binding instruments *and* non-binding instruments, instruments that pre-date the *Charter and* instruments that post-date it, and decisions of international tribunals *and* foreign domestic courts, before concluding that, combined, they represent an “international consensus [that] does not dictate the outcome [but] provides compelling and relevant interpretive support”: para. 107.

[25] As we will discuss, the various instruments and case law our colleague Abella J. reviews play different roles in the analysis and receive different weight. Treating them all alike — stating that each is “indispensable” and provides “compelling and relevant interpretive support” (at paras. 100 and 107) — actually risks *undermining* the importance of Canada’s international obligations:

The temptation may be great to treat all international law, whether binding on Canada or not, as “optional information” and to disregard the particular interpretative onus that is placed upon courts by the presumption of conformity with Canada’s international obligations. There is a significant difference between international law that is binding on Canada and other international norms. The former is not only potentially persuasive but also obligatory. This distinction matters — when we fail to uphold our obligations, we undermine the respect for law internationally. The distinction also provides the rationale for the traditional common law presumption of conformity with Canada’s international obligations as well as for treating differently international norms that do not legally bind Canada.

(J. Brunnée and S. J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002), 40 *Can. Y.B. Intl Law* 3, at

p. 41 (emphasis added); see also J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 260.)

[26] We are not alone in expressing concern about the need for structure when citing international and foreign sources. Commentators have called for clarification in this regard, noting that courts should provide “greater analytical rigour” and “approach international law in a principled and coherent manner, providing clarity as to precisely what effect is accorded to international law in a given case and why”: Brunnée and Toope, at p. 8; see also the Honourable Mr. Justice R. G. Jursanz, “International Law and Canadian Courts: A Work in Progress” (2008), 25 *N.J.C.L.* 171, at pp. 176 and 178. Specific areas calling for clarification include:

. . . the standards by which courts will determine whether treaties have been implemented; what role non-binding sources (such as treaties which Canada has signed but not ratified, treaties which Canada has neither signed nor ratified, or “soft law” instruments) should play in interpreting domestic law; and whether these various categories of non-binding sources should be treated differently from one another or Canada’s binding international legal obligations.

(Currie, at p. 262)

[27] A principled framework is therefore necessary and desirable, both to properly recognize Canada’s international obligations and to provide consistent and clear guidance to courts and litigants. Setting out a methodology for considering international and comparative sources recognizes how this Court has treated such sources in practice and provides guidance and clarity. Given the issue raised in this

case, our focus is on the use of international and comparative law in constitutional interpretation.

[28] This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights. Respectfully, our colleague Abella J.'s approach represents a marked and worrisome departure from this prudent practice.

[29] This Court (generally, albeit not invariably) has been careful to specify the normative value and weight of different kinds of international sources. Our colleague Abella J.'s approach simply abandons this important practice.

[30] A useful starting point is Dickson C.J.'s guidance in *Re PSERA*. While it appeared in a dissenting opinion, his approach to international and comparative law has since shaped the way this Court treats these sources. His consideration of the scope of s. 2(d) of the *Charter* looked first to Canadian and Privy Council jurisprudence and then to U.S. and international law: p. 335. On international sources specifically, he explained:

The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. [Emphasis added; pp. 348-49.]

[31] Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”: p. 349 (emphasis added). This proposition has since become a firmly established interpretive principle in *Charter* interpretation, the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64; *Kazemi*, at para. 150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70.

[32] Importantly, Dickson C.J. referred to instruments that Canada had *ratified*. In other words, his focus in framing this presumption was on *binding* international instruments, as ratification is the way in which international instruments become

binding internationally: see Currie, at pp. 153-54. Similarly, Dickson C.J. explained that in becoming a party to international human rights conventions, “Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*” and that “[t]he content of Canada’s international human rights obligations is . . . an important indicia of the meaning of ‘the full benefit of the *Charter*’s protection””: p. 349 (emphasis added).

[33] Subsequent case law has continued to tie the presumption of conformity to the language of Canada’s international *obligations* or *commitments*: *Ktunaxa*, at para. 65; *Badesha*, at para. 38; *Saskatchewan Federation of Labour*, at paras. 62 and 64-65; *Divito*, at para. 22; *Health Services*, at para. 69.

[34] This Court has explained that the presumption of conformity “operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights”: *Kazemi*, at para. 150. But, being a presumption, it is also rebuttable and “does not overthrow clear legislative intent”: para. 60.

[35] Dickson C.J.’s approach to *non-binding* sources — treating them as relevant and persuasive, but not determinative, interpretive tools — also holds true: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 80. Non-binding sources notably include international instruments to which Canada is *not* a party. Such instruments do not give rise to the presumption of conformity. They therefore have only persuasive value in *Charter* interpretation.

[36] This is not to say that such instruments are irrelevant. As Professors Brunnée and Toope observe, “[t]here is no reason why Canadian courts should not draw upon these [non-binding] norms so long as they do so in a manner that recognizes their non-binding legal quality”: p. 53 (emphasis added); see also G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at p. 350. As our colleague notes, “[t]his Court has frequently relied on [non-binding] international law sources to assist in delineating the breadth and content of Charter rights”: Abella J.’s reasons, at para. 99 (emphasis added). Respectfully, her subsequent attempt to pull into this jurisdiction the deep divisions that inhabit the jurisprudence of our neighbour is no part of what is at issue here. But more importantly, the cases she relies on support the distinctions we draw in these reasons. Dickson C.J.’s articulation of the presumption of conformity in *Re PSERA* was described as the “template for considering the international legal context” in *Divito*, at para. 22. That passage was similarly cited in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056. Meanwhile, *Burns* and *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, dealt with the meaning of the “principles of fundamental justice,” a point we address below in para. 45.

[37] In addition to properly characterizing their use, courts must not allow consideration of such instruments to displace the methodology for *Charter* interpretation set out in *Big M Drug Mart*. This Court has been careful to proceed in this manner. For example, in *Ktunaxa*, the Court first reviewed Canadian case law on the scope of freedom of religion before confirming that scope with reference to binding

international instruments: paras. 62-65. It then briefly looked to non-binding instruments that “also” supported the Canadian case law, being careful to specify that the instruments were “not binding on Canada and therefore do not attract the presumption of conformity” but were “important illustrations of how freedom of religion is conceived around the world”: para. 66. Similarly, in *Saskatchewan Federation of Labour*, the Court began with Canadian case law on s. 2(d) of the *Charter* and its history: paras. 28-55. It then explained that Canada’s international human rights obligations “also” mandated protecting the right to strike, with particular emphasis on binding instruments and the presumption of conformity: paras. 62-70. Finally, it noted that its conclusion was “[a]dditionally” supported by foreign domestic law: paras. 71-74.

[38] It follows from all this — and, specifically, from the presumption of conformity — that binding instruments necessarily carry more weight in the analysis than non-binding instruments. While resort may be had to both, courts drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used. We respectfully say that the distinctions we draw are the very reason that “[t]his Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others” (Abella J.’s reasons, at para. 104) and that stating this framework with clarity will not do “a disservice to our Court’s ability to continue to consider them with selective discernment”: para. 102. Our methodology is firmly rooted in this Court’s jurisprudence.

