

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

B E T W E E N:

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

Appellant

- and -

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

9147-0732 QUEBEC 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, CANADIAN CONSTITUTION FOUNDATION**

Interveners

**MEMORANDUM OF ARGUMENT OF THE INTERVENER, CANADIAN CIVIL
LIBERTIES ASSOCIATION**

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

Alyssa Tomkins
Albert Brunet
Caza Saikaley s.r.l./LLP
350-220 Laurier West
Ottawa, ON K1P 5Z9

Tel: 613-565-2292
Fax: 613-565-2087
Email: atomkins@plaideurs.ca
abrunet@plaideurs.ca

Penelope Simons
Faculty of Law – Common Law Section
University of Ottawa
57 Louis Pasteur St. Room 364
Ottawa, ON

Tel: 613-562-5800, ext: 3217
Fax: 613-562-5124
Email: psimons@uottawa.ca

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

COPIES TO:

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

Laura Élisabeth Trempe
Director of Criminal and Penal Prosecutions
of Quebec
Complexe Jules-Dallaire, Tower 1
500-2828 Laurier Boulevard
Quebec, QC G1V 0B9

Tel: 418-643-9059, ext: 21565
Fax: 418-646-5412
Email: [laura-
elisabeth.trempe@dpcp.gouv.qc.ca](mailto:laura-elisabeth.trempe@dpcp.gouv.qc.ca)

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

**Sylvain Leboeuf
Julie Dassylva**
Attorney General of Quebec
Constitutional and Aboriginal Law Branch
1200, route de l'Église, 4^e étage
Québec (Québec) G1V 4M1

Tel: 418-643-1477, ext: 21010 / 20776
Fax: 418-644-7030
Email: sylvain.leboeuf@justice.gouv.qc.ca
julie.dassylva@justice.gouv.qc.ca

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

Emily K. Moreau
Director of Criminal and Penal Prosecutions
of Quebec
Gatineau Courthouse
1.230-17 Laurier Street
Gatineau, QC J8X 4C1

Tel: 819-766-8111, ext: 60412
Fax: 819-772-3986
Email: appelgatineau@dpcp.gouv.qc.ca

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

Pierre Landry
Noël & Associés
111 Champlain Street
Gatineau, QC J8X 3R1

Tel: 819-503-2178
Fax: 819-771-5397
Email: p.landry@noelassociés.com

Stéphanie Quiron-Cantin
Anne-Sophie Blanchet-Gravel
Attorney General of Quebec
Civil Litigation Branch
1.03-300 Jean-Lesage Boulevard
Quebec, QC G1K 8K6

Tel: 418-649-3524, ext: 42612/42076

Fax: 418-646-1656

Email:

stephanie.quirioncantin@justice.gouv.qc.ca
anne-sophie.blanchet-gravel@justice.gouv.qc.ca

Counsel for the Respondent,
9147-0732 Quebec Inc.

Martha Villa
Services juridiques de l'APCHQ Inc.
100-1720 Père-Lelièvre Boulevard
Quebec, QC G1M 3J6

Tel: 418-688-1656, ext: 247

Fax: 418-682-3304

Email: martin.villa@apchq.com

Counsel for the Intervener,
Director of Public Prosecutions

François Lacasse
Director of Public Prosecutions of Canada
160 Elgin Street, 12th floor
Ottawa, ON K1A 0H8

Tel: 613-957-4770

Fax: 613-941-7865

Email: francois.lacasse@ppsc-sppc.gc.ca

Agent for the Respondent,
9147-0732 Quebec Inc.

