The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 88 (2019) Article 13

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Citation Information

Stewart, Hamish. "Assn. of Justice Counsel: The Section 7 Liberty Interest in the Context of Employment." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 88. (2019).
https://digitalcommons.osgoode.yorku.ca/sclr/vol88/iss1/13

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Assn. of Justice Counsel: The Section 7 Liberty Interest in the Context of Employment

Hamish Stewart[*]

I. INTRODUCTION

Assn. of Justice Counsel v. Canada (Attorney General)[1] is a labour arbitration case. An employer issued a directive requiring employees to be available for overtime work. The union argued that the directive was not a proper exercise of a management rights clause in a collective agreement. But the employer was the government, and the collective agreement also contained a clause forbidding the employer to violate employees' Charter rights.[2] And so the union also argued that the directive violated the employees' rights under section 7 of the Charter. An adjudicator agreed with the union on both grounds. The Supreme Court of Canada held that the adjudicator's decision as to management rights was reasonable, but rejected the union's constitutional argument on the ground that the directive did not affect the employees' section 7 right to liberty. It was therefore unnecessary to consider whether it was consistent with the principles of fundamental justice. In my view, this constitutional holding was probably wrong. Requiring someone to be somewhere at a particular time does affect the liberty interest, both in itself and, if sufficiently demanding of a person's time, through its impact on fundamental personal choices. The Court's reluctance to recognize these points may unnecessarily impede the continued development of the section 7 liberty interest. Moreover, the constitutional

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[*] Faculty of Law, University of Toronto. I am very grateful to Sonia Lawrence and Benjamin Berger for the invitation to speak at the 2018 Osgoode Constitutional Cases Conference, to Brian Langille for a helpful conversation, to Sonia Lawrence and two anonymous readers for comments on a draft, and to James Schneider for a very useful and engaging research memorandum.

[1] [2017] S.C.J. No. 55, 2017 SCC 55 (S.C.C.) [hereinafter "*Assn. of Justice Counsel*"], varg [2016] F.C.J. No. 204, 2016 FCA 92 (F.C.A.), which allowed the employer's application for judicial review of the adjudicator's decision, 2015 PSLREB 31 [hereinafter "Decision"].

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

holding is inconsistent with the Court's determination that the adjudicator's decision was reasonable. On the facts of *Assn. of Justice Counsel*, if section 7 of the Charter applied at all, the constitutional issue and the issue of interpreting the collective agreement were essentially the same and should have been resolved the same way.

II. OVERVIEW

Lawyers working in the Quebec office of the Immigration Law Directorate of the federal Department of Justice were, from time to time, required to work outside regular hours to deal with urgent matters. Until 2010, the office used a system whereby lawyers would volunteer to be on standby and would be compensated with paid time off, whether or not any matters actually arose requiring their attention. In March 2010, the Director of the Quebec office changed the standby system so that lawyers on standby would be paid only if their services were actually required. After that, there were no more volunteers. So, in April 2010, the Director issued a directive requiring all lawyers in the office to be available for standby duty, on a rotational basis. The result was that each lawyer was required to be on standby one to three weeks per year.[3] The Court described standby duty as follows:

> The standby period is from 5:00-9:00 p.m. on weekdays and from 9:00 a.m.-9:00 p.m. on weekends. While on standby, the lawyers need to be ready to prepare and argue possible stay applications on short notice. They must carry an employer-issued pager and cell phone and be able to reach their office within approximately one hour if called.[4]

The lawyers' union grieved the directive. The collective agreement did not speak explicitly to the issue of standby duty, but it did contain standard clauses preserving management rights and requiring the employer to administer the agreement reasonably. The adjudicator held that the directive was not a reasonable exercise of the employer's management rights. The Federal Court of Appeal held that the adjudicator's decision was unreasonable. The Supreme Court of Canada, by a 7-2 majority, reversed the Court of Appeal on this point and held that the adjudicator's decision was reasonable.

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[3] This summary is based on *Assn. of Justice Counsel*, *supra*, note 1, at paras. 4-8 and the Decision, *supra*, note 1, at para. 7.

[4] *Assn. of Justice Counsel*, *id.*, at para. 7.