[39] In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“*ICCPR*”), are both binding on Canada, thus triggering the presumption of conformity. However, we agree with our colleague that neither extends protection from cruel and unusual punishment to corporations.

[40] Our colleague’s analysis then flows into a consideration of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, adopted by Mexico and nations in the Caribbean and central and South America, and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. While we agree that neither instrument has been found to extend protection to corporations against cruel and unusual punishment, we are wary of our colleague Abella J.’s approach, which appears to give these non-binding instruments similar weight to binding ones. We therefore highlight that these instruments are merely persuasive here, and that a court relying upon them should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them).

[41] Another important distinction is between instruments that pre- and post-date the *Charter*. Within the *Big M Drug Mart* approach itself, courts are called on to consider the “historical origins of the concepts enshrined” in the *Charter* when determining the scope of a *Charter* right: p. 344. International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and

illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the “drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them”: L. E. Weinrib, “A Primer on International Law and the Canadian Charter” (2006), 21 *N.J.C.L.* 313, at p. 324. In this case, then, the context of the English *Bill of Rights*, and the Eighth Amendment is highly relevant as each contained similar — but, importantly, not identical — protections as s. 12, as we have explained above. Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, and related protocols Canada has ratified: Weinrib, at p. 317.

[42] As for instruments that *post-date* the *Charter*, however, the question becomes once again whether or not they are binding on Canada and, by extension, whether the presumption of conformity is engaged. It can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.

[43] Finally, we turn to decisions of foreign and international courts. In *Re PSERA*, these decisions were included among those non-binding sources that “are relevant and may be persuasive”: p. 348. Particular caution should, however, be

exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter* — a point stated emphatically by this Court in *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 62. As Michel Bastarache explains, “[t]he logic employed by other courts provides guidance to Canadian courts rather than precedents to be followed” and “it is important to note that all foreign decisions ultimately influence Canadian law based on persuasive, rather than binding, authority”: “How Internationalization of the Law has Materialized in Canada” (2009), 59 *U.N.B.L.J.* 190, at p. 196.

[44] While our colleague notes that her review of foreign domestic jurisprudence is “not determinative” and “supports” her analysis (Abella J.’s reasons, at para. 118), jurisprudence of foreign and international courts seems to infuse her analysis at various points without an explanation of their role in the interpretive process. Respectfully, her discussion of these sources fails to explain in what way they are instructive, how they are being used, or why the particular sources are being relied on. Indeed, she considers various sources of international and comparative law, and gives them unstated, but seemingly equal, interpretive weight. This is made most clear at paras. 99-100 of her reasons, where she says that the Court “has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights” and that “both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law”. Yet, in line with the distinctions we have drawn, the cases our colleague cites in support of this broad

statement largely focus on *binding* instruments: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 58; *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 120-21; *Health Services*, at paras. 70-71; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1061; *Ktunaxa*, at paras. 64-65; *Saskatchewan Federation of Labour*, at paras. 65-70. As we have already explained, the discussion of non-binding instruments in *Saskatchewan Federation of Labour* and *Ktunaxa* properly served a *confirmatory* function.

[45] Nor can *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, *Re B.C. Motor Vehicle Act, Burns*, or *Kazemi* justify relying on non-binding, non-historical instruments for the purposes of *Charter* interpretation in the present case, as those cases required consideration of whether an international consensus existed because of the nature of the questions asked. In *Suresh*, the Court was called on to determine if a peremptory norm of customary international law existed, which necessarily required looking to international sources: paras. 59-75. *Re B.C. Motor Vehicle Act, Burns*, and *Kazemi*, meanwhile, were concerned with the principles of fundamental justice under s. 7. Determining these principles may call for an examination into international sources as the analysis requires establishing a “societal consensus”: *Kazemi*, at paras. 139 and 150; *Re B.C. Motor Vehicle Act*, at p. 503; *Burns*, at paras. 79-81.

[46] As this Court’s jurisprudence amply shows, the normative value and weight of international and comparative sources has been tailored to reflect the nature

of the source and its relationship to our Constitution. Reaffirming this guidance cannot reasonably be characterized as “novel”, howsoever forceful or overstated our colleague Abella J.’s charges to the contrary.

[47] In all, courts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate, accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it. In our respectful view, our colleague Abella J.’s reasons do not conform to this approach. The result is that foreign and international instruments and jurisprudence dominate her analysis, contrary to this Court’s teachings on constitutional interpretation. While this change in approach is not determinative in the case at bar, it could very well be in a different one. We therefore find it crucial to reiterate the proper approach to *Charter* interpretation.

III. Conclusion

[48] We would allow the appeal and set aside the judgment of the Court of Appeal.

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

ABELLA J. —

[49] The *Canadian Charter of Rights and Freedoms* constitutionalized protection for human rights and civil liberties in Canada, entrusting courts with the responsibility for interpreting the meaning of its provisions. Using a contextual approach, the Court has, over time, decided who and what came within the *Charter*'s protective scope.

[50] Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual treatment or punishment. This is the first case in which the Court has been asked to determine the scope of s. 12, that is, who or what comes under its protection. This appeal raises the question of whether corporations come within its scope.

[51] In my respectful view, s. 12's purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Background

[52] The corporation before the Court, 9147-0732 Québec inc., was found guilty of carrying out construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of the *Building Act*, CQLR, c. B-1.1:

46. No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.

No contractor may use, for the carrying out of construction work, the services of another contractor who does not hold a licence for that purpose.

[53] Pursuant to s. 197.1 of the *Building Act*, the penalty for an offence under s. 46 of this statute is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation:

197.1 Any person who contravenes section 46 or 48 by not holding a licence of the appropriate class or subclass is liable to a fine of \$5,141 to \$25,703 in the case of an individual and \$15,422 to \$77,108 in the case of a legal person, and any person who contravenes either of those sections by not holding a licence is liable to a fine of \$10,281 to \$77,108 in the case of an individual and \$30,843 to \$154,215 in the case of a legal person.¹

[54] Applying this provision, the Court of Québec imposed the then minimum fine for corporations of \$30,843 on 9147-0732 Québec inc.

¹ The current provision states:

197.1 Any person who contravenes section 46 or 48 is guilty of an offence and is liable, as the case may be, to a fine

(1) of \$5,841 to \$29,200 in the case of an individual and \$17,521 to \$87,604 in the case of a legal person if the individual or legal person does not hold a licence of the appropriate class or subclass or uses the services of another person who does not hold a licence of the appropriate class or subclass; or

(2) of \$11,682 to \$87,604 in the case of an individual and \$35,041 to \$175,206 in the case of a legal person if the individual or legal person does not hold a licence or uses the services of another person who does not hold a licence.

[55] The corporation challenged the constitutionality of the mandatory minimum fine in s. 197.1 of the *Building Act* on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the *Charter*.

[56] It did not succeed at the Court of Québec, where Ratté J.C.Q. concluded that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12 of the *Charter*. In any event, he concluded that the minimum corporate fine at issue, far from being cruel and unusual, represented the norm in penal regulatory law. At the time, no fine had yet been invalidated as cruel and unusual by a higher court, even in the context of individuals.

