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The Brilliant Career of Section 7 of the Charter

Peter W. Hogg
Osgoode Hall Law School of York University

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I. SECTION 7 OF THE CHARTER

Section 7 of the *Canadian Charter of Rights and Freedoms*[1] provides as follows:

> 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.

II. THE ORIGINS OF SECTION 7

A brilliant career usually starts with humble origins, and that was certainly the case with section 7.[2] It was born in 1982, along with the rest of the Charter, and the framers made two decisions that were intended to ensure that its life would be uneventful and unimportant, even poverty stricken. Their model was the due process clause which is to be found in each of the Fifth and Fourteenth Amendments of the Constitution of the United States and which guarantees against the deprivation of "life, liberty and property, without due process of law". But the framers of the Charter dropped the reference to "property" from section 7 so as to greatly reduce the class of governmental acts to which section 7 would apply. The replacement phrase in section 7, namely, "security of the person", is — at least in the realm of governmental policies — a much

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* C.C., Q.C., Professor Emeritus, Osgoode Hall Law School of York University; Scholar in Residence, Blake, Cassels & Graydon LLP, Toronto. I am grateful to Professors Hamish Stewart, Jamie Cameron and Sonia Lawrence, who read and commented on an earlier draft and made suggestions for its improvement.

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

[2] This paper draws heavily from Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (annually supplemented), ch. 47, "Fundamental Justice" [hereinafter "Hogg"]. I am also indebted to Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012) [hereinafter "Stewart"].

narrower category than property. And the framers of section 7 replaced "due process of law" with "the principles of fundamental justice", which they believed would provide only procedural protections to life, liberty and security of the person, in contrast to the "substantive due process" jurisprudence that had developed in the United States around the due process clauses.[3] Both of these changes were intended to reduce the scope of judicial review under section 7, eliminating judicial protection of property rights, and restricting judicial protection of life, liberty and the security of the person to the requirements of a fair procedure.[4]

These efforts to stunt the growth of section 7 were partly successful. The omission of property rights has been respected by the Supreme Court of Canada. This has meant that section 7 does not provide any procedural protection against the taking of property by government and no requirement of fair compensation — matters which in practice are not of great significance since they are usually well protected by statute. Of more significance, section 7 also has nothing to say about the myriad of statutes that affect only economic interests, because the courts have been careful to interpret "liberty" as excluding economic liberty, not wanting to admit property by the back door when it was shut out of the front. For this reason, section 7 does not apply to civil proceedings where only money is at stake. However, "liberty" still has a long reach, because it obviously includes imprisonment,[5] and this sweeps into its purview much of the *Criminal Code*[6] and other federal criminal statutes and even some regulatory statutes (provincial as well as federal), on the basis that a potential sentence of imprisonment is a deprivation of liberty. For this reason, section 7 has many applications to criminal proceedings. There is no reason to doubt that these interpretations accord with the intention of the framers.

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[3] Hogg, *supra*, note 2, at s. 47.10(a); Stewart, *supra*, note 2, at 98-99.

[4] The *Canadian Bill of Rights*, S.C. 1960, c. 44, the statutory precursor of the Charter (which applied only to federal laws) was also a model for the framers of the Charter; by s. 2(e) it supplied (in a procedural context) the phrase "the principles of fundamental justice", and in s. 1(a) it guaranteed "security of the person", but it went on to follow the Fifth and Fourteenth Amendments in guaranteeing "enjoyment of property", and "the right not to be deprived thereof except by due process of law". These provisions remain in place for federal but not provincial laws.

[5] "Liberty" has usually been interpreted as physical liberty, and most of the cases exemplify physical liberty (liability to imprisonment being the most common hook into s. 7), but there is a strand of jurisprudence, starting with Wilson J. in *R. v. Morgentaler*, *infra*, note 10, which expands the concept into the liberty to make "fundamental personal choices", which was accepted by the majority in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at paras. 49, 54 (S.C.C.).