But there was an additional element to the grievance. The collective agreement provided that nothing in it "shall be construed as an abridgment or restriction of any lawyer's constitutional rights …". The union argued that the directive also violated that provision, specifically that it violated section 7 of the Charter. To demonstrate a violation of section 7, a Charter applicant has to show that the government action in question affects their "life, liberty or security of the person" and that the effect on life, liberty or security is not "in accordance with the principles of fundamental justice."[5] As noted, the directive required the lawyers to be on call at certain times, and a lawyer on call was required to "be able to reach their office within approximately an hour if called."[6] The adjudicator held that the section 7 liberty interest included "the right to enjoy a private life outside the workplace and outside normal work hours".[7] On that basis, he concluded that the directive engaged section 7. The adjudicator further held that the directive did not comply with the principles of fundamental justice because its deleterious effect on the liberty interest was "completely disproportionate to its objective", in that there were other ways that the employer could have structured the on-call system that would have affected the liberty interest less.[8]

The Federal Court of Appeal and the Supreme Court of Canada both held that the directive did not even engage section 7 (and that it was therefore unnecessary to consider whether it complied with the principles of fundamental justice). The Supreme Court of Canada first hinted that section 7 might not apply at all, but went on to say that even if section 7 did apply, it was not engaged. The Court has recognized that the section 7 liberty interest protects certain fundamental personal decisions;[9] but it has not extended that idea to cover every decision that any individual happens to consider important. The Court understood the union's claim as an attempt to do just that, and rejected it on the ground

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[5] On s. 7 generally, see Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012) [hereinafter "Stewart, *Fundamental Justice*"].

[6] *Assn. of Justice Counsel*, *supra*, note 1, at para. 7.

[7] Decision, *supra*, note 1, at para. 60.

[8] Decision, *id.*, at para. 65.

[9] *Assn. of Justice Counsel*, *supra*, note 1, at para. 49, citing *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, 2003 SCC 74 (S.C.C.), where the interest in question was not recognized; and *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.), where the interest was recognized, though not by a clear majority of the Court. Strangely, the Court did not mention *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.), where the Court unanimously recognized a decision of fundamental personal importance as engaging the s. 7 liberty interest.

that the directive did not affect the employees' control over fundamental personal choices:

> … not all activities that an individual happens to define as central to his or her lifestyle are protected by s. 7. … By analogy, the ability of the lawyers — for two to three weeks per year — to attend opera or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s. 7.
>
> … the directive requires them, as a condition of employment, to be potentially less available to their family for, at most, two to three weeks a year. This does not fall within the scope of s. 7.[10]

The Court did not reach the question whether the directive was consistent with the principles of fundamental justice.

III. ASSESSMENT

Thus, the Court upheld the adjudicator's holding that the directive was not a reasonable exercise of management rights, but, disagreeing with the adjudicator, held that the directive did not even engage, much less violate, the lawyers' section 7 rights.[11] There are two difficulties with these holdings. First, the holding that the directive did not engage section 7 is troubling. Second, the two holdings are inconsistent with each other. In the particular context of this case, it is hard to see how the employer's exercise of its management rights could be unreasonable if section 7 was not engaged or, conversely, how that exercise of management rights could be reasonable if section 7 was engaged.

1. The Section 7 Liberty Interest

As noted above, the Court expressed some doubt as to whether section 7 applied at all in this context, commenting that "[t]he extent to which s. 7 of the *Charter* applies outside the context of the administration of justice has yet to be settled in this Court …".[12] This

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[10] *Assn. of Justice Counsel*, *supra*, note 1, at paras. 50-51.

[11] The adjudicator's interpretation of the collective agreement is reviewed on the standard of reasonableness. The court does not discuss the standard of review applicable to the adjudicator's constitutional reasoning, but appears to review it for correctness. In light of the subsequent decision in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.), the appropriate standard would appear to be reasonableness.

[12] *Assn. of Justice Counsel*, *supra*, note 1, at para. 49.

hesitancy is odd. Section 7 applies whenever legislation or other state action affects life, liberty or security of the person, regardless of the extent to which the state action in question involves "the administration of justice".[13] The most significant cases of recent years illustrate the point. In *Bedford*, the Supreme Court of Canada invalidated certain provisions of the *Criminal Code* concerning sex work;[14] in *Carter*, the Court invalidated the provision of the Code prohibiting assisted suicide. In both cases, the Charter applicants argued that the provisions in question were unconstitutional not because their rights were violated when they were alleged to have *violated* these provisions, but because their rights were violated when they *complied* with them. And so the constitutional arguments in these cases focused not on issues characteristic of the administration of justice (jurisdiction,[15] procedural fairness,[16] *mens rea* requirements,[17] and so forth) but on the effect of the provisions on the lives of people who were trying to comply with the law while carrying on a lawful economic activity (*Bedford*) or struggling with a debilitating disease (*Carter*). Thus, the connection between the constitutional arguments in these cases and the administration of justice was tenuous at best.

