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A WITHERING INSTRUMENTALITY: THE NEGATIVE IMPLICATIONS OF *R. v. SAFARZADEH-MARKHALI* AND OTHER RECENT SECTION 7 JURISPRUDENCE

Andrew Menchynski and Jill R. Presser*

I. INTRODUCTION

The Supreme Court of Canada has faced a perennial problem, particularly since the advent of the *Canadian Charter of Rights and Freedoms*[1] ("Charter"), in its efforts to protect the constitutional rights of individuals without unduly interfering in the domain of the legislative branch of government.[2] A key question has been — to what extent should the courts use section 7 of the Charter to review or police Parliament's decisions regarding laws that engage an individual's liberty interests? Indeed, this is an issue brought to the fore in many of the Supreme Court of Canada's recent decisions[3] that have struck down criminal legislation. Is the Supreme Court being too interventionist in its approach, or is the Court rightly putting a check on repressive legislation?

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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.

2 See Kent Roach, *The Supreme Court on Trial*: *Judicial Activism or Democratic Dialogue, Revised Edition* (Toronto: Irwin Law Inc., 2016).

3 As discussed below, the Court's recent decisions that we focus on are *Canada (Attorney General) v. PHS Community Services Society*, *infra*, note 22; *Canada (Attorney General) v. Bedford*, *infra*, note 11; *Carter v. Canada (Attorney General)*, *infra*, note 29; *R. v. Smith, infra*, note 30; *R. v. Appulonappa*, *infra*, note 31; *R. v. Lloyd*, *infra*, note 14; and *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14 (S.C.C.) [hereinafter "*Markhali*"] .

Most recently, the Supreme Court needed to deal with this question in *R. v. Safarzadeh-Markhali*[4] ("*Markhali*"). In many respects, the Supreme Court's decision in this case should be celebrated as an important entry in the Court's jurisprudence on section 7 of the Charter. Not only does the Supreme Court re-affirm the potency of the constitutional doctrine of overbreadth but also it creates a systematic methodology for analyzing the statutory purpose of challenged legislation (a key focus at many stages of Charter litigation[5]). The Court's decision in *Markhali* leads to a more stable and predictable application of section 7 in future cases.

However, in this article we look beyond the obvious strengths of cases like *Markhali* to review the Supreme Court's recent section 7 jurisprudence through a more critical lens. We argue that the Court's recent boldness in utilizing section 7 to strike down legislation may not be as protective of substantive rights or as "interventionist" as it appears at first blush. In particular, we argue that future litigants should be concerned about the Court's implicit whittling down of section 7's arsenal of principles of fundamental justice to the doctrines of overbreadth and arbitrariness. This is because these principles of fundamental justice are not "substantive", creating no specific set of rights that accused individuals can utilize in day-to-day litigation. We argue that the Supreme Court's recent trend in section 7 jurisprudence is in reality more deferential to Parliamentary authority and less protective of long-term individual liberties than the Court's early[6] Charter jurisprudence.

II. *MARKHALI* AND THE MODERN ERA OF FOCUSING ON "INSTRUMENTAL RATIONALITY"

1. The Supreme Court's Decision in *R. v. Safarzadeh-Markhali*

In *Markhali*, the Supreme Court was asked to deal with an aspect of the *Truth in Sentencing Act*[7] ("TISA") that had restricted credit for pre-sentence custody to one day for each day served ("1:1") in situations where an

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[4] *Id*.

[5] The interpretation of statutory purpose is key at the very least in analyses of ss. 1, 7, 12 and 15 of the Charter.

[6] By "early" Charter jurisprudence, we mean the Court's s. 7 decisions released after the advent of the Charter in 1982 but prior to the modern age of "instrumental rationality" (as explained below).

[7] S.C. 2009, c. 29.

accused was detained primarily due to his or her criminal record. Mr. Safarzadeh-Markhali himself was charged with possession of marijuana and several firearms offences. The Justice of the Peace presiding over his bail hearing detained him and endorsed his Information pursuant to section 515(9.1) of the *Criminal Code*[8] (the "Code"), signifying that his detention was primarily due to his criminal record. As a result, section 719(3.1) of the Code — enacted as part of the legislative amendments introduced under the TISA — restricted the sentencing judge's discretion to grant Mr. Safarzadeh-Markhali credit for pre-sentence custody to a maximum of 1:1. He was detained in pre-sentence custody for one year, eight months and 22 days, despite making every effort to proceed to trial expeditiously.

Prior to imposing sentence, the sentencing judge agreed with Mr. Safarzadeh-Markhali that the portion of section 719(3.1) that restricted the credit he could receive for his pre-sentence custody to 1:1 violated section 7 of the Charter in a manner that could not be justified under section 1. The sentencing judge then awarded Mr. Safarzadeh-Markhali "enhanced" credit of one-and-a-half days for each day served.[9] The Crown appealed the sentencing judge's finding.

The Court of Appeal for Ontario dismissed the Crown's appeal, holding that the relevant part of section 719(3.1) was not in accordance with the *process* component of the principle of proportionality in sentencing — which the Court of Appeal recognized to be a "new" principle of fundamental justice under section 7 of the Charter. The Court of Appeal also found that the effects of the legislation could result in grossly disproportionate punishments in reasonably foreseeable scenarios.[10]

The Crown appealed again to the Supreme Court of Canada. The Court dismissed the Crown's appeal, but for different reasons than did the Court of Appeal for Ontario. The Supreme Court found that the impugned portion of the TISA violated section 7 because it was unconstitutionally overbroad.[11] The Chief Justice, writing for the

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8 R.S.C. 1985, c. C-46.