[57] At the Quebec Superior Court, Dionne J. similarly held that corporations were not covered by s. 12. In his view, s. 12's purpose was the protection of human dignity, a notion clearly meant exclusively for [TRANSLATION] "natural persons".

[58] A majority at the Quebec Court of Appeal allowed the appeal and held that s. 12 can apply to corporations. It found that s. 12's association with human dignity did not prevent its application to corporations, since other *Charter* rights which also protect human dignity — ss. 8 and 11(b) of the *Charter* — have been held to apply to corporations. Rather than looking at the purpose of the provision, it adopted a [TRANSLATION] "tangible benefit" approach, focusing on whether a corporation could theoretically benefit from the *Charter* protection in question: "a corporation's ability to derive a tangible benefit from it". This resulted in its conclusion that since corporations could face cruel treatment or punishment through harsh or severe fines,

s. 12 could apply to them. It remitted to the Court of Québec the question of whether the particular minimum fine against corporations set out in s. 197.1 of the *Building Act* amounted to cruel and unusual treatment or punishment.

[59] In dissent, Chamberland J.A. was of the view that s. 12 is concerned with human dignity, a concept inapplicable to corporations.

[60] For the following reasons, I agree with Chamberland J.A. that s. 12 does not apply to corporations. I would therefore allow the appeal.

Analysis

[61] This case gives us an opportunity to apply this Court's approach to both constitutional interpretation and the role of international and comparative law in its development. Regrettably, however, the majority has put into question this Court's approach to both. Instead of using the text as the beginning of the search for purpose, the majority has given it "primacy" and assigned a secondary role to the other contextual factors, thereby erasing the difference between constitutional and statutory interpretation. And instead of only relying on the traditional distinction between binding and non-binding international sources, the majority seems to have added a novel requirement: whenever a Canadian court considers non-binding international sources, it must explicitly justify their use, segment them into categories, and attribute a degree of weight to their inclusion, thereby transforming the Court's usual panoramic search for global wisdom into a series of compartmentalized barriers. For

constitutional, comparative and international law, this apparent change in direction is a worrying setback.

[62] Section 12 of the *Charter* states:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[63] Most of this Court's s. 12 jurisprudence has dealt with minimum and indeterminate sentences and the harmful effects of incarceration. The threshold test developed and applied in these and other cases is whether the treatment or punishment of the individual is so "grossly disproportionate" as to "outrage standards of decency", and be "abhorrent or intolerable".²

[64] 9147-0732 Québec inc. argued that this is the language that we should apply, since it is broader than the language used in the French version of our s. 12 jurisprudence, which refers to treatment or punishment that is [TRANSLATION] "incompatible with human dignity". This argument, with respect, results from looking at the words literally, in both the English and French versions, without examining them in the context of the cases in which they were decided, thereby creating artificial conceptual schisms instead of linguistic coherence (see Michel Doucet, "Le

² See, e.g., *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Morrisey*, [2000] 2 S.C.R. 90; *R. v. Latimer*, [2001] 1 S.C.R. 3; *R. v. Ferguson*, [2008] 1 S.C.R. 96; *R. v. Nur*, [2015] 1 S.C.R. 773; *R. v. Lloyd*, [2016] 1 S.C.R. 130; *R. v. Boudreault*, [2018] 3 S.C.R. 599.

bilinguisme législatif”, in Michel Bastarache and Michel Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 179, at p. 281).

[65] A review of the language used in our s. 12 jurisprudence shows that both the English and French versions capture the same concept, namely, that s. 12 prohibits treatment or punishment that is incompatible with human dignity (see *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 811, 815 and 818; *R. v. Boudreault*, [2018] 3 S.C.R. 599, at paras. 43, 67 and 126). I agree with Chamberland J.A. that [TRANSLATION] “[t]he assertion that no one is to be subjected to cruel [and unusual] treatment or punishment cannot be dissociated from the concept of human dignity” (para. 59). The French and English versions of how this Court has described what is at stake in s. 12 are, therefore, not only reconcilable, they are different ways of expressing the same idea.

[66] 9147-0732 Québec inc. also argued that the scope of s. 12 should be seen to include corporations based on this Court’s recent decision in *Boudreault*. Writing for the majority, Martin J. found that the mandatory victim surcharge under s. 737 of the *Criminal Code*, R.S.C. 1985, c. C-46, violated s. 12 of the *Charter* because it caused four interrelated harms to *individuals*: disproportionate financial consequences suffered by the indigent; threat of detention and/or imprisonment; threat of provincial collections efforts; and *de facto* indefinite criminal sanctions (para. 65).

[67] But recognizing the suffering of *individuals* from harsh economic treatment by the state does not lead to the inference that s. 12 protects the economic

interests of corporations. To answer that question requires a prior assessment of whether s. 12 applies to a corporation at all. This in turn requires 9147-0732 Québec inc. to “establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision” (*R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852).

[68] Unlike the approach applied by the majority of the Court of Appeal, with respect, determining the scope requires first determining the *purpose* of the right. A *Charter* right must be interpreted “by an analysis of the purpose of [the] guarantee” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344 (emphasis deleted); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-57; see also Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 36.8(c)). *Big M Drug Mart* provides the definitive account of this approach:

... the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. *The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.*

In my view this analysis is to be undertaken, and *the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.* The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court’s

decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, *be placed in its proper linguistic, philosophic and historical contexts*. [Underlining in original; italics added; p. 344.]

[69] Most recently, in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, this Court endorsed the purposive approach set out in *Hunter* and *Big M Drug Mart*, describing the interpretive task as follows:

Before turning to the facts of this appeal, I consider it necessary to review the background to the enactment of s. 23 and the principles that must inform the interpretation of that section.

...

The historical and social context at the root of language rights in education makes clear the unique role of s. 23 in Canada's constitutional landscape. In an oft quoted passage, Dickson C.J. illustrated the section's importance by stating that it represents a "linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 350). More recently, in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139 ("*Rose-des-vents*"), Karakatsanis J. noted that Canada has a bicultural founding character and that its commitment to bilingualism sets it apart among nations (para. 25, citing *Assn. des Parents Francophones (Colombie Britannique) v. British Columbia* (1996), 27 B.C.L.R. (3d) 83 (S.C.), at para. 24).

...

I would add that in conducting the analysis under s. 23, a court must bear in mind that this section has three purposes, as it is at once preventive, remedial and unifying in nature. [paras. 4, 12 and 15]

[70] As this passage illustrates, the principles and values underlying the enactment of the *Charter* provision are the primary interpretive tools.

[71] This Court has always made clear that examining the text of the *Charter* is only the beginning of the interpretive exercise, an exercise which is fundamentally different from interpreting a statute. Dickson J. explained the reason for this in *Hunter*:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”. [p. 155]

Nonetheless, as *Big M Drug Mart* indicated, the text of the *Charter* matters since the purpose of the right in question is to be sought by reference “to the language chosen to articulate the specific right” (p. 344).