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

III. PROCEDURAL SUBSTANTIVE JUSTICE AND ABORTION

Nor should it be assumed that *procedural* fundamental justice is unimportant, even considering that there are specific procedural guarantees of criminal justice in section 11 of the Charter.[7] The right of an accused person to silence is not guaranteed by section 11, but the Supreme Court has held that it is guaranteed by section 7.[8] And the right to a fair trial, which is guaranteed by section 11, is given a broader application by section 7, because section 7 is not restricted to criminal proceedings against "any person charged with an offence" (section 11), but includes civil and administrative proceedings where they affect life, liberty or security of the person: proceedings for child protection, extradition and security certificates are examples.[9] Indeed, the most famous application of section 7, which was to invalidate the legal restrictions on abortion, was based primarily on procedural defects in the law that was struck down.

The abortion case was *R. v. Morgentaler (No. 2)*,[10] where the Supreme Court, by a 5-2 majority, struck down the provisions of the *Criminal Code* that made abortion a criminal act unless the procedure was approved by a "therapeutic abortion committee" of an approved hospital. The evidence showed that the requirement of approval by a therapeutic abortion committee restricted access to the procedure (because some hospitals would not set up the required committees), and caused delays in treatment, which increased the risk to the health of the woman. All five majority judges agreed that the risk to health that was increased by the law was a deprivation of security of the person. The breach of fundamental justice consisted (for four of the majority judges) in the unnecessarily restrictive *procedural* requirements for a therapeutic abortion[11] and (for one of the majority judges, Wilson J.) in the deprivation of the woman's

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[7] Procedural fairness as a principle of fundamental justice occupies a long chapter 5 in Stewart, *supra*, note 2.

[8] *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.); and see Hogg, *supra*, note 2, at s. 47.20 for a full discussion.

[9] For example, *New Brunswick v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) (child protection); *United States of America v. Cobb*, [2001] S.C.J. No. 20, [2001] 1 S.C.R. 587 (S.C.C.) (extradition); *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) (security certificate).

[10] [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

[11] The reasoning of the majority judges is not totally clear on this point. Stewart, *supra*, note 2, at 140, takes the view that the majority was implicitly invoking a notion of arbitrariness — a substantive principle.

freedom of conscience. Since this decision, abortion has been unregulated in Canada.[12]

But the intention of the framers to restrict judicial review under section 7 to matters of procedure has been totally disregarded by the Supreme Court of Canada with the dramatic consequences that will be related in this paper.

IV. SUBSTANTIVE FUNDAMENTAL JUSTICE AND THE FAULT PRINCIPLE

Reference re Motor Vehicle Act (British Columbia) s. 94(2)[13] is the case that decided that fundamental justice was not restricted to procedure. At issue was a provision in British Columbia's *Motor Vehicle Act* that made it an offence to drive a car while prohibited from driving or while one's driving licence was suspended. The Act was a deprivation of liberty because it imposed a penalty of imprisonment on anyone found guilty of the offence. The controversial provision was a subsection that declared that the offence was one of "absolute liability" in which "guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension". The Court held that it was a breach of fundamental justice to impose a term of imprisonment for an offence that lacked the element of *mens rea* (a guilty mind). The Court made no attempt to characterize this as a procedural defect in the law; the absence of *mens rea* as an element of the offence was not an issue of procedure, but a substantive injustice. Section 7 prohibited substantive as well as procedural injustice.

Justice Lamer, who wrote the principal opinion of the Court, did not ignore the legislative history of section 7. The Minister of Justice and the other officials who were responsible for drafting section 7 had testified before the Special Joint Committee of the Senate and House of Commons on the Constitution (1980-1981), had explained the concerns about substantive due process in the United States, and had asserted that "fundamental justice", unlike "due process", was a purely procedural concept.[14] Justice Lamer considered this evidence, but he described it as

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[12] *Infra*, note 59.

[13] [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*B.C. Motor Vehicle Reference*"]. Justice Lamer wrote for a majority of four. Justices McIntyre and Wilson each wrote concurring opinions. All seven judges were unanimous in ruling that fundamental justice extended to substantive as well as procedural justice.

[14] *Supra*, note 3.

being "of minimal weight". In his view, the words "fundamental justice" did not have a settled interpretation, and could be interpreted as extending to substantive injustice. And that was the preferable interpretation in the context of section 7 because it would provide stronger protection to life, liberty and security of the person.[15] He might have added that the distinction between substantive and procedural injustice would inevitably have become a vexed and ongoing source of litigation. Perhaps these points were strong enough to overcome the clear legislative history — at least for those of us who are not originalists.[16] But the effect of the decision, as I will show, was to expand greatly the scope of judicial review under section 7.

