

**A HISTORICAL ANALYSIS OF THE SUBSTANTIVE PRINCIPLES OF
FUNDAMENTAL JUSTICE UNDER SECTION 7 OF THE CANADIAN CHARTER OF
RIGHTS AND FREEDOMS**

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Abstract

The Principles of Fundamental Justice ascribed under section 7 of the Charter of Rights and Freedoms are a commonly misunderstood and an ambiguous area of Canadian law. Within the Canadian context, the Supreme Court's interpretations of these principles give them incredible weight and significance, while giving little definition or explanation. Drawing on case law from the Supreme Court of Canada, this thesis examines the Supreme Court's interpretation of substantive principles of fundamental justice for the purpose of evaluating their importance and use within Canadian law. The Court is reluctant to provide precise definitions of these principles for the purpose of increased interpretive power in the future. Due to the Charter's relatively young age and the emergence of significant topics under section 7, the Court denies furthering what the principals of fundamental justice are in order to better protect the right to life, liberty and security of person in the future.

Dedication and Acknowledgments

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**A Historical Analysis of the Substantive Principles of Fundamental Justice under
Section 7 of the Canadian Charter of Rights and Freedoms.**

In this thesis, the Supreme Court of Canada's interpretations of the substantive principles of fundamental justice will be examined. It is suggested that the substantive principles of fundamental justice ascribed under Section 7 of the *Charter of Rights and Freedoms* do not offer strong definitions of their own abilities and their current use remains open for interpretation from the Courts. The Supreme Court of Canada offers limited definitions surrounding these ominous and important principles within the legal system. The central conclusion found within the examination is that the Courts have found more benefit in not providing clear definitions, expectations and methods for these principles as it increased the Court's future ability to use them in more ways. The young nature of the Charter presents limitations on the Court, as many issues have not been heard regarding the right to life, liberty and security of person. By refraining from providing strict definitions, the Court gives themselves an increased ability to openly develop section 7.

The primary aim of this historical analysis is to create a more comprehensive understanding of the current definition of each substantive principle of fundamental justice through the examination of Supreme Court decisions. Through examination of the principles of vagueness, overbreadth, arbitrariness, moral blameworthiness and gross disproportionality, the Court's power of judicial review is examined while compiling the currently available interpretations. Principles of fundamental justice are defined by the Courts to be the basic tenets of the legal system offering a secondary standard for section 7 infringements. This ability is examined through what information the Courts have chosen to present regarding the principles. The principles of fundamental justice are the systematic evaluation for "bad laws." This is an

integral part of protecting individuals right to life, liberty and security of person, that is within an already misunderstood area of law. The Charter is commonly misunderstood by the individuals it is meant to offer protection to. This evaluation assists in developing understanding of the Charter, section 7 and the use of the principles of fundamental justice to better develop legislation.

I. Methodology

The purpose of this examination is to provide a furthered understanding of the substantive principles of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms. This examination takes a historical analysis design for the purpose of providing synthesized information regarding the substantive principles of fundamental justice. A historical analysis is a type of study that collects previous research to create new understandings of a topic (University of Southern California, 2019). The use of collection, verification and summary of secondary sources of data assist in the development of this type of study. The benefits found through historical analyses include the unobtrusive nature of the data, the presentation of trends, and important historical context for societies. This method was chosen for these benefits and direct relation to the type of data available. Case law and Supreme Court interpretations are considered official records / reports / and archives, which best fit a historical approach (University of Southern California, 2019). Through the use of the historical design, a trend in interpretation from the Supreme Court can be identified and better understood. The collection of precedent cases that have had significant impact on the definitions of these principles creates increased understanding on the principles use and purpose within the Canadian legal system.

This thesis uses case law as the primary source of data while consulting scholarly authors that have written significant works on Supreme Court decisions. This study does not have direct implications on the findings due to the historical approach. Each principle is evaluated through the analysis of case law, which directly impacts the definition and understanding of that individual principle. The principles are first defined then evaluated through case law. Each principle offers three or four cases that present furthered understanding or meaning for the principle. Trends between each of the principles to create overarching understandings are analyzed through how the definition was created and its impacts on society.

II. Section 7 of the Charter

Section 7 of the Canadian Charter of Rights and Freedoms provides the following right:

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 (Constitution Act, 1982).

Principles of Fundamental Justice were included as an imbedded secondary standard when concluding section 7 violations. These principles were left undefined for the purpose of continuous interpretation and flexibility. Due to the lack of specific definition, these principles are commonly misunderstood by some and are open to many different interpretations.

III. Principles of Fundamental Justice

When an individual claims that state action has infringed on section 7, the state's actions must comply with the principles of fundamental justice in order to save the policy, law or legislative action. If the state's action complies within the principles, then it can be saved under

section 1 of the Charter. If it does not comply, the individual has proven a section 7 violation (Stewart, 2012, pg. 97). These principles act as regulations for policy's to ensure that individuals and processes are protected, and that legislative intent is properly established. These principles are the second half in a two-step process to examine an infringement on section 7. The first half is the analysis by the Courts to establish if a section 7 violation exists; this looks at the legislations impact on the individual's "life, liberty and security of person". (Evans, 1991). If a section 7 infringement is found, the second half of the test is initiated.

The second test determines if the impugned law is contrary to any of the principles of fundamental justice. Due to the constant evolving nature of these principles, the evaluation is not limited to procedural justice, but can encompass substance issues or fault issues (Evans, 1991). A central component of these principles, as recognized by Justice Lamer in *Re BC Motor Vehicle Act*¹, is the inability of these principles to be free standing in nature (Sharpe & Roach, 2017). This understanding furthered the interpretation of these principles to only apply to law once a section 7 violation has been evoked (Sharpe & Roach, 2017). The reason for not including these as a free standing principle was to properly define them as part of the "basic tenets of our legal system" and "the specter of a judicial super-legislature" as opposed to general aspects of law, keeping the standard of importance with these principles, as said by Justice Lamer (Sharpe & Roach, 2017).

To establish a principle of fundamental justice, a three-part test was formed to ensure each principle remained within the realm of fundamental law and the tenets of the legal system.

¹ *Re BC Motor Vehicle Act* [1985] 2 SCR 486

This three-part test includes that each principle must be (1) a legal principle, (2) supported by a social consensus and (3) yield a manageable standard (Sharpe & Roach, 2017). Principles of fundamental justice intend on setting out the standard for the least amount that law can negatively impact an individual before it violates their life, liberty and security of person.

There are several definitions offered by the Courts as to what a principles of fundamental justice is, Justice Lamer J. defined them as: “[t]he term ‘principles of fundamental justice’ is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right” (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (“*Motor Vehicle Reference*”), at p. 512). As seen above, Lamer also offered the definition of “basic tenets of the legal system.” Not only are there multiple definitions of these principles, but they have also been applied inconsistently. The lower courts have presented confusion regarding the principles of arbitrariness, overbreadth and gross disproportionality as they overlap in definition and use in several cases. The Supreme Court noted this confusion and even furthered the discussion regarding the combobulated nature of overbreadth and grossly disproportionate (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555). Although there is significant overlap, the Court has stayed firm on ensuring they are each individual and important tenets of the legal system. The first principles included under section 7 were moral blameworthiness and mens rea in 1985. Principles have been included from 1985 until 2005, with new definitions being included until 2015. The current principles are divided into three categories: fault, procedural and substantive. Below is a comprehensive chart of the current principles of fundamental justice:

Fault Principles	Mens Rea
	Doli Incapax
Procedural Principles	Presumption of Innocence
	Right of Silence
	Right to Full Answer & Defense
	Right to Full Disclosure
	Best Evidence Rule
Substantive Principles	Vagueness
	Overbreadth
	Arbitrariness
	Moral Blameworthiness
	Gross Disproportionality

Figure 1: *Comprehensive Principles of Fundamental Justice.*

For the purpose of this paper, only the substantive principles will be examined. These principles were chosen due to their significant impact on individual protection from injustice laws. Substantive principles target just that, the substantive elements of laws challenged under section 7. Laws are developed to have both a procedural (procedures or methods to follow) and substantive (rights and duties to be followed) element entwined into them (Cornel Law School, 2019). Substantive principles seek to ensure the substantive elements of laws are just and offer fair protection of life, liberty and security of person.