[72] This Court has applied the balanced *Big M Drug Mart* framework when interpreting the scope of several *Charter* rights, without elevating the plain text of those guarantees to a factor of special significance. The Court resolved questions about the scope of s. 2(a) of the *Charter* without recourse to a dictionary definition of “religion”, choosing instead to examine the “historical context” and “purpose” of freedom of religion and conscience (*Big M Drug Mart*, at pp. 344-48; see also *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paras. 41-42). In interpreting the presumption of

innocence in s. 11(d), the Court focused on the “cardinal values” that the right embodies (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119). And in marking the boundaries of freedom of expression under s. 2(b), the Court has always emphasized the “principles and values underlying the freedom”, instead of the plain meaning of the term “expression” (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 764-67; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 727-28; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 499-500; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53; *R. v. K.R.J.*, [2016] 1 S.C.R. 906, at paras. 37-38).

[73] This purposive approach to interpreting *Charter* provisions continued in *R. v. Grant*, [2009] 2 S.C.R. 353, where the Court, while acknowledging that the “starting point” for constitutional interpretation is the language of the right being interpreted, proceeded to endorse the contextual approach from *Big M Drug Mart*, stating that “where questions of interpretation arise, a generous, purposive and contextual approach should be applied” (para. 15; see also para. 16). And more recently in *R. v. Stillman*, 2019 SCC 40, the Court reiterated that:

A *Charter* right must be understood “in the light of the interests it was meant to protect” (*R. v. Big M Drug Mart Ltd.* . . . at p. 344; see also *Hunter v. Southam Inc.* . . . at p. 157), accounting for “the character and the larger objects of the *Charter* itself”, “the language chosen to articulate the specific right or freedom”, “the historical origins of the concepts enshrined” and, where applicable, “the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” (*Big M*, at p. 344). It follows that *Charter* rights are to be interpreted “generous[ly]”, aiming to “fulfi[1] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection”

(*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question (*ibid.*).

(para. 21; see also *R. v. Poulin*, 2019 SCC 47, at para. 32.)

[74] The complete lack of support in our jurisprudence for an approach to constitutional interpretation focused on the primacy of the text is hardly surprising. Because *Charter* rights — like all constitutional rights — are meant to be capable of growth and adaptation (see *Hunter*, at pp. 155-57; *Re B.C. Motor Vehicle Act*, at p. 509; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 365-67; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 179-81; Hogg, at s. 15.9(f)), many of them were drafted with vague, open-ended language (see *Hunter*, at p. 154; *Poulin*, at para. 70 (summarizing “evolving, open-ended standards” in the *Charter*, including s. 12)). The text of those provisions may accordingly be of comparatively limited assistance in interpreting their scope.

[75] Not only is considering the text as prime unhelpful in interpreting constitutional guarantees, it could unduly constrain the scope of those rights, or even yield two irreconcilable conclusions leading, for example, to the interpretive triumph of the presence of a comma in expanding gun-owners’ rights under the Second Amendment of the United States Constitution in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (see Brittany Occhipinti, “We the Militia of the United States of America: A Reanalysis of the Second Amendment” (2017), 53 *Willamette L. Rev.* 431, at pp. 438-42, discussing *Heller*).

[76] Overemphasizing the plain text of *Charter* rights creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to uphold. As one scholar has noted, a “purely textual reading” of the Constitution “cuts against the grain of the living tree” (Lorne Neudorf, “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” (2018), 41 *Dal. L.J.* 519, at p. 544). Aharon Barak has similarly warned that “[p]urely textual interpretation severs the constitution . . . from the fundamental values of society” (“A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002), 116 *Harv. L. Rev.* 19, at p. 83). He advocates a broader approach:

. . . to arrive at a proper system of interpretation, the horizons of the interpreter need to be widened beyond those of new textualism. The context of the text — the importance of which is noted by new textualism, albeit narrowly — includes society’s principles, values, and fundamental views, both at the time of enactment and at the time of interpretation. These and other changes would be necessary to transform new textualism into a proper system of interpretation. At that point, however, it would cease to be new textualism and become purposive interpretation.

(p. 84; see also Jonathan R. Siegel, “The Inexorable Radicalization of Textualism” (2009), 158 *U. Pa. L. Rev.* 117, at pp. 173-75.)

[77] Justice Susanne Baer of the German Constitutional Court has also urged against a narrow focus on constitutional text:

. . . constitutional text matters, but . . . constitutionalism should not be reduced to mere textualism.

(“Dignity, liberty, equality: A fundamental rights triangle of *constitutionalism*” (2009), 59 *U.T.L.J.* 417, at p. 441)

[78] A textualist approach would also make Canadian constitutional law more insular. Canadian constitutionalism “contains characteristics that make it objectively appealing to foreign constitution-makers and interpreters” (Adam M. Dodek, “The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism” (2004), 17 *N.J.C.L.* 353, at p. 373). Our model of constitutional interpretation is one of those characteristics. As Professor Dodek notes:

The . . . interpretation given to the Charter by the Supreme Court of Canada has served to reinforce rather than limit its international appeal. Specifically, purposive interpretation accompanied by the conception of a constitution as “a living tree” capable of growth and adaptation to new circumstances are doctrines that have captured the constitutional imaginations of other courts around the world. Outside of Canada, this has made the Canadian constitutional model amendable to various circumstances. Aspects of the Charter have thus proved to be “a living tree” abroad.

(“Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007), 36 *S.C.L.R.* (2d) 309, at pp. 321-22)

[79] Professor Karen Eltis makes the further point that the “living tree” approach helps explain Canada’s willingness to consider “foreign jurisprudence and international instruments”, a subject explored later in these reasons:

Thus, for instance, *as distinguished from an enduring attachment to originalism³ or textualism in the U.S.*, the living tree approach or the “multicultural values reflected and promoted in Canada’s *Charter of Rights and Freedoms* are in fact indicative of a national experience that embraces looking outward to foreign jurisprudence and international

³ Textualism has been described as a theory which shares “both the philosophy and the partisans of the ‘originalist’ method of constitutional interpretation” (see Stéphane Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998), 43 *McGill L.J.* 287, at p. 300).

instruments as a source of domestic jurisprudence” . . . [Emphasis added; footnote added.]

(“Comparative Constitutional Law and the ‘Judicial Role in Times of Terror’” (2010-2011), 28 *N.J.C.L.* 61, at pp. 69-70)

[80] Purpose, in other words, remains the “central” consideration when interpreting the scope and content of a *Charter* right (*Poulin*, at para. 85). Several factors — including the text — can help inform the exercise. But this Court has never endorsed a rigid hierarchy among these interpretative guides. Rather, all of them “can offer useful insights, and the best tools are likely to depend on [the] particular circumstances of the case” (David Landau, “Legal pragmatism and comparative constitutional law”, in Gary Jacobsohn and Miguel Schor, eds., *Comparative Constitutional Theory* (2018), 208, at p. 211).

[81] This brings me back to the central question in this appeal: whether the right to be free from “cruel and unusual treatment or punishment” in s. 12 of the *Charter* extends to corporations.

[82] *Black’s Law Dictionary* defines “cruelty” as “[t]he intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage” (11th ed. 2019), at p. 475). The term “unusual”, is not central to the analysis, but is nonetheless part of the “compendious expression of a norm” (*R. v. Smith (Edward Dewey)*, at p. 1072). It is defined as “[e]xtraordinary; abnormal” and “[d]ifferent from what is reasonably expected” (*Black’s Law Dictionary*, at p. 1851). Together, the words “cruel and unusual punishment” are

defined as “[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community” (*Black’s Law Dictionary*, at p. 1490).