Marie-France Major
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Tel: 613-695-8855, ext: 102

Fax: 613-695-8580

Email: mfmajor@supremeadvocacy.ca

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

Courtney Harris

Ravi Amarnath

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto (Ontario) K1A 0H8

Tel: 416-455-5186

647-649-5623

Fax: 416-649-4105

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

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

Léon H. Moubayed

Sarah Gorguon

Guillaume Charlebois

Davies Ward Phillips & Vineberg LLP
1501 McGill College Avenue
Montréal, QC H3A 3N9

Tel: 514-841-6461

Fax: 514-841-6499

Email : lmoubayed@dwpv.com

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

Gib van Ert

Jessica Magonet

Gib Van Ert Law

148 Third Avenue

Ottawa, Ontario K1S 2K1

Tel: (613) 408-4297

Fax: (613) 651-0304

Email: gib@gibvanertlaw.com

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

Karen Perron

Borden Ladner Gervais LLP

1300-100 Queen Street

Ottawa, ON K1P 1J9

Tel: 613-369-4795

Fax: 613-230-8842

Email: kperron@blg.com

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

Guy Régimbald

Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600

Ottawa, Ontario K1P 1C3

Tel: (613) 786-0197

Fax: (613) 563-9869

Email: guy.regimbald@gowlingwlg.com

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

Brandon Kain

Adam Goldenberg

Sébastien Cusson

McCarthy Tétrault LLP

Suite 5300 - Toronto Dominion Bank Tower

Toronto, Ontario M5K 1E6

Tel: (416) 601-7821

Fax: (416) 868-0673

Email: bkain@mccarthy.ca

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

Darius Bossé

Juristes Power

130, rue Albert - bureau 1103

Ottawa, Ontario K1P 5G4

Tel: (613) 702-5566

Fax: (613) 702-5566

Email: DBosse@juristespower.ca

TABLE OF CONTENTS

PART I – OVERVIEW OF POSITION	1
PART II – QUESTIONS IN ISSUE	1
PART III – STATEMENT OF ARGUMENT.....	2
A. This Court should adopt a principled and purposive approach to determine whether a corporation may benefit from a <i>Charter</i> right.....	2
B. Five Principles that Should Form the Basis of a Purposive Approach	3
i. Charter rights are first and foremost the rights of human beings.....	3
ii. A potential conflict of interests between human beings and corporations further supports the need for a limited application of Charter rights	4
iii. The nature of the Charter right at issue may itself be a strong indicator to as to whether a corporation should be able to benefit from its protection	5
iv. Only in exceptional circumstances should corporations be permitted to invoke the Charter rights of those “behind the corporate veil”	6
v. A corporation constituted and operated with the purpose of exercising the Charter interests of human beings may seek the protection of the Charter	7
C. Application of the Principles to Section 12	8
i. Charter rights are first and foremost the rights of human beings.....	8
ii. A potential conflict of interests between human beings and corporations further supports the need for a limited application of Charter rights	8
iii. The nature of the Charter right at issue may itself be a strong indicator to as to whether a corporation should be able to benefit from its protection	9
iv. Only in exceptional circumstances should corporations be permitted to invoke the Charter rights of those “behind the corporate veil”	9
v. A corporation constituted and operated with the purpose of exercising the Charter interests of human beings may seek the protection of the Charter	10
PARTS IV & V – SUBMISSIONS CONCERNING COSTS AND ORDER SOUGHT	10
PART VI – TABLE OF AUTHORITIES.....	11
PART VII – STATUTES AND RULES.....	12

PART I – OVERVIEW OF POSITION

1. The Canadian Civil Liberties Association (the “CCLA”) fights for the civil liberties, human rights, and democratic freedoms of people in Canada. In this regard, it regularly advances legal positions before legislatures, courts, and in the community generally, aimed at reconciling rights and other interests, and as such supports a generous, but also principled and purposive interpretation of legislation aimed at protecting and promoting fundamental rights and freedoms.

2. In this appeal considering the applicability of s. 12 of the *Canadian Charter of Rights and Freedoms*¹ (the “*Charter*”) to corporations, the CCLA takes the view that the jurisprudence has not to date engaged in a principled and purposive discussion regarding the availability of *Charter* protections for non-human legal persons, generally.

3. The CCLA submits that *Charter* rights are first and foremost the rights of human beings and that interpreting the right of corporations to avail themselves of *Charter* protections in a generous or expansive manner may limit, hinder or obstruct the rights of individuals. Any application of *Charter* rights to corporations must be done in a principled manner that focuses on the embodied human beings these rights are meant to protect.

4. The CCLA recognizes that there may be circumstances where the application of *Charter* rights to corporations is required and appropriate. For example, certain rights, such as freedom of peaceful assembly, freedom of association, and freedom of religion are necessarily practiced collectively, and certain corporations are formed primarily for the purpose of exercising such rights.