9 *R. v. Safarzadeh-Markhali*, [2014] O.J. No. 4194, 2014 ONCA 627, at paras. 33-45 (Ont. C.A.).

10 *Id.*, at paras. 63-101.

11 The Supreme Court described the doctrine of overbreadth in *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, at paras. 112-113 (S.C.C.) [hereinafter "*Bedford*"] as prohibiting Parliament from passing laws that impact the life, liberty and security of the person of individuals that Parliament did not intend to target:

> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement

unanimous Court, found that the goal of the impugned section was "*to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs*".[12] The Court found that the impugned provision was overbroad because, despite its legislative purpose, (1) it could foreseeably deny credit to offenders who did not pose a threat to public safety or security and (2) it could foreseeably deny credit to offenders whose information was erroneously endorsed under section 515(9.1) and who could not appeal that endorsement (because the impugned statute did not allow for any mechanism of review from a Justice's endorsement under section 515(9.1) of the Code).[13] In this way, the Court found that the impugned law is irrational or arbitrary "in part" because it could affect individuals Parliament did not intend to target.

2. The Creation of the Doctrines of Overbreadth and Arbitrariness[14]

The Supreme Court's decision to rely on the doctrine of overbreadth — rather than on the "new" principle of fundamental justice recognized in the Court of Appeal for Ontario (*i.e.*, the principle of proportionality in sentencing) — was unsurprising given the Court's frequent reliance on this doctrine in recent years (as discussed in the next section). Overbreadth was originally recognized as a principle of fundamental justice under section 7 in *R. v. Heywood*[15] ("*Heywood*"). In that case, the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Supreme Court found that the law, which aimed to protect children from sexual predators, was overbroad because it impacted on offenders who

more practical, there is still no connection between the purpose of the law and its effect on the *specific individual.* (emphasis in original)

[12] See *Markhali*, at para. 47, *supra*, note 3 (emphasis in original).

[13] *Id*., at paras. 53-54.

[14] Note that, in past s. 7 cases like *Bedford*, *supra*, note 11, the Supreme Court has typically discussed the doctrines of overbreadth and arbitrariness alongside the principle of fundamental justice that prohibits the imposition of "grossly disproportionate" punishments. However, the Supreme Court of Canada appears to have made clear more recently in *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 (S.C.C.) [hereinafter "*Nur*"] and *R. v. Lloyd*, [2016] S.C.J. No. 13, 2016 SCC 13 (S.C.C.) [hereinafter "*Lloyd*"] that "gross disproportionality" should be more appropriately invoked under s. 12 of the Charter (which prohibits "cruel and unusual" punishment). At the very least, it can be said that the principle of fundamental justice prohibiting "grossly disproportionate" sanctions has no distinct content outside of s. 12 of the Charter. As a result, we focus in this article primarily on s. 7's two remaining distinct principles of fundamental justice in the modern age of "instrumental rationality": overbreadth and arbitrariness.

[15] [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

did not pose a danger to children and prohibited other offenders from attending parks and other places where children would *not* be present.

Since its inception in *Heywood*, the doctrine of "overbreadth" lay dormant and unpopular for nearly two decades. It was not relied on by the Supreme Court as the basis for striking down any legislation, with the sole exception of *R. v. Demers* ("*Demers*").[16] In *Demers*, the impugned legislation prevented accused who were found unfit to stand trial from receiving an absolute discharge, and instead subjected them to indefinite appearances before a provincial review board. The Court found that the purpose of the impugned legislation was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial".[17] The Court found that the legislation was overbroad insofar as it applied to *permanently* unfit accused, *i.e.*, those who would never become fit to stand trial.[18] Accordingly, the legislation was found to violate section 7 of the Charter.

In this time frame, the doctrine of arbitrariness was similarly recognized but disused. As explained in *R. v. Clay*,[19] the doctrines of arbitrariness and overbreadth are closely connected. Whereas overbreadth strikes down legislation that impacts on individuals Parliament did not intend to target, arbitrariness polices against Parliament passing laws that do not *in any substantial way* advance its legislative goals. The doctrine of arbitrariness was first conceived of by the Supreme Court in *R. v. Morgentaler*,[20] which is a case that dealt with the criminalization of abortion. Three of the four of the majority judges in *Chaoulli v. Quebec (Attorney General)*[21] then utilized the doctrine of arbitrariness when they dealt with a legislative prohibition on private health insurance. Aside from these cases, the doctrine of arbitrariness, much like overbreadth, lay largely dormant for many years.

3. The Modern Era of "Instrumental Rationality"

The doctrines of overbreadth and arbitrariness did not experience a true resurgence until after the Supreme Court of Canada's decision in

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[16] [2004] S.C.J. No. 43, 2004 SCC 46 (S.C.C.). See also *R. v. Clay*, *infra*, note 19 where the Court makes mention of the doctrine of overbreadth but does not use it to strike down legislation.

[17] *Id*., at para. 41.

[18] *Id*., at paras. 42-43.

[19] [2003] S.C.J. No. 80, 2003 SCC 75 (S.C.C.).