[83] The *Oxford English Dictionary* defines “cruel”, in relation to persons, as “[d]isposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress, destitute of kindness or compassion; merciless, pitiless, hard-hearted” ((2nd ed. 1989), vol. IV, at p. 78). It is also used to describe actions that are “proceeding from or showing indifference to or pleasure in another’s distress” (“cruel”, at p. 78). When referring to conditions and circumstances, i.e. treatment or punishment, “cruel” means “[c]ausing or characterized by great suffering; extremely painful or distressing” (p. 78).

[84] Similarly, “cruelty” is defined in the *Oxford English Dictionary* as referring to:

1. The quality of being cruel; disposition to inflict suffering, delight in or indifference to the pain or misery of others; mercilessness, hard-heartedness: *esp.* as exhibited in action. Also, with *pl.*, an instance of this, a cruel deed; . . .

2. Severity of pain; excessive suffering; . . .

3. Severity, strictness, rigour; . . .

[p. 79]

[85] The term “*cruel*” is also defined in French by reference to the concept of suffering, which, as Chamberland J.A. noted, cannot be experienced by inanimate entities like corporations:

[TRANSLATION]

1. Taking pleasure in inflicting suffering, in witnessing suffering.
2. Denoting cruelty; showing the cruelty of humans.
3. Inflicting suffering through its harshness, its severity.
4. (Of persons). Without leniency, merciless.
5. (Of personified things). Inflicting suffering by manifesting a sort of hostility.
6. (Of persons). Indifferent, insensitive.

(*Le Grand Robert de la langue française* (2nd ed. 2001), at pp. 864-65)

[86] In short, the ordinary meaning of the words cruel and unusual treatment or punishment centers on *human* pain and suffering. As Chamberland J.A., eloquently stated:

[TRANSLATION] It would completely distort the ordinary meaning of the words, in my view, to say that it is possible to be cruel to a corporate entity.

Cruelty is inflicted on living beings of flesh and blood, be they human beings or animals.

And not on corporations.

Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects without a soul or emotional life.
[paras. 53-56]

[87] The fact that the word “everyone” is found in the text of s. 12 cannot, by virtue of its literal meaning, expand the protection to corporations, without any regard for the purpose of the right as protecting *human* dignity. It is worth remembering that in *Irwin Toy*, this Court explained that “[e]veryone’ . . . must be read in light of the

rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings” (p. 1004).

[88] We turn then to the historical origins and values underlying the right, in compliance with Dickson C.J.’s direction in *Oakes*, that the exercise requires “understanding the cardinal values [the provision] embodies” (p. 119).

[89] The values embodied by s. 12 can be traced back to the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2, which, in art. 10, stipulated “[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”.

[90] The provision was incorporated almost verbatim into the Eighth Amendment of the United States Constitution in 1791, where its purpose was definitively discussed in *Furman v. Georgia*, 408 U.S. 238 (1972), dealing with the constitutionality of the death penalty. Each of the judges in the majority wrote separate reasons explaining why the death penalty constituted cruel and unusual punishment in the cases before the court. Marshall J. reviewed the English antecedents of the clause and concluded that:

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the

language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. [p. 319]

[91] Brennan J.'s reasons described the Eighth Amendment's primary purpose as protecting the dignity of human beings. He concluded that the state "even as it punishes, must treat its members with respect for their intrinsic worth *as human beings*", explaining that the reason barbaric punishments have been condemned by history "is that *they treat members of the human race as nonhumans*, as objects to be toyed with and discarded" and are "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity" (pp. 270-73 (emphasis added)).

[92] While there is some debate about the underlying purpose of the English *Bill of Rights* provision, it seems not to be disputed that in both the English and American contexts, protection for corporations was not contemplated. And, it is safe to say that at least in the United States, the historical purpose of prohibiting cruel and unusual punishment was to protect the inherent worth and dignity of *human beings*.

[93] In Canada, similar language first appeared in s. 2(b) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which prohibited "the imposition of cruel and unusual treatment or punishment". The *Canadian Bill of Rights* was adopted in its own historical context, which included a profound emphasis on the need to protect human rights in a post-Second World War era. As then Professor Walter Tarnopolsky observed, "[n]oticeable interest in, and concern for the protection of certain human

rights and fundamental freedoms began to increase in Canada during World War II, possibly as part of a world-wide interest in these values” since “civilized nations could revert to barbarity too easily” (Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (2nd rev. ed. 1975), at p. 3; see also Hogg, at s. 35.1).

[94] The *Canadian Bill of Rights* was introduced as *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*. Beyond its title, the *Canadian Bill of Rights*’ preamble included specific references to “the dignity and worth of the human person”:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge . . . *the dignity and worth of the human person* . . .

. . .

And being desirous of enshrining these principles and the *human rights* and fundamental freedoms derived from them . . . [Emphasis added.]

[95] The wording of the s. 2(b) *Canadian Bill of Rights* provision and s. 12 of the *Charter* are almost identical. However, unlike the *Canadian Bill of Rights*, which is an ordinary statute, albeit of enormous philosophical significance, “the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection” (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 638).

[96] Like the *Canadian Bill of Rights*, the enactment of the *Charter* was influenced by the events of the Second World War. As Pierre Elliott Trudeau, then Minister of Justice, observed in 1968, these events were “disturbing proof of the need to safeguard the rights of individuals” (*A Canadian Charter of Human Rights* (1968), at pp. 10-11). Discussing “[t]he rights of the individual”, Minister Trudeau reminded Canadians that “man [*sic*] has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity” (p. 9). For Trudeau, an entrenched bill of rights would serve to “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts” (p. 11; see also Lester B. Pearson, “Federalism for the Future: A Statement of Policy by the Government of Canada” (1968), in Anne F. Bayefsky, *Canada’s Constitution Act 1982 & Amendments: A Document History* (1989), vol. 1, 61).

[97] World War II’s shocking indifference to human dignity and the devastating human rights abuses it tolerated, resulted not only in responsive protections in international human rights instruments, but also in domestic rights guarantees such as the *Canadian Bill of Rights* and, ultimately, the constitutional protection of rights and freedoms in the *Charter*.

[98] Since Canada’s rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada’s prohibition against cruel and unusual treatment or punishment with how courts around

the world have interpreted the numerous international human rights instruments containing provisions that closely mirror the language of s. 12. As Professor Dodek points out, since courts face common problems, considering how other courts have addressed them can assist in determining how to exercise judicial discretion (“Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities” (2009), 47 *S.C.L.R.* (2d) 445, at p. 454). In other words, “the search for wisdom is not to be circumscribed by national boundaries” (Hogg, at s. 36.9(c)).

[99] This Court has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights (see, e.g., *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 22; *United States v. Burns*, [2001] 1 S.C.R. 283, at paras. 79-81; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1056-57; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 348-49 (per Dickson C.J., dissenting); *Re B.C. Motor Vehicle Act*, at p. 512). As the majority noted in *Divito*, such sources can often be “instructive in defining the right” (para. 22). International human rights law, in particular, has been described by L’Heureux-Dubé J. as a “critical influence on the interpretation of the scope of the rights included in the *Charter*” (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70).

