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Rigour Required: Recent Direction from the Supreme Court of Canada on Binding and Non-Binding Sources of International Law in Charter Interpretation

Ravi Amarnath and Courtney Harris*

I. INTRODUCTION

It is not uncommon for parties to plead principles of international law to inform a court's analysis of the *Canadian Charter of Rights and Freedoms*.[1] However, commentators have long expressed concern about the Supreme Court of Canada's lack of clarity on how it uses international human rights law and for what purpose in Charter interpretation.[2]

This paper addresses how a divided Supreme Court of Canada in *Quebec (Attorney General) v. 9147-0732 Québec inc.*[3] attempted to clarify when it is appropriate for a court to use international law to interpret the scope of a Charter protection and how this should be done.

The paper is set out as follows: Part II sets out the background of the case, while Part III discusses the judgments of the lower courts. Part IV of the paper explains the disagreement between the majority and concurring justices in the Supreme

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* Counsel, Ministry of the Attorney General (Constitutional Law Branch). The views expressed in this paper reflect those of the authors and are not those of the Attorney General of Ontario or the Government of Ontario. The authors would like to thank Gib van Ert, Maia Stevenson and Priscila Atkinson for their contributions to this paper.

[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 [hereinafter "the Charter"].

[2] Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992), at 94-95; Jutta Brunnée & Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l L. 3; William A. Schabas & Stéphane Beaulac, *International Human Rights Law and the Canadian Charter*, 2d ed. (Scarborough, ON: Carswell, 1996), at 47; Stephen J. Toope, "Keynote Address: Canada and International Law" in *The Impact of International Law on the Practice of Law in Canada: Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15-17, 1998* (The Hague: Kluwer Law International, 1999), at 36.

[3] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.) [hereinafter "*9147-0732 Québec inc.*"].

Court's judgment on the role of international law in Charter interpretation, while Part V analyzes the disagreement between the majority and concurring justices and the implications of the majority's holding in *9147-0732 Québec inc.* for future cases.

II. THE DISPUTE

The dispute in *9147-0732 Québec inc.* arose out of a regulatory fine imposed on a company which did contracting work for kitchen cabinets and other residential home renovation projects. 9147-0732 Québec inc., was found guilty of carrying out construction work as a contractor without holding a current licence for that purpose, an offence under section 46 of Quebec's *Building Act*.[4]

Quebec instituted mandatory minimum penalties under section 197.1 of the *Building Act* 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 if the individual or legal person does not hold a licence or uses the services of another person who does not hold a licence. 9147-0732 Quebec inc., a legal person, challenged the mandatory minimum fine imposed on it, $30,843 as a violation of section 12 of the Charter.

III. LOWER COURT DECISIONS

1. Cour du Quebec Decision on the Merits of the Prosecution

The owner of 9147-0732 Québec inc. argued that he owned two corporations — one for manufacturing cabinets and counters, and another which held the requisite permits for constructing cabinets and counters. He further argued that the wrong corporation had billed for the work done at the home in question.[5] The judge at first instance rejected this defence, holding that the corporation committed a strict liability offence and that it had not acted with reasonable diligence to establish a mistake of fact defence.[6]

2. Cour du Quebec Decision on the Constitutional Question

At the hearing on the constitutional question, 9147-0732 Québec inc. did not lead evidence on whether it could withstand the mandatory fine — rather it argued two points: (1) an excessive fine could constitute cruel and unusual punishment; and, (2) Charter section 12 *could* apply to a corporation. There was no jurisprudential support in Canada for corporations to have Charter-protected rights under section 12 nor was there jurisprudential support for striking down a monetary penalty under section 12, either for an individual or a legal person. Therefore, the onus was on 9147-0732 Québec inc. to "establish that it has an interest falling within the scope

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[4] *Building Act*, CQLR, c. B-1.1, s. 46.

[5] *Directeur des poursuites criminelles et pénales c. 9147-0732 Québec inc.*, [2016] J.Q. no 7441, at paras. 35-36, 2016 QCCQ 5931 (Que. Ct. (Crim. and Penal Div.)).

[6] *Directeur des poursuites criminelles et pénales c. 9147-0732 Québec inc.*, [2016] J.Q. no 7441, at paras. 41, 58, 2016 QCCQ 5931 (Que. Ct. (Crim. and Penal Div.)).

of the guarantee, and one which accords with the purpose of that provision".[7]

The Cour du Quebec rejected the argument that a monetary penalty was abhorrent treatment, intolerable, and would outrage standards of decency to the same extent as whipping, castration or lobotomy would for a natural person. In the Court's view, it would not have mattered if the fine was $10,000 or $50,000, the answer would have been the same.[8] In particular, the Court took note of the recent decision of the Québec Court of Appeal in *R. v. Boudreault*,[9] which rejected the argument that excessive fines could fall within the ambit of the section 12 protection against cruel and unusual punishment.[10]