[20] [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

[21] [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

Canada (Attorney General) v. PHS Community Services Society[22] ("*PHS*"). In this case, the Supreme Court was reviewing the Minister of Health's decision not to exempt a "safe injection site" from criminal prosecution under the *Controlled Drugs and Substances Act* ("CDSA"). The Court found that the Minister's decision violated section 7 of the Charter because it was arbitrary. The purpose of the CDSA was to promote public health and safety, whereas the Minister's decision to recriminalize a safe injection site would imperil the lives of those addicted to drugs who were searching for a safe place to consume them. The Supreme Court also affirmed that section 7 protects individuals from laws that are overbroad (which is to say, arbitrary "in part").[23]

In *Canada (Attorney General) v. Bedford*[24] ("*Bedford*"), the Supreme Court once again focused on the doctrines of arbitrariness and overbreadth. In that case, the Court struck down a number of prostitution-related provisions of the Code and gave Parliament one year to craft a new legislative scheme addressing sex work. In doing so, the Supreme Court found that "courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways".[25] The Court explained that these are all examples of "failures of instrumental rationality"[26] — whereby Parliament passes legislation that poorly achieves its aims. The Supreme Court reasoned that courts have a duty to assess critically such "failures of instrumental rationality". They must perform this analysis without reviewing the substantive content of the legislation that Parliament passes. In *Bedford*, such a critical assessment of the failures of instrumental rationality resulted in the prostitution laws at issue being struck down as unconstitutional.

Since *Bedford*, the Supreme Court has relied almost exclusively[27] on the doctrines of overbreadth and arbitrariness to strike down unconstitutional legislation under section 7 of the Charter (whereas "gross disproportionality" has now been relegated to constitutional

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[22] [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

[23] In *R. v. Khawaja*, [2012] S.C.J. No. 69, 2012 SCC 69 (S.C.C.), the Court re-affirmed the existence of both doctrines in a case that dealt with the constitutionality of certain anti-terrorism offences.

[24] *Supra*, note 11.

[25] *Id*., at para. 106.

[26] See also Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012).

[27] There is one notable exception in *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.), which is discussed in more detail below.

claims under section 12 of the Charter[28]). In *Carter v. Canada (Attorney General)*[29] ("*Carter*"), the Court relied on overbreadth to strike down laws surrounding assisted suicide. In *R. v. Smith*[30] ("*Smith*"), the Court used arbitrariness to strike down a prohibition on medical marihuana. In *R. v. Appulonappa*,[31] ("*Appulonappa*"), the Court used overbreadth to strike down a portion of the *Immigration and Refugee Protection Act*[32] dealing with illegal human smuggling. Finally, in *Markhali*, the Court used overbreadth to strike down a provision limiting the amount of credit awarded to offenders for serving time in pre-sentence custody.

In each of these cases, the Supreme Court envisioned section 7 as a tool for ensuring that an impugned legislation's objective and means are "aligned". In other words, the Court did not review in any of these cases whether the legislation impacted on substantive and procedural freedoms. That is, legislation was not struck down because Parliament impinged on the substantive rights of Canadians — such as an individual's right to self-determine when they die (*Carter*), or their right to use "illicit" substances to alleviate suffering (*Smith*), or the right to be credited fairly for their imprisonment awaiting trial (*Markhali*). Instead, the Supreme Court chose to cure each of these substantively unfair laws by questioning whether Parliament's legislative goals were intended to achieve their effects. In each case, the Supreme Court also theoretically left Parliament with the option of passing each impugned provision anew and declaring that it *did* wish to achieve such an "unfairness" through its laws (thus "aligning" goals and means and passing constitutional muster).

III. Stagnation in Recognizing "New" Substantive Principles of Fundamental Justice

In our view, the Court's focus on "instrumental rationality" in recent years appears to have had a corresponding adverse impact on the recognition of "new" principles of fundamental justice under section 7 of the Charter.

Section 7 of the Charter protects the life, liberty and security of the person, ensuring that these are not impacted in a manner that is not in

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28 *Supra*, note 14.
29 [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.).
30 [2015] S.C.J. No. 34, 2015 SCC 34 (S.C.C.).
31 [2015] S.C.J. No. 59, 2015 SCC 59 (S.C.C.).
32 S.C. 2001, c. 27.

accordance with the "principles of fundamental justice". As first explained in the *Reference re Motor Vehicle Act (British Columbia) S 94(2)*[33] ("*B.C. Motor Vehicle Act Reference*"), the Charter itself does not provide an exhaustive list of the principles of fundamental justice. Sections 8 to 14 of the Charter do provide enumerations or examples of the principles of fundamental justice. However, as the Court found in the *B.C. Motor Vehicle Act Reference*, it is both possible and desirable — for the sake of the health and growth of the Charter, which the Court conceptualized to be a "living tree" — to recognize "new" principles of fundamental justice under section 7, not necessarily envisioned by the section's framers. Importantly, in that case, Lamer J. also expressly recognized that any "new" principles of fundamental justice should not necessarily be limited to procedural protections; they may take on the form of substantive rights.[34]

Indeed, the Supreme Court of Canada set out a deliberate methodology for recognizing the existence of "new" principles of fundamental justice, and did not forbid the formation of substantive protections. As explained in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,[35] the Supreme Court set out the following test for determining what constitutes a "new" principle of fundamental justice: (1) the proposed principle must be a legal principle; (2) there must be consensus that the proposed principle is essential to our shared notions of justice; and (3) the proposed principle must be capable of being identified with precision and applied in a manner that yields predictable results.

Using this test, the Supreme Court recognized a plethora of "new" principles of fundamental justice in the Charter's first two decades. In addition to the principles of fundamental justice described above that relate to legislative "failures of instrumental rationality", the Supreme Court has recognized a variety of other principles of fundamental justice that protect substantive and procedural rights:[36]

- **Criminal liability must correspond to fault:** An overarching principle of fundamental justice requires that individuals not face criminal liability beyond that corresponding to their actual fault;[37]

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[33] [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[34] *Id*., at para. 63.

[35] [2004] S.C.J. No. 6, 2004 SCC 4 (S.C.C.).

