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The Other Section 7

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The Other Section 7

Margot Young*

I. INTRODUCTION

Section 7 has been the site of much debate. Certainly this is not unique — many of the protections in the *Canadian Charter of Rights and Freedoms*¹ have spawned extensive controversy and consideration, for example, the equality rights provisions of section 15. However, the debate around section 7 is particularly polarized and reflects a central tension of liberal rights protection — that between classical protections against state power and more substantive guarantees of the material conditions of human well-being and flourishing that make these classical protections meaningful to all. Encoded in this debate are the competing pictures of the state as enemy of individual freedom — in which case freedom from government demands protection — and the state as facilitator of freedom — embodying the idea of freedom through government.

Section 7 clearly has had significant impact on the criminal and penal justice system in Canada. However, the somewhat rudimentary notions of liberty, life and security of the person that are corralled by this task are not the sum of what section 7 potentially ought to, and indeed may ultimately, protect and ensure. Courts increasingly recognize and acknowledge this. So, while early on in section 7 jurisprudence the Supreme Court of Canada expressed doubt that section 7 protections extended beyond the criminal law context, it is now fairly well established that the rights the section protects apply well outside that

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

sphere.² Canadian and former Supreme Court justice, Louise Arbour, when serving as United Nations High Commissioner for Human Rights, stated that: “the first two decades of *Charter* litigation testify to a certain timidity — both on the part of litigants and the courts — to tackle, head on, the claims emerging from the right to be free from want”.³ In the years that have followed this statement, the courts and litigators may be showing more gumption. How far beyond the criminal law they will take section 7 is an interesting and important question, and core to the ongoing debate around that section.

Two strands of expansion of section 7 outside of the criminal and penal context exist, one less controversial than the other. First, it is relatively clear that section 7 encompasses executive administration of the law. Thus, in *Blencoe v. British Columbia (Human Rights Commission)*, the Court noted that section 7 extended beyond the sphere of criminal law to “state action which directly engages the justice system and its administration”.⁴ In the subsequent case of *Gosselin v. Quebec (Attorney General)*, McLachlin C.J.C. explained that: “[T]he justice system and its administration” refers to “the state’s conduct in the course of enforcing and securing compliance with the law.”⁵ Certainly, section 7 rights have had and will continue to have resonance in the area of regulatory law generally, thus clearly reaching beyond the criminal sphere of state action.

The second path of expansion would allow section 7 rights to require the state to provide substantive benefits and guarantees to individual claimants. Section 7 rights permit, because of their abstract and “protean” nature,⁶ potential applicability to a wide range of normative claims and aspirations for a just society. This is also true of the principles of fundamental justice. Many of these claims have no other obvious home in the Charter and thus

² See, for example, then Chief Justice Lamer’s statement in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 58 (S.C.C.) [hereinafter “*G. (J.)*”], that “the protection accorded by this right [security of the person] extends beyond the criminal law and can be engaged in child protection proceedings”.

³ Louise Arbour, “Freedom from want — from charity to entitlement” (La Fontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, March 3, 2005), online: United Nations High Commissioner for Human Rights: <<http://www.unhcr.ch/hurricane/hurricane.nsf/0/58e08b5cd49476bec1256fbd006ec8b1?opendocument>> [hereinafter “Arbour”].

⁴ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at paras. 45-46 (S.C.C.) [hereinafter “*Blencoe*”], citing *G. (J.)*, *supra*, note 2, at para. 66.

⁵ [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 77 (S.C.C.) [hereinafter “*Gosselin*”], citing *G. (J.)*, *supra*, note 2, at para. 65.

⁶ Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 307 [hereinafter “Stewart”].

much of the more “ambitious” litigation under the Charter is anchored in relation to section 7 rights. Arguments are made that within the rights to life, liberty, and security of person lie government obligations to ensure a degree of material well-being for all resident in Canada. For example, a number of commentators argue that section 7 obligates government to take up the challenges of poverty and homelessness that figure across Canada.⁷ The span of the state obligations these types of claims call for requires more than mere reformulation of existing regulation and current state action. Thus, it is argued that such obligations need not be formulated as a claim for alteration of present state action but, rather, could be imposed freshly, or independently of any prior state action. At a more philosophical level, these claims rest upon notions of life, liberty and security of the person that reflect: “freedom from the risks inherent in an industrialised society through social security involving state action”.⁸

This chapter takes up the challenge of mapping the signposts of a course for a more complex and, I would argue, an increasingly meaningful role for section 7 in the modern, neo-liberal state that Canada has become. The exercise is not an imaginary one — jurisprudence points towards such a potential role for the section and such a fuller capacity for the protections of life, liberty and security of the person under our constitutional regime.⁹

⁷ See, for example, Martha Jackman & Bruce Porter, “Right-Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework”, Working Paper (Huntsville, ON: Social Rights Advocacy Centre, June 2012), online: Social Rights in Canada <<http://www.socialrightscura.ca/documents/publications/Constitutional%20Framework%20Canada.pdf>> [hereinafter “Jackman & Porter, 2012”]; Bruce Porter & Martha Jackman, “International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection”, Working Paper (Huntsville, ON: Social Rights Advocacy Centre, September 2011), online: Social Rights in Canada <<http://socialrightscura.ca/documents/publications/Porter-Jackman%20making%20the%20connection-can.pdf>>; Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in M. Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 [hereinafter “Jackman & Porter, 2008”]; Martha Jackman, “Section 7 of the Charter and Health-Care Spending” in G.P. Marchildon, T. McIntosh & P.G. Forest, eds., *The Fiscal Sustainability of Health Care in Canada* (Toronto: University of Toronto Press, 2004) 110 [hereinafter “Jackman, 2004”].

Frank R. Scott, “Expounding Concepts of Human Rights” in Frank R. Scott, ed., *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977) 353, at 358. F.R. Scott was one of Canada’s best-known constitutional scholars and lawyers. These words capture what many understand to be a central dilemma of industrial societies — the presence of both affluence and deprivation.

For a convincing and thorough argument on this front, see Martha Jackman, “The Protection of Welfare: Rights Under the Charter” (1988) 20 *Ottawa L. Rev.* 257 [hereinafter “Jackman, 1988”].

II. THE TEXT AND FRAMEWORK

The text of section 7 reads as follows:

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.

The Supreme Court of Canada has held that the section sets out a two-part task for claimants.¹⁰ The claimant must, first, show that one or more of the rights to life, liberty and security of the person have been infringed. The Supreme Court has stated that these three rights inform and reinforce each other and that all three are, of equal importance.¹¹ Secondly, to establish a breach of the section, the claimant must also show that the infringement is not in accordance with the “principles of fundamental justice”. Each part places a distinct and separate onus on the claimant. If the claimant is not able to show, first, that an infringement of one of the rights has taken place that, second, is not in accordance with the principles of fundamental justice, then any evidence of infringement of one of the rights is of no constitutional import. Thus, the principles of fundamental justice qualify the constitutional guarantee of the rights, resulting in a narrower scope of protection than reference to the rights alone would accomplish. However, the Court has emphasized that the principles of fundamental justice are to be identified in light of the interests the rights themselves represent, rather than reflecting merely administrative convenience and reasonableness.¹² The section is to have a coherence that reflects the centrality of the interests at stake. In *Chaoulli v. Quebec*

¹⁰ At different points, judges and commentators have contemplated the argument that the section actually establishes two distinct sets of rights, rather than a single set of rights modified by the notion of fundamental justice. For instance, in her dissent in *Gosselin, supra*, note 5, at para. 338, Arbour J. maintained that it was arguable that s. 7 contains two rights:

... a right, set out in the section’s first clause, to “life, liberty and security of the person” full stop (more or less); and a right, set out in the section’s second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.

Louise Arbour has since left the Court and this notion of s. 7 rights has not been taken up by other justices.

¹¹ *Rodriguez v. British Columbia*, [1993] S.C.J. No. 94, 107 D.L.R. (4th) 342, at 388 (S.C.C.), per Sopinka J. for the majority [hereinafter “*Rodriguez*”].

¹² Hester Lessard, “Liberty Rights, the Family and Constitutional Politics” (2002) 6:2 Rev. Const. Stud. 21, at 220 [hereinafter “*Lessard*”]; *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 548 (S.C.C.), per Lamer J. [hereinafter “*Motor Vehicle Reference*”].

(*Attorney General*), McLachlin C.J.C. and Major J. summarized the dictates of section 7:

Section 7 of the *Charter* guarantees that “[e]veryone 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.” The disposition of this appeal therefore requires us to consider (1) whether the impugned provisions deprive individuals of their life, liberty or security of the person; and (2) if so, whether this deprivation is in accordance with the principles of fundamental justice.¹³

The rights guaranteed by section 7 cast obligations upon the full range of government actors and actions. A significant range of statutes or regulations, for example, has come in for scrutiny under section 7.¹⁴ Section 7 has also been applied to decisions by a variety of government executive actors. Thus, in *Canada (Attorney General) v. PHS Community Services Society*, the Court found that a decision by the Minister of Health to deny an exemption from the *Controlled Drug and Substance Act* (“CDSA”)¹⁵ to the staff and clients of a Vancouver supervised safe injection site was bound by the dictates of section 7 and unconstitutional under those obligations.¹⁶ This was despite the fact that the legislation itself, the CDSA, was deemed constitutionally sound.¹⁷ The Court stated that: “as with all

¹³ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at para. 109 (S.C.C.), per McLachlin C.J.C. and Major J. [hereinafter “*Chaoulli*”].

¹⁴ For example, outside of the criminal law context, s. 7 has been relied on to initiate judicial review of statutes that deal with, for example, immigration (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter “*Charkaoui*”]), private health insurance (*Chaoulli, id.*), welfare payment levels (*Gosselin, supra*, note 5), child apprehension (*Winnipeg Child and Family Services v. W. (K.L.)*, [2000] S.C.J. No. 48, [2000] 2 S.C.R. 519 (S.C.C.) [hereinafter “*W. (K.L.)*”]), adoption records (*Cheskes v. Ontario (Attorney General)*, [2007] O.J. No. 3515, 87 O.R. (3d) 581 (Ont. S.C.J.)), municipal by-laws (*Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29 (B.C.C.A.) [hereinafter “*Adams (BCCA)*”]). Similarly, the following examples of regulatory Acts have been the subject of s. 7 obligations: assisted conception (*Doe v. Canada (Attorney General)*, [2007] O.J. No. 70, 84 O.R. (3d) 81 (Ont. C.A.)); health insurance (*Flora v. Ontario (Health Insurance Plan, General Manager)*, [2008] O.J. No. 2627, 295 D.L.R. (4th) 309 (Ont. C.A.)).

¹⁵ S.C. 1996, c. 19.

¹⁶ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter “*Insite*”].

