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## THE SLEEPING GIANT OF RIGHTS: SECTION 7 AND SUBSTANTIVE REVIEW

KATHLEEN MCMANUS<sup>†</sup>

*Section 7 of the Charter has given the courts the powerful tool of substantive review. This instrument allows the courts to go beyond procedural review to examine the merits of legislation. This ability to intrude on what has been regarded as the exclusive jurisdiction of legislatures has attracted powerful critics. The courts have ignored some opponents and have used substantive reviews. The steps have been tentative but important. If the courts continue to use and indeed broaden substantive review, then section 7 will be the source of new rights which will enable Canada to become a society of truly meaningful equality.*

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*L'article 7 de la Charte procure aux cours de justice un puissant instrument en matière de révision substantielle. Celui-ci permet non seulement de réviser l'aspect procédural de la législation, mais également de réviser le mérite de celle-ci. Cette capacité de participer dans ce que l'on considère comme le domaine exclusif de la branche législative fut critiquée vivement. Les cours de justice ont toutefois ignoré ces opposants et utilise la révision substantielle. Les développements ont été timide mais néanmoins important. Si les cours continuent à utiliser et à augmenter la portée de la révision substantielle, l'article 7 deviendra le fondement de nouveaux droits qui permettront au Canada de devenir une société égalitaire véritable.*

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The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits.

Lord Sankey, *Edwards v. A.G. Canada*<sup>1</sup>

An explosion of new rights within the *Charter*<sup>2</sup> will eventually occur in Canada. Canadians will see, at some point, a Supreme Court of Canada cast in the mold of interventionist courts such as the United States' Burger and Warren Courts or even some variation on the *Lochner* era. A Supreme Court of Canada with such dynamics will push aside deference to Parliament and provincial legislatures and challenge the merits of government action. When this confrontation occurs, hopefully it will be a progressive Court whose actions broaden the base of rights protected by the *Charter*. In this expansion of rights, it will be critical that the Court recognizes the rights of groups who to date have been left out of the Canadian experience, such as the poor or various cultural minorities.

Section 7 of the *Charter* will most likely be the source for this burst of new rights. Section 7 guarantees that:

Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the *principles of fundamental justice* [emphasis added].

It will be in defining "fundamental justice" that the Court will have the ability to question and reject the policy of government action as contrary to protected rights. This examination of the purpose or merits of the legislation is known as substantive review. Conversely, when the court restricts its examination to the implementation or the means of the legislation, then the court is conducting a procedural review. A court which engages in substantive reviews tends to be highly interventionist in government policy, as seen with the United States Supreme Court during various periods of its history.<sup>3</sup>

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<sup>1</sup> *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136.

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> The United States Supreme Court use of substantive review exists in case law from the 1870s to the 1970s. The most famous use in recent times is *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. (2d) 147 (1973), when the Court struck down a prohibition on abortions. In terms of specific eras, the Court's intervention was

In 1985, the Supreme Court of Canada opened the door for substantive review through its decision in *Reference re Section 94(2) of the B.C. Motor Vehicle Act R.S.B.C.*<sup>4</sup> The Court held that fundamental justice, as defined in section 7, included both procedural and substantive review. Following this ruling, the courts mainly have shied away from utilising substantive reviews and have chosen, for the most part to restrict themselves to procedural review. Their discomfort with substantive review is evident in examining the cases on section 7.

As of March 1993, over one thousand cases on section 7 have been heard in Canada. The Ontarian courts have dealt with the largest number of section 7 challenges.<sup>5</sup> The Supreme Court of Canada has engaged in a significant substantive review in only five of these cases.<sup>6</sup> The courts' limited use of substantive review has not initiated supporters of this type of review to demand more; indeed

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felt most keenly during the *Lochner* era from 1905 to 1930. During these three decades, the Court rejected the attempts of government to regulate industry. The Court used substantive review to defend *laissez-faire* economics. The *Lochner* era is so named for the first case in 1905 which commenced the interventionist role of the Court. In *Lochner v. New York*, 198 U.S. 45 (1905), legislation prescribing maximum hours of work in bakeries was nullified. This trend of intervention continued as the Court nullified: minimum wages for women, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); and, fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924). See: *Ferguson v. Skrupa*, 372 U.S. 726 (1963) which listed examples of laws nullified through the due process clause; and, T. C. Marks, Jr., and M. Greenwood, "The Burger Court and Substantive Rights, An Analytical Approach" (1980) 57 J. Urban Law 751.

<sup>4</sup> *Reference re Section 94(2) of the Motor Vehicle Act R.S.B.C.* 1979, c. 288, as amended by the *Motor Vehicle Amendment Act* 1982, 1982 (B.C.), c. 36., [1985] 2 S.C.R. 486 [hereinafter *B.C. Motor Vehicle*].

<sup>5</sup> These statistics are drawn from the Quicklaw database "Charter of Rights cases" (CRC). The CRC database is a summary of *Charter* decisions which have been compiled since 1982 at the University of Alberta. These statistics are up to date as of 31 March 1993. *Charter* litigation is more dominant in some provinces than others and this statistic is not solely on a population basis. Ontario litigated 235 section 7 challenges which represented almost 25% of all the cases. British Columbia came second with 157 cases or 15% of the cases. Saskatchewan came third with 103 cases or 10% of the cases. These three provinces were responsible for almost 50% of all section 7 challenges. See Appendix III.