3. Quebec Superior Court of Justice: First Level of Appeal

The corporation's Charter argument also failed at the first level of appeal before the Quebec Superior Court.[11] The Superior Court canvassed section 12 jurisprudence from the Supreme Court of Canada and concluded that the Court must ask if the punishment imposed is so excessive to the point of being incompatible with human dignity.[12] The Superior Court held that the purpose of section 12 is to protect human dignity and as such legal persons cannot benefit from section 12.[13] On this point, the Superior Court engaged with the threshold issue of whether a corporation can avail itself of section 12. The Court concluded it could not after reviewing the text of section 12 and the context of other Charter rights foreclosed to corporations. It did not cite any international law or comparative foreign law in interpreting section 12 nor does it appear from the decision that the parties presented argument on this issue. The Superior Court also relied on the Quebec Court of Appeal's decision in *R. v. Boudreault* for the proposition that a monetary penalty did not meet the high threshold required by section 12 of the Charter.

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[7] *R. v. CIP Inc.*, [1992] S.C.J. No. 34, [1992] 1 S.C.R. 843, at 852 (S.C.C.).

[8] *Directeur des poursuites criminelles et pénales c. 9147-0732 Québec inc.*, [2017] J.Q. no 2085, at paras. 40-41, 2017 QCCQ 1632 (Que. Ct. (Crim. and Penal Div.)).

[9] *R. v. Boudreault*, [2016] J.Q. no 16795, at para. 158, 2016 QCCA 1907 (Que. C.A.), revd [2018] S.C.J. No. 58, 2018 SCC 58 (S.C.C.) [hereinafter "*Boudreault*"].

[10] *Directeur des poursuites criminelles et pénales c. 9147-0732 Québec inc.*, [2017] J.Q. no 2085, at para. 20, 2017 QCCQ 1632 (Que. Ct. (Crim. and Penal Div.)), citing *R. v.* Boudreault, [2016] J.Q. no 16795, at para. 158, 2016 QCCA 1907 (Que. C.A.), revd [2018] S.C.J. No. 58, 2018 SCC 58 (S.C.C.).

[11] See *Directeur des poursuites criminelles et pénales c. 9147-0732 Québec inc.*, [2017] J.Q. no 2085, 2017 QCCQ 1632 and 9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales, [2017] J.Q. no 16310, 2017 QCCS 5240 (Que. S.C.).

[12] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2017] J.Q. no 16310, at para. 35, 2017 QCCS 5240 (Que. S.C.).

[13] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2017] J.Q. no 16310, at paras. 56, 62, 2017 QCCS 5240 (Que. S.C.).

4. Decision of the Quebec Court of Appeal

A majority at the Quebec Court of Appeal allowed the appeal and held that section 12 can apply to corporations. The section 12 jurisprudence on monetary penalties shifted significantly between the decision of the Quebec Superior Court of Justice and that of the Quebec Court of Appeal when the Supreme Court of Canada held in *Boudreault* that the impacts of the victim fine surcharge, which was a mandatory fine attached to convictions under the *Criminal Code*,[14] were cruel and unusual punishment under section 12 of the Charter.[15] This marked the first time the Supreme Court struck down a monetary penalty as unconstitutional.

The majority used this change in the law to hold that: (1) section 12 goes beyond the concept of human dignity and includes penalties that are excessively disproportionate; (2) the term "everyone" found in section 12 must be interpreted consistently with other Charter rights (*e.g.*, sections 8 and 11(b)) which also have been held to apply to corporations; and (3) public interest requires that a totally disproportionate fine not be imposed where it would result in a corporation going bankrupt thereby jeopardizing the rights of its creditors or forcing layoffs.[16] The majority of the Court pulled back the corporate veil to examine the impact of a disproportionate fine levied against a corporation on humans behind a corporation such as workers, shareholders or consumers.[17]

The dissenting judgment of Chamberland J. held that section 12 was inseparable from human dignity, which corporations do not possess.[18] Unlike the majority, Chamberland J. was not willing to "look behind the corporation" to shareholders, directors or employees, who have different legal personalities from the corporation. Referencing *R. v. Wholesale Travel Group Inc.*, Chamberland J. wrote: "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

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[14] R.S.C. 1985, c. C-46.

[15] *R. v. Boudreault*, [2018] S.C.J. No. 58, at paras. 65-79, [2018] 3 S.C.R. 599 (S.C.C.) [hereinafter "*Boudreault*"].

[16] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. No. 1443, at paras. 114-118, 124-128, 130-134, 2019 QCCA 373 (Que. C.A.). The Supreme Court has previously held that ss. 8 [*Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.)] and 11(b) [CIP] apply to corporations.

[17] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. no 1443, at para. 133, 2019 QCCA 373 (Que. C.A.), revd [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

[18] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. no 1443, at para. 59, 2019 QCCA 373 (Que. C.A.), revd [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

not to their benefit).[19]

For the first time in the history of 9147-0732 Quebec inc.'s appeal, international law was mentioned though it played a very minor role. Both the majority and dissenting justices referenced the *International Covenant on Civil and Political Rights*. Justice Chamberland also examined the historical origins of section 12 of the Charter by looking at the English Bill of Rights of 1688 as well as the 8th Amendment of the Constitution of the United States of America, analysing their influence on the text of section 12. He then briefly distinguished the Canadian case law from recent American jurisprudence which had extended 8th Amendment protections against excessive fines to corporations.[20] The judgment of the Quebec Court of Appeal did not identify the weight it attributed to these sources or how they were being used.