¹⁷ This is a puzzling outcome. The Court saved the legislation from a s. 7 infringement because of the availability of the ministerial discretion to exempt, yet then held that the ministerial discretion could only be exercised in one constitutional form in the context of Vancouver’s Insite facility. For a similar discussion of this result, see Rahul P. Agawam, “Case Comment: *Canada (Attorney General) v. PHS Community Services Society*” (2011) 20:2 Const. Forum 41. For more general concern about this type of outcome, see Sujit Choudhry & Kent Roach, “Racial and Ethnic

exercises of discretion, the Minister's decision must conform to the *Charter*.¹⁸ The decision of the Court in *Operation Dismantle v. Canada* similarly shows the applicability of section 7 to the executive branch of government.¹⁹ In that case, a challenge was brought to the decision by the federal cabinet to allow the United State to test cruise missiles on Canadian territory. The Court stated that: "the cabinet has a duty to act in a manner consistent with 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".²⁰

Executive administrative action raises an interesting doctrinal conundrum. One can anticipate that the application of the Charter to administrative discretionary decision-making will become increasingly important, particularly in relation to section 7.²¹ Yet, two possible paths lie for judicial review of discretionary decisions made by executive actors: traditional administrative law review and constitutional review under the Charter. Unlike administrative review of administrative discretion, review on constitutional grounds does not entail any *pro forma* deference to the decision-maker.²² The decision is held

Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1; Sarah Parker, "Discretionary Administrative Decisions and the *Charter*: Finding the "Proportionate" Balance in *Doré v Barreau du Québec*", Working Paper on file with author [hereinafter "Parker"].

¹⁸ *Insite*, *supra*, note 16, at 117, citing *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 22, [2002] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Suresh*"], in support of that contention.

¹⁹ *Operation Dismantle v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

²⁰ *Id.*, at para. 28.

²¹ Parker, *supra*, note 17.

²² For a discussion of the different tracks traced by the Court between administrative review and constitutional review of the exercise of executive discretion that engages constitutional issues or values, see Stewart, *supra*, note 6, at 26-28. As Stewart notes, the difference between these two approaches is essentially one of applicable standard of review. Administrative law is marked by the more deferential standard of reasonableness, while the standard of correctness applies to constitutional review. The Court appears to use one or the other in a somewhat unpredictable manner when constitutional issues arise. Arguably, review of state action to which the Charter is applicable (under s. 32 of the Charter), that relates to an interest important enough to have been constitutionalized by the Charter, ought always to engage full constitutional review. This should be so regardless of whether the state action at issue is discretionary or not. Such review, however, need not ignore the specific context of the decision at issue and the fact that the nature of the decision may not be one appropriate for the Court to second guess, at least under s. 1 of the Charter. In *Insite*, the Court, in a standard constitutional review, held that the Minister of Health's discretionary decision was contrary to s. 7 of the Charter and not justifiable under s. 1 (*Insite*, *supra*, note 16). For the other approach, see *Doré v Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.), in which the Court subjected the tribunal decision under challenge by a freedom of expression claim to

accountable to the substantive right and any infringement is justifiable under only a full section 1 analysis.

III. THE RELEVANCE OF CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Canada is signatory to a broad range of international agreements setting out social and economic rights.²³ While international obligations become a direct source of legal obligation in Canada only if such obligations have expression in domestic legislation,²⁴ international obligations bear other weight. That is, international treaties are not without legal effect or significance. They can serve as guides for interpretation of domestic litigation and constitutional provisions. As L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)* wrote: "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review".²⁵ In the constitutional context, then Dickson C.J.C. wrote that: "The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions."²⁶ More specific to the topic of this chapter: such international guarantees are an "invaluable point of reference in the search for meaning in the ambiguous language of the section 7 right to life liberty and security of the person".²⁷

These commitments lend an important context to the Charter. As part of an international community marked by strong aspirations for

an administrative judicial review that employed the standard of reasonableness. See David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279.

²³ See, e.g., Jackman & Porter, 2012, *supra*, note 7.

²⁴ *Arrow River and Tributaries Slide & Boom Co. v. Pigeon Timber Co.*, [1932] S.C.J. No. 24, [1932] S.C.R. 495 (S.C.C.).

²⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at paras. 69-71 (S.C.C.) [hereinafter "*Baker*"].

²⁶ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at para. 57 (S.C.C.), *per* Dickson C.J.C. in dissent [hereinafter "*Alberta Reference*"], quoted with approval in *Slaight Communications v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1056-57 (S.C.C.) [hereinafter "*Slaight*"].

²⁷ Jackman, 1988, *supra*, note 9, at 290.

extensive human rights, Canada is convincingly held accountable to these standards. Justice Belzil of the Alberta Court of Appeal in his dissenting judgment in *R. v. Big M Drug Mart* noted that: “it can be seen that the Canadian *Charter* was not conceived and born in isolation. It is part of the universal human rights movement.”²⁸ Various Supreme Court of Canada judgments pick up this trope, asserting that, here in the words of then Dickson C.J.C.: “The *Charter* would generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights document which Canada has ratified.”²⁹ Thus, in the words of L’Heureux-Dubé J., “[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect”.³⁰ Specifically, as already mentioned, the Court has referenced international conventions under its interpretation of both the scope of the individual rights of section 7 and the phrase “principles of fundamental justice”.³¹ Of course, the real import of these statements, the degree to which the Supreme Court’s interpretation of Charter rights actually tracks the substance of Canada’s international human rights commitments, is a point of contention.

Two international human rights conventions are of particular relevance to section 7: the *Universal Declaration of Human Rights*³² and the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”).³³ The *Universal Declaration* asserts a number of important social and economic guarantees,³⁴ including the rights to social security

²⁸ *R. v. Big M Drug Mart Ltd.*, [1983] A.J. No. 766, 5 D.L.R. (4d) 121, at 149 (Alta. C.A.).

²⁹ *Slaight*, *supra*, note 26, at 1054, citing *Alberta Reference*, *supra*, note 26, at para. 59.

³⁰ *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330, at para. 73 (S.C.C.).

³¹ See *e.g.*, *Suresh*, where the Court held that: “The inquiry into the principles of fundamental justice is informed ... by international law, including *jus cogens*” (*supra*, note 17, at para. 46). See also *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44, at para. 23 (S.C.C.), in support of the argument that these international rights assist when defining the precise content of certain principles of fundamental justice under s. 7.

³² *Universal Declaration of Human Rights*, G.A. Res. 217(III), 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) [hereinafter “UDHR”].

³³ *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter “ICESCR”].

³⁴ Article 25 of the *Universal Declaration* reads:

1. Everyone has the right to a standard of living adult for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

UDHR, *supra*, note 32, at art. 25, para. 1.

and to the social and economic rights that are essential to a person's dignity and to the free development of her or his personality; the right to work; the right to protection against unemployment; the right to remuneration providing "an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection"; and the right to education.³⁵

The ICESCR elaborates and provides more detailed support for these rights. This document was adopted by the United Nations General Assembly in 1966 and ratified by Canada in 1976. It binds all governments in Canada. The preamble emphasizes the equal significance, interdependence, and indivisibility of all human rights, noting that the conditions necessary for the enjoyment of civil and political rights are provided by social and economic protections.³⁶ The Covenant goes on to guarantee such things as the right to work, the right to just and favourable conditions of work and to decent wages, the right to social security, the right to health, the right to education, the right to an adequate standard of living and the right to continuous improvement of living conditions.³⁷

This larger context of international human rights forms a salient piece of the background conditions to both the adoption of the text of section 7 and courts' subsequent interpretation of that text.

IV. THE RIGHTS

Three distinct sets of interests are protected by section 7: life, liberty and security of the person. From the early days of the Charter, the Supreme Court has called for a purposive approach to interpretation of the rights the document contains. This means that interpretation of each right is to be informed by the general purposes of that specific rights protection and, in turn, to be consistent with the larger purposes that animate the Charter as a whole. The Court has said that interpretation is to be generous and liberal — that is, a rights enhancing approach.³⁸ In an early section 7 case, Lamer C.J.C. stated that the interpretation of section 7 should reflect the metaphor of the "newly planted 'living tree' which is

³⁵ UDHR, arts. 22, 23, 26.

³⁶ ICESCR, *supra*, note 33, at preamble.

³⁷ *Id.*, at arts. 6, 7, 9, 11, 12, 13.

³⁸ See, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

the *Charter*”,³⁹ leading the Court to commit, at least rhetorically, to an expansive and evolving strategy for this section.⁴⁰ However, the Court has also said that, to trigger the protections, the effects on the interests under section 7 must be more than trivial: they “must be serious”.⁴¹

Another interpretive lens is added by section 15 of the Charter, the provision that provides for the right to equality and to protection against discrimination. In the first equality case to reach the Court, *Andrews v. Law Society of British Columbia*, McIntyre J. wrote: “The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.”⁴²

Justice L’Heureux-Dubé stated on a number of occasions that sections 7 and 15 are mutually reinforcing and that, in particular, section 7 analysis should be informed by section 15 concerns.⁴³ In *G. (J.)*, L’Heureux-Dubé J. underscored the importance of equality interests to shaping section 7 issues that disproportionately affect poor women and members of racialized and other disadvantaged groups. She explained:

... in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the realities and needs of all members of society.⁴⁴

Thus, section 15 equality interests may predictably be employed in construing section 7 obligations more broadly to demand state response to the material and social needs of marginalized individuals in Canadian society. Attention to equality as a central and pervasive constitutional

³⁹ *Motor Vehicle Reference*, *supra*, note 12, at 554, *per* Lamer J.

⁴⁰ Lessard, *supra*, note 12, at 221.

⁴¹ *Chaoulli*, *supra*, note 13, at para. 123; *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 56, 173 (S.C.C.) [hereinafter “*Morgentaler*”]; *Blencoe*, *supra*, note 4; *G. (J.)*, *supra*, note 2, at para. 60.

⁴² *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 185 (S.C.C.), *per* McIntyre J.

⁴³ See, for example, *Gosselin*, *supra*, note 5, *per* L’Heureux-Dubé J., in dissent.

⁴⁴ *G. (J.)*, *supra*, note 2, at para. 115.

value arguably ought to render section 7 more responsive to the fundamental inequalities of material well-being.⁴⁵

To summarize, section 7 establishes state obligations in relation to the “fairness and procedural propriety of individual interactions with the state”.⁴⁶ The scope of such obligations is, however, a much more detailed conversation. The Court has acknowledged that “the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning”.⁴⁷ How these concepts function in the context of section 7 and as devices of judicial review is a more particular question. What follows provides a separate, brief overview of each of the three rights, followed by a more general discussion of some of the areas in which current efforts to expand section 7 rights are ongoing. Thus, in the latter set of discussions, the notions of rights to, for example, health, privacy, welfare, housing, as they might be caught within the scope of section 7 rights to life, liberty and the security of the person, are elaborated separately.

1. Life

Examination of the narrower sense of this right in the criminal and penal justice context is provided by the previous chapter on section 7 in this collection. In this chapter, it is key to note how this particular right has more extensive consequence outside the criminal and penal context. The right to life has been argued to cover “the basic struggle for existence”,⁴⁸ and more specifically, to guarantee the necessities of life. As evidence of this, Taylor J. of the British Columbia Supreme Court in *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)* stated:

I conclude that the ability to provide for one’s self (and at the same time deliver the “message”) is an interest that falls within the ambit of the s. 7 provision of the necessity of life. Without the ability to provide

⁴⁵ For an extension of this argument in relation to equality as a fundamental constitutional principle, see Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dal. L.J. 5.

⁴⁶ Lessard, *supra*, note 12, at 216.

⁴⁷ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 205 (S.C.C.).

