# Section 7 of the Charter and Administrative Law: Points of Consensus and Disagreement

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## Introduction

After the Supreme Court of Canada released its decision in *Singh* v. *Canada (Minister of Employment and Immigration)* [1] in 1985, it would have been easy to come to the conclusion that Canadian administrative law was about to be transformed by section 7 of the *Canadian Charter of Rights and Freedoms*. Nearly twenty years later, however, it is difficult to detect signs of a "due process revolution" in Canada. While few commentators would express doubt about the significance of section 7's impact on Canada's system of criminal justice, the role section 7 has played outside the criminal law arena has been much more modest. The deliberate decision of the framers of the *Charter* to exclude property rights from the scope of section 7 has undoubtedly played a part in limiting the impact of section 7 on administrative law. Nevertheless, I think it is fair to say that this phenomenon is more the product of restrictive judicial interpretation of section 7 than it is of the limitations inherent in the constitutional text itself.

The reason for a relatively restrictive approach to the interpretation of section 7 is not difficult to discern. Canadian judges are acutely aware of the criticisms leveled against the constraints judicial review using the *Canadian Charter of Rights and Freedoms* places on governmental action.[2] Mr. Justice Strayer succinctly described these

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1 [1985] 1 S.C.R. 177 (hereafter "*Singh*").

2 For a recent example of this awareness, see Chief Justice Beverly McLachlin, "Democracy, the Rule of Law and Judicial Activism", the text of remarks made by the Chief Justice to a meeting organized by the British Columbia Civil Liberties

criticisms in his book *The Canadian Constitution and the Courts* as "the anti-majoritarian issue", the "functional issue" and the "anti-federalism issue".[3] In brief, the "anti-majoritarian" critique is that it is contrary to democratic principles to allow un-elected judges to thwart the will of elected legislatures (and, to a lesser extent, the will of governmental officials who are empowered by and are responsible to those legislatures). The "functional" critique is that judges are ill-equipped by training and temperament to decide issues that have significant impacts on public policy, and that in any event the adjudicative process is not well-suited to gathering the type of information that is essential to the proper exercise of this function. Finally, the "anti-federalism" critique suggests that the establishment of a body of constitutional rules binding on all levels of government throughout the country undermines the possibility of experimentation and adaptation to distinctive conditions that are thought to be one of the signal advantages of a federal system of government.

It is not necessary for me to rehearse these criticisms in detail or to seek to refute them here. The simple observation I wish to make is that the open-ended character of the text of section 7 tends to throw these concerns into high relief. As Madam Justice Wilson observed in *Singh*, "the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning."[4] The idea that section 7 invites courts to strike down any restriction on a broadly-construed right to liberty or security of the person that does not comport with an ill-defined notion of the "principles of fundamental justice" represents a threat to the belief that there must be limits placed on role of courts in constitutional review. In the early part of the twentieth century American courts employed the American equivalent of section 7, the "due process" clause of the Fifth and Fourteenth Amendments to the United States Constitution, as a vehicle to stall the introduction of the modern regulatory state.[5] That experience resulted in considerable

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Association in Vancouver on November 18, 2003, available online at http://www.bccla.org/18NOVBCCLA(FINAL)21.pdf.

[3] Hon. B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d ed. Toronto: Butterworths, 1988) at pp. 51-58.

[4] *Ibid.* at p. 205.

[5] See, for example, *Lochner* v. *New York* (1905), 198 U.S. 45*; Adair* v. *United States*, (1908), 208 U.S. 161; *Coppage* v. *Kansas*, (1915), 236 U.S. 1; *Adkins* v. *Children's Hospital*, (1923), 261 U.S. 525; *Morehead* v. *New York ex rel. Tipaldo*, (1936), 298 U.S. 587.

criticism of the American judiciary [6] and it is an experience that Canadian courts have not been eager to repeat.[7]

I do not think it is an accident, moreover, that the criminal justice arena has been treated as a special case in relation to these concerns. To the extent that the rights enshrined in the *Charter* are understood to be a necessary counterbalance to protect those who are not likely to have an effective voice in the democratic process, individuals accused of criminal acts seem to be natural subjects of judicial protection. Taken as a whole, the Canadian judiciary can lay claim to a special knowledge and understanding of the operation of the criminal justice system that tends to undercut, if not necessarily eliminate, the "functional" critique in this setting. The assignment of the criminal law power to the federal level of government in section 91(27) of the *Constitution Act, 1867* goes some way toward blunting the "anti-federalism" critique in respect of *Charter* adjudication involving criminal law and procedure. Finally, the association of section 7 with the more specific legal rights contained in sections 8-14 of the *Charter* reinforces the notion that courts have an explicit constitutional mandate to play an active role in supervising the integrity of the criminal justice system, whereas that is much less obvious with respect to our system of administrative justice and regulatory law.

In my view, therefore, it was almost inevitable that Canadian courts would develop interpretive principles that would perform the function of defining the boundaries of the judicial role in relation to section 7 of the *Charter* outside the field of criminal law, even though the text of section 7 itself does not offer much in the way of guidance on the proper limits of that role. One might say that the surprising thing is not that Canadian courts have taken a relatively restrictive approach to section 7 in non-criminal law cases, but that despite indifferent success in doing so, counsel persist in advancing more or less ambitious section 7 arguments outside the criminal law field. Even if one looks only at cases argued before the Supreme Court of Canada[8] since the turn of the century,

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[6] See the discussion in P. Hogg, *Constitutional Law of Canada*, 2003 Student Edition (Scarborough, Ontario: Thompson-Carswell, 2003) at para. 44.7(b).

[7] See, for example, *Authorson* v. *Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40 at paras. 47-50; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (hereafter "*Prostitution Reference*") at pp. 1164-1166; *Skalbania (Trustee of)* v. *Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (B.C.C.A.) at paras. 28-30.

[8] Needless to say, many ambitious section 7 arguments do not make their way to the Supreme Court of Canada or even to the relevant court of appeal. To take only one

those arguments have included attacks on administrative schemes as varied as medicare,[9] social assistance,[10] immigration,[11] police discipline,[12] the regulation of video lottery terminals[13] and human rights.[14] The persistence of this line of argumentation cannot, I believe, be ascribed simply to the optimism (or desperation) of counsel seeking to advance the interests of their clients**.** My goal in this paper is to offer an explanation for counsel's perseverance in putting forward these arguments despite their limited success, and to suggest some ways in which the boundaries of section 7 in the administrative law domain could be drawn more effectively.

The basic argument I am advancing is that some of the lines of reasoning that the Supreme Court of Canada has adopted in establishing the limits on section 7 outside the criminal justice arena are less persuasive than others. In areas where the reasons offered for the limitations are less than compelling, counsel perceive that no consensus

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example, in *Health Services and Support - Facilities Subsector Bargaining Association* v. *The Queen in Right of British Columbia*, 2003 BCSC 1379 (B.C.S.C.) the Health Employees Union and a number of individual union members brought a *Charter* challenge under sections 2(d), 7 and 15 to provincial legislation altering certain provisions of existing collective agreements and restricting collective bargaining on certain issues. The plaintiffs were unsuccessful on all three grounds. In their appeal, which has been heard but not yet decided, they continued to advance their section 2(d) and 15 claims but abandoned their section 7 argument.

9 See *Chaoulli, et al.* v. *Quebec (Attorney General)* (File No. 29272), argued before the Supreme Court of Canada on June 8, 2004, on appeal from [2002] R.J.Q. 1205 (Que. C.A.); *Auton* v. *British Columbia* (File No. 29508), argued before the Supreme Court of Canada on June 9, 2004, on appeal from 2002 BCCA 538, 220 D.L.R. 411 (B.C.C.A.) (hereafter "*Auton*").

10 See *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (hereafter "*Gosselin*"); *Falkiner* v. *Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*, leave to appeal granted (2003), 312 N.R. 200 (note) (S.C.C.), on appeal from (2002), 59 O.R. (3d) 481, 212 D.L.R. (4th) 633 (Ont. C.A.) (hereafter "*Falkiner*").

11 See *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (hereafter "*Suresh*"); *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72 (hereafter "*Ahani*").