IV. ARGUMENTS RAISING INTERNATIONAL LAW AT THE SUPREME COURT OF CANADA

The Supreme Court granted leave to appeal to the Attorney General of Quebec.

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[19] *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. no 1443, at para. 77, 2019 QCCA 373 (Que. C.A.), revd [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.), citing *R. v. Wholesale Travel Group Inc*., [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at 182-183 (S.C.C.).

[20] See *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*, [2019] J.Q. no 1443, at paras. 57-81, 2019 QCCA 373 (Que. C.A.), revd [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.). At para. 78 of his dissenting reasons, Chamberland J.A. referenced a decision of the Court of Appeals of Colorado, which had held that the protection against "excessive fines" provided for in the 8th Amendment to the American Constitution applies to legal persons (*Dami Hospitality, LLC v. Indus*. Claim Appeals Office, 2017 COA 21, 2017 Colo. App. LEXIS 207, 2017 WL 710497 (Colo. Ct. App. February 23, 2017). Justice Chamberland noted that the 8th Amendment of the U.S. Constitution explicitly refers to fines, and that the U.S. Supreme Court had yet to determine whether the 8th Amendment applies to legal persons (either with respect to protection against excessive fines or with respect to cruel and unusual punishment). On appeal, the Colorado Supreme Court held that excessive fines clause of the 8th Amendment does apply to corporations even while other clauses of the 8th Amendment, which include protections against cruel and unusual punishment, do not:

> The question we face, then, is whether there is justification to conclude that the purpose of the Excessive Fines Clause supports its application to protect corporations even if other clauses in the 8th Amendment do not. We conclude that there is. The bail clause is necessarily limited to natural persons because corporations cannot be jailed and therefore cannot be subject to bail. Similarly, cruel and unusual punishment cannot be imposed on a corporation. In short, these two guarantees are not "appropriate to [a corporate] body" (citations omitted). By contrast, "[t]he payment of monetary penalties . . . is something that a corporation can do as entity (citations omitted)."

(*Colo. Dep't of Labour & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*, 2019 CO 47M, at para. 26). The Supreme Court of the United States denied the state's petition for certiorari on January 13, 2020.

Interestingly, international law was mainly raised by two of the interveners — the British Columbia Civil Liberties Association ("BCCLA") and the Director of Public Prosecutions for the Public Prosecution Service of Canada (the "Director").

The BCCLA argued that there existed a consensus in international human rights law that the right to be free from cruel, inhumane or degrading treatment or punishment is enjoyed by natural persons only and cannot be invoked by corporations.

Using language that would later find its way into the majority judgment, the BCCLA argued in its factum:

> In keeping with this international context, "this Court has repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations." Similarly, the *Charter* is "presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified." Other IHRL sources, such as declarations, customary norms, and instruments that Canada has not ratified, remain "relevant and persuasive" in *Charter* interpretation.[21]

The BCCLA explained, quoting the Court, that international human rights laws "form part of the context in which Canadian laws are enacted".[22] The interpretive presumption is that legislation conforms with Canada's international obligations. Canada's international obligations are found in international human rights documents that Canada has ratified, such as the *International Covenant on Civil and Political Rights 1966* ("ICCPR") and the *Convention Against Torture 1984* ("CAT").[23] The presumption of conformity with binding international instruments means that the Charter is "presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[24]

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[21] Factum of the British Columbia Civil Liberties Association, at para. 6 (citations omitted). See also paras. 9, 11, 16 and 20, online: (https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM040_Intervener_British-Columbia-Civil-Liberties-Association.pdf).

[22] *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, at para. 47, 2015 SCC 58 (S.C.C.); *R. v. Hape*, [2007] S.C.J. No. 26, at para. 53, 2007 SCC 26 (S.C.C.) [hereinafter "*Hape*"].

[23] *International Covenant on Civil and Political Rights*, Can. TS 1976 No. 47 ("ICCPR"), Article 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. TS 1987 36 ("CAT"), Article 16(1).

[24] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, at para. 70, 2007 SCC 27 (S.C.C.); *India v. Badesha*, [2017] S.C.J. No. 44, at para. 38, 2017 SCC 44 (S.C.C.); *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, at paras. 22-23, 2013 SCC 47 (S.C.C.) [hereinafter *Divito*]; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, at para. 59, [1987] 1 S.C.R. 313 (S.C.C.), *per* Dickson C.J.C., dissenting) [hereinafter "*PSERA*"].