⁴⁸ Jackman, 1988, *supra*, note 9, at 326.

for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless.⁴⁹

Thus, in substance, there is significant judicial recognition of the observation that, absent the basic means of subsistence (such as food, housing, clothing, health care and some income), the more formal rights the Charter embraces are of little value.⁵⁰

2. Liberty

The majority of cases brought in relation to the right to liberty under section 7 have involved challenges to criminal or penal provisions where a relatively uncontroversial sense of liberty is engaged: freedom from state imposed detention or incarceration.⁵¹ This range of protections accords well with “[c]lassical liberalism’s binary account of politics as a context between the freedom-seeking individual and the potentially repressive state”.⁵² These cases will, then, entail more significant discussion around the requirements of fundamental justice, as the sense of liberty employed is a traditional and uncontroversial one. A court’s analysis will move quickly to the second part of the section 7 inquiry.

There are, however, broader notions of the liberty interest that are relevant to another growing group of constitutional challenges. In *Morgentaler*, Wilson J., in her concurring judgment, crafted a more substantive notion of liberty as it is protected by the Charter. Similarly, as constitutional scholar Hester Lessard observes,⁵³ Wilson J., this time in dissent, did so in *R. v. Jones*.⁵⁴ Justice Wilson stated that:

the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day’s parlance, “his own person” and

⁴⁹ *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493, 40 Admin. L.R. (3d) 159, at paras. 201-202 (B.C.S.C.).

⁵⁰ See e.g., Jackman, 2004, *supra*, note 7, at 236; Jackman, 1988, *supra*, note 9, at 326.

⁵¹ Lessard, *supra*, note 12, at 216.

⁵² *Id.*, at 223.

⁵³ *Id.*, at 225.

⁵⁴ [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.), *per* Wilson J., in dissent [hereinafter “*Jones*”].

accountable as such. John Stuart Mill described it as “pursuing our own good in our own way.”⁵⁵

It is a conceptualization of liberty, Lessard goes on to argue, which rests on the idea of “self-ownership and self-realization”.⁵⁶ Similarly, Bastarache J., author of the majority reasons in *Blencoe*, argued that section 7 liberty entails more than “mere freedom from physical restraint,” protecting “decisions of fundamental importance”.⁵⁷ (Although, in *Blencoe*, the claim was held not to trigger liberty interests as protected by section 7.) The same extension is echoed by La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*: “liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance”.⁵⁸

It is not necessary to show that the underlying condition that prompts such a fundamental and personal decision or choice need be of the claimant's own making. In *Adams*, it was recognized that homelessness had a range of causes — both systemic and individual. But the Court held that responses to the condition of homelessness were themselves intimate and necessary decisions protected by the right to liberty, despite the fact that homelessness was not itself necessarily the result of personal choice.

Similarly, the fact that homelessness is not a choice does not mean that a homeless person's decision to provide him or herself with some form of shelter is not protected under s. 7. Treatment is as much a “necessary response” to illness as sheltering oneself is to the state of being homeless. The fact that a claimant has not chosen their underlying situation does not mean that a decision taken in response to it is not protected by the s. 7 liberty interest.⁵⁹

Of course,

liberty does not mean unconstrained freedom Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on

⁵⁵ *Id.*, at 318-19.

⁵⁶ Lessard, *supra*, note 12, at 227.

⁵⁷ *Blencoe*, *supra*, note 4, at para. 49.

⁵⁸ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] S.C.R. 315, at para. 80 (S.C.C.) [hereinafter “*Children's Aid Society*”].

⁵⁹ *Adams* (BCCA), *supra*, note 14, at para. 107.

individual behaviour, and not all limitations will attract *Charter* scrutiny.⁶⁰

The notion of liberty as protected by section 7 is not without limits — it is not equivalent to licence — and operates under constraints necessitated by collective values and the common good. Nonetheless, the concept permits a more substantial entitlement than is traditionally assigned to it.

3. Security of the Person

Security of the person has been held by the Supreme Court to have both physical and psychological dimensions. Justice Sopinka wrote in *Rodriguez v. British Columbia (Attorney General)* that:

... personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.⁶¹

Similarly, but at more length and specific to psychological harm, Lamer C.J.C. in *G. (J.)* stated that:

For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.⁶²

Thus, security of the person extends beyond mere physical security from arbitrary state action. The kind of psychological harm a court may recognize as sufficiently serious (greater than ordinary stress or anxiety) can flow from a variety of state-caused consequences. For example, the Supreme Court found that government's failure to ensure that the Appellant in *G. (J.)* had legal representation in a process that could have resulted in loss of custody of her children imposed serious psychological stress, stigmatization, loss of privacy and disruption of family life that

⁶⁰ *Children's Aid Society*, *supra*, note 58, at 368-69, *per* La Forest J.

⁶¹ *Rodriguez*, *supra*, note 11, at para. 136, *per* Sopinka J.

⁶² *G. (J.)*, *supra*, note 2, at para. 60, *per* Lamer C.J.C.

interfered with her security of the person.⁶³ In *Wareham v. Ontario (Ministry of Community and Social Services)*, the Ontario Court of Appeal held that:

There is a potential argument to be made that a delay in processing applications for welfare benefits, essential for day-to-day existence and to which the applicants are statutorily entitled, could engage the right to security of the person where that delay has caused serious physical or psychological harm.⁶⁴

The applicants were granted the opportunity to amend their pleadings to include a claim for breaches of section 7 based on the government's failure to observe procedural requirements of fundamental justice in the context of this administrative delay.⁶⁵

It has been argued that the right to security of the person should be interpreted broadly enough to protect "all aspects of human personhood".⁶⁶ Prior to adoption of the Charter in 1982, the now defunct Law Reform Commission of Canada argued for the following definition of security of the person: "the right to security of the person means not only protection of one's physical integrity but the provision of necessities for its support".⁶⁷ Such an understanding is the one Abella J. used in her dissenting judgment in *Gosselin* to construct her argument that the right to security of the person in section 7 imposes an obligation on the state to provide a minimum level of social assistance.⁶⁸

4. Property and Economic Interests

No right to property, or to the enjoyment of property, joins the list of protected interests in section 7. This was a controversial decision by the drafters of the Charter and, historical evidence shows us, a deliberate omission.⁶⁹ In then Dickson C.J.C.'s judgment in *Irwin Toy Ltd. v. Quebec*

⁶³ *Id.*, at paras. 5, 61, 97.

⁶⁴ *Wareham v. Ontario (Minister of Community and Social Services)*, [2008] O.J. No. 4598, 93 O.R. (3d) 27, at para. 17 (Ont. C.A.).

⁶⁵ *Id.*, at para. 34.

⁶⁶ Jackman, 1988, *supra*, note 9, at 267.

⁶⁷ Law Reform Commission of Canada, "Medical Treatment and the Criminal Law" (Working Paper 26) (Ottawa: Law Reform Commission of Canada, 1980), at 6.

⁶⁸ *Gosselin*, *supra*, note 5, at para. 377, *per* Abella J., in dissent.

⁶⁹ Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2:1 ICON 17 [hereinafter "Choudhry"]; Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993) 19 Queens L.J. 64 [hereinafter "Jackman, 1993"].

(*Attorney General*),⁷⁰ two consequences are attributed to leaving the right to property out of section 7. First, Dickson C.J.C. argues that its replacement by the phrase “security of the person” means that the inference that economic rights, as generally encompassed by the term “property”, lie outside the section 7 guarantee:

The intentional exclusion of property from s. 7, and the substitution thereof of “security of the person” has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee.⁷¹

But Dickson C.J.C. follows this statement with the elaboration that: “This is not to declare, however, that no right with an economic component can fall within ‘security of the person.’”⁷² Justice Arbour, in her dissenting judgment in *Gosselin*, explains: “On its face, [Chief Justice Dickson’s] statement purports to rule out of s. 7 only those economic rights that are generally encompassed by the term ‘property.’”⁷³ Consequently, it is clear that then Dickson C.J.C.’s statement in *Irwin Toy* applies only to economic claims that invoke a right to property.⁷⁴ *Irwin Toy* involved a challenge to Quebec legislation limiting the method and means of advertisement aimed at children and, in this context, the Court was clear in distinguishing “corporate-commercial economic rights” from “economic rights fundamental to human life or survival”. Chief Justice Dickson thus noted that to exclude such things as rights to social security, equal pay, adequate food, clothing and shelter “at this early moment in the history of *Charter* interpretation seems to us to be precipitous”.⁷⁵ Echoing and expanding such sentiment is Arbour J.’s dissent in *Gosselin*,⁷⁶ where she wrote that the right to security of the person contained in section 7 places a positive obligation on government to provide those in need with a basic and adequate amount of social assistance.⁷⁷

⁷⁰ [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter “*Irwin Toy*”].

⁷¹ *Id.*, at para. 95.

⁷² *Id.*

⁷³ *Gosselin*, *supra*, note 5, at para. 311, *per* Abella J., in dissent.

⁷⁴ *Id.*, at para. 311, *per* Abella J.

⁷⁵ *Irwin Toy*, *supra*, note 70, at 1003-1004.

⁷⁶ *Gosselin*, *supra*, note 5.

⁷⁷ *Id.*, at para. 332, *per* Arbour J.

Thus, Dickson C.J.C.'s statement in *Irwin Toy* is, as Lorne Sossin notes,⁷⁸ oft repeated but of unclear actual import.

The second effect of the exclusion of property rights from the text of section 7 is that the section protects only the rights of human beings, not also corporations or other organizations. Chief Justice Dickson has stated that, read as a whole, section 7 confers protection "on a singularly human level".⁷⁹

In *Godbout v. Longueuil (City)*,⁸⁰ the Supreme Court considered a municipal resolution that all new permanent employees reside within the city's territorial limits. Justices La Forest, L'Heureux-Dubé and McLachlin (as she then was) held that this resolution violated section 7. The justices rejected the argument that the claimant had raised an economic interest beyond the scope of the Charter. Instead, they held that the right to choose the location of one's home fell within the scope of the liberty interest protected by section 7. Such a choice inhabits that sphere of personal autonomy where individuals are free to make inherently private choices:

Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.⁸¹

Thus, contrary to what many argue, the Supreme Court of Canada has not ruled out section 7 coverage of, at least, some significant economic interests.

Interestingly, at international human rights committees reviewing Canada's compliance under the United Nations ICESCR,⁸² the federal government has asserted that, "[w]hile the guarantee of security of the person under section 7 of the *Charter* might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of

⁷⁸ Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care: Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161, at 164 [hereinafter "Sossin, Flood & Kent"].

⁷⁹ *Irwin Toy*, *supra*, note 70, at 1004.

⁸⁰ [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.) [hereinafter "*Godbout*"].

⁸¹ *Id.*, at para. 66, *per* La Forest J.

⁸² ICESCR, *supra*, note 34.

the basic necessities of life”.⁸³ The B.C. Supreme Court made a similar admission in *Victoria (City) v. Adams* in relation to a right to an adequate income under section 7.⁸⁴

The insistence that the absence of a specific right to property in section 7 must mean that non-corporate economic interests are excluded denies evidence that omitting property rights from protection was, at least in part, due to concerns that protection of property rights might open the door to challenges to Canada’s social programs and to regulation of corporate interests.⁸⁵ There is an irony to reliance on the absence of property protections to rule out coverage of those economic interests central to individual welfare. Arguably, the protection of these very social welfare interests motivated the omission of property rights from the Charter text in the first place.