Substantive Principles of Fundamental Justice

Substantive principles of fundamental justice are a subsection of principles under section 7 that include: vagueness, overbreadth, arbitrariness, moral blameworthiness and gross disproportionality. These principles are considered to be most concerned with protecting individuals from unjust laws, creating an increased importance for these principles to be examined. Substantive principles are most often engaged in legal questions of statutes, regulations, and common law rulings but also apply to formal and social norm procedures of legal disputes (Stewart, 2012).

Re. Motor Vehicle Act (British Columbia) established that not all principles of fundamental justice are concerned with strictly procedural issues, but also address substantive issues (Hogg, 2012, pg. 198). This decision from the Court was controversial due to the Minister of Justice and other officials, who had drafted section 7, testifying in front of the Special Joint Committee and the Senate and House of Commons expressing that the intention of principles of fundamental justice was to be procedural (Hogg, 2012, pg. 198). The concern with introducing substantive elements arose from the US term “substantive due process” and their desire to separate “fundamental justice” from “due process.”

In his decision, Justice Lamer interpreted the principles of fundamental justice to not have a settled interpretation and therefore could include substantive elements (Hogg, 2012, pg. 199). The Court agreed that the inclusion of substantive elements better suited section 7's intentions and could more strongly protect individual life, liberty and security of person. Hogg (2012) states that the original intention of the legislation does not support substantive principles being included, but “...for those of us who are not originalists”, the inclusion of these rights

expand and support judicial review under section 7, bettering the Court's ability to protect individual liberties (Hogg, 2012, pg. 199).

Below is a historical analysis of each of the substantive principles of fundamental justice. Each section provides an overview of the principle, its history of enumeration, and case law examples of the Court's use and definition in attempt to provide a semi-comprehensive understanding of each principle. The term semi-comprehensive is used as each principle is complex and is open to further definition by the Court, so a completely comprehensive analysis is unlikely to exist in the near future. Each section seeks to provide the most important and relevant information surrounding the current definition of the principle.

IV. Vagueness

The principle of vagueness states that laws must not be overly vague in order to provide sufficient guidance for legal discussion and debate (Stewart, 2012). Vagueness was recognized within the principles of fundamental justice in 1992 in the *R v Nova Scotia Pharmaceutical Society*² decision.

The principle of vagueness states that policies and law must be specific and precise in the wording as to give fair notice to those affected under the law or policy. The language used within each policy must be precise enough that a fair defense is not denied or impeded. This principle is further defined by Stewart (2012) to include that laws must be precise enough to give sufficient guidance for legal debate. However, this principle does not require laws to be absolute, as ruled in *R v Nova Scotia Pharmaceutical Society* (1992), as laws could never be certain in every

² *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606

aspect. The Supreme Court of Canada confirmed vagueness as a principle of fundamental justice within the *Nova Scotia Pharmaceutical Society* decision as Justice Gonthier stated that section 7 could not be offended if the law was so “devoid of precision in its content that a conviction [would] automatically follow.” (*R v Nova Scotia Pharmaceutical Society*, 1992).

Being constitutionally accepted as not being vague is defined as language that bares enough information to relate to human knowledge and understanding of the operations of the legal system with the ability to to give sufficient guidance for legal debate (*R v Nova Scotia Pharmaceutical Society*, 1992). This acknowledgment opens up an acceptable risk for those effected under the law by creating an “acceptable” and “not-acceptable” area within each law that is clearly understood within the general public as well as creating a substantive guidance for notice. Fair notice to citizens encompasses two formal aspects: the text of the policy or law and the substantive understanding that a specific context is the subject of legal restrictions (*R v Nova Scotia Pharmaceutical Society*, 1992). The definition of vagueness when applied to law tries to achieved the goal of delineating the area of risk – if a policy has succeeded in defining what would create risk for the individual effected by it, then it is not considered unconstitutionally vague.

The doctrine of vagueness is defined by five central theoretical aspects: fair notice to citizens, limitation of law enforcement discretion, European Court of Human Rights Case law, the scope of precision, and the rule of law. These five areas assist in developing a fuller understanding of how vagueness should be interpreted and create a threshold for finding a law vague. Due to the expansive nature of these definitions, they will not be covered in this evaluation.

R v Nova Scotia Pharmaceutical Society [1992] 2 SCR 606

The Supreme Court of Canada's (SCC) decisions in *R v Nova Scotia Pharmaceutical Society* [1992]³ is the leading interpretation of the principle of vagueness in Canadian context. The issue of law that arose throughout the appeal was whether the term "unduly" within section 32(1) of the Combines Investigation Act infringes on section 7 of the Charter, engaging the doctrine of vagueness. The Court's interpretation of this principle created the definition provided above, for the purpose of ruling on whether the twelve accused were guilty of conspiracy to prevent or lessen competition unduly. The appeal was dismissed. The issue of vagueness was addressed due to the term "unduly" within section 32(1). The Court found that fair notice to citizens within substantive elements of law enforcement and discretion was essential to the individual's constitutional rights, requiring that laws not be so lacking in specific content that a conviction would automatically follow. The Court recognize that the central competent to vagueness is the need to leave room for legal debate. This is further defined to state that "legal debate" is considered to be within the "limits of human knowledge and understanding in the operation of the law" (*R v. Nova Scotia Pharmaceutical Society*, 1992). If a law were to leave no room for legal debate, it would contradict the rule of law. The Court reason for including vagueness to the principles of fundamental justice was to ensure that when a section 7 violation occurs, the laws are specific enough in wording to allow the individual a proper legal debate and awareness of what the law is entailing.

³ See Note 2

R v Morals [1992] 3 SCR 711

The issue of law being discussed in the R v Morals⁴ decision is the issue of being denied judicial interim release based on the grounds that the individual's detention is essential to the protection and safety of the public under section 515(1)(b) of the Criminal Code of Canada (CCC). The appellant argued that this provision violated his section 11(e)⁵ right. The Court examined this infringement using vagueness under section 7 to determine if section 515(1)(b) was threatening section 11(e). The Court found that the phrasing of this standard did not leave room for legal debate and was a "standardless sweep, as the Courts can order imprisonment whenever it sees fit" (Stewart, 2012, pg. 131). The use of vagueness in this decision resulted in changing the provisions for denying judicial interim release to include three grounds for denial, as opposed to the previous two, while removing the previous second step. The revised section 515 was challenged for being constitutionally vague, but this was denied as the Court stated that leaving room for the Court's interpretation did not mean it was vague or did not allow for legal debate (Stewart, 2012, pg. 131). The use of vagueness in this decision created a new understanding of the principle, as it further defined the principle's ability to be used outside of section 7 challenges as well as created the understanding that laws do not have to be absolute, but instead need to fit within the rule of law.

⁴ *R v Morlas* [1992] 3 SCR 711

⁵ Section 11(e) of the Charter of Rights and Freedoms states that everyone has the right not to be denied reasonable bail without just cause.