V. ATTEMPTS TO DEFINE FUNDAMENTAL JUSTICE

If fundamental justice was now substantive and not merely procedural, what was its definition? Justice Lamer in the *B.C. Motor Vehicle Reference* refused to offer any kind of exhaustive definition, but he said that "the principles of fundamental justice are to be found in the basic tenets of the legal system".[17] It was hard to square this with the actual decision in the case since he never explained why absolute liability, which had long been a familiar (if unloved) part of Canada's system of criminal justice, was now contrary to the basic tenets of the legal system. Moreover, it turned out that, even in the *Criminal Code* itself, *mens rea* was by no means an essential element of every offence, and the Supreme Court was readily persuaded to strike down (or redraft) a number of offences. For example, statutory rape (intercourse by a man with an underage girl) was modified to require that the accused was aware of the age of his victim;[18] and the felony-murder rule (a death caused in the course of another crime is murder) was struck down,[19] as was the *Criminal Code* definition of a "party" to an offence which could lead to the conviction for murder of a participant in an unlawful enterprise (like

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15 *Id.*, at 504-505.

16 Stewart, *supra*, note 2, at 310, points out that the case being one of first impression "any answer the Court gave would be an answer chosen by the Court". That is true, although "the interpretation proposed by the civil servants" (his phrase) was the interpretation offered to the Special Joint Committee reviewing the draft Charter and seems to have been accepted by the legislative committee which neither demurred nor proposed any change in s. 7.

17 *Id.*, at 503.

18 *R. v. Hess; R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.).

19 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

a robbery) who did not kill, and did not intend to kill the victim.[20] These were offences with long pedigrees in Canada and elsewhere in the common law world, but they were now contrary to the basic tenets of the legal system.

Even where the mental element of crime was the issue, the Court still had enormous difficulty in teasing out the implications for a wide variety of offences.[21] Where the mental element of crime was not the issue, the *B.C. Motor Vehicle Reference* left the Court completely at sea. The crime of assisting suicide (another offence with a long history, albeit an unusual offence in that the victim actively consents) was upheld by a narrow 4-3 margin, with majority and minority proposing radically different tests for a breach of fundamental justice.[22] Another crime that causes no obvious harm to others is that of possession of marijuana, and that was also upheld by the Court — but by an 8-1 majority: the Court held that a "harm principle" was not a principle of fundamental justice.[23]

In the marijuana case, *Malmo-Levine*, the majority gave a definition of fundamental justice as its reason for decision,[24] and this one seems to have stuck — at least for the nine years up until the time of writing (2012). The majority postulated three requirements for a rule to qualify as a basic tenet of the justice system and to qualify as a principle of fundamental justice: (1) the rule must be a "legal principle"; (2) there must be a "significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate"; and (3) "the rule must be capable of being identified with sufficient precision to yield a manageable standard".[25]

I have one important quibble with this definition, and that is the requirement of a "societal consensus" as part of element (2). Why should that be an element of what is supposed to be a legal test to be applied by

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[20] *R. v. Logan*, [1990] S.C.J. No. 89, [1990] 2 S.C.R. 731 (S.C.C.).

[21] Hogg, *supra*, note 2, at ss. 47.11-47.14; Stewart, *supra*, note 2, at 157-217.

[22] *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Rodriguez*"]. This issue is now being relitigated on the basis of the Court's subsequent rulings that "overbroad laws" are contrary to fundamental justice: *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886 (B.C.S.C.) [hereinafter "*Carter*"] (creating a "constitutional exemption" for assisted suicide when accompanied by judicially defined safeguards).

[23] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) [hereinafter "*Malmo-Levine*"].

[24] The definition closely followed the one used by Sopinka J. for the majority in *Rodriguez*, *supra*, note 22, at 590-91.