[36] This list is not exhaustive and borrowed from Dwight Newman (Main Title Contributor), *Halsbury's Laws of Canada – Constitutional Law (Charter of Rights) – 2014 Reissue* (available on QL).

[37] See *B.C. Motor Vehicle Act Reference.*

- **No absolute liability offences when section 7 interests engaged:** When section 7 interests are at stake, including in the context of any offence resulting in imprisonment, there is a principle of fundamental justice prohibiting absolute liability.[38]

- ***Mens rea* requirement appropriate to the stigma of offence:** A more general principle of fundamental justice within the category of those relating to the necessity of fault for criminal liability prescribes that the *mens rea* requirement in an offence must be appropriate in light of the gravity of the offence and, especially, the stigma occasioned by conviction;[39]

- **Defences affecting fault:** A principle of fundamental justice mandates that defences that would negative the requisite standard of fault, including those related to voluntariness, must be available;[40]

- **Duty to act fairly:** The principles of fundamental justice require that any state action engaging an interest protected by section 7 must be in accordance with duties of procedural fairness, which would appear at a minimum to embrace the contents of natural justice;[41]

- **Youth to be treated in a manner respecting their reduced culpability:** There is a principle of fundamental justice that youth criminal justice must be responsive to the actual culpability of youth, which involves a "reduced maturity and moral capacity";[42]

- **Full answer and defence:** The principles of fundamental justice afford significant protection to the accused's opportunity to make use of the adversarial system in contesting charges;[43]

- **The right to disclosure:** Section 7 gives rise to a right of full and ongoing "first party" disclosure of evidence in the possession of the state that is relevant to a criminal prosecution;[44]

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[38] *Id.*

[39] See for example *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[40] See *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.).

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

[42] See *R. v. D.B.*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.).

[43] See *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

[44] See *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

- **The right to silence:** The right to silence is a fundamental tenet of our criminal justice system and recognized as a principle of fundamental justice;[45]

- **Prohibition on abuse of process:** The principles of fundamental justice also give constitutional status to prohibitions on abuses of process.[46]

It should not be surprising that many of these "new" principles of fundamental justice were recognized shortly after the advent of the Charter. The Canadian legal system had many core or fundamental values that were not enumerated in the Charter. Section 7 thus served as a vehicle for providing a constitutional dimension to well-recognized values that existed long before the Charter came along. This may explain why the early days of the Charter saw the birth of numerous "new" principles of fundamental justice — with a relative slowdown in later years.

However, what *is* surprising is the near absence of recognition of "new" principles of fundamental justice by the Supreme Court in the years since *PHS*. Indeed, since there has been a revived focus in section 7 jurisprudence on "instrumental rationality", there have been virtually no cases where the Court recognized a "new" substantive principle of fundamental justice. Notably, as discussed in more detail in the next section, the Court has in fact *declined* to recognize some "new" principles of fundamental justice when asked to do so in *Carter*, *R. v. Anderson*,[47] ("*Anderson*"), *Lloyd*,[48] and *Markhali*.[49]

The only exception to this trend is the Court's decision in *Canada (Attorney General) v. Federation of Law Societies of Canada*.[50] In this case, the Supreme Court recognized the uncontroversial point that "the lawyer's duty of commitment to the client's cause" is a principle of fundamental justice and that the state cannot pass laws that would impede a lawyer in this duty.[51] However, even in this case, the Court

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[45] See *R. v. R.J.S.*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451 (S.C.C.); *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.).

[46] See *R. v. Jewitt*, [1985] S.C.J. No. 53, [1985] 2 S.C.R. 128 (S.C.C.).

[47] [2014] S.C.J. No. 41, 2014 SCC 41 (S.C.C.).

[48] *Supra*, note 14.

[49] Only the latter two cases are examined in detail below. However, it should be noted that, in *Carter*, the Supreme Court refused to recognize "parity" as a principle of fundamental justice and, in *R. v. Anderson*, the Supreme Court declined to recognize the principle that "Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options" as a principle of fundamental justice (see para. 29 of *R. v. Anderson*).

[50] [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.).

[51] *Id*., at paras. 74-115.

declined to deal with the argument that the independence of the bar at large, *i.e.*, that lawyers practising their duties should be "free from incursions from any source, including from public authorities" — is a principle of fundamental justice.[52]

This stagnation in the recognition of "new" principles of fundamental justice has been noted by constitutional litigants. In *Markhali*, the Attorneys General submitted, in response to the Court of Appeal's recognition of a "new" principle of fundamental justice, that the Supreme Court has now limited the bases of the principles of fundamental justice under section 7 to: arbitrariness, overbreadth and gross disproportionality. Given the Supreme Court's recent trend in section 7 jurisprudence, this argument was not without a foundation. Indeed, the Supreme Court itself recognized the central importance of these principles of fundamental justice in *Carter*:

> Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty, or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, **three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.** (emphasis added)

IV. The Worrying Implications of the Supreme Court's Focus on "Instrumental Rationality" in Section 7 Jurisprudence

We believe that the Supreme Court's focus on "instrumental rationality" in recent jurisprudence has changed the identity of section 7 in a troubling manner, straying from the conception of the section originally recognized in the *B.C. Motor Vehicle Act Reference*. As discussed below, the Court's focus on "instrumental rationality" has set up a variety of hurdles to the Charter's ability to remain a "living tree" — one that provides long-term safeguards against repressive legislation and that recognizes "new" rights in response to inevitable sociopolitical, cultural and demographic changes.

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[52] *Id.*, at para. 80.