<sup>6</sup> *B.C. Motor Vehicle*, *supra* at note 4; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [hereinafter *Singh*]; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*]; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 [hereinafter *Vaillancourt*]; and, *R. v. Martineau*, [1990] 2 S.C.R. 633 [hereinafter *Martineau*].

this development, however nascent, has drawn the attention of critics. The critical response has been forceful, articulate and persuasive in arguing for a narrow form of substantive review. Without vocal supporters for substantive review, the critics have set the agenda for issues surrounding substantive review.

The study that follows seeks to gauge the future scope of substantive review. This end will be reached by examining: the history of the drafting of section 7, the meaning of substantive review already given in case law, an assessment of the critics interpretative theory, and, a prediction of future decisions. It will be seen that the youth of the *Charter* means that much more must be done before a meaningful conclusion can be drawn. Substantive review remains an open question. In keeping with the liberal interpretation of the *Charter* which the Supreme Court advocates,<sup>7</sup> the potential of substantive review appears to lie more in an expansive interpretation, and as such it lends itself to being a source of new rights.

### THE DRAFTING HISTORY OF SECTION 7

The *Charter* went through seven different versions before being finalized.<sup>8</sup> Remarkably, section 7 was rewritten only once, but the changes made were dramatic. Section 7's original version<sup>9</sup> provided that:

Everyone has the right to life, liberty and security of person and the right not to be deprived thereof *except by due process of law* [emphasis added].<sup>10</sup>

During hearings in January 1981, the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada replaced due process with fundamental justice.<sup>11</sup> The Committee executed this change with minimal considerations.

<sup>7</sup> *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

<sup>8</sup> The dates of the various drafts are: 22 August 1980; 5 October 1980; 12 January 1981; 13 February 1981; 24 April 1981; 18 November 1981 and 2 December 1981. See R. Elliot, "Interpreting the *Charter*—Use of Earlier Versions As An Aid" [1982] U.B.C. L. Rev. 11 Charter Ed. 13 at 13–16.

<sup>9</sup> In the first draft, section 7 was actually numbered as section 6. *Ibid.* at 30.

<sup>10</sup> *Ibid.*

<sup>11</sup> Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, No. 40, 27

It is often said that the most important time of a meeting is the final minutes. It is during this period that substantial change is proposed and often adopted. This general maxim is applicable to changes in section 7. In January 1981, the Special Joint Committee devoted three days to the examination of section 7. The debate was devoted almost exclusively to whether "enjoyment of property" should be included among the rights enumerated. The language of due process was scrutinized and changed only in the last hour of the debate.<sup>12</sup>

Changes in section 7 were primarily done at the instigation of the federal Department of Justice. Several lawyers from the Department of Justice argued the necessity of limiting section 7 to procedural review. It was the presentation by Mr. Barry Strayer, the Assistant Deputy Minister of Public Law in the Department of Justice, which seemed to persuade the Committee.

Speaking for the Department of Justice, Mr. Strayer told the Committee:

[I]t is our belief that the words 'fundamental justice' would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question . . .<sup>13</sup>

Mr. Svend Robinson, M.P. suggested that fundamental justice might have a component of substantive review as well as procedural review. Mr. Fred Jordan, Senior Counsel, Public Law, Department of Justice rebuked this suggestion. Mr. Jordan maintained that there was no distinction between the principles of fundamental justice and the rules of natural justice.<sup>14</sup> During an exchange with The Honourable David Crombie, M.P., Mr. Strayer supported Mr. Jordan's assertions.

*Mr. Crombie:* Natural justice and fundamental justice do not deal with substantive matters, only procedural fair-

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January 1981. See also J. D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the *Charter*" (1983) 13 Man. L.J. 455 at 457-462.

<sup>12</sup> *Ibid.* at 458.

<sup>13</sup> Minutes of Proceedings, *supra* note 11 at 46:32. See also Whyte, *ibid.* at 458.

<sup>14</sup> Minutes of Proceedings, *ibid.* at 46:33. See also Whyte, *ibid.* at 458.

ness, that is the difference between those two and due process?

*Mr. Strayer:* Yes.<sup>15</sup>

Testimony given at the proceedings suggests that the firm belief regarding the meaning of fundamental justice came from the courts' interpretations in the *Canadian Bill of Rights*.<sup>16</sup> The phrase "fundamental justice" is found in section 2(e) of this Act. Section 2(e) provides that no law of Canada shall:

(e) deprive a person of the right to a fair hearing in *accordance with the principles of fundamental justice* for the determination of his rights and obligations [emphasis added].

The Committee's attention was drawn to the ruling by Fateux, C.J. in *Duke v. The Queen*<sup>17</sup> on section 2(e). Fateux, C.J. held that the section required that a

tribunal which adjudicates upon [a person's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.<sup>18</sup>

Fundamental justice, in other words, meant in accordance with the laws of natural justice.

The context of the *Charter* presented at least one difficulty in transposing the meaning of fundamental justice as found in *Canadian Bill of Rights* to the *Charter*. Section 2(e) of the *Canadian Bill of Rights* supplied context to its principles of fundamental justice through specific language such as "fair hearing." Similar language did not exist in section 7. This issue of differing contexts did not come up at the Committee's hearing. The Committee accepted the testimony and accordingly removed due process and inserted fundamental justice. With this adjustment, section 7 was now in its final form.