O’Neill v Canada (Attorney General) [2006] 213 CCC (3d) 389 (Ont SCJ) [O’Neill]

The issue of law being discussed in *O’Neill v Canada* (AG) [2006]⁶ is the provisions under the *Security of Information Act* that allowed RCMP officers to obtain and exercise warrants to search a reporters home were unconstitutionally vague. The Act did not define the difference between “secret official” and “official” information. This was argued to be vague under section 7 of the Charter as the risk areas were not properly defined between acceptable and non acceptable and could not be interpreted sufficiently to make a defense or set an expectation for the individual (Stewart, 2012, pg. 132). This is an important area of case law for the principle of vagueness as it is one of the few cases that was ruled to be vague under section 7. The standard for vagueness is very high and often results in a rejection. This principle is important to recognize as it addresses when laws do not fall under the rule of law and offend the individual’s ability to present a defense in court. Laws do not need to be overly precise as to hinder the legal debate, but should be able to inspire law debate around the actions and law. The lower majority of cases that engaged vagueness do not get ruled as unconstitutionally vague due to the laws ability to spark legal debate.

V. Overbreadth

The principles of Overbreadth states that legislation must not be overly broad in its relation to its intended purpose (Stewart, 2012, pg. 133). The principle was defined and include into the principles of fundamental justice in *R. v. Heywood*⁷

⁶ *O’Neill v Canada* (AG) [2006] 213 CCC (3d) 389 (Ont SCJ) [O’Neill]

⁷ *R. v. Heywood* [1994] 3 SCR 761

Overbreadth dictates that legislation cannot have a broader impact than its initial intention or have extended negative implications for the person effected by the law. The purpose of including this principle under section 7 is to ensure that laws are created with specific purpose and precision in their intentions. This principle was recognized in 1994 in the *Heywood* decision. Written by Justice Lamer, overbreadth is discussed as a similar, but separate, principle from vagueness – vagueness considers laws that are not precise enough, whereas overbreadth considers laws that entail too much in relation to the intention of the law. These principles overlap in their related concerns with legislation being accurate, however, their execution and scope are different (*R v Heywood*, 1994). A key factor that separates vagueness and overbreadth is the Court's ability to find a law unfit even if it is rational in some aspects (Roach & Sharpe, 2017, pg. 265).

In the case of *R. v Heywood*⁸, the law preventing sexual offenders from loitering in a public park is rational, if those offenders have been charged with an offence relating to children. However, the law is considered to be overbroad, as the law applies to all sexual offenders, even if children were not involved. Overbreadth is discussed by Justice Lamer to specify that the analysis includes the means the state used to meet its objectives and what the intended purpose of the legislation is. If the legislation's purpose is legitimate, the means of reaching the purpose must be within a reasonable scope as to not be overly broad and encompass reasonable limitations on the individual. The Court stated that in deciding if a law is overly broad, it must have an effect that in some instances is inappropriate and/or disproportionation. To decide if overbreadth should be included within the principles of fundamental justice, the Court concluded

⁸ See note 6.

that the principle was a means of balancing state interest against that of the individual – if the states interests are not properly conveyed through the legislation, then it violates the principles of fundamental justice (*R v. Heywood*, 1994).

The principles of overbreadth can also be compared to minimal impairment under the *Oakes Test*⁹ as both attempt to establish if the objective of the law is fitting to the action taken to reach it. The differentiating factor between these two legal concepts is overbreadth's intentional focus on section 7 violations. The minimal impairment pronged within the *Oakes Test* seeks the best option for social impact as a greater, more general, whole (Roach & Sharpe, 2017, pg. 265). Overbreadth is further defined within the discussion of *R v Heywood*.

R. v. Heywood [1994] 3 SCR 761

The *Heywood* decision is the precedent case for the principle of overbreadth, as it was introduced into the principles of fundamental justice within this decision. The accused was charged under section 179(1)(b)¹⁰ of the Criminal Code of Canada. Previously, the accused had been convicted of two counts of sexual assault, a year following this conviction, the accused was found in a public park with a camera. Police informed him of the provisions under section 179, and asked him to leave the area. The accused complied. One month later, the accused was again found in a public park with a camera. At this point the accused was arrested and charged under section 179. In detention, the accused was searched and he was found to have photographs of

⁹ The *Oakes Test* was established in *R v Oakes* [1986] 1 SCR 103, that comprised the section 1 guarantee test into three recognizable steps to determine if an infringement is justified. One of these three steps is minimal impairment that states that legislation must take the option that impairs the individual's rights the least amount possible while still meeting the objective of the law.

¹⁰ Section 719(1)(b) of the Criminal Code of Canada states that if an individual has been previously convicted of a sexual offence and is loitering near a play ground, park, school grounds or public bathing area they have committed a vagrancy (Criminal Code of Canada, 2018).

clothed genital areas of young girls. The accused argued that section 179 was unconstitutionally overbroad to reach its intention.

Heywood was successful and section 179 was found to be overbroad. The Court's reasoning for the law being overbroad was the lack of definition regarding loitering – the Court stated that the correct definition for this provision would be to “ideally stand, hang around, linger...” (*R v Heywood*, 1994) – which would prevent any person charged of sexual assault from entering parks, playground and schools, which also were not precise enough and would entail wilderness parks as well. This overbroad definition would mean that any person with a sexual assault conviction could not enter a park at any point during their life time. The other issue found within section 179 was the lack ability for the person to be informed of the violation, as section 179 was not disclosed at the time of being convicted. The section also applies to all sexual offenders, not only those charged with sexual offences relating to children. The Court stated that the section's purpose is to mitigate risk of children being victimized by sexual offenders, but it is overly broad in its actions. Due to the section's disproportionate effects, it violated section 7, the principle of overbreadth, and it does not pass the minimal impairment portion of the *Oakes Test* (Stewart, 2012, 135). This leading case brought overbreadth into the principles of fundamental justice in order to more simply address laws that do not directly meet the original intention.

R v Demers [2004] 2 SCR 489, 2004 SCC 46

The issue of law being determined in this case was the accused ability to stand trial due to a moderate intellectual handicap. The accused was charged with a sexual assault offence, admitted into a hospital and remained at the hospital until his discharge, with conditions. Three months later the Review Board, granted authority under section 672.47 and 672.54 of the

Criminal Code, acknowledged that the accused was unfit to stand trial until his circumstances change and he is able to stand trial or the Crown is unable to establish a *prima facie* case (*R v Demers*, 2004). Overbreadth was engaged due to the review boards inability to fully release the accused due to the provisions wording that he was “permanently” unable to stand trial. The review board’s lacked evidence that the accused would be of danger to the public, which is included within section 672.54 of the Criminal Code. The SCC found that the review board’s inability to release the individual put a permanent restriction on the individual’s right to life, liberty and security of person and was overly broad in its means of reaching its objective (*R v Demers*, 2004).

The Court found that by not providing a reason other than the anticipated lack of improvement to the individual’s handicap, the law was reaching far past its original intention and was unconstitutionally too broad. This case’s use of overbreadth furthered the definition of the principle to include successfully finding a law to be overly broad, as the standard for reaching overbreadth is high, and that lack of definition and ability for interpretation can result in the law being overly broad (Stewart, 2012, pg. 135). *R v Demers* (2004) demonstrates this through the board’s inability to have discretion within a Criminal Code section and therefore the law becomes inappropriate for this circumstance.

R v Clay [2003] 3 SCR 735

The issue of law being discussed in *R v Clay*¹¹ is the illegal possession and selling of marijuana. The defendant owned a store located in Ontario where he sold hemp and hemp-related products as well as marijuana seedlings. An undercover officer purchased a small amount

¹¹ *R v Clay* [2003] 3 SCR 735

of the drug from the store leading to charged being laid under the *Narcotic Control Act* (*R v Clay*, 2003). The defendant argued that the illegal nature of possession of marijuana infringed on his section 7 right to life, liberty and security of person. This argument was rejected by the trial court and the subsequent appeal was dismissed on the grounds that section 7 protects the central elements of dignity and independence within human nature that are fundamental to human rights and personal autonomously, and the recreation use of marijuana did not meet this standard.