But the Court did not base its decision on the question of whether section 7 applied; instead, the Court assumed that it did, but held that it was not engaged because the directive requiring each employee to be available outside working hours one to three weeks in the year did not affect any decision of fundamental personal importance. This reasoning misses the point of the union's argument and of the adjudicator's decision. The claim was not that the directive affected any personal choice in particular; it was that it affected private life in general, and therefore all the choices — regardless of where they fell on the spectrum between importance and triviality — that an employee might make. Having free time is essential to one's ability to develop and practice those activities one thinks of as important, whatever they may be; and so, a law that interfered with one's time to the extent of substantially impeding one's opportunities to develop one's interests (whatever they might be) would surely be subject to section 7

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[13] See Stewart, *Fundamental Justice*, *supra*, note 5, Chapter 2, and among the cases, see particularly *Carter*.

[14] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

[15] For example, *R. v. Moriarity*, [2015] S.C.J. No. 55, 2015 SCC 55 (S.C.C.).

[16] For example, *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

[17] For example, *R. v. Morrison*, [2017] O.J. No. 3600, 2017 ONCA 582 (Ont. C.A.), appeal heard and reserved May 24, 2018, [2017] S.C.C.A. No. 290 (S.C.C.).

scrutiny. A law that affected family bonds has already been recognized as engaging section 7,[18] and more generally decisions about private life — whom to marry or partner with, whether to have children and how to raise them, how to develop and maintain the affective bonds that are necessary elements of personal life — are obvious candidates for protection under this branch of the liberty interest. State action that significantly restricts the time available for the development of one's personal interests and interpersonal bonds should be recognized as engaging the section 7 liberty interest, not because it affects any personal choice in particular, but because it affects the possibility of making these choices at all. Even if the section 7 liberty interest does not protect the decision to engage in any particular activity, it surely does protect the exercise of the *capacity* to engage in activities in general; if not, legislation or other state action could indirectly restrict those fundamental life choices that have already been recognized as directly engaging the liberty interest by, for example, requiring everyone to be available to serve the state's purposes every evening and weekend.

If this line of argument is correct, the Court's holding that section 7 was not engaged might nevertheless be supported on a slightly different basis. The Court might be read as holding that the directive's interference with the liberty interest was not sufficiently substantial to attract section 7 scrutiny. It is well established that trivial interferences with the liberty interest do not engage section 7.[19] And although Karakatsanis J. does not put it that way, her repeated emphasis on the limited time commitment involved (availability after hours for "two to three weeks a year"[20]) suggests that that is what she had in mind.

But, whatever one's views about the impact of the directive on decisions of fundamental personal importance, there is a more straightforward and compelling argument that the directive engaged the lawyers' liberty interest — an argument that was not made before the Supreme Court of Canada and appears not to have been raised in the proceedings below either. The directive limited the lawyers' freedom of movement by requiring them to remain within a certain radius of their office for a certain period of time. Freedom of movement within Canada is a well-recognized aspect of the liberty interest. State action that prevents a person from moving about engages the liberty interest. Offence definitions, recognizances, court orders, and temporary security

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[18] *New Brunswick (Minister of Heath and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[19] See Stewart, *Fundamental Justice*, *supra*, note 5, Chapter 2(D)(5)(c).

[20] *Assn. of Justice Counsel*, *supra*, note 1, at para. 51.

zones have all been recognized as engaging section 7 on this basis.[21] Moreover, state action that requires a person to appear at a certain place and time engage the liberty interest.[22] And so a law or other government action that required all the residents of Quebec City, or even some proper subset of them, to remain in the city for a specific period of time would undoubtedly affect those residents' liberty interests and would have to be consistent with the principles of fundamental justice in order to comply with section 7. The directive had just this effect on the lawyers' freedom of movement. It therefore directly engaged the section 7 liberty interest.

2. Section 7 in the Context of Government Employment

The next step in a section 7 claim is to determine whether the effect on the liberty interest is consistent with the principles of fundamental justice. The adjudicator found that the directive was overbroad because there were other ways for the employer to achieve its objective;[23] and he also noted that "it is difficult to conclude otherwise in the absence of consent from [the employee], either in the form of a clear and precise availability clause or voluntarily in exchange for some form of return from the employer."[24] In other words, the directive would have been consistent with the principles of fundamental justice if it was a reasonable implementation of a clause that dealt specifically with overtime or had otherwise been bargained for. But that is precisely the same question, in constitutional guise, as the question whether the issuance of the directive was a reasonable exercise of the employer's management rights.

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[21] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 789 (S.C.C.) (offence definition); *Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440*, [1998] O.J. No. 1769, 159 D.L.R. (4th) 340 (Ont. Gen. Div.) (striking workers impeding traffic, though the Charter probably did not apply to them); *R. v. Budreo*, [2000] O.J. No. 72, 142 C.C.C. (3d) 225, at para. 23 (Ont. C.A.) (recognizance); *Tremblay c. Quebec (Procureur général)*, [2001] J.Q. no 1504, at para. 47 (Que. C.S.) (temporary security perimeter during international meeting); *Baril v. Obelnicki*, [2007] M.J. No. 110, 2007 MBCA 40, at para. 69 (Man. C.A.) (court order, made under provincial legislation, restricting a person's movements). See also *Sahaluk v. Alberta (Transportation Safety Board)*, [2017] A.J. No. 499, 2017 ABCA 153 (Alta. C.A.), which is difficult to understand except on the assumption that limitations on the freedom to drive, as a particular form of the freedom to move about, can under some circumstances engage the s. 7 liberty interest.