The Committee's desires cannot be denied. It wanted only procedural review in section 7 and the lawyers from the Department of Justice appeared to provide the means. In retrospect, it remains re-

<sup>15</sup> *Ibid* at 46:42.

<sup>16</sup> R.S.C. 1985, Appendix III.

<sup>17</sup> *Duke v. The Queen*, [1972] S.C.R. 917.

<sup>18</sup> *Ibid.* at 923.

grettable that if the Committee knew what it wished that it had not sought more advice. This wisdom comes with hindsight. History offers many examples of monumental political decisions occurring rapidly and with minimal scrutiny. These examples, however prevalent in history, do not soften the shattering blow of the haste with which the Committee disposed of this matter. This haste exacted its cost in *B.C. Motor Vehicle*.<sup>19</sup>

### ESTABLISHING A VIOLATION OF SECTION 7

*B.C. Motor Vehicle* set out how to come within the meaning of section 7 and the scope of judicial review therein. A three-part test must be satisfied before the court will find a violation of section 7.<sup>20</sup> First, the plaintiff must show that government action infringes life or liberty or security to the person.<sup>21</sup> Second, the plaintiff must show that the violation of her right was not in accordance with principles of fundamental justice. Third, the onus shifts to the government to show that the infringement is justified pursuant to section 1.

The court will determine whether fundamental justice has been followed by using the test set out by Lamer, J, as he then was, in *B.C. Motor Vehicle*:

All [ss. 7-14] have been recognized . . . as essential elements of a system for the administration of justice which is founded upon the belief in dignity and the worth of the human person. 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* [emphasis added].<sup>22</sup>

<sup>19</sup> *Supra* note 4.

<sup>20</sup> It is assumed here that the plaintiff has established the involvement of a government actor, thereby satisfying the threshold of s. 32 of the *Charter*.

<sup>21</sup> The early jurisprudence shows confusion as to whether life, liberty or security to the person was read as a single right or as three distinct rights. Marceau, J. of the Federal Court of Appeal in *Canada v. Operation Dismantle*, [1983] 1 F.C. 745 at 772-775 held that section 7 protected one right. Wilson, J., however, expressed the contrary view in *Singh*, *supra* note 6 at 204. Wilson, J. found three distinct rights in section 7. Her view was confirmed by Lamer, J. in *B.C. Motor Vehicle*, *supra* note 4 at 500 and by Dickson, C.J. in *Morgentaler*, *supra* note 6 at 45.

<sup>22</sup> *B.C. Motor Vehicle*, *supra* note 4 at 512.

This test, Lamer, J. held, includes procedural and substantive reviews.<sup>23</sup> This finding rejected the Special Committee's desire to have only procedural review. Enabling the courts to conduct both procedural and substantive reviews broadens significantly their powers; they are no longer restricted to the implementation of legislation but now can review the purpose of the legislation. The courts' new breadth of power comes through best in an illustration. Assume that Nova Scotia's *Motor Vehicle Act* has a section which states:

Everyone who drives recklessly is guilty of a summary offence and liable to imprisonment for a term not exceeding two years.

A plaintiff has been charged under this section for driving through a red light. This plaintiff wants to challenge this section using section 7. The court in a procedural review could strike down the section as being too vague or overly broad. Under this review, the court does not address the social policy of keeping reckless drivers off the road, but determines if the legislative means conform to natural justice. If, however, the court bases its review on the merits of preventing reckless driving it then would be conducting a substantive review of the legislation.

Most courts have not taken advantage of the extensive powers of substantive review. A large part of the court's hesitation no doubt rests with Lamer, J.'s test of "basic tenets of the legal system," which is broad and vague. Lamer, J. acknowledged the imprecise nature of his test:

Consequently, those words [fundamental justice] cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations.<sup>24</sup>

This broad test is perhaps a little too daunting and confusing for most courts to use in giving meaning to fundamental justice. Even the Supreme Court of Canada is not immune from confusion. In an attempt to define the "basic tenets of the legal system," five justices of the Supreme Court of Canada gave five different opinions in

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<sup>23</sup> *Ibid.* at 497.

<sup>24</sup> *Ibid.* at 513.

*Thomson Newspapers v. Canada*.<sup>25</sup> It cannot be particularly enticing to lower courts to apply this test to new areas when clearly the Supreme Court of Canada appears at a loss as to how it functions.

### UNDERSTANDING THE PRE-DOMINANCE OF PROCEDURAL REVIEW

The courts employ almost exclusively a procedural review because this form of judicial review has existed long before the *Charter* was enacted. Common law, through the principles of natural justice, has long employed procedural review to ensure a fair hearing.<sup>26</sup> This review has included protection against the bias of decision-makers, the ability to defend, and the right to know reasons of the decision. The language in sections 8–14 of the *Charter* are in most regards a codification of the common law principles of natural justice. Among the specific protection these sections afford are: protection against search and seizure without authority (s. 8); protection against arbitrary detention or imprisonment (s. 9); protection against arrest or detention without knowing the reasons (s. 10); guarantee of habeas corpus (s. 10); presumption of innocence (s. 11(d)); protection against cruel and unusual punishment (s. 12); and, protection against self-incrimination (s. 13). The nature of these sections relate primarily to arrest and trial procedures, so it is not surprising that criminal law represents 60% of section 7 challenges.<sup>27</sup>

The protections in sections 8–14 are ones whose applications courts can quickly grasp and thus do use them with ease. When, therefore, Lamer, J. held that sections 8–14 are “illustrative, but not exclusively so,”<sup>28</sup> of the protection found in fundamental justice, it is hardly surprising that the courts focussed on the “illustrative” in using sections 8–14 as interpretative tools of fundamental justice. The courts’ embracing of sections 8–14, as the guide, has resulted in giving fundamental justice an almost exclusive procedural review flavour. The second portion in Lamer, J.’s statement, that funda-

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<sup>25</sup> *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

<sup>26</sup> Administrative law, which has become extremely active in the last few decades, has contributed much to defining and broad application of natural justice.