5. Right to an Adequate Standard of Living

*Gosselin v. Quebec*⁸⁶ dealt with section 7 and section 15 challenges to social assistance rates for individuals in the province of Quebec. The claim was unsuccessful on both counts. The majority judgment, written by McLachlin C.J.C., was quick in its dismissal of grounds under section 7 for this specified claim. Interestingly, however, as discussed later in this chapter, the majority judgment left open the possibility for future protection of the right to adequate level of income under the right to security of the person:

The question therefore is not whether s. 7 has ever been, or will ever be, recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.⁸⁷

Justice Arbour wrote a powerful dissent on the issue of section 7, arguing that the language and the structure of the Charter and of section 7

⁸³ *Summary Record of the Fifth Meeting*, UNCESCROR, 1993, U.N. Doc. E/C 12/1993/SR 5 at paras. 3, 21.

⁸⁴ *Victoria (City) v. Adams*, [2008] B.C.J. No. 1935, 299 D.L.R. (4th) 193, at para. 98 (B.C.S.C.) [hereinafter “*Adams* (BCSC)”]. See, *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, 1983, U.N. Doc. CCPR/C/1/Add 62, at 23.

⁸⁵ Choudhry, *supra*, note 69; Jackman, 1993, *supra*, note 69, at 76.

⁸⁶ *Gosselin*, *supra*, note 5.

⁸⁷ *Id.*, at para. 82.

“*compel*” imposition of a positive duty on the Canadian state to provide basic protection for life and security of the person.⁸⁸ More specifically, Arbour J. held that a section 7 right exists to a level of welfare sufficient to meet one’s basic needs.⁸⁹ This contention rests largely on the observation that income level is deeply connected to a person’s basic physical and psychological health, aspects central to security of the person.⁹⁰

The majority result in *Gosselin* has been viewed as a large disappointment for litigation strategies to confirm more positive and material entitlements under section 7.⁹¹ However, the ultimately open-ended conclusion of McLachlin C.J.C.’s decision on section 7 and the strong formulation by Abella J. of a substantive right to an income to meet one’s basic needs have resulted in the frequent reference to the case as portending better days for social justice arguments relying on section 7.

6. Shelter and Housing

In the *Adams* case, claimants made a variety of arguments about infringements of section 7. The one recognized at the level of the British Columbia Court of Appeal was that:

The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a temporary basis in areas where the City acknowledges that people can, and must, sleep. This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose significant and potentially severe health risks on one of the City’s most vulnerable and marginalized populations.⁹²

The trial judge in this case, Ross J., found that “the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision ‘life’”.⁹³ The Court of Appeal upheld that conclusion, holding that:

⁸⁸ *Id.*, at para. 309 (emphasis in original.)

⁸⁹ *Id.*, at para. 385.

⁹⁰ *Id.*, at para. 358.

⁹¹ For discussion of *Gosselin*, see Margot Young *et al.*, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007).

⁹² *Adams* (BCCA), *supra*, note 14, at para. 100.

⁹³ *Adams* (BCSC), *supra*, note 84, at para. 145.

We agree with the trial judge that prohibiting the homeless from taking simple measures to protect themselves through the creation or utilization of rudimentary forms of overhead protection, in circumstances where there is no practicable shelter alternative, is a significant interference with their dignity and independence. The choice to shelter oneself in this context is properly included in the right to liberty under s. 7.⁹⁴

Efforts continue to expand the relevance of section 7 to this category of material deprivations. In a current case originating out of Ontario, a group of claimants have alleged that the national and Ontario governments' failures to implement strategies to reduce and eliminate homelessness are in violation of the applicants' section 7 and section 15 rights.⁹⁵ Their argument is that the harms of homelessness — threats to life, health, physical and psychological security, personal inviolability and the integrity of the family — are core components of the section 7 rights.

7. Health

State action that is likely to impair an individual's health implicates both the right to security of the person and the right to life under section 7.⁹⁶ In the relatively recent decision in the *Insite* case,⁹⁷ the Court was clear that a law that creates a risk to health affects an individual's rights to life and to security of the person and that: "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer".⁹⁸ At the trial level in this case, Pitfield J. stated that: "a law that prevents access to health care services that can prevent death clearly engages the right to life".⁹⁹ The Supreme Court of Canada similarly held that the risk to health created by

⁹⁴ *Adams* (BCCA), *supra*, note 14, at para. 109.

⁹⁵ *Tanudjaja v. Canada (Attorney General) and Ontario (Attorney General)*, Notice of Application, CV-10-403688 (Ont. S.C.J.).

⁹⁶ *Rodriguez*, *supra*, note 11, at para. 136. See also the discussion in *Toussaint v. Canada (Attorney General)*, [2011] F.C.J. No. 984, [2013] 1 F.C.R. 374 (F.C.A.) [hereinafter "*Toussaint*"] where the Federal Court of Appeal, in finding against the claimant, implied that exposure to serious health risks was protected against under the rights to life and security of the person.

⁹⁷ *Insite*, *supra*, note 16, at para. 93.

⁹⁸ *Id.*, at para. 93.

⁹⁹ *PHS Community Services Society v. Canada (Attorney General)*, [2008] B.C.J. No. 951, 293 D.L.R. (4th) 392, at para. 142 (B.C.S.C.).

state prevention of access to health care deprives individuals of their rights to both life and security of the person.¹⁰⁰

This understanding of health rights encoded into section 7 rights had been previously confirmed by the Court's decision in *Chaoulli v. Quebec (Attorney General)*.¹⁰¹ In this case, a plurality of justices found that, although the legislation under challenge related to access to health care and health insurance and was thus outside the criminal law context, section 7 rights to life and security of the person were implicated.¹⁰² The risk to health resulted from state induced delay in access. The Province of Quebec's failure to ensure access to health care of a "reasonable" quality within a "reasonable" time was held to infringe both security of the person and life.¹⁰³ Reference was made to the finding by then Dickson C.J.C. in *R. v. Morgentaler* that delays in obtaining medical treatment which have physical and psychological effects on patients trigger section 7.¹⁰⁴ Even the judges in dissent, despite ultimately rejecting the section 7 claim on the basis that the limitation was in accordance with the principles of fundamental justice, were prepared to admit that the province's ban on private health care insurance could potentially put some persons' rights to life and security of the person in jeopardy.¹⁰⁵

Advocates and academics have argued for an expansion of section 7 interests — particularly security of the person interests under section 7 — to contemplate risks to health broadly understood. That is, it is argued

¹⁰⁰ "to prohibit possession at Insite engages their rights to life and to security of the person" (*Insite*, *supra*, note 16, at para. 92). To support the contention that a risk to health through state impediment of access to health involves the right to security of the person, McLachlin C.J.C. cites *Morgentaler*, *supra*, note 41, at 59, *per* Dickson C.J.C., and at 105-106, *per* Beetz J.; *Rodriguez*, *supra*, note 11, at 589, *per* Sopinka J.; *Chaoulli*, *supra*, note 13, at para. 43, *per* Deschamps J. and at paras. 118-119, *per* McLachlin C.J.C. and Major J.; *R. v. Parker*, [2000] O.J. No. 2787, 188 D.L.R. (4th) 385 (Ont. C.A.).

¹⁰¹ *Chaoulli*, *supra*, note 13. For a critical exposition of this decision, see Martha Jackman, "The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 *Osgoode Hall L.J.* 349.

¹⁰² *Chaoulli*, *supra*, note 13, *per* McLachlin C.J.C. and Major J.

¹⁰³ *Id.*, at para 105. For a range of consideration of this case, see Sossin, Roach & Flood, *supra*, note 78.

¹⁰⁴ *Morgentaler*, *supra*, note 41, *per* Dickson C.J.C., cited with approval in *Chaoulli*, *supra*, note 13, at para. 118, *per* McLachlin C.J.C. and Major J. Similarly, delays in receiving emergency health services were found by the Federal Court of Appeal in a different case to engage s. 7 rights to life and security of the person. However, the section was not triggered as the Court of Appeal found that the state had not been the cause of such delays and inadequate coverage. Rather, the claimant herself was at fault as an illegal immigrant (*Toussaint*, *supra*, note 96).

¹⁰⁵ *Chaoulli*, *supra*, note 13, at para. 200, *per* Binnie and Lebel JJ.

that the Court should understand section 7 rights as covering deprivations that have significant secondary health consequences. Thus, homelessness and food insecurity, given their implications for individual health, are argued to obligate government responses under section 7.

One caution is necessary. Chief Justice McLachlin stated in *Chaoulli* that: “The *Charter* does not confer a freestanding constitutional right to health care.”¹⁰⁶ This is not, however, a majority opinion and McLachlin C.J.C. follows this comment with her conclusion that the state’s foray into “a scheme to provide health care” instantiates Charter obligations, as noted above.¹⁰⁷

8. Privacy

In *R. v. Dymont*, La Forest J. observed that “privacy is at the heart of liberty in a modern state”.¹⁰⁸ Thus, the “privacy” aspect of section 7 protects “‘inherently private choices’ of fundamental personal importance”.¹⁰⁹ Section 7 accordingly fences off “an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference”.¹¹⁰ Included in the cluster of cases that invoke this interest are those that entail parental liberty rights. These are understood to be a protected part of this private sphere, as detailed below.

(a) Parental Rights

The Supreme Court has held that liberty interests under section 7 are engaged by a legal proceeding in which the state has put a parent’s access to her or his children at issue.¹¹¹ In *Children’s Aid Society*, a number of different pictures of liberty emerge from the range of judgments.¹¹² Chief Justice Lamer wrote that section 7 interests are limited primarily to protections against physical interference in context of administration of

¹⁰⁶ *Id.*, at para. 104, *per* McLachlin C.J.C.

¹⁰⁷ *Id.*, at para. 104, *per* McLachlin C.J.C.

¹⁰⁸ *R. v. Dymont*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 427 (S.C.C.).

¹⁰⁹ *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735, at para. 3 (S.C.C.), *per* Gonthier and Binnie JJ.

¹¹⁰ *Godbout*, *supra*, note 80, at 893, *per* La Forest J.

¹¹¹ *G. (J.)*, *supra*, note 2.

¹¹² Lessard, *supra*, note 12.

justice system.¹¹³ Three others — in a judgment written by Iacobucci and Major JJ. — extended the scope of section 7 to include parental liberty. This last judgment engages an idea of an “open-ended negative zone of freedom”.¹¹⁴ The judgment of La Forest J., representing a plurality of four, held that parental decision-making and other attributes of custody are protected under the liberty interest. He wrote:

On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in *R. v Big M Drug Mart Ltd.*, *supra*, the *Charter* was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.¹¹⁵

Similarly, in the case of *G. (J.)*, mentioned above, an “indigent” claimant was granted the constitutional right to be provided with state-funded counsel in the context of a child custody hearing.¹¹⁶ Thus, parental custody interests have been held to be protected by section 7, in particular under the right to security of the person. Justice L’Heureux-Dubé, in a concurring judgment in *G. (J.)*, stated that:

... the importance of one’s identity as a parent, and the serious stigma and psychological stress that will occur if the child is removed from the home because of the removal of the parent’s power to care for him or her mean that the parent’s security of the person will be violated if the child is removed from the home.¹¹⁷

In *Winnipeg Child and Family Services v. W. (K.L.)*, the ambit of the right to security of the person was extended to cover state action resulting in the apprehension of the claimant’s baby.¹¹⁸

¹¹³ *Children’s Aid Society*, *supra*, note 58, at para. 115.