1. The Current Supreme Court and Section 7: A Crisis of Identities

The Supreme Court's focus on instrumental rationality is unfortunate given the rich substantive history of section 7. As explained above, section 7 has been used to recognize a number of procedural and substantive protections for litigants in the criminal justice system (as well as in some areas outside of it, including in administrative law). One need only think of the prominence of such doctrines as "full answer and defence", the right to disclosure, cases establishing the requisite levels of fault for different types of criminal and quasi-criminal offences, and the doctrine of procedural fairness to realize how influential section 7 of the Charter has been from a substantive rights perspective. So why should the Court now imagine a section 7 that is mainly a tool for ensuring Parliament's "instrumental rationality"?

This new conceptualization of section 7 may be attributed to the judiciary's reluctance to be viewed as interfering with the democratic responsibility of Parliament to pass laws. In other words, the Court may not want to be perceived as stepping on Parliament's toes. Judicial activism is a practice very often debated and criticized among academics and legal observers, especially when courts use the Charter to find legislation unconstitutional.[53] In recent years, the Supreme Court has not shied away from striking down legislation that deals with everything from sex work[54] to various mandatory minimum sentences[55] (not to mention other hot-button cases like the "Nadon reference"[56]).

It may, be tempting for the Court to step away from even creating the impression of over-activism by re-imagining section 7 as simply dealing with the flawed *rationality* of bad laws — and not as a method of interfering with the substance of Parliament's laws. In this way, the judicial branch can be seen to be merely policing Parliament's good legislative drafting practices, while in fact utilizing the doctrines of arbitrariness and overbreadth to achieve its desired substantive results.

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[53] See *e.g.*, Kent Roach, *The Supreme Court on Trial*: *Judicial Activism or Democratic Dialogue, Revised Edition* (Toronto: Irwin Law Inc., 2016); James B. Kelly, *Governing with the Charter: Legislative And Judicial Activism And Framer's Intent (Law and Society Series)* (Vancouver, Canada: UBC Press Publishers, 2006); and Rory Leishman, *Against Judicial Activism: The Decline of Freedom And Democracy in Canada* (Montreal: McGill-Queen's University Press Publishers, 2006).

[54] See *Bedford*, *supra*, note 11.

[55] See *Nur* and *Lloyd*, *supra*, note 14.

[56] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.).

2. Three Specific Worries about the Future of Section 7 Jurisprudence

We welcome the Court's boldness in striking down a variety of ill-conceived "tough-on-crime" laws in recent years. We believe that Parliament's legislation should be rational — in the sense that it should not be arbitrary, overbroad, or grossly disproportionate. However, we also believe that this development in the identity of section 7 — as merely a tool to ensure the "instrumental rationality" of legislation — should be worrying to future litigants for at least three reasons.

First, our concern is that, while arbitrariness and overbreadth have been useful doctrines to date, their utility in scrutinizing unfair legislation will diminish in the future. In *Markhali*, the Supreme Court set out a very detailed roadmap for how courts should assess legislative purpose. The Court outlined a step-by-step approach for determining legislative purpose that relies on sources produced almost exclusively by the legislature: (1) pre-ambles to Parliamentary bills, (2) any text, context and scheme of the legislation; and (3) extrinsic evidence, such as speeches made by the Minister of Justice introducing the legislation. The result is that, as argued by Marcus Moore in his recent analysis of the Supreme Court's decision in *Markhali*,[57] it will now be easier for the legislature to pass constitutional laws:

> In our system of government with its separation of powers and judicial review checking unconstitutional action by the state's democratic organs, *Markhali*'s Rigorous Approach to purpose construction may significantly improve "communications" between legislatures and courts. Because the Rigorous Approach is both transparent and consistent, legislatures should generally be better-equipped to appreciate what makes laws unconstitutionally overbroad, discriminatory in purpose, unjustifiable in their rights limitations *etc*. **This will encourage legislatures to be much more clear about the legislative object, within the authoritative sources that courts look to as indicia under the Rigorous Approach.** (emphasis added)

No person interested in the rule of law could reasonably take issue with a system that favours instrumentally rational laws.[58] However, this

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[57] Marcus Moore, "*R. v. Safarzadeh-Markhali*: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223 at 249.

[58] Indeed, it could be said that the right to be free from instrumentally irrational laws is, in itself, a type of substantive right. However, our point in this article is that section 7 ought to be imbued with more than just this one set of protections.

approach risks giving Parliament the tools to insulate substantively problematic legislation from constitutional scrutiny. In other words, because the doctrines of overbreadth and arbitrariness are simply concerned with aligning statutory purpose and effect, it will be easy enough for legislators and legislative drafters to ensure that otherwise unfair laws pass constitutional muster. All that Parliament needs to do is simply to make sure its legislative sources articulate, without ambiguity, its objectives — even if the objectives themselves are substantively unfair or unjustly target and punish the politically and socially powerless.

Indeed, in 2014, the federal government of the day attempted to do exactly that when passing the *Protection of Communities and Exploited Persons Act* ("Bill C-36") — which was their legislative response to the Supreme Court's decision in *Bedford*. The government passed legislation that was substantially similar to the laws struck down by the Supreme Court. However, they included with Bill C-36 a lengthy pre-amble that is, as was noted in Parliament, "unusual" in its meticulous outline of the government's statutory purposes for passing the Bill. Similarly, the Minister of Justice, Peter MacKay, made a point of stressing the aims of Bill C-36 in his speeches in Parliament. He emphasized that *Bedford* was decided on the premise that sex work was legal in Canada, and that the new legislation intends to deter sex work and to make it illegal.[59] The government's painstaking efforts to detail Bill C-36's purpose highlights the need for concern: an unfair law may, in this way, be protected from section 7's scrutiny simply because it passes the test of instrumental (but not substantive) rationality.