12 See *Jones* v. *British Columbia (Police Complaint Commissioner)* (File No. 28846) appeal quashed on the ground of mootness, May 5, 2003, 2003 CarswellBC 1068 (hereafter "*Jones*").

13 See *Siemens* v. *Manitoba (Attorney General)* 2003 SCC 3, [2003] 1 S.C.R. 6 (hereafter "*Siemens*").

14 See *Blencoe* v. *British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (hereafter "*Blencoe*").

has emerged and they continue to "try on" arguments that have limited prospects of success on the theory that "you never know when you might encounter a sympathetic bench". The development of consensus is not simply a matter of establishing a preference for a more or less interventionist role for the courts in the administrative law field using section 7 of the *Charter*, though of course that preference and the reasons for it underpin the entire debate. Rather it is a product of the essential judicial craft of articulating principles and legal tests that can be employed effectively to set the framework for debate in legal disputes. The best examples of this craft offer justifications for the principles and tests that are capable of gaining reasonably wide acceptance and that provide reasonable guidance to courts for the production of broadly acceptable results. There have been some notable successes in the development of a compelling account of the boundaries of the judicial role in relation to section 7 in the field of administrative law, but there are, in my respectful view, some equally notable shortcomings.

Ultimately, of course, the Supreme Court of Canada has the task of drawing the proper boundaries of section 7. Since this paper is written for an audience of lower court judges, it is less important to me that I develop a convincing argument that the Court will or should identify those limits in a particular way than it is that I identify the contours of the arguments courts should be considering in carrying out this task.

With this goal in mind, I will begin my discussion with a brief review of those areas of the jurisprudence under section 7 where a broad consensus appears to have emerged. I will then consider three areas in which I believe the Supreme Court has been less successful in identifying the principles that ought to govern the limits of section 7 in the administrative law realm. These are: (1) Does section 7 require the state to take affirmative steps to protect the life, liberty and personal security of individuals in Canada or do "deprivations" of life, liberty or personal security only occur as a result of state action? (2) How do we define the "liberty" and "personal security" interests of individuals that section 7 is designed to protect once we step outside the field of criminal law? and (3) How much flexibility does the government enjoy in the administrative law arena in complying with "principles of fundamental justice" that have been identified primarily in the criminal justice setting? In each instance I will attempt to identify not only what appear to be the dominant strands of the jurisprudence but what seem to me to be the difficulties that cause litigants to continue challenging the dominant view.

### 1. Where Are the Points of Consensus on Section 7?

Section 7 of the *Charter* reads" "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." While I will be giving considerable emphasis later in this paper to areas in which the Supreme Court of Canada's section 7 decisions do not offer a particularly compelling account of the boundaries of the constitutional protection offered by these words, it is useful to reflect at the outset on the main areas in which a clear consensus has emerged. For example, it is clear that when the state holds out the potential of the imprisonment of an individual as a possible outcome of a legal proceeding, that individual's section 7 interests are engaged. As a result, both the conduct of the proceeding itself and the legal rules that may result in the individual's imprisonment must be consistent with the "principles of fundamental justice". This is true also of the use of compulsory legal process, backed by the potential sanction of imprisonment, to secure evidence in a legal proceeding.[15]

While this was not always the case,[16] I believe it is also clear now that section 7 protects interests that extend beyond interference with an individual's physical freedom as a result of a legal proceeding.[17] Thus, the Supreme Court of Canada has ruled authoritatively that a legal proceeding in which a parent's continued access to his or her children is at risk is one that engages the parent's interests protected by section 7.[18] Similarly, the Court has held that an immigration proceeding in which there is a possibility that the individual who is the subject of those proceedings will be deported to face torture engages that individual's section 7 rights.[19] The same is true of extradition proceedings,[20] and even

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[15] See *Thompson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 (hereafter "*Thompson Newspapers*"); *British Columbia Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3 (hereafter "*Branch*").

[16] See *Prostitution Reference*, *supra* note 7 (per Lamer, J.); *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (hereafter "*Children's Aid Society*") (per Lamer, C.J.).

[17] *See New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46 (hereafter "*G.(J.)*"); *Blencoe*, *supra* note 14 (per Bastarache, J.)

[18] *G.(J.)*, distinguishing *Children's Aid Society*, *supra* note 16; *Winnipeg Child & Family Services* v. *K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519 (hereafter *K.L.W.*").

[19] *Suresh*, *supra* note 11.

though only three members of the Supreme Court of Canada pronounced on the applicability of section 7 to refugee determination proceedings in *Singh*,[21] it has been accepted since that time that these proceedings engage the refugee claimant's interests under section 7. The Supreme Court's jurisprudence also makes it clear that the mere fact that an individual is engaged in a legal proceeding is not a sufficient basis for finding that the proceeding triggers the application of section 7.[22] In other words, section 7 has not been construed as a generic constitutional guarantee that all legal proceedings must be consistent with "the principles of fundamental justice" any more than it has been understood to require all laws to comply with the "principles of fundamental justice".

The "principles of fundamental justice" themselves include a right to fair procedures that are informed by the common law principles governing procedural fairness.[23] Nevertheless, this notion of fair procedure is not a rigid one and will be sensitive to contextual factors.[24] These contextual factors are themselves drawn from the common law, and were held in the *Suresh* case to include "(1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself."[25]

It is also well established that the "principles of fundamental justice" are not restricted to purely procedural protections and include

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[20] See, for example, *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500; *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States* v. *Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (hereafter "*Burns*").

[21] *Supra* note 1.

[22] *Blencoe*, *supra* note 14.

[23] *Singh*, *supra* note 1, at pp. 212-213; *Suresh*, *supra* note 11, at para. 113. Nevertheless, Mr. Justice Iacobucci took some pains in *Suresh* to emphasize that "At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case." (para. 114).

[24] See, for example, *Ruby* v. *Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para. 39; *K.L.W.*, *supra* note 18; *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at p. 743 (hereafter "*Chiarelli*").

[25] *Suresh*, *supra* note 11, at para. 115.

"the basic tenets of our legal system".[26] These tenets include a number of general principles, such as a right to be governed by laws that are not overbroad[27] or impermissibly vague.[28] These types of principles appear to be derived from widely accepted notions of the rule of law in democratic societies, and as a result they tend not to be controversial in and of themselves. Where disagreement tends to arise is with the contextualization of the principle and its application in particular settings.

In other instances, however, the Supreme Court of Canada has identified "principles of fundamental justice" that appear to be the product of its perception of a broad consensus (sometimes an international consensus)[29] surrounding a particular important legal issue. For example, the Court concluded in *United States* v. *Burns* that, at least in some cases, the extradition of individuals to face criminal charges for which they may receive the death penalty is contrary to the "principles of fundamental justice".[30] Similarly, in the *Suresh* case the Court concluded that, as a general rule, it would be inconsistent with the "principles of fundamental justice" for Canada to deport an individual to another country where there are substantial grounds to believe that the individual would be subjected to torture.[31]

In the criminal law field the Court has sometimes been prepared to accept as "principles of fundamental justice" relatively broad concepts that reflect traditional Canadian understandings of the proper operation of a criminal justice system. For example, the Court has accepted the principle that imprisonment should not be used as a sanction for absolute liability offences,[32] and that conviction for murder requires proof of

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26 *Reference re: s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at pp. 503 and 512 (hereafter "*Motor Vehicle Reference*").

27 *R.* v. *Heywood*, [1994] 3 S.C.R. 761.

28 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R.* v. *Morales* [1992] 2 S.C.R. 606; *Ruffo* v. *Conseil de la Magistrature*, [1995] 4 S.C.R. 267

29 See *Burns*, *supra* note 20, at paras 82-93; *Suresh*, *supra* note 11, at paras. 59-75.

30 It is worth noting the contrast in the outcome of this case with the outcomes in *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 and *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858.

31 Once again, it is worth noting that the Court qualified this outcome as a general rule, not a universal one, and that in the companion case of *Ahani*, *supra* note 11, the Court emphasized that the individual must make out a *prima facie* case that the risk of deportation to face torture is a substantial one.

