

Section 12 – Cruel and Unusual Treatment or Punishment

Section 12 of the *Canadian Charter of Rights and Freedoms* states: “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.”^[1]

The purpose of section 12 has been defined by the Supreme Court of Canada (SCC) as: “prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals.”^[2] It does not protect other entities such as corporations.^[3]

For the section to be engaged, the state must be responsible for the *punishment* or *treatment*.^[4]

For section 12 purposes, punishment has been defined simply as a penalty imposed by the state (most often in the sentencing context).

While treatment has not been clearly defined in law, the SCC has opined that it includes conduct by the state that is not of a penal or quasi-penal nature.^[5] For instance, in Ontario, the unnecessary use of a taser after arrest was held to be cruel and unusual treatment.^[6]

Crucially, the words “cruel and unusual” do not mean that the treatment or punishment must be both cruel *and* unusual. Rather, these words have been interpreted broadly to cover any treatment or punishment that “outrages the standards of decency.”^[7]

The Two Prongs of Section 12

Section 12 has been interpreted as containing two prongs. The first prong protects against punishment that is so excessive that it offends human dignity. The second protects against punishment that, by its very nature, is incompatible with human dignity.^[8]

The first prong is made out when a punishment is *grossly disproportionate*. This occurs when the method of punishment is acceptable (i.e. prison time) but its effects are more than “merely excessive.”^[9] In undertaking an analysis under this prong, a court will consider the specific contexts of a case and the individual involved to determine whether the sentence imposed was appropriate.^[10] However, the Supreme Court has made an exception to this approach when dealing with mandatory minimum sentences: in those instances, a court may consider whether a minimum sentence could *hypothetically* be grossly disproportionate.^[11]

The second prong of the right is satisfied where the method or mode of punishment itself is “degrading and dehumanizing.”^[12] These punishments are always grossly disproportionate.^[13] Examples of such punishments include corporal punishment, lobotomy, castration, and torture.^[14] More recently, a provision allowing for the imposition

of consecutive 25-year periods of parole ineligibility was found to violate section 12 under this prong.^[15] When a punishment falls into this category it can never be imposed or even remain as a possibility.^[16]

Section 12 Rights Are Not Absolute

As with all rights under the *Charter*, a person's section 12 rights are subject to limitation under section 1.^[17] However, the Supreme Court has opined that it is unlikely that any punishment that is cruel and unusual by nature (under the second prong described above) could be justified under section 1.^[18]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 12 [*Charter*].

[2] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32, para 51 [*Quebec*].

[3] *Ibid*.

[4] *Rodriguez v British Columbia (Attorney General)*, [1993] SCJ No 94, 3 SCR 519, at para 177.

[5] *Ibid* at para 182.

[6] *R v Walcott*, [2008] OJ No 1050, 57 CR (6th) 223.

[7] *R v Smith*, [1987] SCJ No 36, 1 SCR 1045 at paras 52-53.

[8] *R v Bissonnette*, 2022 SCC 23 at para 60 [*Bissonnette*].

[9] *Ibid* at para 61.

[10] *Ibid* at para 62.

[11] *R v Nur*, 2015 SCC 15 at para 46.

[12] *Quebec*, *supra* note 2.

[13] *Bissonnette*, *supra* note 8 at para 64.

[14] *Ibid* at para 66.

[15] *Ibid*.

[16] *Ibid* at para 68.

[17] *Charter*, *supra* note 1, s 1.

[18] *Bissonnette*, *supra* note 8 at para 121.