5. In these submissions, the CCLA puts forward (i) principles that should form the basis of a framework to be applied when a court must decide whether a corporation should be permitted to invoke a *Charter* right, and (ii) considerations relevant to the application of this principled approach to s. 12.

PART II – QUESTIONS IN ISSUE

6. The CCLA advances three main submissions:

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

- i. It justifies the necessity of adopting a principled and purposive approach to the application of *Charter* rights to corporations;
- ii. It proposes five (5) principles that should form the basis of this approach; and,
- iii. It applies these principles to s. 12 of the *Charter*.

PART III – STATEMENT OF ARGUMENT

A. This Court should adopt a principled and purposive approach to determine whether a corporation may benefit from a *Charter* right

7. The CCLA respectfully submits that since the adoption of the *Charter*, there has been only very limited discussion by this Court about the application of *Charter* rights to corporations. The most in depth consideration of this issue was undertaken in *Irwin Toy Ltd.* and in *R v CIP Inc.*,² both decisions having been rendered approximately thirty years ago. Since that time, this Court has been called upon to determine whether corporations may invoke particular *Charter* rights but has done so without a principled consideration of the effect of giving corporations access to such human rights.³ With respect to s. 8, the Court extended *Charter* protection to corporations without any discussion whatsoever.⁴

8. The lack of thorough and principled consideration of the significant implications of this important issue in the jurisprudence is not unique to Canada, with international scholars observing that other courts, such as the European Court of Human Rights, have also simply assumed, without any principled discussion, that corporate entities may benefit from the protection of human rights.⁵

² *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, at pp 1003-1004 [*Irwin Toy*]; *R v CIP Inc*, [1992] 1 SCR 843 [*CIP*].

³ *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 (section 2(b)); *Irwin Toy*, *supra* note 2 (section 7), *CIP*, *supra* note 2 (section 11(b)); *R v Amway Corp*, [1989] 1 SCR 21 (section 11(c)). The Court has also left open the possibility of recognizing a section 2(a) right to corporations: *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 33, [2015] 1 SCR 613 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 61, [2018] 2 SCR 293 [*TWU*].

⁴ *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 159.

⁵ Anat Scolnicov, *Lifelike and Lifeless in Law: Do Corporations Have Human Rights?* (May 2013), University of Cambridge Faculty of Law Research Paper No 13/2013

B. Five Principles that Should Form the Basis of a Purposive Approach

9. The CCLA advances five principles that should form the basis of a framework to be applied when corporations seek to invoke *Charter* rights. The principles are based both on existing jurisprudence, and on academic literature and commentary which has engaged more fully with the consequences of granting corporate entities constitutional human rights protections. The CCLA submits that these principles, along with others that may be developed in the caselaw in relation to other specific *Charter* rights and based on new issues that may arise given the facts of a specific case, should be considered when a court is asked to apply *Charter* rights to corporations.

i. *Charter rights are first and foremost the rights of human beings*

10. The starting point in considering whether a corporation can benefit from a *Charter* right is the recognition that the *Charter* must, above all, protect the fundamental rights and freedoms of human beings. Presumptively, *Charter* rights belong to individuals and not to corporations.

11. *Charter* rights should, as a rule, focus on protecting the intrinsic value and dignity of human beings. The *Charter* implements into Canadian law this country's international legal obligations under the *International Covenant on Civil and Political Rights*⁶ and other universal human rights treaties. These treaties recognize that such "rights derive from the inherent dignity of the human person".⁷ This Court in *R v Hape* emphasized that the treaties ratified by Canada are crucial to interpreting *Charter* rights.⁸

12. Constitutional human rights are rights of a higher order and differ from other legal rights, such as contractual or commercial rights. Academics, such as Upendra Baxi, have pointed to the worrying displacement of "the notion that universal human rights are designed for the attainment of dignity and well-being of human beings and for enhancing the security and well-being of socially, economically, and civilizationally vulnerable peoples and communities" by the idea of "trade-related, market friendly human rights".⁹ Equally, Professor Anna Grear has asserted that

⁶ *International Covenant on Civil and Political Rights*, December 16, 1966, [1976] Can T.S. No. 47, entered into force 23 March 1976, accession by Canada 19 May 1976 [*ICCPR*]; Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 36 (12 January 1981) at p 13, per Jean Chretien.