32 *Motor Vehicle Reference*, *supra* note 26.

subjective foresight by the accused of the death of the victim.[33] Not surprisingly, however, the Court has tended to be very circumspect in its recognition of these types of "principles of fundamental justice" outside the criminal law field. Those principles that it has accepted are often qualified, as was the case in both *Burns* and *Suresh*.

Moreover, even within the criminal justice field that Court has tended to be reluctant to accept "principles of fundamental justice" based on broad philosophical concepts rather than a strictly legal consensus. For example, in *R.* v. *Malmo-Levine*[34] the majority of the Court recently rejected the use of the "harm" principle as the sole justification for the imposition of a criminal sanction. Even those members of the Court who dissented in the companion case of *R.* v. *Caine* were reluctant to embrace an unqualified version of the "harm" principle as a "principle of fundamental justice".[35]

Advocates for relatively broad statements of the "principles of fundamental justice" typically find themselves confronted with the following statement by Mr. Justice Sopinka in *Rodriguez* v. *British Columbia (Attorney General)* :[36]

> Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision

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33 *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636; *R.* v. *Martineau*, [1990] 2 S.C.R. 633.

34 2003 SCC 74, [2003] 3 S.C.R. 571 (hereafter "*Malmo-Levine*").

35 Mr. Justice LeBel shared the majority view that the "harm" principle could not be elevated to the status of a "principle of fundamental justice" (para. 272) but would have struck down the offence of simple possession on the basis that the law was overbroad and therefore arbitrary (see paras. 279-280). Madam Justice Deschamps (at paras. 285 - 288 and 294-295) also rejected the "harm" principle as an independent principle of fundamental justice but found that the criminalization of simple possession of marijuana was arbitrary since it was not a proportional response to the harms associated with marijuana use. (see paras. 295-302) Even Madam Justice Arbour, who did accept the use of the "harm" principle as a "principle of fundamental justice" did so only where the state employed imprisonment as a sanction to address harms that are confined to the individual whose conduct is being sanctioned. (see paras.190, 244-251 and 256). Another example of the Court's reluctance to embrace broad philosophical ideas as "principles of fundamental justice" is the majority's failure to accept the "proportionality" principle advanced by Madam Justice Wilson in her concurring reasons for judgment in the *Motor Vehicle* Reference, *supra* note 26.

36 [1993] 3 S.C.R. 519 at pp. 590-591 (hereafter "*Rodriguez*")..

> and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:
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> > Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

The Supreme Court of Canada is naturally concerned that the "principles of fundamental justice" it identifies should represent manageable standards against which to justify the deprivation by the state of liberty or personal security.[37] Likewise the Court has tended to be reluctant to embrace "principles of fundamental justice" that might have significant unintended social consequences, such as a right of individuals to make their own end-of-life decisions.[38] This does not mean that section 7 arguments that have significant consequences outside the criminal justice field can never succeed.[39] Nevertheless, I think it is fair to say that the dominant view of members of the Supreme Court of Canada is that ambitious use of section 7 outside the criminal justice field should not be encouraged.

The Supreme Court has also made significant progress in reaching consensus on some of the more important limitations of section 7 rights. The most significant of these is that section 7 only protects the rights of individual human beings as distinct from corporations, trade unions or other organizations. The Supreme Court of Canada did not arrive at this conclusion by considering whether the legal character of corporations as "persons" did or did not entitle them to be included within the definition of "everyone" in the opening words of section 7. Rather, the rationale for the exclusion of corporate interests from the scope of section 7 protection is contained in an elegant passage from Chief Justice Dickson's judgment

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[37] See, for example, the reasons for judgment of Gonthier and Binnie, JJ. for the majority in *Malmo-Levine*, *supra* note 34, at paras. 106-109 and 127-129.

[38] *Rodriguez*, *supra* note 36.

[39] See, for example, the reasons of Madam Justice Arbour and Madam Justice L'Heureux-Dubé in dissent in *Gosselin*, *supra* note 10.

in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*[40] After setting out the text of section 7, Chief Justice Dickson wrote:

> What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from section 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the section 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.
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> That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined

[40] [1989] 1 S.C.R. 927 (hereafter "*Irwin* Toy").

> to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.[41]

It is worth taking a moment to observe that only five members of the Court actually participated in the judgment in *Irwin Toy*.[42] Moreover, two of those five judges (Beetz and McIntryre, JJ.) disagreed with Chief Justice Dickson's ruling in respect of the outcome of the appeal, though not with this particular aspect of it.[43] Despite this fact and the complete transformation in the composition of the Court since 1989 when *Irwin Toy* was decided, this passage has stood the test of time.

For example, in *Siemens* v. *Manitoba (Attorney General)*,[44] a case in which the appellants included both individuals and a corporation, the appellants challenged the restriction of their ability to pursue a video lottery terminal business as a fundamentally unjust restriction of their liberty interests under section 7. The Supreme Court of Canada unanimously rejected the argument of the individual appellants on the basis that "the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under section 7 of the *Charter*." [45] The Court did not even consider it necessary to address the possibility that the corporate appellant had any interests that might have been subject to section 7 protection.

### 2. Where are the Points of Disagreement?

The foregoing brief account of areas in which some measure of consensus appears to have emerged with respect to the role of the courts in section 7 cases is not designed to suggest that there is something untoward about dissident views on the subject. Controversy is the

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41 *Ibid.* at pp. 1003-1004.

42 The panel that heard the appeal was composed of Chief Justice Dickson and Beetz, Estey, McIntyre, Lamer, Wilson and LeDain, JJ. Estey and LeDain, JJ. did not, however, take part in the judgment.

43 In the concluding sentence of his brief reasons for dissent, McIntyre, J. observed: "In agreement with the majority, section 7 of the Canadian Charter cannot be invoked by the respondent." *Irwin Toy*, *supra* note 40, at p. 1009.

44 *Supra* note 13.

45 *Ibid*, at para. 46.

lifeblood of the law, and it would be surprising indeed if the resolution of all the issues that might plausibly arise under section 7 were a matter of general agreement. Criminal cases where section 7 are invoked are not different than section 7 cases outside the criminal justice setting in this respect. The lack of consensus that I find troubling is not with respect to the outcomes of particular cases but in relation to the establishment of a broad framework for thinking about how section 7 ought to operate in a non-criminal law setting.

### a) Can Governmental Inaction Cause a "Deprivation" of Liberty or Security of the Person?

It is not surprising that there should be some confusion over whether section 7 imposes positive obligations on government to protect the life, liberty and personal security of individuals as opposed to protecting individuals from unjust deprivations of their life, liberty or personal security that are the product of governmental action. This discussion can be understood to be part of a broader debate about whether the *Charter* applies to non-governmental action, and whether the *Charter* itself empowers courts to require the state to take affirmative measures to protect the rights enshrined therein, a debate that is sometimes framed in terms of whether the *Charter* acts as a sword as well as a shield. Without wishing to disparage the value of the more general discussion, I think it is helpful to disentangle these general questions from the more specific question of whether section 7 itself imposes such obligations on government.

It seems to me, for example, that it is difficult to support a general argument that the *Charter* can never be used to impose affirmative obligations on government. For example, at a minimum it would appear that the official language minority rights provisions of section 23 impose affirmative obligations on governments to provide services in certain circumstances.[46] Unless one conceives of section 15 of the *Charter* as enshrining a right to "equality with a vengeance", courts will also need to be able to redress inequalities by ordering governments to extend benefits to equality seekers rather than by denying them to those who have enjoyed an unfair advantage.[47] It can even be the case that, in order to

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[46] See, for example, *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342.

[47] See, for example, *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Vriend*, v. *Alberta*, [1998] 1 S.C.R. 493.

remedy a situation in which an individual is deprived of liberty or personal security in a manner that is fundamentally unjust, it is necessary for a court to order government to provide that individual with a service such as legal assistance.[48] Even if one accepts these arguments, however, it does not follow as a general proposition that section 7 imposes affirmative obligations on government.