Our second concern is that, even if this generation of the Supreme Court has utilized instrumental rationality to strike down substantively problematic laws, this may not necessarily happen with other Supreme Courts in the future. The problem is that a decision based on an "instrumentality analysis" generally does not entrench itself in "horizontal" or "vertical" *stare decisis* beyond the question of whether a specific impugned provision violates section 7.[60] In other words, any analysis that declares any given legislative provision unconstitutional on the basis of "instrumental irrationality" does not bind other courts that are analyzing

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[59] Speech by Hon. Peter MacKay at Second Reading of Bill C-36, *Official Report of Debates (Hansard)*, 41st Parl., 2nd Sess., Vol. 147, No. 101 (June 11, 2014), at 6652-53.

[60] See Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006) 32(1) Manitoba L.J. 135 and Debra Parkes, "Precedent Revisited: *Carter v. Canada (AG)* and the Contemporary Practice of Precedent" (2016) 10(1) McGill J.L. & Health 123 for a detailed discussion of how the doctrine of *stare decisis* operates in contemporary Canadian jurisprudence.

different statutes or provisions. For example, simply because the portion of the TISA analyzed in *Markhali* was found to be unconstitutional does not even mean that other portions of the legislation that restrict pre-sentence credit to 1:1 in a different context[61] are unconstitutional. On the other hand, if the Supreme Court in *Markhali* had declared "fair credit for pre-sentence custody" and/or the "principle of proportionality in sentencing" (as discussed below) to be principles of fundamental justice, then it would be much more difficult for other courts to uphold any 1:1 legislative restriction on pre-sentence credit in other contexts. Accordingly, a section 7 imbued with substantive content is much more likely to safeguard rights and liberties through the doctrine of *stare decisis* in the future. Indeed, it is difficult to imagine many existing substantive rights recognized under section 7, such as the right to receive disclosure or the right to have the Crown prove a certain level of fault in any given criminal prosecution, being abolished or revised by a future Supreme Court.[62]

Importantly, we must also note that an instrumentality analysis only *appears* to be value-neutral and objective. However, the doctrines animating "instrumental rationality" are actually open to easy manipulation, for "rationality" is in the eye of the beholder. As noted by the Supreme Court itself in *R. v. Moriarity*,[63] it is very easy to change the interpretation of a statutory purpose in order to achieve a desired result. On the one hand, "[i]f the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose".[64] On the other hand, "if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively

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[61] That is where an accused's bail is revoked because of a breach of his or her conditions of release.

[62] However, we should note that, although it is difficult to revise existing substantive protections recognized under the Charter, it is certainly not impossible. See, *e.g.*, *R. v. Nedelcu*, [2012] S.C.J. No. 59, 2012 SCC 59 (S.C.C.) and the previous line of cases interpreting the protections afforded by s. 13 of the Charter.

[63] [2015] S.C.J. No. 55, 2015 SCC 55 (S.C.C.). In this case, the Supreme Court was deciding whether provisions of the *National Defence Act*, R.S.C. 1985, c. N-5 were overbroad. The impugned provisions made it an offence, even when not on military duty, to engage in conduct prohibited under an underlying federal statute (including the *Criminal Code*) and to engage in fraudulent conduct. The Supreme Court engaged in an analysis of the appropriate level of generality at which the purpose of an impugned provision must be cast before finding that s. 7 was not violated.

[64] *Id*., at para. 28.

foreclose any separate inquiry into the connection between them".[65] While *Markhali* attenuates this problem with its "Rigorous Approach"[66] to interpreting statutory purpose, it would be somewhat naïve to believe that results-oriented statutory interpretation can be eliminated in its entirety. It will be possible in almost any case to put a spin, even if unintentionally, on the statutory objectives of the legislation being reviewed — and, particularly in close cases, this will make all the difference in deciding whether a law is instrumentally rational. As a result, future Supreme Courts that are more deferential to Parliament may interpret the purposes of impugned laws in a way that is much more likely to align them with their effects.

Third, we believe that a focus on "instrumental rationality" undermines the philosophical underpinnings of section 7. As explained by Lamer J. in the *B.C. Motor Vehicle Act Reference*, the Charter is a "living tree" that is intended to give a constitutional dimension to the substantive liberties and rights recognized as essential in the continuous present. The Charter should not be frozen in time or dependent on Parliament's ability to align the purposes and means of its legislation. Instead, the Charter is intended, at least in part, to be an instrument that gives voice to those who often cannot be heard by politicians focused on pleasing their constituents. Because "new" principles of fundamental justice can always be recognized by the courts as there are shifts in the social milieu, we believe that section 7 provides the best opportunity for protecting the substantive rights and liberties of the socio-politically "excluded" in the long-term future.[67] However, for this to occur, section 7 needs to be imbued with "substantive" rather than just "relative" principles of fundamental justice. Indeed, as discussed above, this is the only hope for securing the longevity of past section 7 victories.

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[65] *Id*.

[66] Marcus Moore, "*R. v. Safarzadeh-Markhali*: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223.

[67] That said, we must of course acknowledge that the courts do not always take up the cause of the marginalized or politically disempowered. However, unlike elected politicians, we believe that an independent judiciary is in a more advantageous — or, at least, less institutionally constrained — position to recognize or affirm the liberties of the socially powerless. Indeed, as discussed above, the Supreme Court's early Charter jurisprudence is some evidence of the proposition that the judiciary can at least advance the "dialogue" with Parliament regarding the need to safeguard the liberties of those normally excluded from dominant societal discourses. See Kent Roach, *The Supreme Court on Trial*: *Judicial Activism or Democratic Dialogue, Revised Edition* (Toronto: Irwin Law Inc., 2016).