⁷ *ICCPR*, *supra* note 6, preamble.

⁸ *R v Hape*, 2007 SCC 26 at para 55, [2007] 2 SCR 292. See also *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at pp 348-350, per Dickson C.J, dissenting, but not on this point.

⁹ Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2008) at pp 234-275.

the rhetorical power of human rights should be reserved for vulnerable human beings and not disembodied, artificial entities. Allowing corporations access to human rights protections stretches “the semantic structure of human rights to the point where they become a meaningless, all-embracing reference for anything thought to have ethical importance or a claim for inclusion within the legal community of concern”.¹⁰ *Charter* rights should not become a mere instrument in the course of business activity, where human rights claims become just another possible legal tool in the pursuit of profit.

ii. ***A potential conflict of interests between human beings and corporations further supports the need for a limited application of Charter rights***

13. In addition to the above, there is a further risk in extending certain constitutional rights to corporations. This threat stems from the potential of conflict between the interests of a corporation and the human rights and interests of individuals. In accordance with the first principle advanced by the CCLA, where there is a potential for a conflict of interests, the embodied human being should trump the artificial corporation. As a result, courts should be extremely reluctant to apply *Charter* protections to corporations where there exists a risk of a conflict with the rights of human beings.

14. In the context of potential conflicts between corporations and their employees, there is a presumption of conflict, and the rights of employees should prevail over those of the employer-corporation. Corporations should not be able to claim *Charter* rights in the face of regulatory regimes aimed at employee protection, such as health and safety legislation or labour codes.

15. The CCLA is further concerned about expanding access to the *Charter* for corporations in a way that would hobble a government’s ability to regulate corporations in the pursuit of critical human rights objectives benefiting individuals. Corporations can sometimes themselves be the authors of human rights violations.¹¹ It would be perverse to allow a corporation to benefit from *Charter* rights in defending itself from legitimate government action aimed at limiting or

¹⁰ Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010) at p 47.

¹¹ UN General Assembly, “*Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*” Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 9 February 2007, UN Doc A/HRC/4/035 at paras 2-3.

regulating corporate behavior that is harmful to the human rights of individuals and vulnerable groups.

iii. ***The nature of the Charter right at issue may itself be a strong indicator to as to whether a corporation should be able to benefit from its protection***

16. As explained by this Court in *R v CIP Inc.*, the question of “whether or not a corporate entity can invoke a *Charter* right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision”.¹²

17. In some cases, the interest and purpose of the right at issue will be intrinsically linked to a trait that is inherently human, such as dignity. Such rights include the rights to life, liberty, security of the person¹³, privacy¹⁴, equality¹⁵, and to be free from arbitrary detention¹⁶ and, as will be argued, cruel and unusual treatment or punishment. Barring exceptional circumstances that may justify “piercing” the corporate veil, addressed in more detail below, it is difficult to conceive how these rights could apply to corporations.

18. In other cases, however, the interest and purpose of the rights at issue are to protect against the extraordinary state powers of law enforcement and the criminal justice system – powers that may, in appropriate cases, justify the extension of these rights to corporate entities.

19. For example, in *R v CIP Inc.*, this Court engaged in a nuanced discussion that considered the nature and purpose of the s. 11(b) right and the interests underlying it. While the Court recognized that a corporation may have a valid interest in s. 11(b), it refused to allow corporations to rely upon a presumption of prejudice that had been recognized for individuals. The presumption that delay prejudices an accused emanates from liberty and security of the person, and therefore is based on an interest belonging to human persons only.¹⁷

20. The Court’s decision in *Hunter v Southam* similarly arose in the very specific context of the extraordinary law enforcement powers of the state to enter and search private premises.

¹² *CIP*, *supra* note 2 at p 852, citing *Irwin Toy*.

¹³ *Irwin Toy*, *supra* note 2 at p 1004.

¹⁴ *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para 78 [*Grant*].

¹⁵ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 51-54.