¹¹⁴ Lessard, *supra*, note 12, at 248.

¹¹⁵ *Children’s Aid Society*, *supra*, note 58, at 370, *per* La Forest J.

¹¹⁶ *G. (J.)*, *supra*, note 2.

¹¹⁷ *Id.*, at para. 116, *per* L’Heureux-Dubé J.

¹¹⁸ *W. (K.L.)*, *supra*, note 14.

9. Immigration

Certain immigration proceedings have been ruled to implicate the section 7 liberty right. Those in which an individual faces risk of deportation and consequent possible torture are caught by section 7,¹¹⁹ as are extradition proceedings¹²⁰ and refugee determination hearings.¹²¹

V. ENVIRONMENT

There is a growing literature on the use of section 7 in the context of environmental concerns.¹²² This focus promises (or at least attempts) to expand section 7 rights considerably. There are two obvious possible mechanisms for protecting environmental rights in a document like the Charter: establishment of a free-standing right to, say, environmental quality or formal recognition through judicial interpretation of environmental interests implicit within already established Charter rights.¹²³ The latter option requires the recognition that adverse environmental conditions imperil the rights already recognized in the Charter. This has been described as an “ecological literature approach to ... [existing] human rights instruments”.¹²⁴

Section 7 is an obvious choice for anchoring environmental claims of this second sort: the question is simply whether or not the rights protected under section 7 have ecological dimensions. For example, the right to life is argued to entail state obligations to protect individuals

¹¹⁹ *Suresh*, *supra*, note 17.

¹²⁰ *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.) [hereinafter “*Schmidt*”]; *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.) [hereinafter “*Kindler*”]; *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter “*Burns*”].

¹²¹ Philip Bryden, “Section 7 of the *Charter* Outside the Criminal Context” (2005) 38:2 U.B.C. L. Rev. 507, at 513 [hereinafter “*Bryden*”].

¹²² Nickie Vlavianos, “The Applicability of Section 7 of the *Charter* to Oil and Gas Development in Alberta” (2008) 13:3 *Constit. Forum*. 123.

¹²³ Nickie Vlavianos, “Intersection of Human Rights & Environmental Law” (Paper delivered at *A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage*, University of Calgary, 2012), online: Canadian Institute of Resources Law <http://www.cirl.ca/system/files/Nickie_Vlavianos-EN.pdf> [hereinafter “*Vlavianos*, 2012”]. See also David Boyd, *The Right to a Healthy Environment* (Vancouver: University of British Columbia Press, 2012); David R. Boyd, “No Taps, No Toilets: First Nations And The Constitutional Right To Water In Canada” (2011) 57:1 *McGill L.J.* 81 [hereinafter “*Boyd*, 2011”].

¹²⁴ Lynda M. Collins, “An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*” (2009) 26 *Windsor Rev. Legal & Social Issues* 7, at 17.

from environmental threats to survival or quality of life. With regard to the right to security of the person, Linda Collins argues that it is “well established that persons exposed to known environmental risks frequently experience substantial psychological effects, including anxiety sometimes rising to the level of a phobia”.¹²⁵

These arguments are not novel. Several cases that have environmental aspects have already been argued under the Charter’s section 7, although all have been dismissed on other grounds.¹²⁶ At the international level, the Human Rights Committee of the United Nations has noted, in the context of a challenge coming out of Canada, that the storage of radioactive waste near homes raised “serious issues” with respect to the right to life.¹²⁷ The Committee went on to recommend that the plaintiffs pursue a section 7 argument in Canadian courts. But, as of yet, no Canadian court has ruled that section 7 rights do in fact protect against actual or potential environmental harms.¹²⁸

Rarely have public health issues emerged as part of a Charter challenge. Nonetheless, increasingly commentators note the clear connection between the rights protected under section 7 and environmental public health threats. Environment rights, thus framed, are an offshoot of cases regarding health concerns: they call for an expansion of the idea that section 7 protects against “unreasonable risks or impacts to human health” to contemplate of the public health hazards of environmental degradation.¹²⁹ The notion of “public health hazard” refers

¹²⁵ *Id.*, at 25.

¹²⁶ *Metropolitan Authority v. Coalition of Citizens for a Charter Challenge*, [1993] N.S.J. No. 404, 125 N.S.R. (2d) 241 (N.S.C.A.), leave to appeal refused [1993] S.C.C.A. No. 543, [1994] 1 S.C.R. vi (S.C.C.) (alleged violation of s. 7 based on health consequences of the operation of a waste incinerator); *Manicom v. Oxford (County)*, [1985] O.J. No. 2635, 52 O.R. (2d) 137 (Ont. Div. Ct.) (alleged s. 7 violation flowing from location of a landfill near plaintiffs’ homes); *Energy Probe v. Canada (Attorney General)*, [1989] O.J. No. 537, 68 O.R. (2d) 449 (Ont. C.A.) (alleged violation of s. 7 resulting from liability limitation of nuclear power generation); *Locke v. Calgary*, [1993] A.J. No. 926, 15 Alta. L.R. 70 (Alta. Q.B.); *Millership v. Kamloops (City)*, [2003] B.C.J. No. 109, 2003 BCSC 82 (B.C.S.C.); *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016, 350 D.L.R. (4th) 720 (Ont. Div. Ct.); *Domke v. Alberta (Energy Resources Conservation Board)*, [2008] A.J. No. 650, 432 A.R. 376 (Alta. C.A.); *Kelly v. Alberta (Energy and Utilities Board)*, [2008] A.J. No. 127, 167 C.R.R. (2d) 14 (Alta. C.A.) [hereinafter “*Kelly*”].

¹²⁷ *EHP v. Canada*, Communication No. 67/1980, 2 Selected Decisions of the Human Rights Committee (1990), U.N. Doc. CCPR/C/OP/2, (1984), 8.

¹²⁸ The *Kelly* case, for example, resulted in a holding by Berger J.A. of the Alberta Court of Appeal that the applicant’s s. 7 arguments about procedures granting approval to sour oil well drilling could, at least arguably, raise a valid s. 7 argument. *Kelly*, *supra*, note 126, at para. 2.

¹²⁹ Vlavianos, 2012, *supra*, note 123, at 8; *Chaoulli*, *supra*, note 13.

to harm that occurs across a large population, with diffuse and diverse causes, and clarity with respect to only certain health outcomes.¹³⁰ Typically, these cases do not involve the rights of a specific individual but rather refer to a larger number of, not identifiable, often future, individuals.

VI. PRINCIPLES OF FUNDAMENTAL JUSTICE

Section 7 requires that any deprivation of the rights to life, liberty, and security of the person must be in accordance with the principles of fundamental justice. The phrase is “extraordinarily open-ended and admits of many possible interpretations”.¹³¹ While the term “fundamental justice” has some appearance in earlier statute and case law,¹³² its reference has challenged the court to think beyond traditional notions of natural justice and due process.¹³³ As already mentioned, the Supreme Court indicated early on in its section 7 jurisprudence that the principles of fundamental justice are to be given a meaning that is consistent with the three core rights elaborated in the section. It is asserted that the phrase “fundamental justice” was chosen over “due process of law” in response to concerns about how the latter phrase has figured in American jurisprudence as a means of propertied interests challenging state regulation of private property. More evocatively, the Court early on stated that these principles were “essential elements of a system for administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law”.¹³⁴

The Court has also counselled a generous reading of the phrase. A majority of the Court asserted that: “The narrower meaning given ... the greater will be the possibility that individuals may be deprived of these most basic rights.”¹³⁵ Yet, in *Rodriguez*, Sopinka J. cautioned that:

Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers

¹³⁰ Andrew Gage, “Public Health Hazards and Section 7 of the *Charter*” (2003) 13 J.E.L.P. 1, at 1.

¹³¹ Stewart, *supra*, note 6, at 97.

¹³² *Canadian Bill of Rights*, S.C. 1960, c. 44.

¹³³ Choudhry, *supra*, note 69, at 17-24.

¹³⁴ *Motor Vehicle Reference*, *supra*, note 12, at 512. Interestingly, the Court has not held that the notion of respect for human dignity itself constitutes a principle of fundamental justice.

¹³⁵ *Id.*, at 548, *per* Lamer J.

to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.¹³⁶

Philip Bryden has argued, albeit in the context of asserting a narrow reading of the rights under section 7, that the principles of fundamental justice “represent the real teeth of s. 7”.¹³⁷

Importantly, the Court has indicated that it will not be strictly guided by the drafting intentions of the framers of the text that became section 7. In one of its first decisions under the Charter, and the first opinion that issued from the Court on section 7, the Court held the purposive approach adopted to interpret the Charter demanded a reading of the phrase “principles of fundamental justice” that was both substantive and procedural.¹³⁸ As Hester Lessard argues, “this latter directive appears to contemplate judicial scrutiny of governmental objectives as well as of governmental means for accomplishing those objectives, thereby significantly enlarging the scope of constitutional review”.¹³⁹ Another scholar, Hamish Stewart, agrees, arguing that by expanding the principles to include both procedural and substantive concerns, the Court has ensured that “a wide range of laws would be scrutinized under section 7”.¹⁴⁰

The principles of fundamental justice are to reflect the “basic tenets of the legal system”.¹⁴¹ Justice Sopinka spoke of fundamental justice as comprised of principles “upon which there is some consensus that they are vital or fundamental to our societal notion of justice”.¹⁴² They are fundamental in that “they have general acceptance among reasonable people”.¹⁴³ Chief Justice Lamer wrote that the phrase fundamental justice “represent[s] principles which have been recognized ... as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law”.¹⁴⁴ The principles of fundamental justice are informed by Canadian experience and jurisprudence, taking into account the various

¹³⁶ *Rodriguez, supra*, note 11, at 590-91, *per* Sopinka J.

¹³⁷ Bryden, *supra*, note 121, at 530.

¹³⁸ *Motor Vehicle Reference, supra*, note 12, at 546, *per* Lamer J.

¹³⁹ Lessard, *supra*, note 12, at 220.

¹⁴⁰ Stewart, *supra*, note 6, at 101.

¹⁴¹ *Suresh, supra*, note 17, at para. 45.

¹⁴² *Rodriguez, supra*, note 11, at 590-91.

¹⁴³ *Chaoulli, supra*, note 13, at para. 127, *per* McLachlin C.J.C.