<sup>27</sup> See Appendix I.

<sup>28</sup> *B.C. Motor Vehicle*, *supra* note 4 at 502-503 per Lamer, J.

mental principles have meaning beyond sections 8–14, remains largely uncharted waters for the courts. The scope of substantive review will rest on how the courts eventually navigate their way in these new waters.

### JUDICIAL INTERPRETATION OF SUBSTANTIVE REVIEW

The real challenge of defining substantive review within fundamental justice has been, as seen above, avoided by the courts. This being said, the courts, particularly the Supreme Court of Canada, have not been completely unwilling to conduct substantive reviews. Since 1985, the Supreme Court of Canada has rendered five key decisions on substantive review.<sup>29</sup> These five cases divide into two distinct groups. In two of these cases, *R. v. Vaillancourt*<sup>30</sup> and *R. v. Martineau*,<sup>31</sup> the Supreme Court of Canada adopted a front-door approach to substantive review. The Court rejected Parliament's policy on categorization of certain types of murder. In the remaining three cases, *Singh*,<sup>32</sup> *B.C. Motor Vehicles*,<sup>33</sup> and *Morgentaler*,<sup>34</sup> the Court took a back-door approach to substantive review. These cases are accepted as instances in which the Court engaged in procedural review. The concerns of the Court in these instances, however, were far more than procedural as the Court was striking down legislative policy. Elements of substantive review, in varying degrees, are found in these cases under the guise of procedural review. All five cases will now be examined briefly in turn.

In *Vaillancourt*<sup>35</sup> and *Martineau*,<sup>36</sup> the Supreme Court of Canada used substantive review in examining the section in the Criminal Code on felony-murder (sometimes called the constructive murder rule)<sup>37</sup> and found it violated fundamental justice. The striking down

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<sup>29</sup> The Supreme Court of Canada has considered section 7 on sixty-two occasions since 1982. Source: Quicklaw database of Supreme Court of Canada.

<sup>30</sup> *Supra* note 6.

<sup>31</sup> *Supra* note 6.

<sup>32</sup> *Supra* note 6.

<sup>33</sup> *Supra* note 4.

<sup>34</sup> *Supra* note 6.

<sup>35</sup> *Supra* note 6.

<sup>36</sup> *Supra* note 6.

<sup>37</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 21(2).

of felony-murder as a type of murder in the Criminal Code occurred in two stages. The first stage occurred in *Vaillancourt*. The accused was charged with a felony-murder. Under the section, an accused who caused death while involved in certain serious offences, such as robbery, while armed with a weapon, was guilty of murder. This section required no *mens rea* for murder, only the proof of the felony. The majority of the Supreme Court of Canada held that the felony-murder provision was unconstitutional because it lacked a *mens rea* requirement for murder. It was held that the extreme stigma of murder and the severe punishment involved meant some form of *mens rea* was required to satisfy fundamental justice. The Court left unanswered whether the *mens rea* should be objective or subjective. The *Martineau* decision answered this question. The majority of the Supreme Court of Canada held subjective *mens rea* was required. This ruling struck down felony-murder as a type of murder. The Supreme Court of Canada in direct opposition to the policy of the Parliament struck down felony-murder as a type of murder. L'Heureux-Dubé, J., in dissent, wrote that the setting of policy as to which acts constituted murder was a policy of Parliament not to be interfered with by the courts. She wrote further of the contradictions she found in the majority's decision. Principles of fundamental justice were supposed to be found in the basic tenets of the legal system. L'Heureux-Dubé, J. could find no other system based on inherited English principles of criminal law that set subjective foresight as the exclusive standard of murder. L'Heureux-Dubé, J.'s observations show just how far the Supreme Court of Canada was prepared to reach into policy matters.

The Supreme Court of Canada's willingness to explore the merits of policy is not always done in a forthcoming manner. A back-door approach was taken in the next three cases.

The first of these three cases on substantive review under the guise of procedural review is *Singh*.<sup>38</sup> This case is not only the earliest decision, but also the one where the focus was most firmly on procedural review. Within the Court's decision, however, are elements of substantive review. The presence of substantive review is subtle. In the successive cases of *B.C. Motor Vehicle* and *Morgentaler*, however, substantive review transforms itself into a dominant voice.

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<sup>38</sup> *Supra* note 6.

*Singh* involved a challenge to the *Immigration Act*<sup>39</sup> and the procedures followed in determining refugee status. Refugee status was determined by the Minister upon the recommendation by the Refugee Status Advisory Committee. An appeal of the Minister's decision could be made in writing to the Immigration Appeal Board. All six justices who participated in the judgment found the appeal process inadequate. They held that any illegal immigrant claiming refugee status had the right to appear before the Appeal Board. The justices differed in giving legal support to this finding. Three justices based their findings on section 2(e) of the *Canadian Bill of Rights*.<sup>40</sup> Writing on behalf of the remaining justices, Wilson, J. found the lack of appeal in the procedures violated fundamental justice.