¹⁶ *Grant*, *supra* note 14 at para 54.

¹⁷ *CIP*, *supra* note 2, at pp 861-862.

21. A more in-depth discussion and nuanced analysis will likely be needed to address other rights and issues pertaining to law enforcement and criminal justice that arise on a case-by-case basis. For example, in a case involving a police service seeking personal information, including metadata, from a telecommunications corporation, special consideration may be given to the preventive function of s. 8 in avoiding a violation of the right to privacy; and the recognition that in occasional (but certainly not all) circumstances, a corporation may be best placed to act on behalf of its customers' s. 8 rights.

iv. ***Only in exceptional circumstances should corporations be permitted to invoke the Charter rights of those “behind the corporate veil”***

22. The CCLA submits that corporations should generally not be permitted to rely on the harm to the rights of individuals behind the corporate veil in order to justify corporate access to *Charter* protections. On the contrary, only in rare and exceptional circumstances will it be appropriate to allow corporations to invoke *Charter* rights on behalf of individuals behind the corporate form.

23. As a matter of corporate law, it is a mistake to conflate harm to individual shareholders or directors with harm to the corporation. The rights that belong to corporations cannot be exercised by their shareholders, unless the legislature intervenes to allow it.¹⁸ The consequences of this legal fiction are that shareholders benefit from limited liability, but also have limited rights with respect to addressing wrongs committed against the corporation.¹⁹ The separate legal personality of corporations from their shareholders and directors has also been upheld at international law, including at international human rights law.²⁰

24. Incorporation achieves certain advantages such as limited liability for shareholders and a distinction between the corporation and its shareholders for tax purposes. Those who use the corporate shield of separate legal personality for some purposes cannot shed it where convenient.²¹ When considering whether a corporation may benefit from a *Charter* right, the focus must be on the actual harm suffered by the corporation, not any derivative harm to its shareholders or others “behind the corporate veil”.²²

¹⁸ See section 239 of the *Canada Business Corporations Act*, RSC 1985, c C-44.

¹⁹ *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165 at para 59 [*Hercules*].

²⁰ See *Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Judgment, [1970] ICJ Rep 3; *Olczak v Poland*, No 30417/96, [2002] ECHR, Reports 2002-X at paras 59 and 62.

²¹ *Hercules*, *supra* note 20, citing the rule in *Foss v Harbottle*, (1843) 67 ER 189 [*Foss*].

²² *R v Deslauriers*, 83 Man R (2d) 7 at pp 13-14, 1992 CanLII 4022 (MB CA).

25. Notwithstanding the above, the CCLA acknowledges that there can be rare exceptions to the general rule about piercing the corporate veil. The proposed exceptions should also be consistent with those established in corporate law. Where government action causes harm or otherwise directly infringes the rights of shareholders as individuals, such individuals would be able to invoke the *Charter* in their own right. In addition, courts have the residual discretion to lift the corporate veil where it would otherwise be incongruous or unfair.²³

26. For example, if a government policy or action were to target a business based on the identity of those behind the corporation (e.g. the race or religion of the directors or shareholders), even where the harm is only to the corporation, it ought to be able to point to those individuals behind the corporate veil whose identity is the reason for government action. It would be unreasonable and unjust to allow the government to rely on the separate legal personality of the corporation as a shield to protect against its abusive and discriminatory conduct.

27. In addition to the above, the CCLA submits that it is also inappropriate to consider the interests of employees of a corporation when determining whether or not a corporation should be able to invoke *Charter* rights. Employees are also protected by the corporate veil, but their interests are distinct from those of the shareholders and directors of a corporation. The financial success of a corporation is generally not shared with most employees.²⁴ Moreover, an employee is not responsible for the payment of a fine imposed on a corporation and does not face the threat of detention or incarceration should the fine not be paid.

v. *A corporation constituted and operated with the purpose of exercising the Charter interests of human beings may seek the protection of the Charter*

28. The CCLA recognizes the array of corporations that exist and observes that some exist for the exercise of individuals' *Charter* rights, and some indeed exist to defend, protect and promote the *Charter* rights of individuals. Religious organizations support their members' exercise of religious freedom. Labour organizations promote and defend the freedom of workers to organize and bargain collectively. In appropriate circumstances, these corporations should be allowed to rely upon the protection of the *Charter* rights they exist to support, promote and defend.