The BCCLA distinguished other international human rights law sources, such as declarations, customary norms, and instruments that Canada has not ratified such as Article 5 of the *Universal Declaration of Human Rights 1948* and explained these international human rights sources are "relevant and persuasive" in Charter interpretation.[25] In addition, the BCCLA discussed regional instruments such as article 3 of the *European Convention on Human Rights 1950* and article 5(2) of the *American Convention on Human Rights 1969* and their respective tribunals' interpretation of these articles.[26] Despite the fact that Canada could not be party to the ECHR and is not a party to the ACHR, these articles and tribunal interpretation of them could be relevant and persuasive to the Supreme Court of Canada's analysis of section 12 of the Charter in much the same way as the Supreme Court may find comparative foreign law relevant and persuasive.

The Director cited these same sources, but was less clear as to the jurisprudential use of binding international instruments that Canada had ratified stating that they are both "relevant and persuasive" and the Charter is presumed to offer similar protection as these instruments:

> [L]es instruments internationaux de protection des droits humains auxquels le Canada adhère peuvent servir d'outils interprétatifs "pertinents et persuasifs" des garanties juridiques conférées par la *Charte*, dans l'art. 12; à cet effect, la *Charte* est présumée offrir une protection similaire à celle de ces instruments.[27]

This combining of the "relevant and persuasive" approach with the "minimum standard" approach has support in decisions of the Supreme Court of Canada.[28] As others have noted, the Supreme Court of Canada has not unambiguously adopted the presumption of conformity (minimum standard approach) preferring the more

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[25] *PSERA*, at paras. 57-60 (S.C.C.), *per* Dickson C.J.C. dissenting; *Divito*, at para. 22; Peter Hogg, *Constitutional Law of Canada*, vol. 2. 5th ed. Supp. (Toronto: Thomson Reuters) (loose-leaf updated 2019), at 36-42; William A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar Rev. 174, at 186 [hereinafter "Schabas"].

[26] *Convention for the Protection of Human Rights and Fundamental Freedoms*, (1950) 213 UNTS 222 ("ECHR"); *American Convention on Human Rights*, 1144 UNTS 123 ("ACHR").

[27] *Constitutional Law of South Africa, Part II – The Bill of Rights*; *New Zealand Bill of Rights Act 1990*, Public Act, 1990, No. 109; *Human Rights Act 2004* Australian Capital Territory; See also Factum of Procureure Generale du Quebec Directeur des poursuites criminelles et penales, at para. 20, online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38613/FM080_Intervenante_Directrice-des-poursuites-p%C3%A9nales.pdf [hereinafter "Director's Factum"].

[28] *PSERA*, at 337, *per* Dickson C.J.C. dissenting). But see: *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 455, [1989] 1 S.C.R. 1038, at 1056 (S.C.C.), *per* Dickson C.J.C., writing for the majority [hereinafter "*Slaight*"] and *Hape*, at para. 55.

flexible "relevant and persuasive" approach.[29]

The Director went on to survey comparative foreign law in her factum such as the South African Bill of Rights,[30] the *New Zealand Bill of Rights* and the *Human Rights Act, 2004* (Australian Capital Territory).[31] Citing *Hunter v. Southam* and *R. v. Poulin*, the Director noted that the Court had found foreign regional or national instruments to be useful interpretive aids in analysing provisions of the Charter.[32] The thrust of these submissions was that the majority of provisions analogous to section 12 did not extend to corporations.

Indeed, argued the Director, no source of international law, binding or non-binding, had extended freedom from torture or cruel and unusual punishment to legal persons. The right remained distinctly human. Thus, no matter which approach the Supreme Court of Canada adopted in this case, there was no international obligation binding Canada to extend section 12 to legal persons as a minimum standard and no sources that were relevant and persuasive to assist the Supreme Court in reaching such a conclusion.

The respondent, 9147-0732 Quebec inc. also raised *Dami Hospitality, LLC v. Indus*, which held that the protection against "excessive fines" provided for in the 8th Amendment to the American Constitution applied to legal persons by offering protection to corporations from excessive fines.[33] The Supreme Court of the United States denied the state's petition for *certiorari* on January 13, 2020, just prior to the Supreme Court of Canada hearing in *9147-0732 Québec inc*.

V. REASONS OF THE SUPREME COURT

The nine justices of the Supreme Court all agreed that section 12 of the Charter does not apply to corporations, as the purpose of the right is to protect human dignity.[34] Nonetheless, the Court issued three sets of reasons — with Brown and Rowe JJ. writing for a majority of five justices, Abella J. writing a concurring judgment for three justices, and Kasirer J. writing his own concurring judgment.

1. Confirmation of *Big M Drug Mart* Approach to Charter Interpretation

All judges agreed that the governing analysis for Charter interpretation remained

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[29] Gib Van Ert, *Using International Law in Canadian Courts*, 2d ed. (Toronto: Irwin Law, 2008), at 336. See also Jutta Brunnée & Stephen J. Toop, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l L. 3, at 335 [hereinafter "Van Ert"]. See also Schabas, at 51-52.

[30] Director's Factum, at paras. 39-41.

[31] Director's Factum, at paras. 42-45.

[32] Director's Factum, at para. 31.