¹⁴⁴ *Motor Vehicle Reference, supra*, note 12, at para. 30.

sources of international human rights law by which Canada is bound. They must also be sufficiently precise in order to serve as appropriate benchmarks against which to assess deprivations of the rights under section 7. To summarize, the principles of fundamental justice are understood as reflecting three criteria: that they be legal principles; that they reflect significant societal consensus that they are fundamental to how the legal system ought fairly to operate; and that they generate a manageable standard of measurement.¹⁴⁵

Articulation of the principles of fundamental justice has required the Court to weigh the right at issue against the state interests at play in the infringement. Some lack of clarity has characterized the Court's treatment of the relevance of societal interests to a section 7 analysis. In *Cunningham v. Canada*, McLachlin J., as she then was, stated that the principles of fundamental justice required that the balance struck between the interests of the individual and those of society be fair: "Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."¹⁴⁶ The Court in *Malmo-Levine* changed course from this, arguing that the proper balancing of the interests at play is neither a specific step in a section 7 analysis nor "an overarching principle of justice" on its own.¹⁴⁷ Subsequently, however, this statement has been modified by the Court and it is now clear that, in relation to at least some of the principles of fundamental justice, societal interests will be considered in assessment of the government objective.¹⁴⁸

It is worth noting that, in considering whether or not a particular rights infringement falls afoul of any of the principles of fundamental justice, the Court will likely look to the entire statutory context in which that particular provision is placed. Thus, in the *Insite* decision, the Court situated the impugned provision in reference to another section of the same statute and held that that other provision, allowance for ministerial exemptions, acted as "a safety valve", preventing the impugned sections

¹⁴⁵ *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at 634 (S.C.C.) [hereinafter "*Malmo-Levine*"; *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3, at para. 46 (S.C.C.).

¹⁴⁶ *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143, at 151-52 (S.C.C.).

¹⁴⁷ *Malmo-Levine*, *supra*, note 145, at para. 96. Hamish Stewart notes that cases that review discretionary decision-making by government actors may be an exemption to this understanding (Stewart, *supra*, note 6, at 113-14). Thus, the Court said in *Suresh*, a case that reviewed a deportation order, that: "The approach is essentially one of balancing" (*supra*, note 17, at para. 45).

¹⁴⁸ *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489 (S.C.C.); *Chaoulli*, *supra*, note 13; *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 (S.C.C.); *Insite*, *supra*, note 16.

from applications that would be arbitrary, overbroad, or grossly disproportionate in effects.¹⁴⁹

The following discussion sets out the principles of fundamental justice most often at play and of relevance in cases outside of the criminal law context.¹⁵⁰ Importantly, the Court has never backtracked upon recognition of a particular principle of fundamental justice. Thus, judicial articulation of a normative commitment as a principle of fundamental justice is a “powerful” enrichment of constitutional protections.¹⁵¹ The discussion provides a simple overview of each of the following: vagueness, arbitrariness, overbreadth, disproportionality, “shock the conscience”, infringement of another Charter right and fair proceedings.

1. Vagueness

The notion that a law must not be overly vague is an important principle of fundamental justice. The principle connects to significant values central to the rule of law. In order for citizens to be able to obey laws, they must know, with some degree of certainty, what those laws command, forbid, provide or encourage. Individuals must be given fair notice about the requirements imposed by law. Moreover, a requirement of precision in law ensures that laws give explicit standards for those who enforce them. Thus, arbitrary and discriminatory application of the law is less likely.¹⁵²

However, this concern, somewhat ironically, is rarely invoked to render laws unconstitutional. In large part, such infrequency of use is due to the degree of latitude the Court has granted itself in interpreting legislation. The Court is inclined to hold that judicial statements or interpretation of legislative provisions do not trigger vagueness concerns. Where the text or its interpretation by the judiciary has raised concerns, the Court tends to address those concerns as an exercise in statutory

¹⁴⁹ *Insite, id.*, at para. 113.

¹⁵⁰ As the Court has held that both substantive and procedural principles are invoked by the notion of fundamental justice in s. 7, division according to these categories is not useful. Moreover, to do so lends more conceptual credence to the division than it warrants.

¹⁵¹ Stewart, *supra*, note 6, at 102.

¹⁵² *Reference re ss. 193 and 195 1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, *per* Lamer J. (S.C.C.).

interpretation prior to commencing on the constitutional analysis, thus “short sheeting” any inquiry into unconstitutional vagueness.¹⁵³

Vagueness as a Charter concern gets its fullest treatment in *R. v. Nova Scotia Pharmaceutical Society*,¹⁵⁴ a case dealing with a section 7 challenge to the federal *Competition Act*. The Court acknowledged the inevitability of some degree of uncertainty in interpretation: “Language is not the exact tool some may think it is.”¹⁵⁵ As Gonthier J. pointed out:

... conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.¹⁵⁶

The threshold of precision that a law must pass is not high. A law must set an intelligible standard and give fair notice of its contents to citizens. Thus, a law is unconstitutionally vague under section 7 if it “does not provide an adequate basis for legal debate” and “for reasoned analysis applying legal rules”.¹⁵⁷ A law must provide a “grasp to the judiciary”.¹⁵⁸

2. Arbitrariness

A core feature of the principles of fundamental justice is the idea that governments must not arbitrarily limit rights. This concern flows, as well, from ideas associated with the rule of law — that authority be exercised in a manner that is reasonable and fair. Arbitrariness speaks to the relationship between the state’s interest underlying the impugned state action and the action itself. Thus, as an initial inquiry, the state’s objectives or purposes must be established. The second step involves assessing the relationship between these objectives and the state action that has

¹⁵³ See e.g., *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

¹⁵⁴ [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.). The Court in this judgment notes that the concern of vagueness figures in three distinct parts of the Charter: as a concern of fundamental justice in s. 7; a problem under the requirement in s. 1 that an infringement be “prescribed by law”; and, a feature of the question of minimal impairment also part of s. 1.

¹⁵⁵ *Id.*, at 639.

¹⁵⁶ *Id.*, at 638-39.

¹⁵⁷ *Id.*, at 639-40.

¹⁵⁸ *Id.*, at 640.

infringed some section 7 right. Chief Justice McLachlin and Major J. thus stated in *Chaoulli* that

The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.¹⁵⁹

There is conflicting judicial opinion on what the character of that relationship must be for the state action at issue to not be arbitrary. In *Chaoulli*, three justices held that the required relationship is one of necessity — in that case, that the limit on accessing private health insurance be necessary to the state objectives underlying the law restricting such access.¹⁶⁰ Chief Justice McLachlin and Major J. in this judgment stated that there must be “a real connection on the facts to the purpose the interference is said to serve”.¹⁶¹ Three other justices, in the dissenting opinion, argued that arbitrariness exists where “a deprivation of a right ... bears no relation to, or is inconsistent with, the state interest” in the impugned state action or law.¹⁶² The question of which alternative is the correct test — the more exacting standard of “necessity to” or the more deferential test of “consistency with” — remains an open one. In the recent *Insite* case, the Court held that the Minister of Health's decision to refuse an exemption from narcotics legislation for Vancouver's supervised safe injection site was arbitrary. It was this because the decision “undermined the very purposes of the CDSA which include public health and safety”.¹⁶³ Such a conclusion did not require the Court to choose explicitly between the two options in contention in *Chaoulli*. However, constitutional scholar Hamish Stewart argues that the kind of detailed examination deployed by the Court of the rationality of the state's action in *Insite* leans in the direction of the test articulated by

¹⁵⁹ *Chaoulli*, *supra*, note 13, at para. 131.

¹⁶⁰ *Id.*, at paras. 131-132, *per* McLachlin C.J.C. and Major J.

¹⁶¹ *Id.*, at para. 134, *per* McLachlin C.J.C. and Major J.

¹⁶² *Chaoulli*, *supra*, note 13, at para. 232, *per* Binnie and LeBel JJ., in dissent. This is the older of the two options. For example, in *Rodriguez* it was asserted that “[a] particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation” (*supra*, note 11, at para. 203).

¹⁶³ *Insite*, *supra*, note 16, at para. 131.

McLachlin C.J.C. in *Chaoulli*.¹⁶⁴ This more conservative test of arbitrariness was also the holding of the majority in the earlier case *Rodriguez*.¹⁶⁵

It is an ongoing question of whether or not failure to take action or adopt positive measures pursuant to one of the rights contained in section 7 can be considered arbitrary. Commentators have argued that treatment of arbitrariness as a principle of fundamental justice in the *Insite* decision makes the governments' current failures to adopt reasonable strategies to respond to the crisis of homelessness and poverty in Canada out of step with the principles of fundamental justice. For example, Martha Jackman and Bruce Porter argue that:

Empirical evidence is mounting as to the irrationality and arbitrariness of governments' inaction in this area, in light of the health outcomes associated with homelessness and poverty, as well as its fiscal consequences. It is therefore increasingly difficult to sustain the position that governments' failure to adopt reasonable strategies to respond to the crisis of homelessness and poverty in Canada is in accordance with section 7 principles of fundamental justice.¹⁶⁶

One can anticipate more arguments of this ilk coming before the courts.

3. Gross Disproportionality

This principle of fundamental justice describes state actions or legislation that respond to a problem in a manner that is so extreme as to be grossly disproportionate to any legitimate government objective that may underlie such action.¹⁶⁷ The standard set is significant: the relationship between the nature of the infringement and the importance of the government objective must be grossly disproportionate rather than merely disproportionate. In *Insite*, legislation that imperilled the life and health of the vulnerable population at issue was held to be grossly disproportionate to the benefits associated with the government objective of national uniformity on the possession of narcotics.¹⁶⁸

¹⁶⁴ Stewart, *supra*, note 6, at 148.

¹⁶⁵ Rodriguez, *supra*, note 11, at 594-95.

¹⁶⁶ Jackman & Porter, 2012, *supra*, note 7.

¹⁶⁷ Suresh, *supra*, note 17, at para. 47; Malmo-Levine, *supra*, note 145, at para. 143; *Insite*, *supra*, note 16, at para. 133.

¹⁶⁸ *Insite*, *id.*, at para. 133.

4. Overbreadth

The notion of overbreadth now has clear standing as an independent principle of fundamental justice under section 7.¹⁶⁹ This is despite the fact that its relationship to the principles against vague and arbitrary law is less than straightforward. For example, overbreadth as a principle of fundamental justice shares similarities with vagueness: both target laws that potentially overreach government objectives informing the laws, but for different reasons. However, overbreadth concerns are identified distinctly as catching situations when the state action infringes a section 7 right and can be understood as doing so “beyond what is needed to accomplish the governmental objective”.¹⁷⁰ Laws that breach a right under section 7, thus, must be no more infringing than necessary to achieve the state objective at stake. In *Carter v. Canada (Attorney General)*, Smith J. of the British Columbia Supreme Court wrote that to successfully make an argument of overbreadth, the claimant has “the burden to show that the absolute prohibition (the means chosen) is not the least restrictive of their interests in life, liberty and security of the person and is not necessary to achieve the state’s objective”.¹⁷¹ The effect of overbreadth is that “in some applications the law is arbitrary or is disproportionate”.¹⁷² In *Adams*, a by-law that prohibited the erection of overhead shelter in public places was held to be overbroad: alternatives less restrictive of the section 7 rights of the homeless unable to locate temporary shelter were available to advance the City’s objective of preservation of public parks.¹⁷³

5. “Shock the Conscience”

A line of cases, mostly to do with extradition, deportation, torture, or some extreme form of punishment, have established that deprivations of section 7 rights that would “shock the conscience” of Canadians are in

¹⁶⁹ *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) [hereinafter “*Heywood*”].

¹⁷⁰ *Id.*, at 794.

¹⁷¹ *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 287 C.C.C. (3d) 1, at para. 1361 (B.C.S.C.).

¹⁷² *Heywood*, *supra*, note 169, at 793.