V. *R. v. Safarzadeh-Markhali*: An Example of the Court's Missed Opportunity to Recognize an Important "New" Substantive Principle of Fundamental Justice

To understand the need for a substantive section 7 of the Charter, one need only examine the Supreme Court's recent refusals to recognize "new" principles of fundamental justice. In both *Markhali* and *Lloyd*, the Court recently had an opportunity to recognize the "principle of proportionality in sentencing" as a principle of fundamental justice. The Court refused to take this opportunity, declining even to conduct the test set out in *Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)* (discussed above) for what constitutes a "new" principle of fundamental justice. Had the Court done so, we believe the principle of proportionality in sentencing would have easily qualified as a principle of fundamental justice:

- First, the principle of proportionality in sentencing is a well-articulated legal principle, which has now been defined with precision by section 718.1 of the Code;
- Second, the Supreme Court in *R. v. Ipeelee*,[68] ("*Ipeelee*") (and other cases) has already recognized that the principle of proportionality in sentencing is the central driving force that allows for "the maintenance of a just, peaceful and safe society through the imposition of just sanctions";
- Third, as recognized by Wilson J. in *B.C. Motor Vehicle Act Reference*, judges have been successfully applying the principle of proportionality "for over a hundred years", yielding predictable and just results.

Indeed, the Code enshrines proportionality as the "fundamental principle" of sentencing under section 718.1. Moreover, as recently recognized by the Supreme Court itself in *Ipeelee*, "proportionality is the *sine qua non* of a just sanction" and a "central tenet of the sentencing process" that existed long before the Code enshrined it as a fundamental principle of sentencing. The principle of proportionality is fundamental to society's notions of just sentencing that is individualized and fair.

Ironically, both in *Ipeelee* and *Anderson*, the Supreme Court expressly recognized the principle of proportionality in sentencing as a principle of

[68] [2012] S.C.J. No. 13, 2012 SCC 13 (S.C.C.).

fundamental justice. Justice LeBel expressly explained in *Ipeelee* that he found the principle of proportionality to be a principle of fundamental justice:

> …The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been **a central tenet of the sentencing process** […] It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. **In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.** (emphasis added)

However, when faced with the notion of striking down legislation in *Markhali* and *Lloyd* based on the principle of proportionality in sentencing, the Court unexpectedly changed course. In *Markhali*, the Court reasoned that section 7 only protects against grossly disproportionate sentences: "Parliament **can** limit a sentencing judge's ability to impose a fit sentence, but it cannot require a sentencing judge to impose **grossly** disproportionate punishment" (emphasis added).[69] Accordingly, the Supreme Court found that the Court of Appeal for Ontario erred when it recognized this "new" and substantive principle of fundamental justice.

However, what the Supreme Court failed to recognize is that the principle of proportionality in sentencing has two distinct components: a *result* component and a *process* component. The *result* component demands that the substantive quantum of the sentence be within a range of punishments acceptable to the moral compass of society. The *process* component requires sentencing judges to impose punishment by focusing on an individual's moral blameworthiness and degree of responsibility, as opposed to other arbitrary or irrelevant factors (and is thus closely related to the principle of parity).[70] It is only when both components are satisfied that a sentence can accord with the principle of proportionality in sentencing:

- First, society must generally decide how severely to punish a type of wrongdoing. In other words, punishment must be anchored to the seriousness of a type of crime. A "mandatory minimum" sentence,

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[69] *Markhali*, *supra*, note 3, see paras. 67-73.

[70] See *R. v. Safarzadeh-Markhali*, [2014] O.J. No. 4194, 2014 ONCA 627, at paras. 73-86 (Ont. C.A.).

for example, is Parliament's expression of what a fair quantum of punishment is for a type of crime. Starting points and ranges are also expressions of fair punishments for categories of crime. Through these mechanisms, it is decided generally what type of a *punishment* or *result* fits a type of crime.[71]

- Second, just punishment must be *individualized* to ensure that people are punished relative to others. Justice demands that those who are more blameworthy receive a harsher sanction. On the other hand, if the moral blameworthiness and the degree of responsibility of two individuals are identical, their punishment should be roughly identical. In order to individualize punishment in this manner, a sentencing judge must follow a *process* through which he or she identifies the particular blameworthiness and degree of responsibility of the individual(s) being sentenced.[72]

Importantly, the deferential standard of *gross* disproportionality does not logically apply to the *process* component of the principle of proportionality. As Strathy J.A. recognized in the Court of Appeal's decision in *Markhali*, an individual is always "entitled to a *process* directed at crafting a just sentence", regardless of the resulting punishment.[73] The existence of a process that individualizes punishment based on moral wrongdoing is not a question of degree or "grossness". Courts must simply look at the legislative context and decide whether that fair process exists or not.

Indeed, Parliament is only in the best position to decide generally what constitutes a fair *result* or quantum of punishment for a type of crime (*i.e.*, the first step described above). This is because the moral compass of society fluctuates with time and changing socioeconomic circumstances. For example, society has viewed certain sexual offences and gun offences much more seriously in the last decade or two than in previous decades. Being a democratically elected institution, Parliament is in the best position to gage the social response of the community and determine the exact "price" (or the parameters thereof) that must be paid for a type of crime.

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[71] This is sometimes referred to as the "cardinal" aspect of the principle of proportionality. See *e.g.*: *R. v. Arcand*, [2010] A.J. No. 1383, 2010 ABCA 363, at paras. 49 and 5 (Alta. C.A.) [hereinafter "*Arcand*"]; *R. v. Johnson*, [2011] O.J. No. 822, 2011 ONCJ 77, at paras. 138-139 (Ont. C.J.) [hereinafter "*Johnson*"].