The traditionally stumbling block for this possibility is identified by Chief Justice McLachlin in her reasons for the majority in *Gosselin* v. *Quebec (Attorney General)*:[49]

> Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar. (emphasis in original)

The question of whether an individual has been "deprived" of life, liberty or security of the person tends to arise in the jurisprudence in two quite different contexts. In the first, the issue is whether Canadian governmental action plays a sufficiently significant role in the deprivation of an individual's life, liberty or security of the person by someone else that section 7 is engaged. In the second, the issue is whether section 7 contains only one right or two. In other words, is section 7 restricted to a right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, or does it also encompass a free-standing right to life, liberty and security of the person that can only compromised in accordance with the "reasonable limits" requirements of section 1?

The traditional place in which the first type of issue has arisen is refugee,[50] deportation[51] or extradition cases[52] in which an individual is the

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48 See *G.(J.)*, *supra* note 17.

49 *Gosselin*, *supra* note 10, at para. 81.

50 See *Singh*, *supra* note 1.

51 See *Suresh*, *supra* note 11.

52 See, for example, *Burns*, *supra* note 20.

subject of legal proceedings in Canada that place him or her in jeopardy of deprivations of life, liberty or security of the person elsewhere. The Supreme Court decisions are clear that at least where the possible consequences of removal from the country are sufficiently serious, the Canadian legal proceedings that determine whether or not an individual will be removed or whether or not the individual will receive Canadian protection result in a potential deprivation of the individual's security of the person and therefore engage section 7. It is not obvious, however, that the removal of a permanent resident from Canada engages section 7 interests in and of itself. The dominant strand of Federal Court jurisprudence suggests that this is not the case,[53] though the Supreme Court of Canada left the matter open when it had the opportunity to address the question in *Chiarelli*.[54]

There have also been cases involving the criminal law in which section 7 rights are engaged even where the person seeking to assert those rights is not the subject of criminal prosecution. For example, in *Rodriguez* v. *British Columbia (Attorney General)*,[55] both Sopinka, J. writing for the majority and McLachlin, J, in dissent agreed that the *Criminal Code* prohibition on assisted suicide interfered with the security of the person of individuals with terminal illnesses who sought to end their own lives but were unable to do so. Ms. Rodriguez would not herself be subject to criminal penalties for attempting or committing suicide, but someone who attempted to assist her in carrying out this act would be subject to criminal sanction. Thus, there can be circumstances where the existence of criminal sanctions governing the behaviour of others can have a sufficient impact on the security of another person that the law can be said to have "deprived" that individual of "security of the person" within the meaning of section 7.

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[53] See, for example, *Williams* v. *Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (F.C.A.); *Hoang* v. *Canada (Minister of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35 (F.C.A.); *Kroon* v. *Canada (Minister of Citizenship & Immigration)*, {2004} F.C. 697 (F.C.T.D.); *Moktari* v. *Canada (Minister of Citizenship & Immigration)*, (2001), 200 F.T.R. 25 (F.C.T.D.); *Bahrami* v. *Canada (Minister of Citizenship & Immigration)* (1991), 168 F.T.R. 190 (F.C.T.D.) and D. Brown and Hon. J. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998 looseleaf) at 8:7330.

[54] *Chiarelli*, *supra* note 24. In that case the Court found that the deportation proceedings were not contrary to the "principles of fundamental justice" and did not find it necessary to address the threshold question of whether the individual's section 7 rights wer4e engaged at all.

[55] *Supra* note 36.

In the recent case of *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney-General)*[56] this principle was taken one step further when the Court concluded that the justification of the use of force to correct children found in section 43 of the *Criminal Code* affected the personal security of children within the meaning of section 7. The majority went on to conclude, however, that the law, when properly interpreted, did not violate section 7 since it was not contrary to the "principles of fundamental justice". It is probably unfair to read too much into this decision since the Crown conceded that section 43 of the *Criminal Code* adversely affects the personal security of children within the meaning of section 7 of the *Charter*.[57] No doubt this concession was well advised in that particular case. Nevertheless, it does raise some interesting questions about to the extent to which the alleged failure of the law to offer sufficient protection to the security of individuals can be treated as a deprivation by the government of those individuals' security of the person within the meaning of section 7.

These lines of authority suggest that it would be unwise to state categorically that section 7 can never be engaged where the deprivation of an individual's liberty or personal security is the result of something other than the activity of a Canadian state actor. The Canadian state's contribution to the deprivation of an individual's liberty or security of the person will, in some circumstances at least, be sufficient. What is remarkable about the approach to section 7 adopted by Arbour and L'Heureux-Dubé, JJ. in *Gosselin* is that they eliminate the need to consider whether or not there is a state deprivation of liberty or personal security at all. This is because they say that section 7 contains two rights, the first of which is a free-standing right to life, liberty and security of the person. This aspect of section 7 is said to guarantee life, liberty and security to individuals, and any governmental action or inaction that interferes with this guarantee must be justified under section 1 of the *Charter*.

The two right theory of section 7 made its first appearance in Supreme Court of Canada jurisprudence in Madam Justice Wilson's concurring reasons for judgment in the *Motor Vehicle Reference*.[58] This decision, released in 1985, was a relatively early attempt by the Court to explore the proper approach to section 7 analysis. Madam Justice Wilson

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56 2004 SCC 4.

57 See the reasons for judgment of Chief Justice McLachlin at para. 3.

58 *Supra* note 26.

herself employed the more conventional "single right" approach in her reasons for judgment in *Singh* released ten months earlier, and she made no effort in the subsequent section 7 decisions in which she participated to revitalize the two right theory. I suspect that by 2002, when *Gosselin* was decided, most constitutional commentators in Canada would have concluded that an argument based on the two rights theory of section 7 was not supported by precedent and had no reasonable prospect of success. Why, then, would so able a jurist as Madam Justice Arbour seek to revive the doctrine in that case?

It seems to me that the answer to this question is twofold. First of all, as Madam Justice Arbour's reasons ably demonstrate,[59] the two right theory has some appeal from a purely textual standpoint. As she described it:[60]

> Past judicial treatments of the section have habitually read out of the English version of section 7 the conjunction and, with it, the entire first clause. The result is that we typically speak about section 7 guaranteeing only the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. On its face, this is a questionable construction of the language of section 7: for it equates the protection of the second clause alone with the protection of the section as a whole.

The second, and it seems to me more significant, reason is that this interpretation makes the *Charter* a much more powerful tool for social justice. It is not an accident, in my view, that cases advancing positive rights claims under section 7 often combine claims that government's failure to provide benefits to a particular group of individuals demonstrates a lack of equal concern and respect for this group and therefore violates section 15.[61] The power of the section 7 argument is that it allows a group advancing a rights claim to seek not only a level of

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59 See *Gosselin*, *supra* note 10, at paras. 334-341.

60 *Ibid*.at para. 335.

61 This is true not only of *Gosselin* but of *Falkiner*, *supra* note 10, and *Auton*, *supra* note 9, to give only two examples.

benefits that is comparable to those received by others, but one that is adequate in absolute terms.[62]

As Jamie Cameron points out in her comment on the *Gosselin* decision, what disappears in Madam Justice Arbour's dissent is "any recognition that section 7's interpretation is based on respect for institutional boundaries."[63] In Professor Cameron's view:[64]

> . . . [I]t is unclear that Arbour J.'s attempt to free section 7 from the fundamental justice constraint is a step in the right direction. Protecting entitlements selectively through section 7's concept of security of the person underscores the subjectivity inherent in any attempt to limit positive, substantive rights on the basis of their content. Though singling certain aspects of liberty or security out for constitutional protection underscores the subjectivity of review and reflects adversely on its legitimacy, an open-ended definition of the first clause is unworkable. Under the *Gosselin* dissent's unrestricted interpretation, however, individuals would be entitled to challenge every interference with their liberty or security of the person and to claim that the state's failure to secure those entitlements violated the Charter. Justice Arbour's rights of performance would include, and potentially render justiciable, any form of inaction on the state's part that substantially impedes security of the person. In this, her interpretation of section 7 contemplates a power of review that would dramatically theceed the *Motor Vehcile's* initiative. Under her conception of the right, institutional boundaries would not only be crossed, but eliminated.