¹⁷³ *Adams* (BCCA), *supra*, note 14, at para. 116.

violation of the principles of fundamental justice.¹⁷⁴ Thus in *Canada v. Schmidt*, the Court stated that: “the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7”.¹⁷⁵ The test for such a violation of these principles asks whether or not the state conduct at issue is “fundamentally unacceptable to our notions of fair practice and justice”.¹⁷⁶

I mention this particular principle of fundamental justice to foreground the possibility that similar arguments about fundamental justice may emerge in relation to challenges to state failure to address extreme poverty or homelessness. The consequences of such material deprivation may be argued to be contrary to notions of fairness and justice. In an analogous manner, for example, David Boyd, an environmental law scholar, has argued that government failure to ensure access to safe drinking water and indoor plumbing for some First Nations communities raises this concern of fundamental justice.¹⁷⁷

6. Infringement of Another Charter Right

An infringement of a section 7 right that is also a breach of another right protected elsewhere in the Charter may fail to be found fundamentally just. Justice Wilson in the *Morgentaler* decision wrote that “a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice”.¹⁷⁸ This principle reflects a larger judicial philosophy about the Charter and its internal integrity and coherence. The different rights and guarantees in the Charter interrelate: the content of each amplifies and informs the meaning of the others. Thus, the Charter is to be interpreted such that it presents “a complex of interacting values”.¹⁷⁹ Simply, the contention rests upon the claim that state action that infringes

¹⁷⁴ *Schmidt*, *supra*, note 120; *Kindler*, *supra*, note 120; *Reference Re Ng Extradition (Canada)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.); *Burns*, *supra*, note 120; *Suresh*, *supra*, note 17.

¹⁷⁵ *Schmidt*, *supra*, note 120, at 522.

¹⁷⁶ *Suresh*, *supra*, note 17, at para. 49.

¹⁷⁷ Boyd, 2011, *supra*, note 123, at 108.

¹⁷⁸ *Morgentaler*, *supra*, note 41, at 175.

¹⁷⁹ *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 326 (S.C.C.), *per* La Forest J.

another Charter right cannot be considered in accordance with the basic tenets of our legal system. This latter feature, of course, is standard description of the principles of fundamental justice. One might also re-frame this principle of fundamental notion as the idea that the state has an obligation to obey the law, in this case constitutional law.

Thus, infringements of section 7 rights that result in significant inequality may also constitute breaches of section 15 equality rights. Were this so — that is, was state action or inaction to breach both sections 7 and 15 — it may not be possible for the state to defeat the claimant's argument that the principles of fundamental justice are, by virtue of this double right infringement, not met. Potentially this idea of fundamental justice is useful recourse for challenges to section 7 that focus on ongoing conditions of poverty or homelessness among marginalized and vulnerable groups.

7. Fair Proceedings

The Court has held that, for certain proceedings, the principles of fundamental justice will require that various procedural and substantive conditions exist. At a minimum, the Court will insist on the procedural guarantees required under common law principles of natural justice and fairness.¹⁸⁰ And, of course, in a constitutional case, unlike cases involving simply a common law duty, the obligation cannot be cancelled by express statutory language.¹⁸¹ The leading case on what the duty of fairness requires, *Baker v. Canada (Minister of Citizenship and Immigration)*,¹⁸² sets out a group of five general factors to be considered in formulating more precise content for that duty in any particular case. A court is to consider: the nature of the decision and the decision-making process; the nature and terms of the relevant statutory scheme; the importance of the decision to the individual affected; the legitimate expectations of the challenger; and, the choices of procedure made by the decision-maker. This is an open list: the important qualifier is that what is required by the duty of fairness is to be decided by reference to the "context of the statute involved and the rights affected".¹⁸³

¹⁸⁰ *G. (J.)*, *supra*, note 2, at paras. 81, 83; *Stewart*, *supra*, note 6, at 224.

¹⁸¹ *Id.*, at 226.

¹⁸² *Baker*, *supra*, note 25, at paras. 23-27.

¹⁸³ *Suresh*, *supra*, note 17, at para. 115.

In different cases, a variety of specific protections have been required. These include such things as adequate notice of a decision, the right to respond and to be present, and the right to be heard by a fair and impartial decision-maker.¹⁸⁴ For example, in the context of child custody proceedings, Lamer C.J.C. in *G. (J.)* argued that, while application of the substantive principle of the best interests of the child was fundamentally just, failure by the state to provide access to counsel was not. And, moreover, such a failure impeded the state's ability to ensure that the substantive principle of best interest would be followed.¹⁸⁵ The Court's conclusion in this case was that: "The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination."¹⁸⁶ The government of New Brunswick was obligated to provide legal aid to the appellant.¹⁸⁷ Thus, decision-making that fails to meet such adequate and uniform standards as are appropriate both to the character of the proceedings at issue and to the claimant will fail to be found in accordance with the principles of fundamental justice.¹⁸⁸

Procedures surrounding social assistance benefits administered by provincial governments have been considered as the kind of decision-making that should have similar guarantees attached. Legal scholar Lorne Sossin, for example, has argued that bureaucratic disenfranchisement includes "structural and situational features of the welfare eligibility process which together have the effect of discouraging applicants and demoralizing recipients".¹⁸⁹ The difficulties these individuals face to

¹⁸⁴ *G. (J.)*, *supra*, note 2, at paras. 72-74, *per* Lamer C.J.C. See also Lorne Sossin, "Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 41:3 *Osgoode Hall L.J.* 1, at 30-31 [hereinafter "Sossin, 2004"]; Martha Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decision Under Section 7 of the Canadian *Charter*" (1995-1996) 4:2 *Health L. Rev.* 3; Martha Jackman, 1988, *supra*, note 9, at 302-305; J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29:1 *Osgoode Hall L.J.* 51.

¹⁸⁵ *G. (J.)*, *supra*, note 2, at para. 81, *per* Lamer C.J.C.

¹⁸⁶ *Id.*, at para. 70.

¹⁸⁷ Worth noting is the qualification that this insistence on access to counsel results from a combination of the seriousness and complexity of the proceedings and the capacity of the appellant: *id.*, at para. 86, *per* Lamer J. The right to counsel funded by the state is case-specific (Stewart, *supra*, note 6, at 285).

¹⁸⁸ Jones, *supra*, note 54; Morgentaler, *supra*, note 41, at 63-73.

¹⁸⁹ Sossin, 2004, *supra*, note 184, at 399.

achieving “expeditious and fair determination of their claim on its merits” amounts to a violation of procedural fairness guarantees.¹⁹⁰

Commentators have argued such a conclusion should be extended, calling for recognition that the principles of fundamental justice require transparent and participatory decision-making. Martha Jackman and Bruce Porter, thus, advance that there must be meaningful participation in levels of governmental decision-making power that affect life, liberty and security of the person.¹⁹¹

VII. SECTION 1

Section 7, like all other rights protected in the Charter, is, in principle, subject to limitation under section 1 of the Charter. The Court has distinguished between analysis under section 7 and justification under section 1. Section 7 is not concerned with the question of justification of limits on the rights to life, liberty and security of the person, or with achieving the “right” balance. Rather, it is focused on “whether the limit has been imposed in a way that respects the principles of fundamental justice”.¹⁹² Balancing is the signature hallmark of section 1 of the Charter.

However, it is unlikely that the government will be able to justify an infringement of section 7 under section 1 of the Charter, unless there are “extraordinary circumstances where concerns are grave and the challenges complex”.¹⁹³ In the *Motor Vehicle Reference*, the Court stated that section 1 will come to the rescue of section 7 violations “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like”.¹⁹⁴ Then Lamer C.J.C. summarized this situation:

First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing,

¹⁹⁰ *Id.*, at 399.

¹⁹¹ Jackman & Porter, 2008, *supra*, note 7, at 30.

¹⁹² *Charkaoui*, *supra*, note 14, at para. 21.

¹⁹³ *Id.*, at para. 66, *per* McLachlin C.J.C.

¹⁹⁴ *Motor Vehicle Reference*, *supra*, note 12, at 518, *per* Lamer J; see also *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687, at para. 92 (S.C.C.).

be upheld as a reasonable limit demonstrably justified in a free and democratic society.¹⁹⁵

Thus, a finding of a breach of any principle of fundamental justice generally dooms any prospective section 1 argument.¹⁹⁶

It is not difficult to see why. The principles of fundamental justice, such as those discussed above, map rather neatly, each in particular ways, onto the elements the Court deploys in analysis under section 1. A finding of problematic vagueness under section 7 triggers issues of the “prescribed by law” and “minimal impairment” stages of a section 1 consideration. A law that is arbitrary raises issues of “rational connection”, gross disproportionality likely prevents a finding of both “minimal impairment” and “proportionality”, and overbreadth is a problem for the requirement of “minimal impairment”.¹⁹⁷ Justification under section 1 for a section 7 rights infringement has never been granted by a majority of the Court.¹⁹⁸ Indeed, it is increasingly seldom that full section 1 analysis follows a finding of a breach of section 7. By way of illustration, in the *Insite* case, the Court stated simply: “If a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed.”¹⁹⁹

So, governments rarely attempt section 1 justifications for section 7 infringements. One consequence of this is that section 7 cases tend singularly to focus on the rights infringement state of Charter analysis, with argument limited to consideration of the scope and import of the section 7 rights and the demands of the principles of fundamental justice. The consequence? As one scholar puts it: “the stakes in a section 7 challenge are high indeed”.²⁰⁰ Typically, a finding of a section 7 breach ends the government’s case.

¹⁹⁵ *G. (J.)*, *supra*, note 2, at para. 99.

¹⁹⁶ Justice Wilson, in the *Motor Vehicle Reference*, argued that a violation of s. 7 rights did not permit of justification under s. 1: “I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either ‘reasonable’ or ‘demonstrably justified’ in a free and democratic society.” *Supra*, note 12, at 523. This view has yet to be supported by a majority of the Court.

¹⁹⁷ Stewart, *supra*, note 6, at 155.

¹⁹⁸ *Id.*, at 5.

¹⁹⁹ *Insite*, *supra*, note 16, at para. 137.

²⁰⁰ Stewart, *supra*, note 6, at 307.

VIII. SOME BACKGROUND ISSUES

A number of prominent distinctions circulate at a more theoretical level in section 7 law. These distinctions shape, often in unacknowledged somewhat unreflective ways, conversations about expansions of section 7 rights. It is worthwhile having some fluency in these more abstract considerations in relation to the topic of a broader scope for section 7. The following discussion examines the notion of social rights, in their juxtaposition to civil and political rights, as well as the distinction drawn between positive rights and negative rights. Finally, the chapter considers briefly the idea of social citizenship as a conceptual framework informing the expansion of section 7 rights.

1. Civil/Political and Social/Economic: First and Second Generation Rights

Liberal rights analysis typically encompasses at least two variants of human rights: civil and political rights and social and economic rights. Civil and political rights, often referred to as first generation rights, include the traditional liberties and privileges of formal citizenship.²⁰¹ These rights are the protections postulated by early liberal theory and provide for such things as free expression, freedom of association, freedom of religion, the right to vote, the right to a fair trial and the right not to be tortured. Social and economic rights — second generation rights — flesh out rights protections, adding to the list of core human rights, such protections as the right to work, the right to health care, the right to education, the right to food security, the right to housing and the right to material well-being.²⁰² This extension of the original set of

²⁰¹ Jeremy Waldron, "Liberal Rights: Two Sides of the Coin" in *Liberal Rights: Collected Papers 1981-1991* (New York: Cambridge University Press, 1993) 1, at 5 [hereinafter "Waldron"].