²³ See *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para 10-14, [2010] OJ No 4336; *Salah v. Timothy's Coffees of the World Inc.*, [2009] OJ No 4444, 182 ACWS (3d) 83, at para 56-59; *Contra Yaiquaje v Chevron Corporation*, 2018 ONCA 472 at paras 64-83.

²⁴ With the exception of bonuses, profit sharing, or employee stock options for some employees.

29. In their concurring reasons in *Loyola*, McLachlin C.J. and Moldaver J. provide a useful framework with respect to the application of s. 2(a) to a religious corporation. While recognizing that a corporation cannot possess religious beliefs, the concurring justices held that an organization (1) constituted primarily for religious purposes and (2) operating in accordance with these religious purposes could avail itself of the protection of s. 2(a).²⁵

30. The CCLA submits that this same framework could be applied in the context of other *Charter* rights. Where a corporation is (1) constituted primarily for the purpose of exercising or advancing individuals' *Charter* protected human rights, and (2) has continued to operate in furtherance of, and in accordance with, this purpose, it may be appropriate, depending on the facts of each case and keeping in mind the other principles set out above, to allow the corporation to rely on the protection of the *Charter*.

C. Application of the Principles to Section 12

31. The CCLA submits that in applying the above-noted principles to s. 12, it is difficult to conceive of a situation where a corporation could benefit from the protection against cruel and unusual treatment or punishment.

i. Charter rights are first and foremost the rights of human beings

32. The CCLA submits that consistent with the caselaw, international human rights law, and the historical, linguistic and philosophical context, the nature and purpose of s. 12 is to protect against actions by the state that are incompatible with human dignity. This must be the starting point of this Court's analysis.

ii. A potential conflict of interests between human beings and corporations further supports the need for a limited application of Charter rights

33. Given the presumptive conflict of interests between a corporation and its employees, and the fact that a s. 12 claim by a corporation would challenge a fine or restriction on a corporation's ability to make profit, it is difficult to conceive how a corporation could claim a right to s. 12 on the basis of its employees' rights.

34. Conflicts of interests between the corporation and human beings will be even more pronounced where a restriction or fine is aimed at protecting the rights of employees or another

²⁵ *Loyola*, *supra* note 3.

identifiable group of individuals, such as occupational health and safety legislation or a consumer protection regime. Extending a s. 12 right to a corporation seeking to strike down such a regime would undermine the protection of vulnerable groups, and would, incorrectly, grant corporations equal *Charter* footing with these human beings.

35. In addition, and as outlined above, corporations can themselves be the authors of human rights violations. It would be perverse to allow corporations to rely upon s. 12 to circumvent or resist laws intended to promote and protect *Charter* rights of individuals with whom these corporations are in conflict.

iii. ***The nature of the Charter right at issue may itself be a strong indicator to as to whether a corporation should be able to benefit from its protection***

36. Considering that s. 12's purpose has been understood to protect against "cruel and unusual" treatment or punishment incompatible with human dignity and that a corporation therefore cannot suffer a cruel and unusual treatment or punishment, there is no reason to extend the protection of s. 12 to corporations. A corporation has "no soul to be damned, and no body to be kicked".²⁶ Corporations are not capable of suffering. At most, any impugned punishment or treatment will take the form of a fine or restriction on a corporation's ability to make profit.

37. There is no doubt that a disproportionate or excessive mandatory fine imposed on a corporation could cause it to go bankrupt. In this sense, the CCLA acknowledges that an excessive fine levelled against a corporation could be draconian or unfair. However, the injury caused to the corporation would only affect its profit-maximizing interests. There is no *Charter* right to profit.

iv. ***Only in exceptional circumstances should corporations be permitted to invoke the Charter rights of those "behind the corporate veil"***

38. It is difficult to conceive of any exceptional circumstances in the context of the protection granted by s. 12 requiring the Court to rely on the rights of the individuals behind the corporation or, in other words, to look behind the corporate veil.