[25] *Malmo-Levine*, *supra*, note 23, at para. 113, *per* Gonthier and Binnie JJ.

judges, and how would the judges ascertain such a phenomenon?[26] I think it could be said with confidence that there would have been no societal consensus on many of the implications of the requirement for a mental element of crime, the general effect of which was to make it difficult to punish people who had undoubtedly behaved very badly. However, it seems likely that the idea of societal consensus is not intended to be taken seriously, and judges will decide for themselves (and no doubt often disagree) on whether a societal consensus exists for a proposed principle of fundamental justice.

The high-water marks of judicial review under section 7 — along with *Morgentaler* — have been the cases striking down "overbroad" laws, "disproportionate" laws and "arbitrary" laws, and I will briefly describe each of these categories of cases.

VI. Overbroad Laws Struck Down

In *R. v. Heywood*,[27] the Supreme Court struck down a law on the ground that it was "overbroad" — broader than necessary to accomplish its purpose. Overbreadth, the Court held, was a breach of the principles of fundamental justice, and therefore a basis for a finding of unconstitutionality in a law that affects life, liberty or security of the person.

The law under challenge in *Heywood* was a provision of the *Criminal Code* that made it an offence of "vagrancy" for a person who had previously been found guilty of the offence of sexual assault to be "found loitering in or near a schoolground, playground, public park or bathing area". Section 7 was applicable because the law restricted the liberty of the convicted sexual offenders to whom it applied. The majority of the Supreme Court held that the law was a breach of the principles of fundamental justice because it was "overbroad". Justice Cory, who wrote for the majority, acknowledged that a restriction of liberty for the purpose of protecting the safety of children would not be a breach of the principles of fundamental justice. But a law that restricted liberty more than was necessary to accomplish its purpose would be a breach of fundamental justice. In this case, the law was overbroad in three respects: (1) its geographic scope was too wide because parks and bathing areas

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[26] Accord, Stewart, *supra*, note 2, at 108, who however goes on to suggest that the term should not be taken too literally: a societal consensus on the general values underlying the administration of justice is all that was meant.

[27] [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.); the case is discussed at more length in Hogg, *supra*, note 2, at s. 47.15.

included some places where children were unlikely to be found; (2) its duration was too long because it applied for life with no provision for review; and (3) the class of persons to whom it applied was too wide because some convicted sex offenders would not be a continuing danger to children. The majority pointed out that a person might be a convicted sexual offender solely by reason of some drunken episode as a teenager, and that a sexual offender might be guilty of vagrancy solely for visiting a remote wilderness park. The case before the Court, however, was a man who had been recently convicted of sexual assault and who had been warned once by the police to stay away from children's playgrounds, who was found standing at the edge of a children's playground in Victoria taking pictures of the children with a telephoto lens. The photos in his camera and the photos found at his home showed that he was taking pictures of young girls with their clothing disarrayed from play so that their crotches, although covered by underclothes, were visible. The trial judge regarded the behaviour as sufficiently sinister to impose a three-month prison sentence followed by three years of probation. The majority of the Supreme Court could hardly have been indifferent to the facts of the case, but they struck down the law and acquitted the accused entirely on the basis of hypothetical facts involving the most innocent possible offenders.[28] It is very hard for any law to withstand an attack of this kind.

Overbreadth raises a host of practical and theoretical difficulties. The use of hypothetical examples is an important one of those difficulties: it has been condemned by the Supreme Court of the United States for going beyond the legitimate scope of judicial review.[29] But consider the other difficulties. The purpose of a law is a judicial construct, which can be defined widely or narrowly as the reviewing court sees fit. In this case, the Court divided on the question whether the purpose of the law was only the protection of children (as the majority held) or the protection of adults as well (as the minority held). Even if agreement could be reached on the purpose of a law, the question whether the law overshoots the purpose, raises difficult interpretative questions. In this case, did

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[28] The hypothetical case of the most innocent possible offender has also been used to strike down a minimum mandatory sentence, even when the particular accused's actual crime justified a sentence above the mandatory minimum: *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.). Later cases have insisted that the hypotheticals must be reasonable, and have upheld minimum mandatory sentences: Hogg, *supra*, note 2, at s. 53.4; but the Court has not disavowed the hypothetical technique.