[100] In fact, both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law (*Oakes*, at pp. 120-21;

Reference re Public Service, at pp. 348-49 (per Dickson C.J., dissenting); *R. v. Smith (Edward Dewey)*, at p. 1061; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 58; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paras. 59-75; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 70; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 129; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, at paras. 70-71; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386, at paras. 64-67). Significantly, this Court’s use of international and comparative sources in the interpretation of the *Charter* has been lauded internationally (see, e.g., Ran Hirschl, “Going Global? Canada as Importer and Exporter of Constitutional Thought”, in Richard Albert and David R. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (2018), 305).

[101] Consideration of international and comparative sources is a standard and accepted practice in this Court’s constitutional interpretation jurisprudence. Between 2000 and 2016, this Court cited 1,791 decisions from foreign courts (Klodian Rado, “The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the *judicial slowbalization* of the Court?” (2020), 16 *Utrecht L. Rev.* 57 (online), at p. 61). During the same time period, this Court cited treaties on 336 occasions (Rado, at p. 73). Though Canada has not signed the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, this instrument was the second most cited international treaty, and the case law of the European Court of

Human Rights — which interprets and applies the European *Convention* — made up one third of the total number of all of this Court’s international court citations (Rado, at pp. 72-75). While international and comparative sources are invaluable to this Court’s work in all areas of the law,⁴ references by this Court to these sources occurred in constitutional cases more than in any other field (Rado, at p. 75).

[102] This is not quantum physics. Non-binding international sources are “relevant and persuasive”, not obligatory. Simply put, such sources *attract* adherence rather than command it (Dodek (2009), at p. 446). Presumptively narrowing the significance of international and comparative sources, as the majority suggests, does a disservice to our Court’s ability to continue to consider them with selective discernment.

[103] The majority acknowledges that this Court has always been willing to treat non-binding international sources as “relevant and persuasive” in *Charter* interpretation (*United States v. Burns*, at para. 80). However, it inexplicably retreats

⁴ The Court has cited comparative legal sources in 50 different fields of both public and private law. The 10 fields of law that have generated the highest number of foreign precedents are: constitutional law, torts, criminal law, insurance, intellectual property, civil procedure, administrative law, evidence, courts and labour law (Rado, Figure 5, at p. 69; see also p. 67). Beyond comparative legal sources, the Court has cited international precedents in 13 different fields of both public and private law: constitutional law, immigration law, criminal law, administrative law, torts, labour law, statutes, civil procedure, intellectual property, courts, evidence, international law, contracts (Rado, Figure 6, at p. 76; see also p. 75) as well as international treaties in constitutional law, intellectual property, international law (public and private), immigration law, administrative law, civil procedure, labour law, statutes, arbitration and in 20 other fields of law (Rado, Figure 7, at p. 76).

from this long line of jurisprudence and concludes that non-binding sources should only be used to confirm a pre-established interpretation.

[104] This Court has never required that these sources be sorted by weight before being considered; nor has it ever applied the kind of hierarchical sliding scale of persuasiveness proposed by the majority, segmenting non-binding international and comparative sources into categories worthy of more or less influence. This Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others without using a confusing multi-category chart.

[105] It is true that there are those on the United States Supreme Court who have sought to curtail the influence and use of international sources by calling for more particularization about why, how and when those sources are applied (see, for instance, Antonin Scalia, “Keynote Address: Foreign Legal Authority in the Federal Courts” (2004), 98 *A.S.I.L. Proc.* 305, at p. 307; *Roper v. Simmons*, 543 U.S. 551 (2005), at pp. 622-28 (Scalia J., dissenting); Cindy G. Buys, “Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation” (2007), 21 *B.Y.U. J. Pub. L.* 1, at pp. 7-8). Justice Scalia, for example, “argues that interpretation ought to be focused solely on U.S. legal materials because of the practical difficulties created by consulting transnational sources” (Ryan C. Black et al., “Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine” (2014), 103 *Geo. L.J.* 1, at pp. 8-9). On the other hand, others, like Justice Breyer,

consider that the use of non-binding sources merely “involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful” (Black, at pp. 8-9).

[106] Narrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources gratuitously threatens to undermine Canada’s leading voice internationally in constitutional adjudication, a role based on its willingness to go wide and deep in the global search for the best intellectual resources it can find, as Professor Ran Hirschl eloquently explains:

The rise of a confident, distinctly Canadian approach to constitutionalism and a corresponding maturation of the Supreme Court, all enriched by general appreciation of and selective engagements with comparative constitutional ideas, mainly in the area of constitutional rights, brought about a sharp decline in judicial reliance on British constitutional ideals and jurisprudence. . . . These changes are closely linked to the 1982 constitutional makeover, but also to broader transformations in Canada’s self-perception, sense of collective identity, and the re-conceptualization of its place in the world.

. . .

. . . a fuller understanding of how Canada has emerged from a humble former British colony into *its current role as comparative constitutional powerhouse* necessitates a broader look at the social and ideational transformation—specifically the profound multicultural and cosmopolitan shift in the national meta-narrative — that Canada has witnessed for more than half a century. [Emphasis added; pp. 305-6 and 317.]

[107] All of the relevant international sources in this case lead to the irrefutable inference that the prohibition against cruel and unusual punishment is about protecting human beings from the infliction of inhuman and degrading punishment. None of them

include, or have been held to include, protection for corporations. While this international consensus does not dictate the outcome, it provides compelling and relevant interpretive support. It is part of the development of an international perspective on how rights should be protected, a perspective developed pursuant to the global commitment made in 1945 to internationalize those protections, and a perspective in whose promotion Canada's jurisprudence has played a leading role. Considering what and how laws and decisions have been applied on related questions by other countries and institutions, is part not only of an ongoing global judicial conversation, but of the epistemological package constitutional courts routinely rely on.

[108] Turning then to the international context for assessing the purpose of “cruel and unusual treatment or punishment”, we start with Lord Bingham’s observation in *Reyes v. The Queen*, [2002] 2 A.C. 235, that while s. 12’s international siblings vary in language, a common meaning can be ascribed to their various formulations:

Despite the semantic difference between the expressions “cruel and unusual treatment or punishment” (as in the Canadian Charter and the constitution of Trinidad and Tobago) and “cruel and unusual punishments” (as in the eighth amendment to the United States Constitution) and “inhuman or degrading treatment or punishment” (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated.

(para. 30; see also *S. v. Williams*, 1995 (3) S.A. 632 (C.C.), at para. 35.)

[109] The common meaning ascribed by the Privy Council to the various expressions was the one formulated by Lamer J. in *R. v. Smith (Edward Dewey)*:

I would agree with Laskin C.J. in [*Miller v. The Queen*, [1977] 2 S.C.R. 680], where he defined the phrase “cruel and unusual” as a “compendious expression of a norm”. 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.

(p. 1072; see also *Reyes*, at para. 30.)