²⁶ This quote is attributed to English jurist Lord Chancellor Thurlow (1731-1806), see *Kennedy v. Canada (Customs & Revenue Agency)*, [2000] OJ No 3313 at para 20, 2000 CanLII 22837 (ONSC).

39. In *Boudreault*²⁷, this Court held that mandatory victim surcharges constitute cruel and unusual punishment in the case of indigent individuals, but only because of the consequences of non-payment on their human dignity, *inter alia*, the threat of detention and/or imprisonment.²⁸

40. The human beings behind a corporation have chosen to operate through an entity with separate legal personality and to take advantage of limited liability. As a result of its inability to pay a grossly disproportionate fine, a corporation may cease to exist. Legally, this impacts the corporation as a separate entity, but does not justify looking behind the corporate veil.

v. *A corporation constituted and operated with the purpose of exercising the Charter interests of human beings may seek the protection of the Charter*

41. It is unlikely that a corporation will ever be able to meet the *Loyola* test outlined above in the context of an alleged breach of s. 12.

PARTS IV & V – SUBMISSIONS CONCERNING COSTS AND ORDER SOUGHT

42. The CCLA seeks no costs in this appeal and asks that no costs be ordered against it.

43. The CCLA takes no position on the outcome of this appeal. Given the nature of the question at issue, the CCLA observes the difficulty in advancing argument while not taking a position on the outcome of the appeal. As a regular intervener before this Court, the CCLA respectfully submits that there should be a clarification of the rules surrounding interventions in cases where there is a distinct legal and/or interpretive question before the Court and where the application of the answer to that distinct question to the facts is not at issue.

44. By order dated December 4, 2019, the Court granted the CCLA permission to present oral argument not exceeding five (5) minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2020.



Counsel for the Intervener, Canadian Civil Liberties Association:

Alyssa Tomkins
Albert Brunet
 Caza Saikaley s.r.l./LLP

Penelope Simons
 Faculty of Law – Common Law Section
 University of Ottawa

²⁷ *R v Boudreault*, 2018 SCC 58, [2018] 3 RCS 599.

²⁸ *Ibid* at para 65.

PART VI – TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH CITED
CASELAW	
<i>Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)</i> , Judgment, [1970] ICJ Rep 3 .	
<i>Foss v Harbottle</i> , (1843) 67 ER 189 .	
<i>Hercules Management Ltd v Ernst & Young</i> , [1997] 2 SCR 165 .	59
<i>Hunter et al v Southam Inc</i> , [1984] 2 SCR 145 .	p 159
<i>Irwin Toy Ltd v Quebec (Attorney General)</i> , [1989] 1 SCR 927 .	pp 1003-1004
<i>Kennedy v Canada (Customs & Revenue agency)</i> , [2000] OJ No 3313 , 2000 CanLII 22837 (ONSC) .	20
<i>Law Society of British Columbia v Trinity Western University</i> , 2018 SCC 32 , [2018] 2 SCR 293 .	61
<i>Law v Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497 .	51-54
<i>Loyola High School v Quebec (Attorney General)</i> , 2015 SCC 12 , [2015] 1 SCR 613 .	33
<i>Olczak v Poland</i> , No 30417/96, [2002] ECHR, Reports 2002-X .	59 and 62
<i>R v Amway Corp</i> , [1989] 1 SCR 21 .	
<i>R v Boudreault</i> , 2018 SCC 58 , [2018] 3 RCS 599 .	65
<i>R v CIP Inc</i> , [1992] 1 SCR 843 .	pp 852 and 861-862
<i>R v Deslauriers</i> , 83 Man R (2d) 7 , 1992 CanLII 4022 (MB CA) .	pp 13-14
<i>R v Grant</i> , 2009 SCC 32 , [2009] 2 SCR 353 .	54 and 78
<i>R v Hape</i> , 2007 SCC 26 , [2007] 2 SCR 292 .	55
<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , [1987] 1 SCR 313 .	pp 348-350
<i>Salah v. Timothy's Coffees of the World Inc.</i> , 2010 ONCA 673 , [2010] OJ No 4336 .	10-14
<i>Salah v. Timothy's Coffees of the World Inc.</i> , [2009] OJ No 4444 , 182 ACWS (3d) 83 .	56-59
<i>Slaight Communications Inc v Davidson</i> , [1989] 1 SCR 1038 .	
<i>Yaiguaje v Chevron Corporation</i> , 2018 ONCA 472 .	64-83