[29] *Broadrick v. Oklahoma*, 413 U.S. 601, at 610-11 (1973), *per* White J.

loitering include mere presence in the prohibited areas (as the majority held), or did it involve some element of malevolent intent (as the minority held)? And what of the empirical questions of whether sex offenders can reliably be cured and whether there are patterns of cross-over from one kind of sexual assault (for example, against adults) to a different kind (for example, against children)? Majority and minority disagreed on those questions too. These kinds of disagreements (on purpose, on interpretation and on empirical facts) are not unusual among judges and are not surprising, but when the judges wield the doctrine of overbreadth as a tool of judicial review, it must be recognized that a judge who disapproves of a law will always be able to find that it is overbroad.[30]

The law in *Heywood* was a direct restraint on the liberty of convicted sex offenders, restricting their access to schoolyards, playgrounds, public parks and bathing areas. Such laws are unusual. But it must be remembered that any law that carries the possible sanction of imprisonment is deemed by the Supreme Court to be a deprivation of liberty requiring compliance with section 7.[31] And it must also be remembered that a corporation, although not itself liable to the sanction of imprisonment, is permitted to rely on section 7 as a defence to a criminal charge if the defence would be available to an individual.[32] The effect of these rules is to expose not merely the criminal law, but much regulatory law, to section 7 review.[33] Any law that includes the sanction of imprisonment is unconstitutional if a court determines, relying on hypothetical cases, that the scope of the law is broader than is necessary to carry out its purpose.

After *Heywood*, constitutional challenges based on overbreadth were surprisingly few and uniformly unsuccessful,[34] allowing one to wonder whether the Supreme Court had repented of its incautious foray into overbreadth. However, all doubt was dispelled by the Court's decision in *R. v. Demers*,[35] which demonstrated that the doctrine was still alive and well. In that case, the Supreme Court struck down the *Criminal Code* regime for accused persons who were found unfit to stand trial. The Court held that the statutory regime — annual hearings by a review

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[30] The categories of "disproportionate laws" and "arbitrary laws" (discussed in the text that follows) which the Court has created since *Heywood* are open to similar objections.

[31] Hogg, *supra*, note 2, at s. 47.7(a).

[32] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.); *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.).

[33] For example, *R. v. Wholesale Travel Group Inc.*, *id*.

[34] Hogg, *supra*, note 2, at s. 47.15.

[35] [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489 (S.C.C.) [hereinafter "*Demers*"].

board and restrictions on liberty as ordered by the board — was appropriate for the accused person who was not permanently unfit to stand trial. However, the law was overbroad in its application to the accused person who was permanently unfit to stand trial because he or she was trapped in the system for so long as the criminal charge remained outstanding. The overbreadth led the Court to strike down the entire regime. One might have been tempted to accuse the Court itself of overbreadth in ordering such a radical remedy for a narrow defect in the law. But the Court postponed the declaration of invalidity for 12 months to allow time for Parliament to amend the law. Parliament responded by enacting an amendment to the regime authorizing a court to order a stay of proceedings if the court was satisfied that the accused was not likely ever to become fit to stand trial and did not pose a significant threat to the safety of the public.[36]

The overbreadth doctrine has also been used by the Supreme Court of British Columbia to revisit the offence of assisting suicide, narrowly upheld by the Supreme of Canada in the *Rodriguez* case in 1993[37] — before the Court had developed the doctrine of overbreadth. Justice Lynn Smith applied the doctrine of overbreadth to create a "constitutional exemption" for assisted suicide that took place in compliance with judicially defined safeguards.[38]

VII. DISPROPORTIONATE LAWS STRUCK DOWN

In *Malmo-Levine*,[39] the Supreme Court established a new doctrine of "disproportionality", which is a breach of the principles of fundamental justice, and therefore a basis for a finding of unconstitutionality in a law that affects life, liberty or security of the person. The doctrine of disproportionality, according to the majority of the Court, requires the Court to determine: (1) whether the law pursues a "legitimate state interest"; and, if it does (2) whether the law is grossly disproportionate to the state interest.[40] This doctrine does not replace overbreadth — *Demers* applied overbreadth a year later — and, like overbreadth, it is really an authority for the Court to undertake a review of the efficacy of the means enacted to achieve a legislative objective.

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36 S.C. 2005, c. 22, s. 33.
37 *Supra*, note 22.
38 *Carter*, *supra*, note 22.
39 *Supra*, note 23.
40 *Id.*, at para. 143.