[72] This is sometimes referred to as the "ordinal" aspect of the principle of proportionality. It is also captured by the parity principle, which has been described as an integral aspect of the principle of proportionality in sentencing. See: *Arcand*, at para. 50 and *Johnson*, at paras. 140-143, *id*.

[73] *Supra*, note 70, at para. 82 (emphasis in original).

However, only the courts can meaningfully individualize punishment. Parliament does not and cannot legislate punishments tailored to each particular crime and every unique offender that passes through the criminal justice system. As a result, sentencing judges must evaluate the personal circumstances and moral blameworthiness of each offender, and they must compare different offenders and what they did wrong relative to each other. Only after this comparison process can sentencing judges impose equal punishment under the law. Without this kind of individualized tailoring of sentences to the circumstances of the offence and the offender, punishment would not "fit" the offender: unequally blameworthy individuals would receive equal punishment, and equally blameworthy individuals would receive unequal punishment.

Importantly, courts and academics have long recognized the importance of procedural fairness in sentencing. In *R. v. Smith*,[74] Lamer J. explained that an arbitrary or unfair sentencing *process* may violate section 7 of the Charter even if the *resulting* punishment is not grossly disproportionate pursuant to section 12 of the Charter. Justice Lamer employed similar terminology to that used by the Court of Appeal in *Markhali* when he explained the difference between the "effect" and the "process" of a punishment:

> On more than one occasion the courts in Canada have alluded to a further factor, namely, whether the punishment was arbitrarily imposed. As regards this factor, some comments should be made, because arbitrariness of detention and imprisonment is addressed by s. 9, and, to the extent that **the arbitrariness, given the proper context, could be in breach of a principle of fundamental justice, it could trigger a prima facie violation under s. 7**. As indicated above, **s. 12 is concerned with the effect of a punishment, and, as such, the process by which the punishment is imposed is not, in my respectful view, of any great relevance to a determination under s. 12**. For example, s. 12 would not be infringed if a judge, after having refused to hear any submissions on sentencing, indicated that he would not take into consideration any relevant factors, but then went on to impose arbitrarily a preconceived but appropriate sentence. In my view, because this result would be appropriate, the sentence cannot be characterized as grossly disproportionate and violative of s. 12. (emphasis added)

Unfortunately, despite its own precedent recognizing the need for a fair sentencing *process*, the Supreme Court in *Markhali* appeared

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[74] [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

reluctant to recognize that section 7 provided any substantive protections. Accordingly, the Court would not enshrine a just and individualized sentencing process under the auspices of section 7. Instead, the Supreme Court once again chose to focus on instrumental rationality, striking down legislation simply because Parliament did not match up the legislation's objectives and its effects. The result is that Parliament remains free today to legislate a sentencing process that violates the "*sine qua non* of just sanction" because such legislation would apparently not violate our principles of fundamental justice.

In our view, this is an alarming development. The principles of proportionality in sentencing and the closely associated principle of parity satisfy the pre-conditions for being recognized as principles of fundamental justice. Recognizing these principles as principles of fundamental justice would *not* mean an inconsistency between the standards set out in sections 7 and 12 of the Charter. As explained above, the standard of gross disproportionality only speaks to the ultimate *quantum* of sentence. However, regardless of the quantum of sentence, all Canadians expect that individuals receive an individualized and fair sentencing process. In our view, fairness in the sentencing *process* is not a controversial proposition — and one that should have received the protection of section 7 of the Charter. Prior to the Supreme Court's decision in *Markhali* and *Lloyd*, several other courts across the country agreed that section 7 should be imbued with this substantive protection.[75]

Markhali should thus serve as a watershed moment. It is a symptom of how an exclusive focus on instrumental rationality can lead to an ignorance of substantive liberties and protections that are fundamental to our notions of fairness.

VI. CONCLUSION

Ultimately, we believe that a section 7 laden with substantive principles of fundamental justice is the only way to maintain an adaptive and strong Charter that safeguards individual liberties independent of the dominant ideological discourses of the day. Although the doctrines of arbitrariness and overbreadth have served an extremely important function in the last several years of section 7 jurisprudence, we believe their usefulness in the future may be limited. At the very least, we think it

[75] See *e.g.*, *R. v. Kovich*, [2016] M.J. No. 34, 2016 MBCA 19 (Man. C.A.) and *R. v. Dinardo*, [2015] O.J. No. 1387, 2015 ONSC 1804 (Ont. S.C.J.).

would be naïve to believe that these two principles of fundamental justice can provide for a meaningful or indefinite check on repressive or unduly punitive legislation.

In fact, there are already signs — as evident in the legislative record involved in passing Bill C-36 in response to the Supreme Court's decision in *Bedford* — that Parliament is adapting and may be able to insulate substantively problematic laws from instrumentality assessments in the future. Once that happens, we will be poorly equipped to address the true evil underlying "law and order" legislation that often imposes unworkable, "one size fits all" punitive responses to complex social problems. Indeed, that true evil is the substantive unfairness and social harm of these types of laws — *not* their "instrumental irrationality".

Future section 7 litigants thus have a responsibility to keep confronting the Supreme Court of Canada with attempts to recognize further "new" substantive principles of fundamental justice. The doctrines guaranteeing "instrumental rationality" in legislation should be *one* of the many tools in section 7's repertoire; they should not be section 7's only tools. This is the only way to ensure that the Charter protects Canadians, especially those who are the least socially and politically powerful in our society. Otherwise, we risk bankrupting the arsenal of our future substantive rights by letting section 7 — a central branch of our communal "living tree" — wither away.