It is, of course, possible to treat the section 7 dissent in *Gosselin* as an anomaly in the jurisprudence and to suggest that it is simply a product of the effort of some members of the Supreme Court of Canada to render justice in a particularly compelling and difficult set of circumstances. The majority's refusal to rule out a positive role for section 7 on the future,

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62 See Madam Justice Arbour's reasons in *Gosselin* at paras. 360-362 and 365-366, where she describes the relationship between the section 15 and the section 7 claims advanced in that case.

63 J. Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin* v. *Québec.* (2003), 20 S.C.L.R. (2d) 65 at p. 86.

64 *Ibid.* at p. 89.

however,[65] seems to me to represent an open invitation to counsel to continue advancing this type of claim. With the greatest of respect, it seems to me that it is reasonable to ask for more in the way of leadership from the Supreme Court of Canada in defining how the boundaries of its role under section 7 are to be established. It is not, in my respectful view, particularly productive for the Court to attempt to combine what strikes me as a rather restrictive role for section 7 outside the criminal law realm in the dominant strand of jurisprudence to date with the prospect of a much more ambitious role at some time in the future.

### b) How Broad is the Scope of "Liberty" and "Security of the Person"?

While the debate over whether or not section 7 imposes affirmative obligations on the state in an administrative law context is a significant one, it tends to be dwarfed by the larger effort of Canadian courts to establish the proper scope of "liberty" and "security of the person" in section 7. In other words, the dominant view is that section 7 is only triggered by the deprivation of "liberty" or "security of the person" by the state, and we need to know how broadly those terms will be interpreted in an administrative law setting. The heart of the problem appears to be the desire to adopt a definition of "liberty" (and to a lesser extent "security of the person") in section 7 that avoids an unqualified commitment to protecting the economic liberty of individuals while still giving effect to the protection of important individual interests that extend beyond the field of criminal sanctions or other state-imposed constraints on an individual's physical freedom. Two different limiting principles tend to have been employed in this effort, and each has met, in my respectful opinion, with indifferent success.

The first limiting principle is that the types of liberty or personal security interests that are the subject of section 7 protection have to be sufficiently important. In *Blencoe* v. *British Columbia (Human Rights Commission)*,[66] Mr. Justice Bastarache, writing for the majority of the Supreme Court of Canada, appears to endorse a position adopted by Mr. Justice LaForest in *Godbout* v. *Longeuil* [67] that the meaning of "liberty" in section 7 extends beyond mere freedom from physical restraint but also

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65 See the judgment of Chief Justice McLachlin in *Gosselin*, *supra* note 10. at para. 82.

66 *Supra* note 14.

67 [1997] 3 S.C.R. 844.

encompasses "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[68] Mr. Justice Bastarache was not, however, prepared to find that such interests were engaged in *Blencoe*. He concluded:[69]

> Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices". The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s.7.

Unfortunately, and I say this with respect, the Supreme Court of Canada jurisprudence has not been particularly clear on how "fundamental personal choices" are to be identified or, more fundamentally, why the meaning of "liberty" in section 7 should be restricted in this way. Mr. Justice Bastarache offers a clue to the answer to the second question by his reference to "the more cautious approach" proposed by Professor Hogg who is concerned that a right to "property" not be smuggled in the back door by including economic liberty or security within the scope of section 7.[70]

As Chief Justice Dickson's reasons for judgment in *Irwin Toy* eloquently demonstrate, there are compelling reasons for concluding that section 7 is not designed to protect the economic interests of corporations or other organizations. It seems to me that it is plausible to extend this reasoning to the economic interests of individuals that are indistinguishable from those of corporations, which explains the Supreme Court of Canada's rejection of the appellants' economic liberty argument in *Siemens*. What is less obvious is why an expansion of the scope of "liberty" in section 7 represents an automatic threat of undue judicial interference with governmental regulation of the economy, which is, I take it, Professor Hogg's underlying concern.

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68 *Blencoe*, *supra* note 14, at para. 51, quoting LaForest, J. in *Godbout* v. *Longeuil* at para. 66.

69 *Blencoe* at para. 54.

70 *Blencoe* at para. 53, referring to P. Hogg, *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (update 1999, release 1) at p. 44-12.

I believe that there is a profound difference between arguing that section 7 empowers courts to determine whether it is fundamentally unjust for government to make certain choices about regulating professions and occupations engaged in by individuals, and arguing that section 7 empowers courts to determine whether the legal means by which governments seek to accomplish these regulatory ends are fundamentally unjust. The former claim does represent of serious threat of undue judicial interference in economic and social policy, and I believe it ought to be rejected. The latter argument is not a claim that, in my respectful opinion, overreaches the proper role of courts using section 7. Nevertheless, lower courts have been reluctant to adopt this type of reasoning because they appear to believe (mistakenly in my view) that accepting the second line of argument inevitably leads to acceptance of the first.

The restriction of "liberty" to "fundamental personal choices" has tended to encourage parties seeking to advance section 7 claims to explore the alternative argument, which is that the state has deprived them of "security of the person". This line of argument appears to be particularly attractive because section 7 has been held to cover not only state deprivation of physical security but state interference with psychological integrity. Once again, however, Mr. Justice Bastarache significantly qualified this principle in *Blencoe*:[71]

> Not all state interference with an individual's psychological integrity will engage section 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing section 7 *(G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice

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[71] *Blencoe* at para. 57.

caused by government will lead to automatic section 7 violations.

The majority in *Blencoe* concluded that these tests had not been met in this case. The majority concluded that the negative effects Mr. Blencoe experienced in his life and career were not caused, or even significantly exacerbated, by the Human Rights Commission's delay in processing the complaints against him. More fundamentally, however, the majority decided that the quality of the interference with Mr. Blencoe's personal security did not rise to the level that qualified it as an interference with interests protected by section 7. Mr. Justice Bastarache concluded:[72]

> I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by section 7 of the Charter covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), supra, of an overlong and vexatious pending criminal trial or in *G. (J.), supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in G. (J.). There is thus no constitutional right or freedom against such stigma protected by the section 7 rights to "liberty" or "security of the person"

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[72] *Blencoe* at para. 96.

It is somewhat ironic, given this conclusion, that Mr. Justice Bastarache did not rule out the possibility that, in other circumstances, delays in human rights proceedings could engage interests protected by section 7.[73] As David Mullan and Dierdre Harrington observed in their comment on the *Blencoe* decision: ". . . given the nature of the allegations against Blencoe, and the extent to which they had an impact on his career and life, it is rather difficult to imagine more extreme circumstances in a human rights setting which would trigger the application of section 7 through the "security of the person" route."[74] Mullan and Harrington speculated that the Court may have had in mind difficulties experienced by complainants rather than respondents, or situations where the institution of human rights proceedings has a collateral effect, such as discipline proceedings resulting in a professional suspension. Even here, however, involvement in the human rights proceedings themselves would not be sufficient to trigger the application of section 7, and the proceedings would have to exacerbate some other form of harm before section 7 interests would be engaged.[75]

Once again, one is tempted to ask not only when the distress associated with particular types of proceedings is sufficient to reach the "deprivation of . . . security of the person" threshold, but what purpose is served by maintaining such a high threshold? There is, of course, something to be said for avoiding situations in which the constitution is invoked to protect trivial interests. Nevertheless, this does not seem to be an adequate explanation for why the issuance of an order to testify under oath at administrative proceedings engages interests protected by section 7[76] whereas the impact of the proceedings themselves on the individual's ability to pursue his or her livelihood normally does not appear to engage those protections.[77] As Madam Justice Prowse of the British Columbia

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73 *Blencoe* at para. 98.

74 D. Mullan and D. Harrington, "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002), 27 *Queen's L.J.* 879 at p. 900.

75 *Ibid*. at pp. 901-902.

76 See *Thompson Newspapers*, *supra* note 15; *Branch*, *supra* note 15.

77 The Supreme Court of Canada has never ruled clearly on this question, though it is sometimes argued that the Court's rather cryptic reasons in *Walker* v. *Prince Edward Island*, [1995] 2 S.C.R. 407, have this effect. See, for example, *Waldman* v. *British Columbia (Medical Services Commission)* (1999), 150 D.L.R. (4th) 405 (B.C.S.C.), aff'd on other grounds (1997), 177 D.L.R. (4th) 321 (B.C.C.A.) (hereafter "*Waldman*"). This issue may well have arisen for decision in *Jones*, *supra* note 12, but the appeal was quashed as moot.