The issue in *Malmo-Levine* was the criminalization (with the possibility of imprisonment) of the possession of marijuana. The Court accordingly asked whether there was a legitimate state interest in the prohibition of marijuana use (yes was the answer), and whether the prohibition of possession was too extreme a response to that state interest. On the latter point, the majority concluded that it was not, so that there was no disproportionality and no breach of section 7. Justices LeBel and Deschamps, however, dissented, holding that "the harm caused by using the criminal law to punish the simple use of marihuana far outweighs the benefits that its prohibition can bring".[41] On that basis, which is really just a disagreement with the legislative policy with respect to marijuana, they would have struck down the law for breach of section 7.

Canada (Attorney General) v. PHS Community Services Society[42] was another case arising out of the criminalization of drug use. Insite was a safe-injection clinic established under provincial law and located in Vancouver. It provided a safe and supervised environment with trained staff and clean equipment (but no drugs) to enable drug addicts to inject their illegal drugs, mainly heroin and cocaine (which they had to bring with them). The clinic was very successful in reducing deaths by overdose, reducing injuries from incompetent injections, and reducing the spread of infectious disease from shared equipment. The federal *Controlled Drugs and Substances Act*[43] prohibited, with a penalty of imprisonment, the possession of proscribed drugs (which included cocaine and heroin), and the clinic could not operate if the criminal prohibition were applied to it. Initially this problem was solved by the federal Minister of Health, who, under section 56 of the Act, had the discretion to grant exemptions from the Act "if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest". The Minister granted an exemption to Insite on a trial basis. After a change of policy by a new federal government, and despite the evidence of the benign effects of the clinic, the new Minister refused to extend the exemption, which would have forced the closing of the clinic.

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[41] *Id.*, at para. 301, *per* Deschamps J., at para. 280, *per* LeBel J. Justice Arbour also dissented, but on the basis of a "harm principle" that she alone found to be a principle of fundamental justice.

[42] [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.) [hereinafter "*Insite*"]. Chief Justice McLachlin wrote the opinion of the unanimous Court.

[43] S.C. 1996, c. 19.

The operator of the Insite clinic and two of its patients brought proceedings for a declaration that the criminal prohibition of possession was, in its application to Insite, an infringement of section 7 of the Charter. The Supreme Court of Canada held that the Act did indeed impair the "liberty" of the staff and patients of the clinic (who would all be vulnerable to the penalty of imprisonment for possession), as well as the "life" and "security of the person" of the patients (who would lose their access to a safe venue for injection). However, the Act itself was not in breach of the principles of fundamental justice, because the prohibition of possession was qualified by the power to grant exemptions in section 56, which could prevent the Act from applying where its application would be "grossly disproportionate" or "arbitrary".[44] In this case, however, the Minister had refused to extend the exemption to Insite, thereby reimposing the criminal prohibition on the clinic. The Minister's decision to deny the exemption was a denial of the principles of fundamental justice because it disregarded the evidence that Insite had saved lives and prevented injury and disease without any countervailing adverse effects on public safety (or anything else). The effect of the Minister's decision (the closure of Insite) was "grossly disproportionate" to any state interest in maintaining an absolute prohibition of possession of illegal drugs on Insite's premises.[45] The Minister's decision was also "arbitrary, undermining the very purposes of [the Act], which include public health and safety".[46] The Minister was obliged to exercise his discretion under section 56 in compliance with section 7, and had failed to do so. Since the evidence indicated that there was only one Charter-compliant choice, the Court ordered the Minister to grant an exemption to Insite "forthwith".

The *Insite* case was followed by the Ontario Court of Appeal in *Bedford v. Canada (Attorney General)*,[47] which was a constitutional challenge to the prostitution offences in the *Criminal Code*. Prostitution itself is not a criminal offence, either for the seller or the buyer of sexual services; prostitution is therefore a lawful occupation. But it is an offence to keep or be found in a "common bawdy house", which is a place that is

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[44] *Id.*, at para. 113. The topic of "arbitrary laws" is discussed in the next section of this paper.

[45] *Id.*, at para. 136.