The accused brought forward the issue of overbreadth to the Supreme Court, to suggest the law overly broad in scope. The Court found that the objective of the law, to avoid harm to users and other using marijuana, was met sufficiently by the means of the legislation that prohibited individuals from trafficking and selling the drug. This judgement became significant due to the Court's additional definition of the principles that states the law must not be "grossly disproportionate to the state interest in avoiding harm..." (*R v Clay*, 2003). The use of "grossly disproportionate" created a dual standard for finding a law to be overly broad – mere overbreadth and grossly disproportionate overbreadth. Mere overbreadth is the violation of section 7 when the means of reaching the objective encompass too many aspects and can become disproportionate with limited impact on the individual actions (Stewart, 2012, pg. 135). Within the *Heywood* and *Demers* decision, the Court suggested that mere overbreadth was all that had to be established in order to confirm a section 7 violation. However, the Court's use of grossly disproportionate within *Clay* created a new threshold. If the Court ruled that the law was grossly disproportionate, as opposed to mere overbreadth, the revision of the law must take into account

the increased nature of the overbreadth.¹² The principle of gross disproportionality will be addressed in more detail as a distinct principle of fundamental justice further in this thesis.

VI. Arbitrariness

A principle of fundamental justice is that a law must not be arbitrary, meaning that a law that bears no relation to, or is inconsistent with its original intention, is considered arbitrary (Stewart, 2012). A condensed understanding of this definition is that a law is arbitrary if it is not needed to meet the intention of the law or it does not provide positive effect in the means of meeting the intention (Stewart, 2012).

The Supreme Courts has not created a ‘test’ or clear definition for what is considered to be an arbitrary violation of section 7, but have evoked what would be considered ‘arbitrariness’ in several leading cases. Courts have commonly regarded the principle of arbitrariness to be the same as the principle of grossly disproportionate, but remain that they should be separate principles. This separation is seen in decisions such as *Chaoulli v Quebec*¹³, the leading decision for the inclusion of arbitrariness due to the Court’s decision to strike down the law only on the ground of arbitrariness. Stewart (2012) identifies the principle of arbitrariness to be a check on legislation when the initial intention was acceptable, but the means are irrational and unsuitable. The Court is careful in their use of this principle due to the nature of the principle’s definition – the original intention of the law is met by an irrational means of meeting it; which can be considered harmful in the Court’s dialogue with Parliament (Stewart, 2012).

¹²Overbreadth is also engaged in *Bedford v Canada* (see note 30) and *Carter v Canada* (see note 31)

¹³ *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791

There is no case in which the Court clearly invoke the principle of arbitrariness, but it can be most directly seen in *R v Morgentaler*¹⁴ and *Chaoulli v Quebec (Attorney General)*¹⁵. In *Morgentaler*¹⁶ the requirement of the law that all abortions must go through a therapeutic abortion committee in an accredited hospital was challenged due to its arbitrary nature. The purpose of this law was to ensure women's health was upheld, but the means of achieving this caused or had the potential to cause significant delirious effects to women's health. Within *Morgentaler*, Justice Beetz J. referred to this as "manifest unfairness" which was later interpreted to be 'arbitrariness' (*Canada (Attorney General) v Bedford*, 2013). The Courts have been careful in their approach to arbitrary decisions to ensure detailed and careful consideration of the laws original intention and the instrumentation of reaching this intention (Steward, 2012). The Court specifically acknowledge that arbitrariness must be considered when evaluating, as stated by McLachlin CJC, "...the issues in the light, not just of common sense or theory, but of evidence" (McLachlin as cited in Stewart, 2012, pg. 147).

There have been two types of approaches to arbitrariness taken by the Court. First, as stated by McLachlin CJC, the approach of recognizing the evidence and issues within the individual case. Second, the Court's 'demanding' approach, which is seen within *Chaoulli*, which Stewart (2012) interprets as the prevailing approach. This approach is controversial, direct and impactful on Parliament's legislative abilities.

Sharpe & Roach (2017) identify that, although there is not a clear test to identify legislation as arbitrary, there are several consistent 'tests' from various justices. Within *Chaoulli*

¹⁴ *R v Morgentaler* [1988] 1 SCR 30

¹⁵ Above note 11

¹⁶ Above Note 14

(2005), three dissenting Justices stated that arbitrariness could only be found if the legislation bears no relation to, or is inconsistent with its objective. In contrast, the majority found that the test for arbitrary on the grounds of being situated under section 7 must satisfy the larger requirement of “necessary” for the state’s objective. Within *Bedford*, the Court also identified that this ‘test’ must include a rational connection between the measures taken to reach the interests of the law, without depriving the right to life, liberty and security of person. This continues to stress that if an imposition exists within this realm that bears no connection to the original objective it is considered arbitrary. The 2015 *Carter* decision added to this ‘test’ to include that the test for arbitrary must include an examination of whether the law is capable of fulfilling its’ objective. There is no exact compellation of what is considered arbitrary, however the Court has continued to build this ‘test’ without restricting its ability to continue its defining abilities.

Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791

Chaoulli v. Quebec (Attorney General) (2005)¹⁷ regards the legal issue of Quebec citizens gaining access to private health care sources and for these services to be covered under provincial health care. The appellant, Z, had experienced several health problems that were subject to long wait periods while their physician, C, was seeking to get provincial approval to have a home-delivered medical services recognized and be licensed to work as a private health provider. The provincial statues, s. 15 of the Health Insurance Act (HEIA) and s. 11 of the

¹⁷ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791

Hospital Insurance Act (HOIA), deprives the appellants from accessing private health insurance in order to avoid lengthy wait times and creating private practices.

The validity of the HEIA and HOIA were contested, stating that they violate both section 1 of the *Quebec Charter* and section 7 of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada held that the appeal should be allowed due to the law's engagement of the elements of the right to life and security of person. This infringement violates the principle of arbitrariness, as the intention of the law to prohibit private health care in order to maintain a quality public health care system is arbitrary as there is no evidence that private health care demises the quality of public care institutions.

The legislation also did not pass the *Oakes Test*¹⁸ when evaluating the legislations original intention and effects. The Court determined that the objective of protecting the health care system is not rationally connected to prohibiting private health care. The infringement on individuals right to life liberty and security of person are not minimally impairing in attempting to protect the health care system and the benefits seen from the legislation did not outweigh the deleterious effects of creating unreasonably long wait times for serious health care needs (*Chaoulli v Quebec*, 2005, para. 13). The majority found that the law was arbitrary due to the lack of connection between the objective and the laws impact.

The Court's interpretation of arbitrary within *Chaoulli*¹⁹ is the leading precedent use of the principle, for the increased use and understanding of the Court's definition of it, but also for its separation from grossly disproportionality. The Court could have used both principles to

¹⁸ See note 8

¹⁹ See note 11

declare the violation of section 7, but chose not to. This creates an understanding that the two principles are separate entities.

R v Morgentaler, [1988] 1 SCR 30

The issue of law in *R v Morgentaler*²⁰ was the validity of section 423(1) and 251(1) of the Criminal Code of Canada. This statute required women seeking abortions to have approval from the therapeutic abortion committee and obtain the procedure from an accredited hospital. The appellant argued a violation of sections 2,(a), 7 and 12 of the *Charter*. The Court found that the restriction on women to be put forth in front of a committee and to have a specific type of hospital with a certain criteria of staff working there was arbitrary and unfair. The Court states that the length of travel some women would need to endure for the procedure was systematically unfair, as smaller rural hospitals could never reasonably meet the criteria to be “accredited.” Due to these issues, section 423(a) and 251(1) violated section 7 and could not be saved under section 1. The engagement of section 7 comes from the legislation’s unnecessary delay of access. Parliament is justified in systematically protecting the interest of the fetus, however, the provisions under section 251 violate section 7 as well as the principles of fundamental justice. The Court states that the original intention of the law was valid in seeking to protect the fetus, but the means of reaching this objective were unfair and could contributed to additional health risk to the pregnant women.