Court of Appeal eloquently put it in her dissenting judgment in *British Columbia Teachers' Federation* v. *Vancouver School District No. 39*[78]

> . . . [C]ounsel for the respondents acknowledged that the liberty interest of the teacher would be engaged under section 7 of the Charter if, instead of providing that she would be summarily dismissed if she refused to undergo a psychiatric examination, the legislation provided that she would be imprisoned for two days in the event of such refusal. That submission is based on the authorities which support the proposition that any deprivation of liberty arising from the prospect of imprisonment is sufficient to satisfy the first stage of the section 7 analysis. . . . It highlights the premium which the courts have placed on physical liberty. What it fails to give credence to, however, is the probability that many members of the public would prefer to spend two days in jail than to lose their means of livelihood. That is particularly so where, as here, the loss of livelihood is triggered as a result of a refusal by the individual to sacrifice her personal and psychological privacy as a condition of maintaining her livelihood.

The second limiting principle that is employed in determining when section 7 is engaged is the principle that section 7 only protects the types of state interferences with a person's liberty or security of the person that flow from the operation of the legal system. Mr. Justice Bastarache explained this limitation in his judgment in *Gosselin* as follows:[79]

> Thus, in certain exceptional circumstances, this Court has found that section 7 rights may include situations outside of the traditional criminal context — extending to other areas of judicial competence. In this case, however, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. The appellant was not implicated in any judicial or

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78 2003 BCCA 100, 11 B.C.L.R. (4th) 119, at para 141 (hereafter "*BCTF*").

79 *Gosselin*, *supra* note 10, at paras. 213 and 216. Mr. Justice Bastarache dissents from the majority's refusal to find a violation of section 15 of the *Charter* in *Gosselin*, but he reaches the same conclusion as the majority with respect to the absence of a violation of section 7.

> administrative proceedings, or even in an investigation that would at some point lead to such a proceeding. . . .
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> . . .
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> However, at the very least, in order for one to be deprived of a section 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken.

This approach can be said to have its genesis in a number of decisions by Chief Justice Lamer[80] building on an idea developed by Professor Eric Colvin,[81] which is that section 7 offers protection only for legal rights. These are rights that relate exclusively to the interaction of individuals with the system of justice. In Colvin's words, they are "rights to the use of legal machinery and to the quality of this machinery".[82] The types of deprivations of life, liberty or security of the person that section 7 addresses, according to this theory, are deprivations that can be evaluated by courts using a "fundamental justice" standard that draws meaningfully on judicial expertise in the operation of the institutional machinery of the law.

In my view it is much easier to justify this type of limitation in terms of the institutional role of the courts in constitutional review than it is to justify the first type of limitation described above. Rather than permitting courts to assess all manner of legislation against an unstructured "fundamental justice" standard, this interpretation of section 7 would confine the courts to a narrower and more traditional "domain of the judiciary as guardian of the justice system".[83] Unfortunately, and for reasons that are obscure to me, this approach to the scope of section 7 has been combined with the first type of limit's narrow interpretation of the meaning of "liberty" and "security of the person".

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[80] See *Prostitution Reference*, *supra* note 7; *Children's Aid Society*, *supra* note 16; *G. (J.)*, *supra* note 17.

[81] E. Colvin, "Section 7 of the *Canadian Charter of Rights and Freedoms*" (1989), 68 *Can. Bar Re*v. 560 (hereafter "Colvin").

[82] *Ibid*.at p. 575.

[83] *Motor Vehicle Reference*, *supra* note 26 at p. 503 (per Lamer, J.).

This was never part of Professor Colvin's conception of the theory he was propounding. Indeed, toward the end of his article he wrote:[84]

> Although this article has cast a limited role for section 7 in the protection of life, liberty and security of the person, this limited role is compatible with an expansive view of the scope of these protected interests. Indeed generous interpretation of the scope of life, liberty and security may become more attractive if there are recognized limits to how these interests are protected by section 7.

Neither was Colvin enamoured of a narrow view of the legal system that would restrict section 7 review to the workings of the criminal justice system. In his words:[85]

> . . . [T]he present theory of section 7 offers no reason for confining the role of the section to the sphere of criminal law or to regulatory law generally. . . . There are . . . other ways in which governmental action can deprive a person of liberty and security.
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> Some of the other ways in which governmental action can deprive a person of liberty or security are close to the model of criminal law. For example, the civil process for restraining a mentally disordered person or isolating a contagious person should be subject to review under section 7. Proximity to the model of criminal law need not, however, be a precondition to review under section 7. For example, there is force in the argument that the denial or withdrawal of some State benefits can be so physically dangerous or psychologically traumatizing as to create a deprivation of security of the person. Decisions about entitlements may have to be made by a process which accords with section 7.

It seems to me that the combination of a generally restrictive approach to liberty and security of the person with a requirement that the deprivation of that liberty or personal security take place through the operation of the legal system has undermined the consensus that it might

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84 Colvin, *supra* note 81, at p. 583.

85 *Ibid.* at p. 584 (footnotes omitted).

have been possible to achieve with respect to this requirement. Thus, Chief Justice McLachlin, writing for the majority in *Gosselin*, came to the conclusion that it was premature to determine whether section 7 was confined to deprivations of liberty or security of the person that took place through the administration of justice, and more specifically in an adjudicative context.[86]

No doubt the Chief Justice was wise to show caution when invited to embrace a comprehensive theory of section 7 that might not be necessary for the determination of the case before her. On the other hand, her own reasons for dismissing the section 7 claim in *Gosselin* are rather unsatisfying. Like Mr. Justice Bastarache in *Blencoe* she holds out hope for other litigants in respect of their section 7 claims.[87] Nevertheless, she finds that the evidence before her is not sufficient to make out a claim that section 7 imposes an affirmative obligation on the provincial government to offer a minimum level of social assistance.[88] With the greatest of respect, it seems to me that this is a legal issue not a factual or evidentiary one. One could argue that there was insufficient evidence in *Gosselin* to establish the type of deprivation of personal security that is required to make out a section 7 claim. Or one could say that there was insufficient evidence to satisfy the Court that any such deprivation was contrary to the principles of fundamental justice. Moreover, if one were to accept Madam Justice Arbour's general proposition that section 7 imposes an obligation to provide a minimum level of social assistance, it might still be possible to conclude that the evidence was insufficient to establish a breach of that obligation. But it seems very odd to me to suggest that the very existence of a constitutional obligation to provide a minimum level of social assistance should turn on the establishment of proof that the obligation was not met.

I believe that the lack of a compelling account of why the terms "liberty" and "security of the person" in section 7 should be limited in particular ways tends to feed a desire on the part of litigants to make ambitious section 7 claims rather than to diminish that desire. It is as if counsel cannot believe that the courts are actually serious about these limitations and that all that is needed to retrieve the situation is the right set of facts. The existence of widely divergent views on the Supreme Court of Canada, in my respectful view, exacerbates this tendency. It is

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86 *Gosselin*, *supra* note 10, at parasection 79-81.

87 *Gosselin* at para. 82.

88 *Gosselin* at paras. 82-83.

also fueled by vague suggestions from members of the Court who support the dominant and restrictive view of section 7 applicability that cases presenting different types of facts might be treated differently.

My own view is that the more promising direction for this aspect of the section 7 jurisprudence would be for the courts to build on the requirement that deprivations of "liberty" and "security of the person" take place through the justice system and ease the qualitative restrictions on the types of liberty and personal security interests that deserve section 7 protection. The implication of this view is that *Blencoe* was probably wrongly decided on the section 7 applicability point, though not necessarily on the merits.