The argument can be made that Wilson, J.'s review was solely procedural in nature as she addressed the requirements of a fair hearing. Traces of a substantive review of the procedures, can, however, be found in her decision. The Canadian Government made representations that these procedures were a policy choice made on the need for an efficient system and monetary constraints. Wilson, J. rejected these arguments as inadmissible. In effect, then, Wilson, J. told the federal government what institutional structure was required whether it could be afforded or not. It could be argued that Wilson, J.'s review, while broader than traditional procedural reviews, illustrates that procedural matters can have significant, and substantial effects. Moreover, though the Court may have adopted an activist's position, in some regards, it was all done within the ambit of procedural review. Perhaps procedural review has come to intrude on policy. This development, however, is a change. Although procedural matters largely precipitated this change, the subtle presence of substantive issues cannot be overlooked.

The next case which incorporates a substantive element in the procedural review was *B.C. Motor Vehicle*.<sup>41</sup> This case involved a challenge of a section in the *British Columbia Motor Vehicle Act*.<sup>42</sup> This section made it an offence to drive while prohibited or while

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<sup>39</sup> 1976, S.C. 1976-77, c. 52.

<sup>40</sup> *Supra* note 16.

<sup>41</sup> *Supra* note 4.

<sup>42</sup> R.S.B.C. 1979, c. 288, as am. by the *Motor Vehicle Amendment Act 1982*, S.B.C. 1982, c. 36.

under suspension and set a minimum penalty of imprisonment. The Supreme Court found the section created an absolute liability against person who may or may not know of the prohibition or suspension. This lack of culpability coupled with a prison term was found to violate fundamental justice. The Supreme Court's action seems, at first, to be a procedural review. The decision, it could be argued, was concerned with the implementation of the legislation, not its merits. The Supreme Court did not, after all, say the legislature could not in certain circumstances ban driving. A strong presence of substantive review is found, however, in this decision; the Supreme Court interfered with a policy choice of the legislature regarding sanctions. The legislature exercised a choice in dealing with a social issue and the Court rejected its choice.

*Morgentaler*<sup>43</sup> is the most dramatic example of the Supreme Court broadening the definition of procedural review in order to review the substantive part of legislation. This case involved a challenge to a section in the *Criminal Code*<sup>44</sup> which made abortions illegal unless performed in an accredited hospital with the approval of the hospital's therapeutic abortion committee. The hospital committee could only approve an abortion to preserve the life or health of the woman. Parliament's goal was to limit the circumstances in which women could have abortions. The majority of the Court found that this section violated the principles of fundamental justice. Wilson, J., however, was alone in striking down the section on substantive grounds. She held the restrictions on abortions were unconstitutional. The remainder of the majority justices were less forthcoming. They found a violation of fundamental principles officially on procedural grounds. They held that the procedures of the therapeutic abortion committee could delay or deny an abortion. If these justices had restricted their comments to how the committee conducted itself, then perhaps it could pass as a genuine procedural review; however, they took objection with Parliament's overall scheme to restrict abortions. It is this broader rejection of the Parliamentary scheme which moved the Court into striking down policy and therefore striking down legislation on substantive grounds.

In all of the above cases, the Supreme Court of Canada reviewed legislation on its merits in varying degrees. The Court's in-

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<sup>43</sup> *Supra* note 6.

<sup>44</sup> R.S.C. 1970, c. C-34, s. 251.

trusions into the legislature's policy powers were not severe, but they were sufficient enough to suggest how future ventures into policy could be far bolder as the judiciary gives fuller meaning to substantive review. It is this very potential for fuller review which has brought out the critics of broad substantive review.

### CRITICS OF SUBSTANTIVE REVIEW

Critics against a broad substantive review within fundamental justice have many well-respected legal writers in their ranks as Peter Hogg, J. M. Evans, and Eric Colvin. Concern arose because of the Supreme Court of Canada's decision in *B.C. Motor Vehicle*.<sup>45</sup> Decisions such as *Morgentaler*<sup>46</sup> have heightened these apprehensions. The prevalent anxiety about substantive review is that the judiciary will review the social and economic policies in government action; such broad review would mean the end of deference to the legislature. These concerns are based on the actions of the Supreme Court of the United States during various periods of time, but none more so than the *Lochner* era, 1905–1937.

The *Lochner* era in the United States is so named for the first decision which set the pattern of decisions for the next three decades. In *Lochner v. New York*,<sup>47</sup> the Supreme Court of the United States used substantive due process to strike down a law that limited the hours of work in bakeries. Over the course of the next thirty years, the Court applied substantive due process to strike down state and federal laws that set maximum hours of work, minimum wages, health and safety, standards and protection of union activity.<sup>48</sup> In 1937, these decisions were overruled, but the Supreme Court's disregard for government policy left a lingering concern about the power of courts with substantive review authority. It was this worry that motivated the replacement of due process with fundamental justice in section 7.<sup>49</sup>

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<sup>45</sup> *Supra* note 4.

<sup>46</sup> *Supra* note 6.

<sup>47</sup> (1905) 198 U.S. 45.

<sup>48</sup> *Supra* note 3 for a full discussion of this era. See also: J. E. Nowak and R. D. Rotunda, *Constitutional Law*, 4th ed. (St. Paul: West Pub., 1991) at 351–451.