An additional issue of law discussed in *Morgentaler* is that of the fetus’s interests vs. the woman carrying the fetus. Parliament’s original intention was to protect the interest of the fetus, while the section 7 violation is in the interest of the women carrying it. The Court ruled that the

²⁰ See note 14

women carrying the fetus would have increased severity in ensuring her right to life, liberty and security of person, stating it was unnecessary to discuss the rights of the fetus at early stages of development. The Court did pose the obiter that future cases involving later stages of development within the fetus could result in a change of proportionality.

The issue of law was resolved within the application of the *Oakes Test*. The Court stated that the means of protecting the fetus through accredited hospitals and review committees was not rationally connected. Further, the women's interests were higher in proportionality than the fetus's and the benefits of protecting fetus's did not outweigh the physical and emotional harm resulting from the provision of section 251 onto the pregnant women.

The Court explicitly uses the term "arbitrary" within its judgment to describe the legislation's impact on society and its discussion of a violation of the principles of fundamental justice. The Court applied the definition of arbitrary in describing the judgment. This careful use to indirectly implement the principle furthers the understanding that the Court is reluctant to use the principle and are aware of the possible negative effects it may have within Parliament.

R v Malmo-Levine; R v Caine, 2003 SCC 74

The issue of law being discussed in *R v Malmo-Levine*²¹ is that of the jurisdictional components of the former *Narcotics Control Act* as well as the inclusion of the judicial option for imprisonment for simple possession of drugs, specifically, marijuana. Appellant, C, was approached by two RCMP officers while in his parked car. As the officer approached, a strong smell of marijuana surrounded the car. C forfeited a partially smoked 'joint' that contained

²¹ *R v. Malmo-Levine; R v Caine*, 2003 SCC 74

marijuana. He was charged under section 3(1) of the *Narcotics Control Act* that prohibited any form of possession of narcotics. The two options available to the court under this section was: upon first offence, a maximum fine of \$1000.00 or imprisonment for up to six months, or both; upon subsequent offences, a maximum fine of \$2000.00 or imprisonment for up to one year, or both. C argued that these options for simple possession were unconstitutional.

A second appellant, M, describe himself as a “marijuana/freedom activist”, and assisted in the operations of the organization “Harm Reduction Club” which was a co-operative, non-for-profit association seeking to reduce harm associated with the use of marijuana. Police entered the club and seized over 300 grams of marijuana. M was charged under section 4(2) of the *Narcotics Control Act* for possession for the purpose of trafficking. M appealed this charge on the grounds that the charge was unconstitutional. The trial judge did not allow this constitutional argument, and the conviction was upheld. The Supreme Court dismissed the appeal. The Court approaches the issue surrounding the law, not of the policy due to its sound intention and objective. The appellants argued that the legislation infringed upon the *Charter of Rights and Freedoms*, the Court responded by agreeing the inclusion of an imprisonment option triggers a section 7 violation, however M’s desire to build a lifestyle surrounding recreational use of marijuana does not constitute a section 7 violation.

The Court evaluated the law with consideration of section 7, concluding that if a law was arbitrary or irrational it would constitute a section 7 violation. However, the law’s intention of avoiding harm to citizens is neither arbitrary nor irrational. The Court’s evaluation of arbitrary within this case resulted in denying the appeal on the grounds the law did not constitute a section 7 violation. The principle was examined on the grounds of harm to the public – the law’s intention directly related to the best interest and protection of the general public as opposed to

the individual's freedom. The Court agreed that the intention was rational and the law's means of reaching it was rationally connected. The Court addressed the availability of the imprisonment option for possession of marijuana through examination of previous cases under the same section. The Court found that in majority of cases where simple possession is the issue of law, the imprisonment option is used with strong discretion. The *Narcotics Control Act* is a framework for dealing with all drug offences – not specifically marijuana – and therefore was reasonable in including imprisonment as an option for drugs to better address aggravating factors, amounts and types of drugs. The claim of arbitrariness was unsuccessfully used in this case, creating a furthered definition of what arbitrary is not. Majority of cases do not have a successful arbitrary challenge due to the high standard, specific reasoning for its use, and the respect for the dialogue with parliament.

Limits on the Claim of Arbitrariness.

Due to the 'insulting'²² nature of its use, arbitrary claims are not often made by the Court. In *Rodriguez v British Columbia (Attorney General)*²³ the dissenting opinion argued to allow Rodriguez's appeal for physician assisted suicide on the grounds that the law preventing this procedure was arbitrary. The three dissenting Justices found that the intention of protecting vulnerable individuals was arbitrary as the law was hindering the vulnerable directly. Those in pursuit of physician-assisted suicide would be those who could not commit suicide on their own, and there was no prohibition preventing suicide without assistance. The majority opinion did not

²²The Supreme Court of Canada has a well balanced dialogue with Canadian Parliament. When the Court rejects legislation on the grounds that the "law bears no relation to its intention", it can be considered insulting to law makers within parliament. This is an undesired strain on this important dialogue.

²³ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519

allow the appeal as it was found that that intention of protecting the vulnerable was upheld by the law as it protected individuals from a “moment of weakness in committing suicide.” Arbitrary was not successfully used in *Rodriguez v British Columbia (Attorney General)*²⁴ (Stewart, 2012).

VII. Moral Blameworthiness

Moral Blameworthiness is a relatively unexplored principle under section 7 of the *Charter*. The basic understanding of this principle is the protection of individuals from being criminally charged for a civil wrongdoing. Moral blameworthiness was best explored by the Court in *Re. B.C. Motor Vehicle Act*²⁵. This reference case evaluated the legitimacy of section 92(2) of the *B.C. Motor Vehicle Act*, which provided minimum periods of incarceration for driving without a valid driver’s license, regardless of the driver’s knowledge of the prohibition or suspension. The Court found that this violated section 7 of the *Charter*, specifically evoking the principles of fundamental justice. The principle of ‘moral blameworthiness’ is not explicitly defined within this case and therefore does not have a ‘test’ associated with its use. All absolute liability charges have the potential of offending section 7, however the lack of knowledge of the committing the offence (i.e. driving without a valid driver’s license), offends section 7 past the point of being justifiable in a free and democratic society. The Courts took the opportunity of further define what the principles of fundamental justice are under section 7, as the *Charter* had only been enacted for 3 years at the time of this reference case. The Court provide a more in depth discussion of moral blameworthiness within *R v Ruzic*²⁶. The Court also linked the

²⁴ *Rodriguez*, above note 12

²⁵ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486

²⁶ *R v Ruzic* [2001] 1 SCR 687

principle of moral blameworthiness to “moral voluntariness”. Moral voluntariness is a criminal element which liability is related to *mens rea* and *actus reus* and the individual’s quality of voluntariness in committing the action in question. Voluntariness is associated with the person’s knowing of committing the action and then willing it to be done. The lower court is discussed both moral blameworthiness and moral voluntariness as equated terms.

The Court did not agree with this approach. Instead, moral blameworthiness was removed from being an element of criminal liability, but a factor in establishing section 7 violations. Moral voluntariness is established as a criminal element when *mens rea* and *actus reus* are absent and duress is established. The Court acknowledge the ambiguousness of the principle and the lack of definition surrounding its use but did not add any additional formal definitions. Moral blameworthiness is most used in regards to absolute liability charges, and within *Ruzic*, in regards to moral involuntariness and duress in committing a criminal action. The Court did not further its use from substantive elements of criminal charges and these violating section 7. The Court did provide moral blameworthiness as a larger, overarching term that extends beyond the boundaries of traditional elements of an offence. The principle cannot be evoked as a defense to a criminal action, but as a secondary standard for a criminal action offending section 7.