[110] Article 5 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. While there does not appear to be any judicial authority directly considering whether art. 5 applies to corporations, there are compelling reasons to believe it does not. As a whole, the *Universal Declaration of Human Rights*, as its title suggests, was intended to apply to human beings (Max Planck Institute for Comparative Public Law and International Law, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate “Human” Rights in International Law*, by Silvia Steininger and Jochen von Bernstorff, September 25, 2018 (online), at p. 5). Moreover, its adoption in a post-Second World War context, as well as its preamble which references human dignity, offer no basis to conclude that its art. 5 could apply to corporations.

[111] Article 7 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, which Canada ratified on May 19, 1976, includes the same prohibition against “torture [and] cruel, inhuman or degrading treatment or punishment”. The United Nations Human Rights Committee identified the purpose of

article 7 as being “to protect both the dignity and the physical and mental integrity of the individual” (*General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992), U.N. Doc. HRI/GEN/1/Rev.9, vol. 1, p. 200 (2008), at para. 2). It noted that “[t]he prohibition in art. 7 is complemented by the positive requirements of article 10, paragraph 1, of the [Covenant] which stipulates that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’” (para. 2).

[112] Since the preamble of the *Covenant* asserts that human rights “derive from the inherent dignity of the human person”, it is not surprising that the Human Rights Committee accepts complaints only from people (*A newspaper publishing company v. Trinidad and Tobago*, Communication No. 360/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *A publication and a printing company v. Trinidad and Tobago*, Communication No. 361/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *V.S. v. Belarus*, Communication No. 1749/2008, reported in U.N. Doc. CCPR/C/103/D (2011), at para. 7.3; *General Comment No. 31; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004, at para. 9).

[113] Article 5(2) of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, which applies to approximately 24 countries in the Americas, similarly provides that: “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with

respect for the inherent dignity of the human person”. The language of art. 1(2) states that “for the purposes of this Convention, ‘person’ means every human being”. The Inter-American Court of Human Rights, the adjudicative body responsible for enforcing the *American Convention on Human Rights*, has held that the purpose of the *American Convention* was the “protection of the fundamental rights of human beings” (Angela B. Cornell, “Inter-American Court Recognizes Elevated Status of Trade Unions, Rejects Standing of Corporations” (2017), 3 *Intl Labor Rights Case L.* 39, at p. 40, citing *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, February 26, 2016, at paras. 42-43).

[114] The European *Convention* is the only international human rights treaty that has been interpreted to include corporate rights (Julian G. Ku, “The Limits of Corporate Rights under International Law” (2012), 12 *Chi. J. Int’l L.* 729, at p. 754).

[115] Notably, however, art. 3, which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”, has been held *not* to apply to corporations. In *Kontakt-Information-Therapie v. Austria*, Application No. 11921/86, October 12, 1988, D.R. 57, p. 81 “KIT”, the European Commission of Human Rights explained this conclusion when it stated that the right not to be subjected to degrading treatment or punishment under art. 3 was “by [its] very nature not susceptible of being exercised” by a corporation (p. 88).

[116] More recently, the European Court of Human Rights, applying *KIT*, called it “inconceivable” that a corporation could complain of attacks to its physical and mental integrity under art. 3 (*Identoba v. Georgia*, Application No. 73235/12, May 12, 2015 (HUDOC), at para. 45).

[117] Article 16(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, which provides that state parties “undertake to prevent in any territory under [their] jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”, has also never been extended to include corporations. Not only does the preamble recognize that human rights “derive from the inherent dignity of the human person”, art. 1 defines torture with reference to “severe pain or suffering, whether physical or mental”.

[118] A review of foreign domestic law, while not determinative, also supports an interpretation of s. 12 of the *Charter* which excludes protections for corporations. Section 12(1)(e) of the South African Constitution, for example, mirrors the language in s. 12 of the *Charter*. Interpreting this provision, the South African Constitutional Court concluded that the right of “everyone . . . not to be treated or punished in a cruel, inhuman, or degrading way”, rests on the foundation of human dignity. In *Williams*, the Constitutional Court invalidated juvenile whipping provisions, connecting the dots between the Eighth Amendment of the United States Constitution, s. 12 of the Canadian

Charter, and other international instruments to unite them in protecting “human dignity”. As Langa J. observed:

Whether one speaks of “cruel and unusual punishment” as in the Eighth Amendment of the United States Constitution and in art 12 of the Canadian Charter, or “inhuman or degrading punishment” as in the European Convention and the Constitution of Zimbabwe, or “cruel, inhuman or degrading punishment”, as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society’s concept of decency and human dignity. [para. 35]

[119] The Constitutional Court held that juvenile whipping, “involving as it does the deliberate infliction of physical pain on the person of the accused, offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity” (para. 39; see also *S. v. Makwanyane*, 1995 (3) S.A. 391 (C.C.); *S. v. Dodo*, 2001 (3) S.A. 382 (C.C.)).

[120] The *New Zealand Bill of Rights Act 1990* has a similar provision in s. 9, which states:

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[121] The New Zealand Supreme Court considered this provision in *Taunoa v. Attorney-General*, [2008] 1 N.Z.L.R. 429, dealing with the treatment of prisoners held under a program operated in Auckland Prison by the Department of Corrections called

the “Behaviour Management Regime”. Segregation was at the heart of the program, which was known for imposing the most stringent conditions found in the New Zealand prison system. While a majority of the court did not find a breach of s. 9, both the majority and dissent emphasized that the purpose of the provision was to protect the dignity and worth of humans. Tipping J., writing as part of the majority, concluded that while s. 9 was not breached, it should be understood as “prohibiting inhuman treatment, that is, treating a person as less than human” (para. 297). Similarly, McGrath J., in the majority, expressed the view that its purpose is “universal protection against any form of treatment by the State which is incompatible with the dignity and worth of the human person” (para. 338).

[122] Elias C.J., in dissent, found that s. 9, like its equivalents in the United States, Canada and Europe, is concerned with inhuman treatment, which “amounts to denial of humanity” (paras. 79-80). Inhuman treatment, she added, “is treatment that is not fitting for human beings” (para. 80). And in observing that the Canadian *Charter*’s s. 12 provision is a “compendious expression of a norm”, Elias C.J. viewed this norm “as proscribing any treatment that is incompatible with humanity” (para. 82).

[123] Internationally, then, it is widely acknowledged that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering.

[124] This global unity is not surprising. As Professor Anna Grear noted, “international human rights law arguably emerged from an instinct to protect the human — precisely because it is human — as a reaction to the Nazi genocide — at the end of the Second World War” (Anna Grear, “Human Rights — Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory” (2006), 17 *Law Critique* 171 (online), at p. 173). Human rights, read in this light, “represent a mode of archetypal resistance to suffering” (Grear, at p. 174). In other words, there is a reason they are called *human* rights.

[125] Ever since *Oakes*, where the Court said it was guided by “respect for the inherent dignity of the human person” as a value essential to a free and democratic society (p. 136), it has explicitly stated that “the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of *human* dignity” (*R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 21 (emphasis added)).