LEGISLATION	
<i>Canada Business Corporations Act</i> , RSC 1985, c C-44 .	239
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11 .	2(a)-(b), 7, 8, 11(b)-(c) and 12
DOCTRINE	
Anna Grear, <i>Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity</i> (Palgrave Macmillan, 2010).	p 47
Anat Scolnicov, <i>Lifelike and Lifeless in Law: Do Corporations Have Human Rights?</i> (May 2013), University of Cambridge Faculty of Law Research Paper No 13/2013 .	
Upendra Baxi, <i>The Future of Human Rights</i> (3 rd edn Oxford University Press, 2008).	pp 234-275
OTHER	
Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, <i>Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada</i> , 32-1, No 36 (12 January 1981) , per Jean Chretien	p 13
<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, Can. TS 1976 No. 47 , entered into force 23 March 1976, accession by Canada 19 May 1976.	Preamble
UN General Assembly, “ <i>Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts</i> ” <i>Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie</i> , 9 February 2007, UN Doc A/HRC/4/035 .	2-3

PART VII – STATUTES AND RULES

Canada Business Corporations Act, RSC 1985, c C-44.

<p>Commencing derivative action</p> <p>239 (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a</p>	<p>Recours similaire à l’action oblique</p> <p>239 (1) Sous réserve du paragraphe (2), le plaignant peut demander au tribunal l’autorisation soit d’intenter une action au nom</p>
--	--

<p>corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.</p> <p>Conditions precedent</p> <p>(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that</p> <p>(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;</p> <p>(b) the complainant is acting in good faith; and</p> <p>(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.</p>	<p>et pour le compte d'une société ou de l'une de ses filiales, soit d'intervenir dans une action à laquelle est partie une telle personne morale, afin d'y mettre fin, de la poursuivre ou d'y présenter une défense pour le compte de cette personne morale.</p> <p>Conditions préalables</p> <p>(2) L'action ou l'intervention visées au paragraphe (1) ne sont recevables que si le tribunal est convaincu à la fois :</p> <p>a) que le plaignant a donné avis de son intention de présenter la demande, dans les quatorze jours avant la présentation ou dans le délai que le tribunal estime indiqué, aux administrateurs de la société ou de sa filiale au cas où ils n'ont pas intenté l'action, n'y ont pas mis fin ou n'ont pas agi avec diligence au cours des procédures;</p> <p>b) que le plaignant agit de bonne foi;</p> <p>c) qu'il semble être de l'intérêt de la société ou de sa filiale d'intenter l'action, de la poursuivre, de présenter une défense ou d'y mettre fin.</p>
---	---

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<p>Fundamental freedoms</p> <p>2. Everyone has the following fundamental freedoms:</p> <p>(a) freedom of conscience and religion;</p> <p>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</p> <p>[...]</p> <p>Life, liberty and security of person</p> <p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p> <p>Search or seizure</p>	<p>Libertés fondamentales</p> <p>2. Chacun a les libertés fondamentales suivantes :</p> <p>a) liberté de conscience et de religion;</p> <p>b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;</p> <p>[...]</p> <p>Vie, liberté et sécurité</p> <p>7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.</p> <p>Fouilles, perquisitions ou saisies</p>
---	---

<p>8. Everyone has the right to be secure against unreasonable search or seizure. [...]</p> <p>Proceedings in criminal and penal matters</p> <p>11. Any person charged with an offence has the right [...] <i>(b)</i> to be tried within a reasonable time; <i>(c)</i> not to be compelled to be a witness in proceedings against that person in respect of the offence; [...]</p> <p>Treatment or punishment</p> <p>12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.</p>	<p>8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. [...]</p> <p>Affaires criminelles et pénales</p> <p>11. Tout inculpé a le droit : [...] <i>b)</i> d'être jugé dans un délai raisonnable; <i>c)</i> de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche; [...]</p> <p>Cruauté</p> <p>12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.</p>
--	--