<sup>49</sup> *Supra* note 8 at 4–9 for the history of the drafting of section 7.

Critics of substantive review want to ensure no Canadian equivalent of the *Lochner* era occurs.<sup>50</sup> Only Eric Colvin, however, has put forward a theory as to how substantive review must be interpreted to prevent a Canadian *Lochner* era.<sup>51</sup> His theory has found support among such respected legal scholars as Peter Hogg,<sup>52</sup> and it is a theory that must be addressed.

Colvin's underlying thesis is that:

Section 7 is concerned with legal means rather than social ends, with justice of processes by which social objectives are pursued rather than with the justice of the ends which are sought.<sup>53</sup>

Or stated more bluntly, Colvin holds there is

no support for the broad view that section 7 permits judicial review of the substantive content of law in a sense which would cover the social objectives which law embodies.<sup>54</sup>

Colvin achieves a restrictive substantive review by arguing that section 7 can only be interpreted in light of sections 8–14. The courts cannot for the purposes of analyzing section 7 import from any other sections of the *Charter* beyond those of sections 8–14. The reason given for this restriction is that fundamental justice in section 7 covers only legal rights. This limitation is made by the structure of the *Charter*; sections 7–14 are placed together under the heading of "Legal Rights." The separate grouping, for Colvin, shows the drafters' intent to isolate fundamental justice to legal rights or alternatively stated, to limit it to the means. Inherent in this theory

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<sup>50</sup> Obsession with the *Lochner* era is not exclusive to the critics. Most writers on fundamental justice make reference to this era. See: P. Garant, "Fundamental Rights and Fundamental Justice" in G. A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Scarborough: Carswell, 1989); T. Lee "Section 7 of the Charter: An Overview" (1985) 43 (No.2) U.T. Fac. L. Rev. 1.

<sup>51</sup> E. Colvin, "Section Seven Of The Canadian Charter Of Rights And Freedoms" (1989) 68 Can. Bar Rev. 560.

<sup>52</sup> P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at 1034–35. Another supporter of Colvin's views is J. M. Evans "The Principles of Fundamental Justice: The Constitution and Common Law" (1991) 29 Osgoode Hall L. J. 51.

<sup>53</sup> *Supra* note 51 at 561.

<sup>54</sup> *Ibid.* at 562.

of interpretation is that the courts cannot review with respect either to social or economic interests. Colvin believes that Lamer, J. supported this approach when he held that sections 8–14 were to be “illustrative” of fundamental justice.<sup>55</sup>

It is the *Morgentaler*<sup>56</sup> decision in particular that causes difficulties for Colvin’s theory. In *Morgentaler*, the Supreme Court of Canada’s review ventured beyond means into the social ends. In order to keep the Court’s action consistent with his interpretative theory, Colvin resorts to Hart’s theory of primary and secondary rules.<sup>57</sup>

In Hart’s theory, the primary rules of a legal system are the ends and objectives; these rules set out *what* a person may or may not do in the same spirit of non-legal rules such as morality. Conversely, secondary rules are concerned with means; they prescribe *how* various activities are to be conducted to ensure the operation of the (primary) rule-system. Thus, as Colvin argues, fundamental justice comes under secondary rules because it is concerned with legal rights. Separation between the two sets of rules is essential. Generally speaking, primary rules would not come under judicial scrutiny, but Colvin notes the exception where primary rules set out conditions for the secondary rules. Under this exception judicial review of primary rules is permissible, and for this reason Colvin finds the *Morgentaler* decision to be consistent with his theory.

In *Morgentaler*, Colvin writes, only the institutional structure was altered by the Supreme Court of Canada. The Court attacked only the defects in the primary rules that set conditions for secondary rules; it did not address social or economic interests.<sup>58</sup> Colvin’s distinction is a fine one; arguably, he has pushed the boundaries of Hart’s theory to the point of essentially contradicting the theory by merging together primary and secondary rules. The result is an interpretation theory which fails to account for the broader implications on social policy found in the Court’s decision.

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<sup>55</sup> *B.C. Motor Vehicle*, *supra* note 4 at 502–503.

<sup>56</sup> *Supra* note 6.

<sup>57</sup> H.L.A. Hart, *The Concept of Law* (Toronto: Oxford University Press, 1961) at 78–79, 89–96 as referenced in Colvin, *supra* note 51 at 577.

<sup>58</sup> Colvin, *supra* note 51 at 578–579.

Colvin's interpretative doctrine is tenuous in three main ways. First, his restriction to sections 8-14 as guidance for section 7 are completely contrary to the purposive approach of the *Charter* advocated by the Supreme Court of Canada. Also, Colvin emphasises that Lamer, J. stated sections 8-14 must be illustrative of the principles of fundamental justice. Lamer, J., however, left the future interpretation of section 7 more open. Examining the challenges to date, it is clear that pressure is being placed on the court to use *Charter* sections beyond sections 8-14 in interpreting fundamental justice. In civil cases, section 7 was argued with sections beyond sections 8-14 in 34% of the challenges. In criminal cases, other sections were utilised in only 15% of the challenges. A trend exists, nonetheless, to give section 7 a fuller meaning by going outside sections 8-14.<sup>59</sup> Second, even if interpretation was restricted to illustrations from sections 8-14, Colvin concedes that primary and secondary rules are not isolated from each other. Where he purports the intrusion into primary rules to be exceptional it could equally be viewed as the thin wedge opening the way for further substantive review. This wedge, moreover, has been broadened through such clear assaults on government social policy as seen in *Vaillancourt* and *Martineau*. Third, Colvin drafted his theory only four years after *B.C. Motor Vehicle*. The Court in that period had changed little and it was quite deferential to the parliamentary tradition. Yet, even with the outwardly conservative Court amazing advances were made in substantive review. The trend in the Court is toward a broader meaning of substantive review. Colvin's interpretative theory probably will not withstand the test of time. Even Peter Hogg can only hope that Colvin's link between section 7 and sections 8-14, "however implausible for other interpretative purposes, may help to shield social and economic legislation from judicial review under section 7."<sup>60</sup> In the end, though, Hogg concludes the extent of substantive review remains an unanswered question.<sup>61</sup>