### c) How Much Flexibility Do Governments Enjoy in Complying with the "Principles of Fundamental Justice"?

As the foregoing discussion suggests, despite the force of Madam Justice Arbour's reasoning in *Gosselin* I am still a supporter of the mainstream view that what section 7 offers is a guarantee that the state will abide by the principles of fundamental justice when it deprives individuals of liberty or security of the person. The "principles of fundamental justice", therefore, are the real teeth of section 7. While it is theoretically possible to find a more robust role for section 1 in section 7 cases, I think that rhetorically it is difficult to imagine making a successful argument that a law or practice that has been found to be fundamentally unjust represents a "reasonable limit" in any but the most extraordinary circumstances. Much is sometimes made of Madam Justice Wilson's reluctance in *Singh* to take into account administrative convenience in determining whether a breach of section 7 was justified under section 1.[89] The short answer to criticism of these observations is

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[89] What Madam Justice Wilson stated, at [1985] 1 S.C.R. pp. 218-219 is that "I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in section 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.

that administrative convenience (more persuasively described as "effective administration") can only operate as a compelling factor if it is brought into play at the stage of determining what is required by the "principles of fundamental justice" in any particular setting.

The Supreme Court of Canada has exhibited little interest in establishing a rigid definition of "the principles of fundamental justice" that would be applied in an identical fashion in every circumstance. Even in *Singh*, Madam Justice Wilson was prepared to acknowledge that ". . . it is possible that an oral hearing before the decision-maker is not required in every case in which section 7 of the Charter is called into play"[90] The question, then, is what guidance does the jurisprudence offer to courts in determining what the "principles of fundamental justice" require in any particular setting?

In answering this question, I believe that it is useful to draw two distinctions. The first is whether the fundamental justice argument is being advanced in order to invalidate a statutory scheme or an element the scheme that is arguably unjust, or to attack the manner in which the scheme is being administered. The second is whether the principle being advanced is a procedural principle or a substantive one. I hasten to observe that I recognize that the "principles of fundamental justice" encompass both procedural and substantive principles and that the distinction between the two is not always easy to draw. The reason I find it useful is that it helps us to focus on the distinction between the common law and section 7 of the *Charter* as vehicles for protecting the interests of individuals involved in administrative proceedings.

The common law principles of procedural fairness remain a vital tool for the judicial protection of the interests of parties to administrative proceedings in the post-*Charter* era. This is so for two reasons. First of all, many administrative schemes are silent in respect of procedure and the common law allows courts to read in procedural requirements that are consistent with the statutory framework being administered. If legislatures come to the conclusion that these procedural constraints are undesirable, they can alter the legislation to make it clear that a procedure that would normally be mandated by the common law is not appropriate in that particular setting. Secondly, the rules of procedural fairness apply

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1, it seems to me that the basis of the justification for the limitation of rights under section 7 must be more compelling than any advanced in these appeals."

90 *Supra* note 1 at p. 213.

much more broadly than section 7 of the *Charter*. Most notably, they ensure that corporations and other organizations that do not enjoy section 7 protection receive fair treatment as parties to administrative proceedings. The limitations of the fairness doctrine are that it cannot be used to attack procedures embedded in a statute that are arguably unfair [91] and that it cannot be employed (in Canada at least)[92] to entitle a person to substantive as distinct from procedural fairness.[93] The obvious differences between section 7 of the *Charter* and the fairness doctrine are that section 7 does allow individuals who are the beneficiaries of section 7 protection to attack procedural requirements embedded in statutory schemes and it also allows those individuals to advance substantive as well as procedural arguments.

In those cases in which a claim is made to a particular procedure that does not require a challenge to legislation, one might have expected that common law arguments would displace arguments under section 7 of the *Charter*. In other words, one might have anticipated that the rules of procedural fairness would be more expansive than the procedural requirements of the "principles of fundamental justice", since the common law rules give greater flexibility to legislatures to modify what might appear to be overly rigid procedural rules mandated by the courts. One of the ironies of section 7 jurisprudence is that counsel are sometimes forced to make section 7 claims because the common law lags behind procedural arguments that can be advanced under section 7. The leading example of this phenomenon is the *Blencoe* litigation.

As Mr. Justice Bastarache writing for the majority in *Blencoe* observed, the failure of Mr. Blencoe's section 7 claim did not dispose of the case since it was still possible for him to seek a remedy at common law for unjustifiable delay in processing the human rights claim against him.[94] It seems to me that the reason Mr. Arvay, counsel for Mr. Blencoe,

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91 *Ocean Port Hotel Ltd.* V. *British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (hereafter "*Ocean Port*").

92 Other jurisdictions have adopted fairness principles that have substantive content, sometimes in the guise of a substantive legitimate expectations doctrine. See, for example, *R.* v. *North and East Devon Health Authority, ex parte Coughlan*, [2000] 3 All E.R. 850 (Eng. C.A.); *Webb* v. *Ireland*, [1988] I.R. 353 (Irish S.C.); *Attorney-General (NSW)* v. *Quin* (1990), 64 A.L.J.R. 327 (Australian H.C.).

93 *Mount Sinai Hospital Centre* v. *Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at paras. 32-38 (per Binnie, J. concurring in the result).

94 See *Blencoe*, *supra* note 14, at para. 100.

advanced the section 7 claim is not some momentary lapse in his appreciation of the possibilities of a common law argument, but because he believed that the common law abuse of process doctrine was not sufficiently robust to allow his client's claim to succeed. As things turned out, this assessment proved to be correct. The minority judgment in *Blencoe* seems to me to vindicate Mr. Arvay's choice to pursue a section 7 claim since the considerations the minority took into account in determining that there was an unjustified delay in processing the human rights claim against Mr. Blencoe are precisely those factors that a court would employ in determining a whether or not there was a violation of an accused person's right to a speedy trial under section 7.[95] By assimilating the general approach to delay in section 7 criminal cases into the common law, the minority in *Blencoe* eliminated the pressure to transform the case from a procedural fairness case into a constitutional one.

The difficulty with this approach is that it may not always be appropriate to use "fundamental justice" standards that have been established in a criminal law setting outside that context. It seems to me, however, that this difficulty is not as great as it might appear at first blush. Both the common law and the section 7 jurisprudence allow for the adjustment of procedural requirements to be sensitive to institutional context.[96] The important point is that the types of procedural claims that a party might seek to advance under section 7 should be available at common law. For example, in *Hammami* v. *College of Physicians & Surgeons (British Columbia)*[97] Chief Justice Williams applied the principles for Crown disclosure in criminal cases established in *R.* v. *Stinchombe*[98] to require disclosure of information available to the prosecutorial arm of a professional disciplinary body to the individual who was the subject of a disciplinary proceeding. This right was not unqualified, and it is not one that is easily transferable to administrative adjudication situations outside the disciplinary context. It does, however,

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95 See the judgment of Mr. Justice LeBel for the minority in *Blencoe* at paras. 156-160.

96 See, for example, *Suresh*, *supra* note 11, at para. 115.

97 (1997), 36 B.C.L.R. (3d) 17 (B.C.S.C.). It is not entirely clear from Chief Justice Williams's reasons for judgment whether he is applying section 7 standards directly or using them as a guide to the creation of a common law obligation. It seems to me that the latter interpretation is more likely since the dominant strand of British Columbia jurisprudence is that section 7 rights are not available in professional disciplinary proceedings. See, for example, *Waldman*, *supra* note 77; *BCTF*, *supra* note 78.

98 [1997] 3 S.C.R. 326.

seem to me that the analogy to criminal disclosure obligations in that setting is an apt one, and that the reliance on common law rather than constitutional standards offers the prospect of greater flexibility in establishing the right balance between fairness and administrative efficiency, at least in the first instance.

Another example of the importation of constitutional standards of fair procedure into the common law is the Supreme Court of Canada's recognition of a common law requirement of institutional independence for administrative tribunals in *Canadian Pacific Ltd.* v. *Matsqui Indian Band*.[99] As I have suggested elsewhere,[100] what distinguishes structural guarantees of tribunal independence from other common law doctrines designed to ensure that adjudicators exercise independent judgment as individuals in rendering their decisions is institutional independence provides an objective assurance that adjudicators are not subject to improper pressure since the outcome of a case can have no direct impact on the adjudicator's appointment, remuneration or ability to exercise administrative control of the proceedings. The *Ocean Port* decision [101] illustrates, however, that the common law institutional independence principle cannot overcome limitations on security of tenure or remuneration imbedded in a statute, and where such limitations exist it is not surprising to see counsel reaching for constitutional or quasi-constitutional doctrines in order to establish a right to independent administrative adjudication comparable to the independent adjudication that is guaranteed in court.[102] The Supreme Court of Canada has not yet enunciated the precise boundaries of any institutional independence principle that may emerge in the context of administrative adjudication that is governed by section 7, but a number of trends are noticeable.