R v Vaillancourt [1987] 2 SCR 636

*R v Vaillancourt*²⁷ discusses the validity of the former section 213 of the Criminal Code as it relates to section 7 and 11 of the Charter. Section 213 read that "culpable homicide is murder

²⁷ *R v Vaillancourt* [1987] 2 SCR 636

where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence" (*R v Vaillancourt*, 1987, para. 3).

The majority of the Supreme Court found that section 213 violates section 7 and section 11 of the Charter and should be of no force or effect. The element within section 213 that combines the action of robbery with a homicide charge violates an individual's right to life, liberty and security as well as their right to presumption of innocence. This combination removes the element of *mens rea* that is attached to homicide while removing the standard of proof for homicide, which is beyond a reasonable doubt. The Court held that intention of the original action (armed robbery) does not hold a high enough standard to constitute a homicide charge automatically. The Court rejected section 213's statement that an individual's likelihood of foreseeability of death from an armed robbery be proof enough to automatically constitute homicide. Juries could easily have conflicting views on what establishing foreseeability in different circumstances, effecting section 213's constitutional validity.

Moral blameworthiness is applied by the Court through stating that Parliament's responsibilities to create and enforce law are subject to abiding by the principles of fundamental justice. The Court continues to discuss that any law that has absolute liability is subject to moral blameworthiness as it creates an automatic and substantive restriction of life, liberty and security of person. The Court found that the lack of mental state that must be proven within *mens rea* is not within section 213 parameters and is inconsistent with moral blameworthiness, as an individual's intention could be far from causing harm to the point of death. Moral blameworthiness seeks to

prohibit punishing the “morally innocent” as it creates a prohibition on connecting original intention with an unforeseen outcome. The appeal was allowed and a new trial was ordered while declaring section 213 of no force or effect.

R v Creighton [1993] 3 SCR 3

The issue of law being discussed within *R v Creighton*²⁸ is the constitutional validity of section 222(5) of the Criminal Code. Section 222(5) establishes that culpable homicide is committed when a person causes the death of another person by means of an unlawful act, criminal negligence, threats or willfully frightening them. Creighton, along with the victim and a companion, were ingesting large quantities of alcohol and cocaine within the deceased’s apartment. The deceased was killed by an injection into her arm, which caused cardiac arrest and severe convulsions. The accused placed the victim on the bed and was convinced by the companion to not call the police and to wipe the evidence away of their actions. Several hours later, after leaving the victims apartment, the accused called the police. Creighton was charged under section 222(5) of the *criminal code*, and the distribution of drugs to the victim was considered trafficking drugs under the *Narcotics Control Act*. The accused presented that the definition of manslaughter under section 222(5) violates section 7 of the Charter. The Court dismissed the appeal. The Court evaluated the test of *mens rea* associated with unlawful act manslaughter, which states that an objective foreseeability of risk of bodily harm must not be trivial or transitory if that action is dangerous in nature. The Court found that this test does not violate any of the principles of fundamental justice.

²⁸*R v Creighton* [1993] 3 SCR 3

The punishment attached to this charge does not require an elevated degree of *mens rea* due to the act of ‘killing’ as opposed to ‘murder’. The Court also established that the charges distinction between ‘bodily harm’ and ‘manslaughter’ disappears when the victim is killed, regardless of the nature of the death. It was stated that this does not violate any principles of fundamental justice as well.

The Court defined the principle of moral blameworthiness in two areas. Firstly, the majority discusses that moral blameworthiness does not require absolute symmetry between the moral fault and the prohibited consequence. This discussion is aimed at protecting Parliament’s ability to secure reasonable punishments for actions, regardless of it being considered a moral fault.

Secondly, moral blameworthiness is discussed in La Forest J’s concurrent decision, as *mens rea* is presented as a similar principle to moral blameworthiness. This distinction is in the wording that *mens rea* is subject to the mental state regarding the action, which in turn would protect the morally innocent, whereas moral blameworthiness is discussed as being morally innocent in totality. The Court concluded that manslaughter and section 222(5) of the Criminal Code satisfy the principles of fundamental justice.

VIII. Gross Disproportionality

The principle of Gross Disproportionality applies to the reach of the law’s impact on the person claiming a section 7 violation. Gross disproportionality seeks to ensure that the effect of the law is proportionate to the objective of the law (Stewart, 2012, pg. 149). The Court will evaluate if the beneficial impacts of the law outweigh the negative impacts on the individual. This evaluation is not strict; the Court must only prove that effect of the law is grossly

disproportionate to its beneficial effects (Stewart, 2012, pg.149). Gross disproportionality does have a Supreme Court test for establishing a violation. The test is to determine if the state action or law is “so extreme” that it is “disproportionate to any legitimate government interest” as found within *Suresh v Canada*²⁹. The test also establishes that gross disproportionality must exist and not mere or overbreadth disproportionality. The difference in establishing gross disproportionality is a significant change in expectation and reach of the deleterious effects. The Court allows for “broad latitude” with legislation. Thus makes establishing this test a difficult task. The standard for gross disproportionality is to such a high extent that proving the legislation to be grossly disproportionate is very difficult. Stewart (2012) states that “it is difficult for a Charter application to demonstrate that a law fails to comply with this standard, so it is unsurprising that the Supreme Court has never invalidated a law or expressly set aside a decision on this ground” (Stewart, 2012, pg. 149). The Court has come forward in several cases validating the appellants’ plea of gross disproportionality and explicitly stated that the law is in violation of the principle of gross disproportionality. In the *Bedford*³⁰ decision, the Court explicitly states that the law is in violation of the principle of gross disproportionality due to the deleterious effects on individuals’ safety and the individual interest and right to life, liberty and security of person.

The concept of disproportionality is seen within several areas of judicial ruling, including in the Oakes Test³¹. The third prong of the Oakes Test is Proportionality, which states that the deleterious effects of the law must not outweigh the benefits it provides to society. This area of the

²⁹ *Suresh v Canada (minister of Citizenship and Immigration)*, 2002 SCC 1

³⁰ See Note 31

³¹ See Note 8

Oakes Test is similar in intent as to gross disproportionality. The Court has established that the section 1 evaluation is different than the principle of fundamental justice; however, they have a significant amount of overlap. Within *Malmo-Levine*³² it was established that it was inappropriate under the rule of law to import the ideals of the section 1 evaluation into the principles of fundamental justice (Stewart, 2012). Both of these evaluations seek to balance the positive effects of the law against the negative effects onto the individual. However, gross disproportionality under the principles of fundamental justice have a higher threshold for proving the violation.

R v Smith, [1987], SCR 1045

The issue of law discussed within *R v Smith*³³ regards the constitutionality of section 5(2) of the former *Narcotics Control Act*. The appellant was charged for importing seven and a half ounces of cocaine into Canada. This action invokes section 5(2) that contains the seven-year mandatory minimum sentence of incarceration. The Court stated that a mandatory minimum sentence does not automatically invoke section 12 or an infringement on any Charter right; however, the lack of alternatives available to the courts along with the lack of consideration of severity, personal characteristics of the offender, and circumstantial issues within the individual offence create a possibility of infringing section 12. The Court found that the retributive measures of the minimum sentence, along with inevitable incarceration upon a guilt offence violate section 12 on its face and cannot be saved under section 1.

³² *R v Malmo-Levine, R v Caine* [2003] 3 SCR 571

³³ *R v Smith*, [1987], SCR 1045

R v Smith puts forward a successful use of gross disproportionality, but does not invoke section 7. The appellant challenged if the mandatory minimum attached to the charged violated section 7, 9 and 12 of the Charter. The Court found that the mandatory minimum did violate section 12 under cruel and unusual punishment and could not be saved under section 1. The Court identified that the issue being examined is that of gross disproportionality, due to the aim of punishment beyond that of mere punishment. Section 5(2) was declared no force or effect. Upon analysis of the section 1 evaluation, the Court found that the proportionality prong was offended immediately. The purpose of the minimum sentence of deterring the importation of narcotics into Canada is an important and substantial objective, however, seven years of incarceration for minor or first-time offenders is not proportionate to the offence and unneeded to deter serious offenders.

