

MARCH 18, 2019

Court of Appeal Expands the Range of Fundamental Rights of Legal Persons

Authors: [Léon H. Moubayed](#) and Sarah Gorguos

In a judgment rendered on March 4, 2019 in *9147-0732 Québec Inc. c. Directeur des poursuites criminelles*, 2019 QCCA 373, the Court of Appeal of Québec ruled for the first time on whether legal persons can avail themselves of the right not to be subjected to any cruel and unusual treatment or punishment, which is guaranteed under section 12 of the *Canadian Charter of Rights and Freedoms* (Charter). By finding in the affirmative, the majority of the Court has expanded the range of fundamental rights available to legal persons.

Factual and Procedural Background

The appellant corporation, which had been convicted of an offence under section 197.1 of the *Building Act* (Act), was ordered to pay the minimum mandatory fine prescribed by that section; in 2012, the minimum mandatory fine applicable to legal persons was \$30,843. For purposes of the sentencing hearing, the parties had agreed to submit a single question to the trial judge – namely, whether section 12 of the Charter applied. They had postponed their debate on whether section 12 had in fact been infringed to a subsequent hearing, if necessary. The appellant corporation argued that, on the basis of the facts of the case and that it had only one shareholder, the minimum mandatory fine prescribed by section 197.1 of the Act was so disproportionate that it constituted cruel and unusual punishment within the meaning of section 12 of the Charter. At trial, the presiding justice of the peace dismissed the appellant corporation's argument and ordered it to pay the minimum fine, without, however, ruling on the application of section 12 of the Charter to the appellant corporation. The matter was appealed to the Superior Court, which affirmed the trial judge's decision and stated that legal persons could not benefit from the protection against cruel and unusual treatment or punishment.

Judgment of the Court of Appeal

When the matter came before the Court of Appeal, it was required to answer only the following question: "Can a legal person benefit from the protection provided in section 12 of the *Canadian Charter of Rights and Freedoms*?"¹ [translation]. The majority of the Court of Appeal (comprising Justices Bélanger and Rancourt, with Justice Chamberland dissenting) answered in the affirmative; it allowed the appellant corporation's appeal and returned the file to another presiding justice of the peace to determine, on the basis of the analytical framework established by the Supreme Court in *Smith*,² *Nur*,³ *Lloyd*⁴ and *Boudreault*,⁵ whether, in the matter at hand, the minimum mandatory fine in section 197.1 of the Act violated section 12 of the Charter. The majority began by establishing that "the hypothesis that a minimum fine, or a probation order imposed on a legal person or an organization, may be grossly disproportionate is just as possible. In certain circumstances, though exceptional I admit, such a punishment could result in a grossly disproportionate treatment or punishment when compared to the offender's specific situation"⁶ [translation]. The majority first pegged its analysis of the question before it to the significant expansion of the scope of criminal liability of firms, introduced by *An Act to amend the Criminal Code (criminal liability of organizations)*, S.C. 2003, c 21. In order to answer the question, it also examined the evolution of sentencing in Canada and pointed out that the cruel or unusual nature of a treatment or punishment had changed radically over the centuries and had long ago moved away from a purely corporal or physical aspect. The scope of section 12 of the Charter experienced the same changes: Although it was initially inspired by texts protecting human dignity, in the 21st century, the concept of human dignity is no longer connected solely to bodily suffering. The Court of Appeal pointed out, among other things, that legal persons benefit from other rights aimed at protecting human dignity, such as the right to be presumed innocent.

Consequently, the majority concluded that a connection to human dignity is not an insurmountable argument precluding the extension of the protection afforded by section 12 of the Charter to a legal person or an organization. The Court of Appeal indicated that legal persons

are juridical instruments made available to natural persons for legitimate purposes; thus, a cruel and unusual treatment or punishment targeting a legal person could directly affect the natural persons connected to it. The majority also relied on a textual argument to support its position. Section 8 of the Charter, which protects against unreasonable search or seizure, applies to “everyone,” just as section 12 does, and it is well established that section 8 of the Charter applies to legal persons. Lastly, the majority developed a public interest argument, as follows: It cannot be in the interests of Canadian society to have fines imposed on legal persons that are so grossly disproportionate that they are liable to cause the bankruptcy or jeopardize the activities of those legal persons. Nonetheless, the majority did not go as far as to say that a fine resulting in such consequences would necessarily constitute cruel and unusual treatment.⁷

Impact of the Judgment

From now on, corporations and organizations that have a mandatory minimum fine or probation order imposed on them will be able to avail themselves of the recent pronouncements of the Court of Appeal to challenge the constitutionality of their sentence. That being said, it is important to remember that the Court of Appeal was careful not to relax the criteria for assessing the cruel and unusual nature of a sentence – criteria that will be met only in exceptional circumstances when applied to fines and probation orders imposed on legal persons.⁸ The position adopted by the majority of the Court of Appeal forms part of the gradual broadening of the scope of section 12 of the Charter, which reflects the evolution of Canadian penology and its distancing from corporal and physical punishment. But above all, it seeks to make the distinction between natural persons and legal persons obsolete as regards the application of the fundamental rights afforded to them. Moreover, where the violation of a legal person's fundamental rights is raised as an argument, it opens the door to considering the harm suffered by the natural persons connected to the legal person. Consequently, the pronouncements in this judgment may also have a significant impact on the conditions for applying the principles in *Jordan/Cody* to legal persons.

¹At para 88.

²*R v Smith (Edward Dewey)*, [1987] 1 SCR 1045.

³*R v Nur*, 2015 SCC 15.

⁴*R v Lloyd*, 2016 SCC 13.

⁵*R v Boudreault*, 2018 SCC 58 [*Boudreault*].

⁶At para 92, the majority also referred to the pronouncements of the Supreme Court in *Boudreault*, at paras 56 to 61, on the gross disproportionality of victim surcharges with respect to certain offenders.

⁷See paras 130 to 134.

⁸At para 92.

Key Contact: [Léon H. Moubayed](#)