The first is that the Supreme Court has been very reluctant to equate administrative adjudication with judicial adjudication.[103] This

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99 [1995] 1 S.C.R. 3.

100 P. Bryden, "Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*" (2003), 16 *C.J.A.L.P.* 125 at pp. 131-137.

101 *Supra* note 91.

102 See *Jones*, *supra* note 12; *Bell Canada* v.*Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 (hereafter "*Bell Canada*"); *Barreau de Montréal* v. *Québec (Procureur genera)* [2001] R.J.Q. 2058 (Q.C.A.), leave to appeal denied, (2002), 2002 CarswellQue 2078 (S.C.C.) (hereafter *Barreau de Montréal*").

103 See *Ocean Port*, *supra* note at 91, at paras. 23-24 and 30-33; *Bell Canada* at para. 29.

suggests that the transition into the administrative arena of the more expansive guarantees of independence accorded to members of the judiciary is unlikely to be an easy one.[104] The second is that the Supreme Court of Canada has come down fairly clearly on the side of a relatively pragmatic approach to the common law guarantees of institutional independence. Thus, in *C.U.P.E.* v. *Ontario (Minister of Labour)*[105] the Court gave significant weight to past experience of satisfaction with *ad hoc* systems of labour arbitration in concluding that the scheme of *ad hoc* appointments at issue in that case "would satisfy reasonable concerns about institutional independence".[106] It seems to me that this is precisely the type of argument that the Court rejected in *Valente*[107] when it was offered as a defence of a system of post-retirement appointments of provincial court judges on an "at pleasure" basis. Any section 7 standards for institutional independence for tribunals need not as a matter of logic follow the common law approach, but it seems to me that the general desire to adopt "principles of fundamental justice" that are sensitive to context militates strongly in this direction.

The third point that appears to be significant is that the closeness of the fit between the types of powers exercised by the administrative tribunal in question and those exercised by a court seems to be emerging as the dominant consideration in determining the degree of institutional independence that the tribunal ought to be afforded. I made this observation originally in an article[108] that was written before the Supreme Court of Canada's reasons in *C.U.P.E.* v. *Ontario (Minister of Labour)* and *Bell Canada* had been released. This suggestion was based largely on the Quebec Court of Appeal's reasons for judgment in the *Barreau de Montréal* case, but it seems to me that the *C.U.P.E.* and *Bell Canada* decisions reinforce this trend. The Supreme Court was clearly influenced by the Canadian Human Rights Tribunal's mandate as a rights adjudication body in concluding that the Tribunal was intended "to

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104 See K. Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence" (2001), 14 *C.J.A.L.P.* 61. It is interesting to speculate on whether the Supreme Court of Canada's decision in *Ell* v. *Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, represents the first signs of a trend away from continuing expansion of judicial independence.

105 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 191-193 (hereafter "*C.U.P.E.* v. *Ontario*"). See also *Katz* v. *Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

106 *C.U.P.E.* v. *Ontario* at para. 192.

107 *R.* v. *Valente*, [1985] 2 S.C.R. 673 at para. 36.

108 Bryden, *op. cit.* note 100, at pp. 151-152.

exhibit a high degree of independence from the executive branch". [109] Although the Court in *C.U.P.E.* v. *Ontario* did not address this issue extensively, I believe it is a fair inference from the Court's reasons to suggest that it perceived labour arbitration in general, and interest arbitration in particular, as being somewhat removed from the practice of rights adjudication in the courts, and therefore subject to more flexible standards of institutional independence.[110] Whether this is actually an accurate assessment of the way labour arbitration operates is a different question, but I think it is fair to say that a perception of labour arbitration as more polycentric and policy oriented than traditional rights adjudication helps to reinforce the view that judicialized standards of independence are unnecessary in that setting.

If we move to the "principles of fundamental justice" as a vehicle for establishing substantive rather than procedural standards, it appears to me that the line between using section 7 to dictate certain types of exercise of discretion and using section 7 to invalidate statutory provisions themselves is less distinct than it is in the procedural context. For example, in *Suresh* one of the claims advanced was that section 53(1)(b) of the *Immigration Act* offended section 7 of the *Charter* because it did not expressly prohibit the removal of an individual from Canada to a country where he or she would face a substantial risk of torture. The Court rejected this claim, but it nevertheless held that, absent extraordinary circumstances, it would be a violation of an Suresh's section 7 rights if the Minister were to order him deported to a country where he would face a substantial risk of torture.[111] The effect of this conclusion, however, would appear to be to read into the *Act* a requirement that would not otherwise be present. Moreover, it would seem to me that the enactment by Parliament of a statutory provision expressly permitting (or even requiring) the Minister to deport an individual to a country where there existed a reasonable risk of torture would immediately be met by a claim that this violated section 7 of the *Charter*.

For purposes of the argument I advanced earlier in this paper, echoing Professor Colvin, that section 7 confers only rights with respect to the legal means chosen to effect a set of social ends rather than the ends themselves, the issue is whether decisions like *Suresh* represent an

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[109] *Bell Canada*, *supra* note 102, at paras. 23-24.

[110] See *C.U.P.E.* v. *Ontario*, *supra* note 105, at paras. 190-193.

[111] *Suresh*, *supra* note 11, at parasection 76-79.

illegitimate use of the Court's power under section 7. This is not an easy question to answer, but it seems to me that it turns on whether certain ideas are sufficiently well accepted by the legal community that they are embedded in the rule of law. One of the things that distinguishes the types of substantive section 7 claims that the Supreme Court of Canada has accepted in cases such as *Suresh*, *Burns* and for that matter the *Motor Vehicle Reference* is that they can all be related to the fairly specific legal system norms. In contrast, the claim in *Gosselin* to a minimum level of social assistance guaranteed by section 7 does not seem to me to share that characteristic. This does not mean that claimants in cases similar to *Gosselin* have no proper constitutional claims, but that if their claims to a certain level of social assistance benefits are to succeed it must be as equality claims under section 15 rather than as claims under section 7.[112]

## Conclusion

I began this paper by suggesting that considerations of the proper role for courts using the type of constitutional review powers that the *Charter* holds out requires limits to be placed on the proper scope of section 7 in an non-criminal law context. Supreme Court of Canada jurisprudence has done an exceptional job of establishing the case for some of these limits, such as the restriction of section 7 rights to individuals established in *Irwin Toy*. On the whole, it seems to me that the approach the Court has taken to procedural claims to fundamental justice in those cases to which section 7 has been found to apply is also, generally speaking, a manageable and workable one.

At the same time, I believe that the jurisprudence with respect to when section 7 is applicable outside the criminal law context leaves much to be desired. It seems to me that this jurisprudence is too restrictive of the meaning of "liberty" and "security of the person", and does not do enough to forge the relationship between those concepts and a workable version of the "principles of fundamental justice" based on the proper functioning of the legal system. Moreover, it seems to me that the existence of this excessively restrictive version of section 7 actually encourages counsel to advance claims that overreach the proper scope of

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[112] Colvin, *supra* note 81, makes the same point at p. 583 of his article. He states: "Nor has it been an objective of this article to oppose claims that the Charter confers a range of substantive entitlements to benefits from the state. Such claims should, however, be framed with reference to the promises of equality under the law and the equal benefit of the law under section 15 of the Charter, not with respect to section 7.

section 7 because the existing doctrine seems ripe for attack. This is unfortunate, not least because I believe that Professor Colvin's ideas held out the prospect for a much more effective and coherent administrative law jurisprudence using section 7 if they had been properly understood and developed. Whether this type of development will take place in the future remains to be seen.