The Court uses both the principle of gross disproportionality and arbitrariness to define the nature of the minimum sentence attached to section 5(2) of the act. Gross disproportionality is found in several areas of Charter law including the *Oakes Test*, principles of fundamental justice and as a standard for section 12 violations (Stewart, 2012, pg. 149, note 137). Justice Wilson J states that the minimum sentence under section 5(2) of the *Narcotics Control Act* is grossly disproportionate and meets the high standard of the test to be “so excessive as to outrage standards of decency” (*R v Smith*, 1987). The three concurrent opinions presented by Wilson, Le Dain and La Forest all support the use of arbitrariness and disproportionality as a violation to section 12.

Canada (Attorney General) v PHS Community Services Society [2011], SCR 134

The constitutionality of safe injection sites was questioned under section 56 of the Controlled Drugs and Substances Act (CDSA). Section 56 grants the federal Minister of Health

the authority to allow or disallow exemptions regarding drugs and other substances for scientific needs or societal interests. Drug use and drug related disease reached a crisis level in Vancouver in the early 1990's. As a response to this crisis, safe injection sites were established in the downtown eastside of Vancouver as experimental solutions to the spread of disease and illness associated with the injection of drugs. The experiment was found to be successful in reducing disease and drug related death from users of the safe injection site.

In 2008 a formal application was made by the site for a continued exemption to stay open, the federal Minister of Health, under section 56 of the CDSA, denied this exception. The denied exemption was brought before the courts. The Supreme Court dismissed the appeal and ordered the minister of health to grant the exemption under section 56.

The Court found that the disallowance of safe injection sites was a violation of section 7 for those who used the site. It was found that life, liberty and security of person were inherently invoked for the clients of the site. It was affirmed that section 7 protected their ability to have drugs and controlled substances within the grounds of the site, despite the CDSA prohibition. Section 56 gives discretion to the Minister to make decisions such as this. However, the Court state that this discretion is, as all laws are, subject to the *Charter* and must be within the scope of the Charter. The interests of society to have safe injection sites invoke section 7 and the disallowance under the discretion of the federal Minister of Health violates it. The Court mentions the principles of fundamental justice several times within their discussion of the constitutionality of safe injection sites, offering that not allowing them would offend gross disproportionality, arbitrariness and overbreadth.

The Court primarily focused on the violation of gross disproportionality states that "...this Court found that the Minister's refusal to exempt the safe injection site from drug

possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.” (*Canada (Attorney General) v PHS Community Services Society*, 2011). This statement adds definition to the principle, as it now includes death and disease while also limiting federal power. The Court’s decision creates added importance and definition to the principle of gross disproportionality.

Bedford v Canada (Attorney General), [2013] SCR 1101

*Bedford v. Canada*³⁴ discuss the constitutionality of three section of the 2013 Criminal Code of Canada: section 210, 212(1) and 213(1). Section 210 prohibited being keep or being within a “bawdy-house”, 212(1) made living on the avails of prostitution an offence, and section 213(1) prohibited public communication regarding prostitution. The appellants argued that these sections are a violation of section 7 of the *Charter* due to the limits on life, liberty and security of person from being denied the ability to hire security guards or introduce a “screening process” for clients. At the Supreme Court level, all three provisions were found to be inconsistent with section 7 and could not be saved by section 1. The Court identified that the provisions were blatantly restrictive on life, liberty and security of person and inconsistent with the principles of fundamental justice.

³⁴ *Bedford v Canada (Attorney General)*, [2013] SCR 1101

The Court engages three principles in their discussion of the violation: arbitrariness, overbreadth and gross disproportionality. The objectives of each section of the Criminal Code were examined to determine which principle is engaged. Section 212 systematically targets the ‘pimps’ and their exploitative behaviors in attempt to earn income from the avails of prostitution. However, the law does not punish these individuals, but holds everyone who live off the income earned responsible. This could include those who are attempting to reduce danger such as legitimate bodyguards, drivers, and/or receptionists. This law was arbitrary in its attempt to increase safety of the individual and target the ‘pimps’.

Section 213(1) restricted the public communication of prostitution with the objective of eliminating the nuisance of street prostitution, moving these conversations to private locations. The negative effects on the individual, which include increased danger, lack of screening, heightening issues due to intoxication, is gross disproportionate to the benefit of removing a nuisance to the general public.

Section 210 also sought to remove the nuisance of prostitution from the general public, but significantly increased the danger the individual could encounter making it grossly disproportionate. The benefit of having prostitution behind closed doors, while limiting the individual’s ability to work from a fixed location to access a safe location is grossly disproportionate in objective and in practice.

Bedford v Canada provides an in-depth and fairly comprehensive definition of the principle of fundamental justice under section 3(a)(b) beginning in paragraph 93 of the decision. The Court put forward obvious definitions as to what qualifies as a principle and their use: “The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person’s life, liberty, or security of the person must meet. As Lamer J. put it, “[t]he

term ‘principles of fundamental justice’ is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right” (*Bedford v Canada (Attorney General)* [2013] SCR 1101, para. 94). Within *Bedford v Canada* the Court specifically acknowledge and accept the claim of gross disproportionality for section’s 210 and 213(1) of the *Criminal Code*. This decision had broadly significant impacts on society. The laws were suspended for a one-year duration and faced reevaluation from Parliament by removing criminality from the actions of prostitutes and those living off its earning plus changing to applying criminality to only those who purchase prostitutions. It also provides one of the most comprehensive definitions of the principles of fundamental justice and how they can be applied. The Court also provide a strong definition of the individual principle of gross disproportionality:

“...laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state’s objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: “. . . the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action” (*Bedford v Canada*, 2015, para. 175).

This inclusion set a strong precedent for future section 7 cases.

Carter v Canada (Attorney General) [2015] 1 SCR 331

*Carter v Canada*³⁵ contested the former section 241 of the Criminal Code, which prohibited anyone from assisting or abetting another person in committing suicide. Section 14 was also challenged in this ruling as it restricts a person from consenting to death. Taken together, these two provisions made it an indictable offence to engage in physician-assisted dying. The appellants challenged the provision preventing physician-assisted death after the diagnoses of a fatal neurodegenerative disease.

The Court found that the prevention of access to this physician-assisted dying to a suffering, competent adult was a violation of section 7 and could not be saved under section 1. The Court rendered sections 241 and 14 of no force or effect and allowed physician-assisted dying under two circumstances: it will be allowed for competent adult who “... (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.” (*Carter v Canada*, 2015). The Court identified that the principle of gross disproportionality is engaged, as well as arbitrariness and overbreadth. The impugned legislation was found to violate all three principles.

The test for gross disproportionality was put against the objectives of the legislative and was found that the intention of legislation deprived individuals of their right to life, liberty and security of person to an extent that was beyond that of ‘mere’ or ‘overbreadth’. The objective to protect vulnerable individuals from momentary weakness that results in the ending of their life is highly important for the interest of the individual, their families and society as a whole.

³⁵ *Carter v Canada* [2015] 1 SCR 331

However, the law does not provide protection of vulnerable individuals, it instead prolongs suffering and may result in individuals ending their lives sooner and on less humane methods. The objective is greatly disproportionate to the delirious effects it has on the individual, meeting the standard for gross disproportionality.

The *Carter* decision revised its own precedent case, *Rodriguez v British Columbia (Attorney General)*.³⁶ This change of precedent from rejecting a section 7 violation, to accepting it over a 22 year period represents an important modification in the Court's interpretation of section 7. The *Carter v Canada* decision set an important precedent for the use of gross disproportionality by increasing its understanding within the Canadian legal system.