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<sup>59</sup> Although both criminal and civil are using sections beyond those under Legal Rights, sections 8-14 continue to dominate in defining fundamental justice. Sections 8-14 were used in conjunction with section 7 the majority of the times in criminal (65%) and civil (46%). Section 7 also is gaining sufficient meaning to stand on its own. In both criminal and civil section 7 was used on its own in 20% of the challenges. See Appendices II and IV.

<sup>60</sup> Hogg, *supra* note 52 at 1035.

<sup>61</sup> *Ibid.*

## THE FUTURE OF SUBSTANTIVE REVIEW

Supporters of narrow substantive review are losing the battle. As seen in *Morgentaler*, the Supreme Court of Canada engaged in broad substantive review and likely will continue to do so. The question which remains unanswered, though, is how broadly the Court will apply substantive review to legislation.

Predicting how the Supreme Court will shape substantive review is difficult. The short supply of case law makes this hard to forecast. One indicator may be the *Lochner* era, but realistically this judicial review will be distinctly Canadian. Distinctly Canadian means that the Court probably will not engage in an outright head-to-head confrontation with Parliament or provincial legislatures. Initially, the Court will likely conduct most of its substantive review under the guise of procedural review. This approach has two main advantages. First, it makes it harder for critics to discern the precise nature of the review. An example of this difficulty is seen with Colvin's conclusion that *Morgentaler* had nothing to do with social review. Second, it casts judicial review in a language with which the lower courts are more comfortable. The lower courts would then be eased into conducting more substantive reviews through this broader procedural review.

A strong possibility exists that in building a distinctive Canadian approach the language of substantive review will never be employed. In time, a new phrase for judicial review may emerge that describes a procedural review and substantive review all combined in one form. This new phrase would have the advantage of breaking free of all the negative connotations that substantive review conjures up. The phrase will probably come as the result of a decision which sets a specific test, such as the *Oakes* test<sup>62</sup> which is applied to section 1.

The Supreme Court of Canada will have to establish guiding principles for interpreting fundamental justice. The form of these principles will determine the breadth of judicial review under fundamental justice. At the core of these principles will be the Court's vision of rights. An individual's legal rights in society do not exist exclusive of the rights of others. Each right of a person has two components: first, there is the bare or internal right; and second,

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<sup>62</sup> The test for section 1 was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

there is the external factor, of the rights and responsibilities of others. In the context of section 7, the Court must define the rights of life, liberty and security on the basis of the bare right together with the external factor.

An individual's bare or internal right is a right in its purest state, before it is intruded upon by others' rights. For instance, a person has the right to chose a career. Exercising this right, a person decides to become a doctor. The external factor includes the impact the rights of others have on the bare right and the responsibilities and obligations that others owe the bare right. The external factor shapes the bare right until the final right is established. Frequently the external right shapes the bare right by curtailing it through the intrusions of others' rights. The result is the diminution of the bare right. A person who wants to be a doctor needs the monetary means. If a person cannot access these means, because others have exercised their right to accrue wealth, then the person's bare right of choice to be a doctor is meaningless.

The Court must protect the bare right by taking a more aggressive role. Instead of permitting the rights of others to diminish a bare right, the Court should impose responsibilities and obligations on the external factor, these outside rightholders, which prevents the reduction of a bare right.

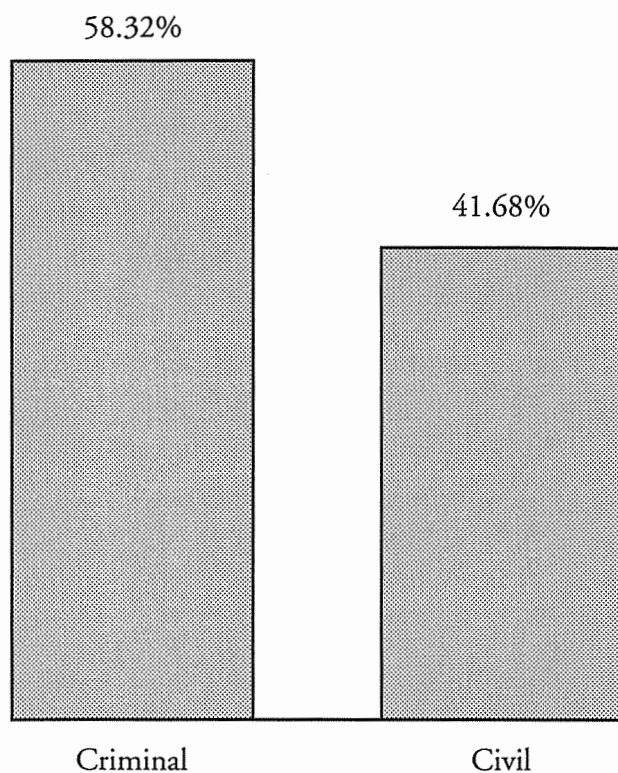
The equality envisioned by the *Charter* requires the Court to impose upon the external factor, the Government, the responsibilities and obligations owed to the individual to compensate for the diminution of her bare right. Thus, the legal rights of life, liberty and security consist of the individual's bare right and the responsibilities and obligations owed by the Government. Government as the shaper of society is responsible to correct any harm the individual's bare right has suffered through society's impact or Government's impact. The person, therefore, who has the bare right to choose to be a doctor, also has the Government's obligation to access the monetary means to be a doctor. Thus, the Court sees the individual's choice in this fuller context.