[33] *Colo. Dep't of Labour & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*, 2019 CO 47M, at para. 26.

[34] *9147-0732 Québec inc*., at paras. 2 (majority reasons of Brown & Rowe JJ.); 136 (concurring reasons of Abella J.); and 140 (concurring reasons of Kasirer J.).

Big M Drug Mart.[35] In *Big M Drug Mart*, the Supreme Court directed that the purpose of the right or freedom "is 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 test of the *Charter*." The Charter was not enacted in a vacuum and must therefore be placed in its proper linguistic, philosophic and historical contexts.[36]

The main source of tension between the majority and the concurring justices was one of principle, as opposed to outcome. Interestingly, both the majority justices and Abella J. agreed that the plain meaning of the world "cruel" in section 12 of the Charter suggests that the provision is limited to *human* pain and suffering.[37] However, the justices disagreed as to the centrality of the text of the provision in arriving at this conclusion.

According to the majority, within the *Big M Drug Mart* framework, the analysis must begin by analyzing the text of the provision, as the words of the provision "form the outer bounds of a purposive inquiry".[38] Justice Abella held that the majority's statements regarding the primacy of the text in Charter interpretation risked "constrain[ing] the scope of [*Charter*] rights".[39] Instead, Abella J. stated that "the principles and values underlying the enactment of the *Charter* provision are the primary interpretative tools."[40]

While the disagreement between the majority and Abella J. over the proper role of text in Charter interpretation served as a harbinger of the disagreement between the two judgments, practically speaking, it ultimately proved to be somewhat inconsequential given the justices agreed on the *Big M Drug Mart* methodology for Charter interpretation and the reliance of both judgments on the plain meaning of the word "cruel" within the text of section 12.

2. Disagreement on How to Use International Law

In her reasons for judgment, Abella J. cited both binding instruments, like the ICCPR and CAT, non-binding sources of international law, like the UNDHR and foreign domestic law such as the *New Zealand Bill of Rights*, and the South African Constitution.[41] She does not mention the presumption of conformity and seems to

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[35] This is consistent with the Supreme Court's reasons from *R. v. Poulin*, [2019] S.C.J. No. 47, at para. 32, 2019 SCC 47 (S.C.C.).

[36] *Big M Drug Mart*, at para. 117.

[37] *9147-0732 Québec inc*., at paras. 14, 86.

[38] *9147-0732 Québec inc*., at paras. 8-9.

[39] *9147-0732 Québec inc*., at para. 75.

[40] *9147-0732 Québec inc*., at para. 70.

[41] *9147-0732 Québec inc*., at paras. 110-123.

treat all sources as relevant and persuasive.[42] The only real distinction she makes is in the pithy quote: "This is not quantum physics. Non-binding international sources are 'relevant and persuasive', not obligatory."[43] Her reasons contain no explicit pronouncement on binding sources; however, her strong reaction to the majority's categorization of international instruments and comparative foreign law imply that the court should draw no distinctions, not even between binding instruments and comparative foreign law.

The majority justices took umbrage with how Abella J. melded international law and comparative foreign law, leading to two sharply divided sets of reasons on the appropriate role of international law in Charter jurisprudence.[44] Specifically, the majority disagreed with Abella J. on two points: (1) the relative weight accorded to binding versus non-binding international law and comparative foreign law; and (2) the role of international law in Charter interpretation.[45]

(a) Weight of Binding versus Non-Binding Instruments

The majority agreed with Abella J. that many of the binding and non-binding international instruments she cited in her reasons support the conclusion that protection against cruel and unusual punishment could not extend to corporations.[46] However, the majority was careful in its reasons to delineate the role of binding and non-binding international instruments in its analysis. According to the majority, such a principled framework was necessary to provide clear and consistent guidance to courts and litigants.[47]

The majority held that binding international instruments (instruments which Canada has ratified) that post-date the Charter carry more weight than non-binding instruments or other sources of international law or foreign comparative law in

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[42] *9147-0732 Québec inc*., at para. 102

[43] *9147-0732 Québec inc*., at para. 102.

[44] "Canadian courts are not obliged to consider the views of the international supervisory bodies responsible for monitoring Canadian treaty performance, unlike in Britain and Ireland, where the courts 'must take into account' the decisions of the European supervisory bodies, whether judicial or recommendatory. In South Africa, a court 'must' consider international law and 'may' consider foreign law": Joanna Harrington, "Interpreting the *Charter*" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, ed, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), 621 at 635 [hereinafter "Harrington"].

[45] See *9147*, at para. 142: Justice Kasirer was of the view that the dissenting reasons of Chamberland J.A. were adequate to dispose of the case, and as such would have left any further analysis on the appropriate role of international law for another day: "In my view, Chamberland J.A.'s reasons permit us to conclude, without saying more, that the appeal must be allowed."

[46] *9147-0732 Québec inc*., at paras. 39-40.

[47] *9147-0732 Québec inc*., at para. 27.