[22] *R. v. Tinker*, [2017] O.J. No. 3435, 2017 ONCA 552, at para. 70 (Ont. C.A.), appeal heard and reserved April 15, 2018, [2017] S.C.C.A. No. 371 (S.C.C.); *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, 2004 SCC 42, at para. 67 (S.C.C.).

[23] Decision, *supra*, note 1, para. 66.

[24] Decision, *id.*, para. 69.

In the context of an employment relationship, the legal basis for the employer's direction of an employee's movements is the employee's agreement to be directed, through a contract of employment or a collective agreement. Direction in accordance with the contract of employment or collective agreement is lawful because it is authorized by agreement; direction that is not in accordance with the contract of employment or collective agreement violates the agreement. The Charter does not, of course, apply to private employers, and it is tempting to think that the Charter does not apply to the government either when it acts purely as an employer. Tempting, but unnecessary: for when the government is the employer, it is arguable that it is a principle of fundamental justice that the employer can affect the employee's liberty interests only in accordance with the contract of employment. This principle meets the three criteria for recognition as a principle of fundamental justice: it is a legal principle; it is sufficiently precise; and it is deeply embedded in our legal order, specifically in the law of employment.[25]

This principle of fundamental justice would in general overlap with the relevant employment law issues. For example, in *St. Peter's Health System v. CUPE, Local 778*,[26] the question was whether a policy of universal vaccination was authorized by the collective agreement. The arbitration board found that the policy was not authorized by the collective agreement. The board went on to say that compulsory vaccination would be forced medical treatment, which would engage the section 7 interest in security of the person,[27] and then noted that such a policy could have been imposed by statute or bargained for.[28] The unstated conclusion is that the policy would then not only have been authorized by the collective agreement but would have been consistent with the principles of fundamental justice and therefore with section 7.

Similarly, on the facts of *Assn. of Justice Counsel*, it is very hard to see how the issuance of the directive could both be reasonable and violate the lawyers' section 7 rights; or, on the other hand, how it could

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[25] On the criteria for identifying a principle of fundamental justice, see Stewart, *Fundamental Justice*, *supra*, note 5, Chapter 2B(3), and for a recent application of this test from the Supreme Court of Canada, see *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.).

[26] *St. Peter's Health System v. Canadian Union of Public Employees, Local 778 (Flu Vaccination Grievance)*, [2002] O.L.A.A. No. 164, 106 L.A.C. (4th) 170 (Ont. Lab. Arb.) [hereinafter "*St. Peter's Health System*"].

[27] Compare Stewart, *Fundamental Justice*, *supra*, note 5, Chapter 2D(4)(a)).

[28] *St. Peter's Health System*, *supra*, note 26, at 192.

be unreasonable without violating the lawyers' section 7 rights. If the directive was authorized by the collective agreement, then the lawyers had consented to it via the collective bargaining process and, although it affected their liberty interest, that effect would accord with the principles of fundamental justice; but if the directive was not authorized by the collective Agreement, then that effect would violate the principle. To apply the relevant principle of fundamental justice is to answer the same question that the adjudicator decided.[29]

IV. CONCLUSION

The Court's holding, in *Assn. of Justice Counsel*, that the directive at issue did not engage the section 7 liberty interest is unsatisfactory. It unnecessarily constrains the possible development of the branch of the liberty interest that is concerned with decisions of fundamental personal importance and it does not fit well with the Court's holding that the adjudicator's decision that the directive at issue was not authorized by the collective agreement was reasonable. If the adjudicator's decision was reasonable, and if section 7 applied at all to the government as employer, then it would have been much more plausible to say that the directive did indeed engage the liberty interest and was not consistent with the principles of fundamental justice because it was not authorized by the collective agreement.

[29] In her dissent, Côté J. describes the majority's position as "contradictory", on the ground that the erroneous s. 7 analysis was so important to the adjudicator's decision that it tainted the rest of the decision; she is particularly puzzled as to how the majority could conclude that the s. 7 liberty interest was not engaged and yet find reasonable the adjudicator's decision that the directive had a significant effect on the lawyers' personal lives: *Assn. of Justice Counsel*, *supra*, note 1, at para. 57. I am suggesting that on the facts of the case, the two questions are indistinguishable.