Fundamental justice in section 7 provides the Court with the tool to enforce the obligations and responsibilities that the Government owes an individual's bare right in the shaping of an individual's legal right. The Court could choose to ignore this power and in doing so show deference to Government. The cost of this action would be at the expense of the individual's legal right.

Conversely, though, the Court may chose to enunciate the obligations of Government and enforce them. If this path is chosen, then an explosion of full and meaningful rights will occur in the *Charter*, and the opportunity to have equality as the state in which all individuals co-exist in Canada will be greatly enhanced.

## APPENDIX I

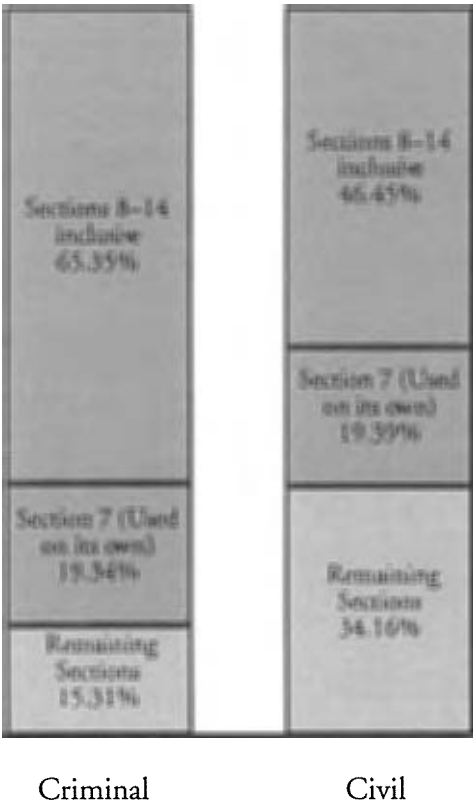
## Overview of Sources of Section 7 Challenges



Source: Quicklaw Database Charter of Rights Cases:  
1982 to 31 March 1993

APPENDIX II

Overview of Sections Used in Conjunction  
With Section 7 Challenges



Source: Quicklaw Database Charter of Rights Cases:  
1982 to 31 March 1993

## APPENDIX III

## Jurisdictional Statistics for Section 7 Challenges

<b>Jurisdiction</b>	<b>Criminal</b>	<b>Civil</b>	<b>Total</b>
Newfoundland	43	11	54
Nova Scotia	39	31	70
P.E.I.	12	9	21
New Brunswick	16	17	33
Quebec	24	27	51
Ontario	131	104	235
Manitoba	34	42	76
Saskatchewan	55	48	103
Alberta	39	46	85
B.C.	81	76	157
Yukon	4	7	11
N.W.T.	9	5	14
Federal Courts	44	70	114
<b>Totals</b>	<b>531</b>	<b>493</b>	<b>1024</b>

Source: Quicklaw Database Charter of Rights Cases:  
1982 to 31 March 1993

## APPENDIX IV

## Sections Used in Conjunction With Section 7 Challenges

Section	Criminal		Civil	
	Number	% of total	Number	% of total
2(a)	8	0.83	15	2.17
(b)	24	2.48	32	4.63
(c)	1	0.10	5	0.72
(d)	6	0.62	16	2.32
3	0	0	7	1.01
4	0	0	4	0.58
5	0	0	3	0.43
6(1)	0	0	8	1.16
6(2)(a)	1	0.10	9	1.30
(b)	2	0.21	11	1.59
(3)	0	0	8	1.16
(4)	0	0	6	0.87
7	187	19.34	134	19.39
8	62	6.41	34	4.92
9	74	7.65	16	2.32
10(a)	14	1.45	6	0.87
(b)	53	5.48	28	4.05
(c)	8	0.83	4	0.58
11(a)	24	2.48	15	2.17
(b)	42	4.34	30	4.34
(c)	34	3.52	22	3.18
(d)	162	16.75	89	12.88
(e)	13	1.34	3	0.43
(f)	22	2.28	4	0.58
(g)	17	1.76	5	0.72
(h)	20	2.07	15	2.17
(i)	11	1.14	2	0.29
12	48	4.96	26	3.76
13	19	1.96	16	2.32
14	9	0.93	6	0.87
15	89	9.20	96	13.89
16	1	0.10	2	0.29
25	1	0.10	1	0.14
26	3	0.31	6	0.87
27	4	0.41	2	0.29
28	8	0.83	5	0.72
Totals	967		691	

Source: Quicklaw Database Charter of Rights Cases:  
1982 to 31 March 1993