Charter interpretation. Specifically, binding instruments carry a presumption of conformity, meaning they are presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party.[48]

By contrast, the majority held non-binding instruments do not carry the same weight in Charter interpretation because Canada is not a party to these instruments, and therefore has not obliged itself to ensure similar guarantees contained therein.[49] For instruments where Canada is not a party — the majority held that these are relevant and persuasive, but that judges must explain how and why these instruments are being used.[50] Similarly, the majority held that decisions of international courts also are limited to persuasive value, "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*".[51]

For her part, Abella J. held that there was no need to circumscribe the weight accorded to different instruments of law based on whether they are binding or not. In a firm rebuke of the majority's approach, she held: "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."[52]

(b) Confirmatory Role of International Law in Charter Interpretation

The majority also made clear in its reasons that international law only be used to confirm or support an interpretation arrived at through the purposive interpretation exercise set out in *Big M Drug Mart*. The majority cautioned: ". . . 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."[53] In expressing strong disagreement with the approach of Abella J., the majority described her approach as "a marked and worrisome departure from this prudent practice".[54]

VI. ANALYSIS

1. Binding versus Non-Binding Sources

The majority judgment makes clear the "presumption of conformity" applies to

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[48] *9147-0732 Québec inc.*, at para. 32.

[49] *9147-0732 Québec inc.*, at para. 35.

[50] *9147-0732 Québec inc.*, at para. 35.

[51] *9147-0732 Québec inc.*, at para. 43.

[52] *9147-0732 Québec inc.*, at para. 104.

[53] *9147-0732 Québec inc.*, at para. 47.

[54] *9147-0732 Québec inc.*, at para. 28.

binding international instruments that Canada has ratified. The majority clearly noted that Canada had "obliged itself" to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter through becoming a party to certain international instruments.[55] Although this is not the first time the Supreme Court has acknowledged the presumption of conformity,[56] it is the clearest articulation that binding international law must be approached differently than non-binding sources of international law and comparative foreign law.

Prior to *9147-0732 Québec inc.*, the Supreme Court was not always clear that international law can be binding on it. Commentators note that Canadian courts generally have not given legal effect to international law in the cases before them.[57] For example, Harrington notes: "[R]arely does a Canadian judge draw a distinction between a binding and non-binding text, preferring instead to group all international materials together as possibly persuasive."[58] In part, this imprecision is attributable to the parties raising international law. As Schabas and Beaulac note, "[I]nternational instruments and cases are presented as a form of background material, like a volume of legal scholarship or doctrine, without any indication or suggestion whether or not they apply, and under what basis."[59]

Another explanation is found in the dissenting reasons of Dickson C.J.C., in *Re Public Service Employee Relations Act (Alberta)*.[60] There, Dickson C.J.C. reviewed international law and comparative law to aid the Court's interpretation of section 2(d) of the Charter. He concluded that while the judiciary is not bound by the norms of international law in interpreting the Charter, these norms provide "a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conven-

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[55] *9147-0732 Québec inc*., at para. 32, citing Dickson C.J.C. in *PSERA*.

[56] *Hape*, at para. 53; *Kazemi Estate v. Islamic Republic of Iran*, [2014] S.C.J. No. 62, at para. 150, 2014 SCC 62 (S.C.C.) [hereinafter "*Kazemi Estate*"].

[57] Jutta Brunée & Stephen J. Toope, "A Hesitant Entrance: The Application of International Law by Canadian Courts" (2002) 40 Can Y.B. Int'l L. 3, at 5; William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law, Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Thomson Carswell, 2007), at 51 wrote: "Canadian judges do not consider international human rights law to be incorporated in any sense that might be binding upon them."

[58] Harrington, at 634.

[59] William A Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 2d ed. (Scarborough, ON: Carswell, 1996), at 47. See also: The Honourable Justice Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?: Recent Developments and Challenges in Internalizing International Law" (2002) 16 Sup. Ct. L. Rev. (2d) 23, at 57.

[60] *PSERA*, at 348.

tions".[61] Some commentators have observed that by choosing not to treat some international law as actually binding, the court has greater flexibility to protect human rights and allows greater dynamism within the law.[62] Others have questioned whether it demonstrates a weaker commitment to the application of international human rights law in Canada because it liberally permits all international sources in without much justification and treats them as relevant and persuasive, but not as determinative.[63]

Following *9147-0732 Québec inc*., there is no longer any ambiguity as to delineation of weight to be accorded to binding rather than non-binding sources of international law. International law instruments that Canada has ratified are binding and the Charter must be interpreted to conform to these obligations. For international law that is not binding, judges must now distinguish the weight to be given to different international instruments and/or judgments cited. This latter requirement to explain how and why international law is being used may indeed be new, but it is certainly not novel since many have called for more discipline in this area.

