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Corporations Cannot Suffer Cruel and Unusual Treatment or Punishment

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The Supreme Court of Canada (Supreme Court) yesterday handed down its highly awaited decision in *Quebec (Attorney General) v 9147-0732 Québec inc.*[1] For the first time, the Court decided that corporations cannot claim the protection of section 12 of the *Canadian Charter of Rights and Freedoms* (*Charter*), which provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

Background and Facts

In 2016, 9147-0732 Québec inc. (Company) was convicted of carrying out construction work as a contractor without holding a proper licence, contrary to Québec's *Building Act*. As a result, the Company faced a mandatory minimum fine of approximately $30,000, which could, at the court's discretion, be increased to approximately $155,000.[2] The Company challenged the constitutionality of the mandatory minimum fine, claiming that it was grossly disproportionate and therefore constituted cruel and unusual punishment prohibited by section 12 of the *Charter*.

Although protection against cruel and unusual punishment has existed in Canadian law for decades, no court had ever been asked to decide whether a corporation could claim its protection. The courts below examined this general issue first without ruling specifically on the mandatory minimum fine prescribed by Québec's *Building Act*.

Both the Court of Québec and the Québec Superior Court held that corporations could not benefit from the protection of section 12 of the *Charter*. The majority of the Québec Court of Appeal allowed the appeal. It held that, in exceptional cases, a grossly disproportionate mandatory minimum fine could constitute cruel and unusual punishment even for a corporation, when, for example, the fine had repercussions on the corporation and, in turn, on the local economy, or it had crippling impacts on the individual owners, employees or retirees of the corporation. The dissenting judge disagreed with majority opinion and held that section 12 of the *Charter* offered constitutional protection only against treatment or punishment that is incompatible with human dignity. The obvious result of his approach was to exclude corporations from the protective shield of constitutional protection.

Decision of the Supreme Court

In three separate sets of reasons, the Supreme Court overturned the majority opinion of the Québec Court of Appeal and concluded that corporations cannot benefit from the constitutional protection against cruel and unusual treatment or punishment. In the view of the plurality, the purpose of section 12 of the *Charter* was to safeguard human dignity. Insisting on the ordinary and literal meaning of the word "cruel," they held that the expression "cruel and unusual treatment or punishment" referred to human pain and suffering, both physical and mental. Being unable to experience such pain and suffering, corporations cannot, in their view, claim relief under section 12 of the *Charter*, either in their personal name or on behalf of the individuals involved in their activities.

Impact

It will be interesting to monitor the impact of the Supreme Court's decision on future case law involving penalties against individuals. In particular, it is unclear whether courts will now require that a demonstration of human pain and suffering forms part of the burden of proof for individuals who claim constitutional relief under section 12 of the *Charter*. Furthermore, while the Supreme Court's decision illustrates how the ordinary meaning of the word "cruel" limits the breadth of section 12 of the *Charter*, it does not address the ways in which the

ordinary meaning of the word "unusual" also could, in some circumstances, restrict the scope of the constitutional protection. In other words, it remains to be seen whether cruel treatment or punishment will automatically be considered unusual, or whether the word "unusual" will be given a meaning that is not already evoked by the idea of cruelty.

The Supreme Court's decision does not mean that the state can systematically inflict excessive and disproportionate treatment or punishment on corporations. It merely confirms the traditional stance of Canadian law. Corporations can still challenge a punishment that does not abide by the sentencing principles prescribed by the *Criminal Code* – unless they are ordered to pay a mandatory minimum fine. Even in the latter case, they will still be able to challenge a legislative provision establishing a fine applicable equally to individuals and corporations by arguing that the fine could result in cruel and unusual punishment for an individual and must therefore be struck down for all purposes. Lastly, other than in the context of penal proceedings, excessive and disproportionate treatment stemming from government action could be a basis for judicial review.

If a corporation is or has been subjected to treatment or punishment considered excessive or disproportionate, its representatives should consult its legal advisers to determine the best strategy in light of the range of other rights and remedies available to corporations.

[1] 2020 SCC 32, decision released on November 5. Davies acted for the intervener *Association des avocats de la défense de Montréal* (Montréal Criminal Lawyers' Association) in the Supreme Court of Canada.

[2] Such fines are part of measures and legislation introduced by the Québec government in 2011 to prevent fraudulent practices in the construction industry: *An Act to prevent, combat and punish certain fraudulent practices in the construction industry and make other amendments to the Building Act*, SQ 2011, c 35.

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