[126] Turning to s. 12’s purpose by looking at “the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” (*Big M Drug Mart*, at p. 344), s. 12 is grouped, along with ss. 7 to 11 and 13 to 14, under the heading “Legal Rights” (“*Garanties juridiques*”). All legal rights, as Lamer J. declared, “have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in ‘the dignity and worth of the human person’ (preamble to the *Canadian Bill of Rights* . . .) and on the ‘rule of law’ (preamble to the *Canadian Charter* . . .)” (*Re B.C. Motor Vehicle Act*, at p. 503).

[127] The broad purposes of the legal rights in ss. 7 to 14 were described by McLachlin J. as being two-fold, “to preserve the rights of the detained individual and to maintain the repute and integrity of our system of justice” (*R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 179). These rights were “designed to ensure that individuals suspected of crime are dealt with fairly and humanely” (Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (6th ed. 2017), at p. 292; see also *Re B.C. Motor Vehicle Act*, at p. 503). They are, as Martin J. has recently put it, “the core tenets of fairness in our criminal justice system” (*Poulin*, at para. 5).

[128] Only ss. 8 and 11(b) within the ss. 7 to 14 grouping have been found by this Court to apply to corporations. In *Hunter*, the Court accepted, without discussion or explanation, that the s. 8 right to be secure against unreasonable search or seizure could apply to corporations. Subsequently, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 521-22, La Forest J. noted that an unlawful search or seizure could have a significant impact on the privacy rights of individuals within a corporation. He noted that since “[p]eople . . . think of their own offices as personal space in a manner somewhat akin to the way in which they view their homes, and act accordingly”, the requirement to submit to a search of business premises could “amount to a requirement to reveal aspects of one’s personal life to the chilling glare of official inspection” (pp. 521-22).

[129] The inference that breaches of s. 8 can have a direct impact on an individual in a corporation, however, is not logically available under s. 12. The individuals within the corporation are not the subject of any treatment or punishment imposed on the corporate entity. This is reinforced by the corporation's separate legal personality, as stressed by Lamer C.J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154:

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). [pp. 182-83]

[130] In *CIP*, the Court extended the s. 11(b) right to be tried within a reasonable time to corporations on the basis that any accused, corporate or human, has, as Stevenson J. said, "a legitimate interest in being tried within a reasonable time", and the right to a fair trial (p. 856; see also pp. 857-59). He acknowledged, however, that some of the harms of a pending criminal accusation, such as "stigmatization of the accused, loss of privacy, *stress and anxiety* resulting from a multitude of factors, including possible disruption of family, social life and work" were not "concerns [that] logically appl[ied] to corporate entities" (p. 862 (emphasis added), citing *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 920). As a result, he concluded that a corporation could not rely on a presumption of prejudice.

[131] Just as corporations cannot experience human reactions such as stress or anxiety, neither can they experience suffering, since, as Chamberland J.A. noted

[TRANSLATION] “Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects” (para. 56).

[132] Significantly, corporations have been found *not* to be included under both ss. 7 and 11(c). In *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, the Court concluded that the s. 11(c) right not to be compelled to be a witness in proceedings does not apply to corporations. Sopinka J. concluded that since a corporation cannot testify, the right of an accused person not to be compelled to be a witness against himself in s. 11(c) is not available to a corporation. Applying a purposive interpretation to s. 11(c), Sopinka J. was of the view that it 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” (p. 40). In his words, “it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness” (p. 39).

[133] In concluding that s. 7, which protects against deprivations of life, liberty and security of the person, does not apply to corporations (*Irwin Toy*, at p. 1004), Dickson C.J. and Lamer and Wilson JJ., for the Court, expressed their resistance to applying s. 7 to corporations as follows:

In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its “life, liberty or security of the person”. We have already noted that it is nonsensical to speak of a corporation being put in jail.

A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. [pp. 1003-4]

[134] The Court in *Irwin Toy* also concluded that bankruptcy and winding up proceedings did not engage s. 7, because that “would stretch the meaning of the right to life beyond recognition” (p. 1003). And it rejected the argument that corporations should be protected against deprivations of economic liberty:

The intentional exclusion of property from s. 7, and the substitution therefor of “security of the person” has, in our estimation, a dual effect. First, it 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. . . . In so stating, we find the second effect of the inclusion of “security of the person” to be that a corporation’s economic rights find no constitutional protection in that section.

That is, read as a whole, it appears to us that this section was intended to confer protection on a *singularly human level*. [Underlining in original; italics added; pp. 1003-4.]

[135] As in *Irwin Toy*, the purpose of s. 12 is to confer protection on a “singularly human level”. In line with the global consensus, its purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. To paraphrase Sopinka J. in *Amway Corp.*, it would strain the interpretation of cruel and unusual treatment or punishment under s. 12 if a corporation, an artificial entity, could be said to experience it.

[136] Corporations are, without question, entitled to robust legal protection, constitutional or otherwise. But protection for a quality it does not have, namely, human dignity or the ability to experience psychological or physical pain and suffering, is a remedy without a right. Since it cannot be said that corporations have an interest that falls within the purpose of the guarantee, they do not fall within s. 12's scope.

[137] Accordingly, I would allow the appeal.

English version of the reasons delivered by

KASIRER J. —

[138] For the reasons given by Chamberland J.A., and with respect for those of a different opinion, I share my colleagues' view that the appeal must be allowed. I fully agree with Chamberland J.A. that the respondent, 9147-0732 Québec inc., a corporation, cannot avail itself of the protection of s. 12 of the *Canadian Charter of Rights and Freedoms* to challenge the constitutionality of s. 197.1 of the *Building Act*, CQLR, c. B-1.1.

[139] Starting, quite rightly, from the language of s. 12, as Abella J. and Brown and Rowe JJ. propose to do in their respective reasons, Chamberland J.A. pointed to the word "cruel" and reasoned that it would distort the ordinary meaning of the words

to say that it is possible to be cruel to a corporate entity (2019 QCCA 373, at para. 53 (CanLII)). I agree.

[140] He was careful to adhere to the principle that *Charter* rights must be given a large, liberal and purposive interpretation, a principle whose relevance was emphasized again recently by Wagner C.J. in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 4. At the conclusion of his analysis based primarily on the decisions of this Court, including *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, Chamberland J.A. found that, although the scope of s. 12 has been broadened over the years, [TRANSLATION] “its evolution is still concerned only with human beings (human dignity) and provides no basis . . . for extending its application to corporations” (para. 59). He further reasoned that “[t]he assertion that no one is to be subjected to cruel treatment or punishment cannot be dissociated from the concept of human dignity” (para. 59). In arriving at this interpretation of s. 12 — unassailable, in my opinion — Chamberland J.A. also relied on sources drawn from domestic law and international law, an approach perfectly in keeping with the principles of *Charter* interpretation.

[141] With regard to the ground of appeal that a corporation might enjoy the protection of s. 12 through the natural persons closely related to it, Chamberland J.A. relied on this Court’s decisions, but also on English case law and the *Civil Code of Québec*, to explain in a compelling manner that the respondent was [TRANSLATION] “asserting rights here that are not its own” (para. 75). Again, no error has been shown.

[142] In this case, all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations. I therefore find it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further. In my view, Chamberland J.A.'s reasons permit us to conclude, without saying more, that the appeal must be allowed.

Appeal allowed.

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