Recent cases show lower courts employing the majority's direction from *9147-0732 Québec inc*. In *Bissonnette c. R*,[64] where the Quebec Court of Appeal held that combining life sentences infringes section 12 of the Charter, the Court was careful to delineate between binding and non-binding international instruments and to cite to *9147* for the proposition that binding international sources of law carry a presumption of conformity.[65]

The Federal Court of Appeal also dismissed a motion for leave to appeal of a proposed intervener group who sought to argue that the principles of fundamental justice in section 7 must be interpreted in a way that incorporates various non-binding international instruments or incorporates the language of other sections of the Charter.[66] In rejecting the proposed intervener, Stratas J. held in part that the

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[61] *PSERA*, at 348. Chief Justice Dickson also stated 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", signally a presumption of conformity, but his reasons are not clear on this point.

[62] William A. Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Thomson Carswell, 2007), at 51-52. See also the discussion of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) in Justice Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?" (2002) 16 Sup. Ct. L. Rev. (2d) 23, at 48-50.

[63] Van Ert, at 8.

[64] *Bissonnette c. R*., [2020] J.Q. no 11243, 2020 QCCA 1585 (Que. C.A.) [hereinafter "*Bissonnette*"]. On May 27, 2021, the Supreme Court granted leave to appeal from the judgment of the Court of Appeal of Quebec, [2021] S.C.C.A. No. 26 (S.C.C.).

[65] *Bissonnette*, at para. 105.

[66] *Canada (Minister of Citizenship and Immigration) v. Canadian Council for Refugees*,

group had failed to cite *9147-0732 Québec inc.*, a case which he called "the lead authority on the interpretation of *Charter* provisions and on the relevance of non-binding international instruments to that issue", and as such dismissed the proposed intervener's motion.[67]

What is left unclear by the Court's reasons in *9147-0732 Québec inc.* is whether courts will have to explain why they did not rely upon international sources which are cited by the parties in their submissions. For example, in *Ktunaxa Nation*,[68] the Supreme Court did not explain why it did not consider the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") even though multiple interveners raised UNDRIP.[69] Post *9147-0732 Québec inc*., there is nothing in the Court's reasons which would *require* a court to explain how it grappled with the declaration (if it did not rely upon it in its reasons).

Overall, *9147-0732 Québec inc.* may be the lead authority, but it is not the best example of the Supreme Court illustrating its own framework in action. On a practical note, it was not necessary to identify how and why international law or comparative foreign law was being used in *9147-0732 Québec inc.* because there was an overwhelming universal consensus that the right to be free from cruel and unusual punishment does not extend to legal persons. The one exception to this consensus, recent interpretation of the 8th Amendment to the U.S. Constitution, was not discussed by any of the judges. It is a mystery why the Supreme Court did not address the recent U.S. decisions that the respondent raised. On this point, the Court missed a real opportunity to contribute to the body of international law by distinguishing Canada's approach to financial monetary penalties found in *R. v. Boudreault* from the excessive fine clause in predecessor rights instruments such as the 8th Amendment.

2. Supporting Role of International Law in Charter Interpretation

One aspect of *9147* that is likely to be scrutinized in future cases is the majority's

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[2021] F.C.J. No. 67, at para. 36, 2021 FCA 13 (F.C.A.) [hereinafter "*Canadian Council*"].

[67] *Canadian Council*, at para. 36.

[68] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54, at paras. 64-67, 2017 SCC 54 (S.C.C.) [hereinafter "*Ktunaxa Nation*"]. In *Ktunaxa Nation*, the majority noted how the two aspects of the right to freedom of religion in s. 2(a) of the Charter — the freedom to hold a religious belief and the freedom to manifest it — are reflected in international human rights law. In addition to citing binding international instruments, the majority referenced how two, non-binding international instruments (which do not carry the presumption of conformity), Article 9(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221, and article 12(1) of the *American Convention on Human Rights*, provided "important illustrations of how freedom of religion is conceived around the world".

[69] Dwight Newman, "Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?" *Key Developments in Aboriginal Law*, ed. Thomas Isaac (Toronto: Thomson Reuters Canada Ltd., 2017).

holding that the role of international law is to "support or confirm" the interpretation reached by the "purposive approach" described by the Supreme Court in *Big M Drug Mart*.[70]

Following the majority's interpretative approach in *9147*, judges may not use international instruments to determine the purpose of a Charter right until its purpose has already been distilled through analysis of the text of the Charter, domestic instruments, or international instruments which pre-date the Charter. The majority's approach to international instruments does make sense in the context of non-binding instruments, which only have "relevant and persuasive" value and thus make sense as having a supporting role in Charter interpretation.

The more difficult issue to square in the majority's reasons is how binding international instruments, which carry a presumption of conformity, have only a supporting or confirmatory role in Charter interpretation. If, as per the presumption of conformity, the legislature is presumed to act in compliance with Canada's obligations for international treaties it has ratified and as a member of the international community, there appears to be no reason in principle why a court could not first look to a binding international instrument to determine the scope of a Charter right. The majority does not address this issue in their reasons for judgment. Moreover, the majority's reasons leave unclear what a court ought to do if an interpretation of a Charter right arrived at through the "purposive approach" conflicts with an international instrument Canada has ratified and by which it is bound.