[46] *Id.*

[47] [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.) [hereinafter "*Bedford*"]. Justices Doherty, Rosenberg and Feldman wrote the majority opinion. Justice MacPherson, with whom Cronk J.A. agreed, wrote a partially dissenting opinion.

used for "the purpose of prostitution". And it is an offence to live "wholly or in part on the avails of prostitution of another person". And it is an offence to "communicate with any person [in a 'public place'] for the purpose of prostitution". All three offences carry the penalty of imprisonment so that "liberty" is affected. And the Court held that "security of the person" was also affected because the Court found that each of the three offences had the effect of preventing prostitutes from taking sensible precautions to reduce the risk of physical violence to which they were subject. The bawdy house offence criminalized the practice of prostitution at a fixed indoor location (including the prostitute's own home) which could include security measures and would in any case be safer than the streets. The living-on-the-avails offence criminalized the hiring of support and security staff, who could serve screening and protective functions. And the communicating offence criminalized any attempt by street prostitutes to screen potential customers by talking to them in a public place before getting into a vehicle or going to a private place. The Court saw a parallel with the *Insite* case, where the criminal prohibitions increased the risks to drug addicts by denying them a safe venue for injections. Indeed, the prostitutes' claim was even stronger since prostitution, unlike the possession and use of illicit drugs, was not an unlawful activity. The Court followed *Insite* to hold unanimously that the bawdy house and living-on-the-avails offences were grossly disproportionate to their objectives, and also held that they were overbroad in catching benign as well as malign activity.[48] In the case of the communicating offence,[49] the Court divided. Three judges (the majority) upheld the communicating offence on the ground that the social nuisances caused by street solicitation outweighed any increased risk to prostitutes. Two judges would have struck the offence down on the ground that the increased risk to prostitutes so outweighed the social

[48] In the case of the bawdy house provision, the Court suspended the declaration of invalidity for 12 months to give Parliament time to enact a Charter-compliant provision, should it wish to do so. In the case of the living-on-the-avails provision, the Court read into the provision language to clarify that it only applied "in circumstances of exploitation".

[49] A complication was that the communicating offence had been upheld by the Supreme Court of Canada in *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 (S.C.C.), but the reasons were primarily based on s. 2(b) (freedom of expression) rather than on s. 7. The Court of Appeal in *Bedford*, *supra*, note 47, regarded itself as bound by the s. 2(b) reasoning (at para. 52), but not by the s. 7 reasoning in light of the dramatic developments in the s. 7 jurisprudence since 1990 and the evidence in the case relying on those developments (at para. 70). The majority did in fact uphold the communicating offence, but the minority would have struck down the communicating offence on s. 7 grounds.

nuisances caused by street solicitation that the offence was grossly disproportionate to its objective.

VIII. ARBITRARY LAWS STRUCK DOWN

Finally, there is the doctrine of arbitrariness, which is a third basis for a breach of the principles of fundamental justice by a law that affects life, liberty or security of the person. As related above, the Court in the *Insite* case relied on a doctrine of arbitrariness as well as disproportionality in ordering the Minister of Health to grant the drug injection clinic an exemption from the criminal prohibition of possession of narcotics. The Court has not yet been able to agree on a definition of arbitrariness, and it is not entirely clear whether it is materially different from disproportionality.[50] However, in *Chaoulli v. Quebec (Attorney General)*,[51] a majority of the Court[52] struck down Quebec's prohibition on the purchase of private health-care insurance on the ground of arbitrariness alone. All judges agreed that the failure to provide timely health care in the public system led to breaches of the right to life (since delays sometimes increased the risk of death) and the right to security of the person (since delays prolonged pain and stress). So section 7 was engaged. According to McLachlin C.J.C. and Major J. for the majority, a law was arbitrary if it "lacks a real connection on the facts to the purpose the [law] is said to serve".[53] That was the case here because the evidence showed that other developed countries with universal public health care plans permitted parallel access to private care without injury to the public health system. Justices Binnie and LeBel dissented, holding that a parallel private system would divert resources from the public system, reducing the quality of the public system.[54]

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[50] In *Malmo-Levine*, *supra*, note 23, above, the majority opinion of Gonthier and Binnie JJ. (at paras. 135-183) treated the two ideas separately, while the dissenting opinions of LeBel J. (at paras. 277-280) and Deschamps J. (at paras. 289-302) treated disproportionality as the test of arbitrariness. In *Insite*, *supra*, note 42, McLachlin C.J.C. for the Court (at paras. 129-133) treated the two doctrines separately, although holding that both were applicable in that case; she also acknowledged (at para. 132) that "the jurisprudence on arbitrariness is not entirely settled".