IX. Limitations of the Principles of Fundamental Justice

There are many critiques regarding the use of the principle of fundamental justice. Some authors, including Hogg (1997), see other areas of law such as the common law system as the basic tenets of the legal system and not the principles of fundamental justice. The central and most dominate definition of these principle are their role as the "basic tenets of the legal system." This sweeping definition is critiqued by Hogg as concepts such as the "common law system" are much more likely to be the basic tenets. The over-stated importance of these principles combined with their lack of definition only increases confusion regarding their use, according to Hogg (1997).

Other limitations on the principles of fundamental just include the significant overlap throughout the principles of overbreadth, arbitrariness and disproportionality as they offer a

³⁶ *Rodriguez v. British Columbia (Attorney General)* [1993] 3 SCR 519

redundancy within section 7. These three principle offer some what identical evaluations of law and could easily be mended into one over-arching principle. The definitions offer the same remedy, but stated differently: "... a law that bears no relation to, or is inconsistent with its original intention...", "...legislation must not be overly broad in its relation to its intended purpose...", and, "...effect of the law is proportionate to the objective of the law." The purpose of the principles of overbreadth, arbitrariness and disproportionality is to correct the failures of instrumental rationality; each principle address laws that failed at meeting a norm, creating a mismatch between the objective and the means (Stewart, 2012, pg. 151). Stewart (2012) explains that the substantive purpose of the principles is similar, but address different aspects of legislative failure. Stewart states that the Court may keep them as separate principles for the purpose of addressing failures that are not identical; a law can be overbroad without being arbitrary, for example (Stewart, 2012, pg. 151). These three definitions could be compressed into one over arching principle, as they all have the same substantive meanings. Stewart suggests that keeping the principles as three distinct principles offers the most benefit due to already being applied in precedent cases (Stewart, 2012, 154). Stewart (2012) suggests that by combining the principles a violation would have to offend all three aspects and meet all three tests in order for an infringement to exist. Counter to this thought, by creating a principle that encompasses all three elements without making it a requirement to meet the standard of all three could broaden the Court's ability.

Another limitation of these principles is the overlap in evaluation from the section 1 test or *Oakes Test*. The primarily overlap is within gross disproportionality. The third prong of the *Oakes* evaluation is the test for proportionality, which could be argued to mimic the standard, wording and test of gross disproportionality. The limitation of this is that when a section 7

violation is presented, the Court automatically run through the section 1 test to determine if the violation is justified. If it does not pass the section 1 test, the violation is found to not be justified in a free and democratic society, which would then trigger the evaluation of the principles of fundamental justice. This means that every law that infringes section 7 must have failed the proportionality test in order to invoke the principles of fundamental justice, meaning all of them would violate gross disproportionality.

X. Conclusion

The conclusion of this study is that the Supreme Court of Canada is reluctant to provide a cohesive and concurrent understanding of each principle for the purpose of keeping them unconstricted. This type of conclusion regarding the principles of fundamental justice can result in confusion regarding the nature of the principles, overlap in definitions and wide differences regarding use from case to case.

The implications of this research is to better examine the Court's interpretation of these principles. It could be concluded that the principles of fundamental justice are not easily understood within the Canadian legal system purposely. The Court has decided to refrain from restricting themselves on defining them precisely for the purpose of better protecting and accommodating individuals right to life, liberty and security of person. The benefit of this lack of definition is the Court's ability to use them in a wide range of areas and continue accessing them for new reasons. The fall back of this method is the lack of knowledge from the Court to society regarding what the Court has stated to be the "basic tenets of the legal system."

The substantive principles were not an original inclusion from the framers of the Charter, but were later added by the Court to better protect life, liberty and security of person. This

change of interpretation is consistent with trends seen within the Supreme Court, including that of judicial activism for the purpose of social and economic benefit for the community (Hogg, 1997, pg. 105). The major trend between each substantive principle of fundamental justice is the openness in definition for the purpose of being able to better protect the individual from injustice laws. Each principle is able to target laws in different areas to address section 7 violations, and the laws attached to those violations.

In the future, it can be predicted that the Courts will eventually add to the definitions to make them cohesive, but due to the relative newness of the Charter, the open interpretation provide more benefit then it does drawback. The Charter has only been enumerated within Canadian society for 37 years, making it relatively new within our legal system. There is significant room for growth for each of these principles and possible inclusion of others in the future. An area that could be potentially added to the principles of fundamental justice is the principle of minimal impairment. Proportionality is seen in several areas in law including the *Oakes Test*. A consideration from the Court could be to take from the *Oakes* evaluation and include minimal impairment under the substantive principles as well. This concept states that the state must take the least impairing means of reaching their goal. This follows the trend of the current substantive principles, within the same trend and objective as several of the other principles. The issues of repetition within these principles and other areas of law is concerning. However, if the Court continues this repetition it could provide a strong ‘back-bone’ to each of these concepts and strength the Court’s ability to use them in other areas.

Although these principles are not easily understood and offer a variety of limitations, their use within the Supreme Court have had important and far reaching positive effects on Canadian society. Presenting a secondary standard for section 7 evaluations has given the right to

life, liberty and security of person increased ‘teeth’ within Parliament, resulting in laws being struck down or read out for societal and individual benefit. The limitations of the principles of fundamental justice do not outweigh their importance and positive effects for Canadian law.

XI. References

- Canada (Attorney General) v Bedford* [2013] 3 SCR 1101
- Canada (Attorney General) v PHS Community Services Society* [2011] SCR 134
- Carter v Canada* [2015] 1 SCR 331
- Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
- Cornell Law School (2019) Legal Information Institute: Civil Procedure. [online] Retrieved February 18, 2019 from https://www.law.cornell.edu/wex/civil_procedure.
- Code of Canada, RSC 1985, c C-46, s 318(1)
- Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791
- Bedford v. Canada (Attorney General)*, [2013] SCR 1101
- Evans, M, J. (1991). The principles of fundamental justice: The Constitution and the common law. *Osgoode Hall Law Journal*. 29 (1) 51-92.
- Hogg, W, P. (1997). The Charter dialogue between courts and legislature (or perhaps the Charter of Rights isn't such a bad thing after all). *Osgoode Hall Law Journal*. 35(1) 75-124.
- Hogg, W, P. (2012). The brilliant career of Section 7 of the Charter. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*. 58 (7) 195-210.
- O'Neill v Canada (Attorney General)* [2006] 213 CCC (3d) 389 (Ont SCJ) [O'Neill]
- Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519
- R v Clay* [2003] 3 SCR 735
- R v Demers* [2004] 2 SCR 489, 2004 SCC 46
- R. v. Heywood* [1994] 3 SCR 761

R. v. Khawaja [2012] SCC 69, 3 S.C.R. 555

R v. Malmo-Levine, R v. Caine [2003] 3 SCR 571

R v Morgentaler, [1988] 1 SCR 30

R v Morlas [1992] 3 SCR 711

R v Motor Vehicle Act [1985] 2 SCR 486

R v. Nova Scotia Pharmaceutical Society [1992] 2 SCR 606.

R v. Oakes [1986] 1 SCR 103

R v Ruzic [2001] 1 SCR 687

R v. Smith, [1987], SCR 1045

R v. Vaillancourt [1987] 2 SCR 636

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1

Sharpe, J, R., Roach, K. (2017) *The Charter of Rights and Freedoms* (6th ed) Toronto: Canada.

Irwin Law Inc.

Stewart, H. (2012). *Fundamental justice: Section 7 of the Canadian Charter of Rights and*

Freedoms. Toronto: Canada. Irwin Law Inc.

University of Southern California (2019) *Organizing your social sciences research paper:*

Types of research design. USC Libraries. Retrieved March 18, 2019 from

<http://libguides.usc.edu/writingguide/researchdesigns>