The trouble with the majority's reasons is the interchangeability with which it uses the terms "international norms" and "international law" in its reasons. At paragraphs 22-23 of its reasons, the majority refer to non-binding norms as having a supporting or confirmatory role in Charter interpretation:

> 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*.
>
> 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.[71]

The scholars cited by the majority at paragraphs 22, 25 and 26 of its reasons all use the terms "international normativity" and "international norms" to discuss something that is *not necessarily binding* in domestic law, and for which there is no presumption of conformity.[72]

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[70] *Big M Drug Mart*, at 344.

[71] *9147-0732 Québec inc.*, at paras. 22-23 [emphasis added].

[72] S. Beaulac & F. Bérard, *Précis d'interprétation legislative*, 2d ed. (2014), c. 5, at paras.

By contrast, at paragraph 28, the majority expands the scope of the judgment and holds that, "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."[73]

The change in terminology used at paragraph 28 of the majority's reasons arguably creates confusion about whether the majority of the Court means that *all* sources of international law, regardless of their effect on domestic law, are limited to supporting or confirming roles (with different degrees of weight/relevance within that role) or that only *non-binding* sources of international law are limited to a supporting or confirming role.

Any doubt on this point, though, is clarified at paragraph 37 of the majority's reasons where they cite instances where the Court has previously used both non-binding and binding international law instruments to support an interpretation arrived at through the *Big M Drug Mart* interpretative process. This part of the decision clarifies the majority's holding that international law can *only* play a supporting or confirming role, regardless of the type of instrument.

The trouble with the majority's position on this issue is that it does not align with what the Court has previously stated with regard to the role of binding international instruments in Charter interpretation. In *Kazemi*, for example, the majority of the Court held that instruments which Canada has ratified could be used to "delineat[e] the breadth and scope of *Charter* rights".[74] It is difficult to see how a particular source can help in *delineating the scope* of a Charter right if it is limited to confirming a Charter right interpretation *only once* arrived at independently through the *Big M Drug Mart* approach.

The majority also does not reconcile Dickson C.J.C.'s dissenting judgment in *PSERA* with his reasons in *Big M Drug Mart.* As stated above, *PSERA*, for the most part stands for a "relevant and persuasive" approach to international law. However, in the midst of those findings, Dickson C.J.C. indicated that what he meant in *Big M Drug Mart* by the interpretation of the Charter being "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" was 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."[75] Neither the majority nor Abella J. deal with this discussion by Dickson C.J.C. of the role of

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5, 36; Brunnée & S.J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l L. 3 at 41 [emphasis added]; J.H. Currie, *Public International Law*, 2d ed. (2008), at 260, 262.

[73] *9147-0732 Québec inc.*, at para. 28 [emphasis added].

[74] *Kazemi Estate*, at para. 150.

[75] *PSERA*, at 189.

international law as it relates to *Big M Drug Mart* or his reiteration of this quote from *Re PSERA* in *Slaight Communications v. Davidson*.[76]

Gib Van Ert notes that in *Slaight*, "Dickson CJ lifted the presumption of minimum protection out of *Re PSERA* and left the relevant and persuasive approach behind."[77] This direct interaction between *Big M Drug Mart* and the presumption of conformity demanded comment from the majority in *9147-0732 Québec inc.* Nor does the majority's position on sources which pre-date the Charter align with its position on sources which post-date the Charter. According to the majority in *9147-0732 Québec inc.*, it is justifiable to use international instruments that predate the Charter (whether binding or not) to define the purpose of a right as such instruments help define the "historical" context of the right, in line with *Big M Drug Mart*.[78] However, it is unclear why a binding international instrument which post-dates the Charter could not be used to determine the "philosophic" context of a right, particularly when such an instrument is presumed to provide the same level of protection as that accorded under the Charter.

9147-0732 Québec inc. may not be the Supreme Court's final word on this issue. Specifically, it is our view that the Supreme Court will likely have to determine whether the majority confirmed the principle of conformity for binding sources or whether *9147-0732 Quebec inc.* in fact shifted the law such that all international sources of law can *only* have a confirmatory role in Charter interpretation.

VII. CONCLUSION

Following *9147-0732 Quebec inc.*, it is clear that international law will continue to play a role in Charter interpretation, but with clearer boundaries as to the appropriate usage of binding and non-binding instruments of law. Specifically, advocates and judges must provide more rigorous explanations as to the purported use of international law and comparative foreign law in an interpretative analysis of a Charter right.

The more contentious question will be whether binding international instruments may be used to delineate the scope of a Charter right or simply limited to confirm or support an interpretation of meaning of a Charter right. The majority judgment does not explain how, or why, binding international instruments cannot be used to delineate the scope of a Charter right when these instruments are presumed to conform with the guarantees in the Charter. We therefore expect that this question will be re-visited by the Supreme Court in the future.

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[76] *Slaight*, at 1056.

[77] Van Ert, at 344.

[78] *9147-0732 Québec inc*., at para. 41. For example, at para. 65 of *Ktunaxa Nation*, the majority describe how the ability to "manifest" one's religion under s. 2(a) of the Charter (protecting freedom of religion) was influenced by consideration of courts of art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.