[51] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

[52] *Id.* The seven-judge bench was actually split 3-1-3, with the one being Deschamps J., who concurred with McLachlin C.J.C., Major J. and Bastarache J., but on the basis of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, not the Charter of Rights. However, her reasons were very similar to the McLachlin-Major opinion which was based on s. 7 of the Charter.

[53] *Id.*, at para. 134.

[54] The dissenting position is open to the criticism that there would be regulatory solutions to the risk of doctors migrating to the more profitable private sector.

IX. THIRTY YEARS LATER

Section 7 is now 30 years old. Who would have imagined that it would give authority to judges to strike down laws respecting abortion, convicted sex offenders, drug addiction, assisted suicide, prostitution and even the single-tier public health care system? These include some of the most contested political issues in Canada. These section 7 cases are the most dramatic examples of the majoritarian critique of the Charter, favoured by Charter critics of both the left and the right, that decries the shift of policy-making away from the elected, accountable, legislative bodies and officials and over to the unelected and unaccountable judges.[55] That is certainly what has happened here.

On the other hand, there is much to like about some of the decisions. The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality",[56] by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective. A law that restricts life, liberty or security of the person, when subjected to an evidence-based review of its operation, may be shown to be not in fact fulfilling the law's objective, or even to be undermining the law's objective by doing more harm than good. That was the thrust of the evidence in the abortion, drug addiction, assisted suicide, prostitution and health care cases.[57] In an ideal world, such failures of policy would be remedied by the responsible legislative body. But if the persons harmed by the dysfunctional law have little popular appeal or political power, then legislators may be uninterested in their problems and disinclined to take any action, especially if they believe that a remedial law is likely to be unpopular. In that situation, there is a case for judicial review of the deprivation of life, liberty or security of the unpopular minority.

It must be remembered too that the majoritarian objection to judicial review often exaggerates the undemocratic character of judicial review. The fact is that judicial review is rarely the last word in Charter cases: a judicial decision striking down a law usually prompts a legislative

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55 Hogg, *supra*, note 2, at s. 36.4(b) describes and cites the literature.

56 Stewart, *supra*, note 2, at 151.

57 *Heywood*, *supra*, note 27, is an outlier because the majority relied on far-fetched hypothetical examples rather than facts to establish the law's overbreadth.

sequel.[58] Judicial review was the last word on abortion, but only because a bill introduced after *Morgentaler* to re-criminalize abortion (but with less restrictive conditions) was defeated in a tie vote in the Senate,[59] and the resulting regulatory vacuum seems to have remained politically acceptable. But in most areas of public policy, the Court, driven by the facts of a particular case, can make only crude and simple interventions in fields that require subtle and complex regulation. Humane policies to minimize the harm done by the criminalization of activity caused by drug addiction and activity associated with prostitution, the provision of safeguards for assisted suicide, and the reduction of long waits for public health care, for example, will be complicated, and they have to be carefully designed with the assistance of experts and informed by what other countries have done, and they must eventually be enacted by elected legislative bodies — taking care to avoid the traps that caused judicial intervention in the first place.

But, whatever conclusion one reaches about the desirability of judicial review under section 7, there is no doubt whatever that in the past 30 years section 7 has achieved much that could not have been anticipated by those present at the birth. That is one characteristic of a brilliant career. And 30 is still a young age, especially for a Charter right that is invulnerable to mandatory retirement or death. So far, the ingenuity of the Supreme Court has been devoted to expanding judicial review under section 7. That may not continue, of course, but, if it does continue for the next 30 years, the career of section 7 will become even more brilliant.

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[58] Hogg, *supra*, note 2, at s. 36.5, provides the data that support this statement and describes and cites the literature on the topic of "dialogue" between the courts and the legislative branch.

[59] Bill C-43 was passed by the House of Commons but defeated by the Senate on a 43-43 tie vote at third reading on January 31, 1991.