²⁰² Social and economic rights are claimed to suffer uniquely from justiciability issues: typically, these are concerns about judicial competency and institutional legitimacy. This contention has been criticized. See, e.g., the discussion in David Wiseman, "Taking Competence Seriously" in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press, 2007) 263; Stephen Holmes & Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999); Jill Cottrell & Yash Ghai, "The Role of Courts in the Protection of Economic, Social and Cultural Rights" in Yash Ghai & Jill Cottrell, eds., *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) 58; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539.

human rights to include material concerns is justified by the insistence that, absent some extent of material flourishing, other more traditional rights are meaningless. Jeremy Waldron, a legal theorist, makes this argument:

There is no prospect of an individual living the sort of autonomous life we have in mind when we talk about liberty if he [sic] is in a state of abject and desperate need. His [sic] condition would be one of lethargy rather than agency; or, at best, action under the impulse of necessity rather than action governed by autonomous deliberation.²⁰³

To say that someone living in desperate need enjoys in any meaningful sense the guarantee of freedom diminishes the idea of rights. The notions of human dignity and respect that underpin protection of first generation human rights speak equally to ensuring provision of some standard of material comfort.²⁰⁴ Waldron elaborates: “people are not just the disembodied wraiths of libertarian ideology, but needy individuals subject to vicissitudes of embodiment and materiality: we must have food and shelter, we must work, we get sick, we grow old, we are often dependent, and so on”.²⁰⁵ Louise Arbour has described social rights as “human rights made whole”.²⁰⁶ At the international level, it is well established that the rights captured across the sets of civil/political and social/economic rights are to be considered “indivisible, interdependent and interrelated”. The South African Constitutional Court captures this notion: “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter”.²⁰⁷

2. Negative or Positive Obligations

It is common to distinguish between rights that cast an obligation on the state merely to refrain from doing something and those rights that obligate the state to act in some positive manner to bring about or facilitate something. It is a considerable point of debate whether the Charter protects only rights that are best understood in the negative terms

²⁰³ Waldron, *supra*, note 201, at 8.

²⁰⁴ *Id.*, at 10.

²⁰⁵ *Id.*, at 28-29.

²⁰⁶ Arbour, *supra*, note 3.

²⁰⁷ *Government of the Republic of South Africa v. Grootboom*, [2000] ZACC 19, 2000 (11) BCLR 1169, at para. 23 (S. Afr. Const. Ct.).

of non-interference or whether the Charter also guarantees rights that demand more proactive state response.²⁰⁸ Thus, the distinction between negative and positive obligation, or between negative and positive rights, is frequently referenced in the debate around section 7 protections. As possibilities for the expansion of scope of section 7 appear more credible, the volume of such a discussion goes up.

The distinction between negative and positive obligations or rights is also referenced in relation to the types of rights discussed above. Social and economic rights are labelled (and often condemned) as positive rights, while civil and political rights are more favourably understood as negative rights.²⁰⁹ It is argued that civil and political rights, as negative rights, better fit the arena of judicially protected constitutional rights, while social and economic rights involve social policy, a matter best left to the judgment of government and politicians.²¹⁰ The Courts have been quick and uniform in their rejection of this latter social policy argument. By way of illustration, the Supreme Court in the *Insite* case stated: "However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*."²¹¹

Further, the divide between different sorts of rights enjoys little credibility among international and domestic human rights experts.²¹² Many human rights impose a mix of both negative and positive state obligations — civil and political rights no less than social and economic rights. Even traditional "negative" rights must be supervised and facilitated by the state using public resources.²¹³ Some judges, in some contexts, understand this.²¹⁴ Thus, any tidy scheme whereby judicially

²⁰⁸ Lessard, *supra*, note 12, at 222.

²⁰⁹ The provision of services or benefits that are preconditions to the fulfilment of certain interests protected as rights are examples of the kind of proactive government observance of rights that the debate imagines.

²¹⁰ In *Adams*, the City and the Attorney General argued that the complex issue of homelessness was an area of policy most appropriate to the legislature, not the courts.

²¹¹ *Insite*, *supra*, note 16, at para. 105.

²¹² Martha Jackman, "Remedies for Socio-Economic Rights Violations: Sleeping under a Box?" in Robert J. Sharpe & Kent Roach, eds., *Taking Remedies Seriously* (Montreal: Les Éditions Yvon Blais, 2009) [hereinafter "Jackman, 2009"].

²¹³ Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 2012), at 51-52.

²¹⁴ In *Gosselin*, Bastarache J. argued in his dissenting judgment that: "The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance,

protected rights are limited to negative obligations is logically and practically impossible.

But the contrast between negative and positive rights, “long abandoned under international human rights law and increasingly rejected in other constitutional democracies”,²¹⁵ lives on in Canadian constitutional discourse. It is a distinction often cited, particularly by government respondents to Charter challenges, to restrain expansion of section 7 rights from speaking to more social and economic issues.

In the recent cases of *Adams*, which reached the level of the British Columbia Court of Appeal, and *Insite*, at the Supreme Court of Canada, it is clear that the claimants’ success was substantially assured by limitation of the claim asserted to a negative right requiring, ultimately, simply government forbearance in application of the impugned law. Thus, the Court of Appeal in *Adams* stated:

Nor does the trial judge’s decision that the Bylaws violated the rights of homeless people under s. 7 impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness. The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless. While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents’ claim or the trial judge’s order into a claim or right to shelter.²¹⁶

The Court of Appeal, in this case, also argued that any positive state actions that might flow from the finding of unconstitutionality of the by-law at issue are incidental only — they are not required by section 7. Rather, such state actions are simply a sensible, political response:

That is not to say the decision will not, from a practical point of view, require the City to take some action in response. That will likely take the form (as we were advised it already has) of some regulation of the overnight use of public parks, and perhaps the creation of additional shelters or alternative housing, which is consistent with the City’s evidence about the initiatives it has undertaken to deal with the homeless. Such responsive action could be said to be a feature of all *Charter* cases; governments generally have to take some action to

may require governments to spend more money in order to establish efficient judicial institutions” (*supra*, note 5, at para. 218).

²¹⁵ Jackman, 2009, *supra*, note 212, at 1.

²¹⁶ *Adams* (BCCA), *supra*, note 14, at para. 95.

comply with the requirements of the *Charter*, which can involve some expenditures of public funds or legislative action, or both. That kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights.²¹⁷

The nuance asserted here by the Court of Appeal is forced. In this case, certainly, the Court of Appeal's order speaks only to state forbearance. In many other cases, it is not so clear.

The Supreme Court, at different moments, has indicated explicit awareness of the vagary and undesirability of this distinction. In discussing the application of the Charter under section 32 of the Charter, the Supreme Court has noted that the distinction between government action and inaction is "very problematic".²¹⁸ In *Vriend v. Alberta*, the Supreme Court, quoting scholar Diane Pothier, stated that section 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority".²¹⁹ The Court continued: "[t]he application of the *Charter* is not restricted to situations where the government actively encroaches on rights".²²⁰ Consequently, it ought not to be possible to defeat a specific Charter claim simply on the basis that it asks a court to place a positive obligation on the state. The Court accepted this in *Schachter v. Canada* when it wrote:

Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.²²¹

²¹⁷ *Id.*, at para. 96.

²¹⁸ *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 53 (S.C.C.) [hereinafter "*Vriend*"].

²¹⁹ *Id.*, at para. 60, citing Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 *Constit. Forum* 113, at 115.

²²⁰ *Vriend*, *supra*, note 218, at para. 60.

²²¹ *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 721 (S.C.C.), *per* Lamer C.J.C.

In the context of section 7, this has been confirmed by McLachlin C.J.C. in the majority reasons in *Gosselin*:

The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstance warrants a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustaining life, liberty, or security of the person may be made out in special circumstances.²²²

This quote evinces both a reluctance to extend section 7 rights to forthrightly demand positive state obligation and an acknowledgment that positive obligations under section 7 are not to be ruled out. In time, perhaps, there may come more straightforward and widespread judicial recognition that the distinction between negative and positive rights is not, on its own, a useful metric for crafting state obligations under the Charter.

3. Social Citizenship

T.H. Marshall, a mid-20th century British sociologist responsible for the foundational modern conception of citizenship, argued for three strands of citizenship rights: civil, political and social. In his most famous essay, “Citizenship and Social Class”, Marshall describes citizenship as “full membership in a community, with all its rights and responsibilities”.²²³ This idea included the right to economic well-being and the right to be included in the “social heritage and to live the life of a civilised being according to the standards prevailing in the society”.²²⁴ Elaborations of section 7 rights pull on this notion of citizenship. The idea of social rights supplements more traditional conceptions of what is

²²² *Gosselin*, *supra*, note 5, at para. 82, *per* McLachlin C.J.C. Justice Abella, in her dissenting judgment in this case, argued that s. 7 rights have a positive dimension. Justice Abella stated that the language and structure of the Charter and of s. 7 “compel” the conclusion that positive rights to the basic means of subsistence are guaranteed (*id.*, at para. 309).

²²³ Thomas Humphrey Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950).

²²⁴ *Id.*, at 14.

owed to individuals as members of shared political community. It is an assertion of richer notions of state obligations.

IX. CONCLUSION

The arguments for a more encompassing breadth for section 7 rights are engaging. The political and multifaceted character of questions that engage broader ideas of life, liberty and security of the person should not in itself bar constitutional recognition. After all, the Chief Justice has stated that “[t]he fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it”.²²⁵ Nor is it the case that the *Charter* should be interpreted such that the key rights and protections it affords are meaningful only to those already with privilege and resources. Surely, the *Charter* must be cognizant of what the demands to life, liberty and security of person require for individuals and groups most disadvantaged and most reliant on government action to ensure decent levels of material well-being.

My argument risks the charge of naivety, that I have ignored the inescapable liberal roots of the *Charter* and the device of judicial review in a political and legal system such as ours. Numerous academics have detailed convincingly the ways in which judicial review under the *Charter* simply reinstates and legitimates a fundamentally unfair and unjust status quo.²²⁶ They have argued that the incremental tinkering with such an unjust order that occasionally, not even frequently, results from more expansive readings of section 7 neither changes nor touches this reality. Casting an eye over the results of the last 30 years or so of *Charter* litigation, it is hard to dispute such a conclusion.

But, the last word has yet to be uttered. Some promise for enhanced recognition of concerns of social justice beckons from the ongoing and evolving interpretations of section 7. Less apparent is what such

²²⁵ *Chaoulli, supra*, note 13, at para. 107, *per* McLachlin C.J.C.

²²⁶ Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thomson, 1989); Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

emerging formulations might in practice offer those most in need of social justice in our country. This is a complex question of both politics and of law. Doctrinal change is unlikely to be enough to guide the Charter into a new era of relevance to the most excluded. But if the Charter, and section 7 in particular, are to be meaningful in the struggle for social justice in Canada, the sorts of threads and leads discussed in this chapter are essential.