R. v. *Heywood*: Overbreadth in the Law or in the Judgment?

June Ross

Last November the Supreme Court of Canada overturned the loitering conviction of a previously convicted paedophile. He had been loitering near a playground, taking revealing photographs of young girls. The court released him, despite its acceptance of evidence that such conduct by such a person increased the risk of reoffending, and despite its opinion that such conduct can therefore be prohibited for the protection of children. The court released him because the law under which he had been convicted was not carefully drafted and could be used to imprison other persons in other circumstances in which imprisonment would be fundamentally unjust.

The decision in *R.* v. *Heywood*[1] is of interest in a number of ways. In terms of assessing the impact of the *Canadian Charter of Rights and Freedoms* on our criminal justice system, it may be considered as one in a series of cases in which the court has been narrowly divided (the appeal was allowed by five to four); and in which the majority and minority views can be characterized in terms of their focus on the rights of the accused or on the community interests served by the law.[2]

But the decision also made a significant addition to *Charter* section 7 doctrine. With this case, the concept of fundamental justice has come to include a consideration of a law's potential for overbreadth. With this addition, fundamental justice is now essentially the equivalent of reasonableness as determined under section 1 of the *Charter*. In effect, it is as though section 7 contained a protection of life, liberty and security of the person, subject only to the same qualification of reasonable limits to which all *Charter* rights are subject. What are the implications of broadening fundamental justice, to the point that it has lost any qualifying impact on section 7 rights?

Heywood's approaches to *Charter* application and to the assessment of an appropriate remedy are also interesting. The majority reviewed the statute in an abstract way and invalidated it due to potential concerns that would only arise in circumstances other than those of the accused. This stance, while not uncommon in the criminal law context,[3] stands in stark contrast to the Court's approach to *Charter* challenges in the civil context.[4] A more flexible approach to the appropriate remedy would alleviate an excessive response to hypothetical concerns.

Interpretation of the Criminal Code Prohibition

Robert Heywood had been convicted in 1987 of two counts of sexual assault involving children. This made him subject to section 179(1)(b) of the *Criminal Code*, which prohibited persons convicted of specified sexual offenses from "loitering in or near a school ground, playground, public park or bathing area." Heywood was charged under the section after being observed on two occasions near a children's playground, carrying a camera with a telephoto lens. His camera and film were seized. A picture developed on the film showed young girls playing in the park, their clothing disarranged by play, so that their crotch areas, covered by underwear, were visible.[5]

In the Supreme Court of Canada, both Cory J. for the majority and Gonthier J. for the dissent agreed that Heywood's liberty had been restricted. He

was prevented from attending at places "where the rest of the public is free to roam," and a breach of the prohibition could result in imprisonment.[6] Both also agreed that the restriction of an individual's liberty "for the purpose of protecting the public does not *per se* infringe the principles of fundamental justice."[7] Thus, the constitutionality of the *Criminal Code* prohibition turned upon the relationship between the *Code's* restriction of liberty and its objective of protecting the public. This in turn depended on the scope of the restriction, a matter of statutory interpretation.

The majority interpreted loitering in accordance with the ordinary meaning of the word, to "stand idly around, hang around, linger, tarry, saunter, delay, dawdle," without any requirement of malevolent intent.[8] Applying this definition, the majority held that the prohibition would restrict liberty in circumstances in which the law's objective of protecting children would not be advanced. The prohibition was overbroad in its geographical ambit, as it applied to places other than those where children would be present; in the persons to whom it applied, as not all would constitute a danger to children (previous convictions did not necessarily relate to children); and in the time for which it applied, as it amounted to a lifetime prohibition without review and thus would apply even if a person ceased to be a danger to children.[9]

The dissent looked to other aids to interpretation of the provision and, aided by its consideration of the purpose and legislative history of section 179(1)(b), concluded that the prohibition was intended to apply only to persons who were "lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offenses."[10] Employing this interpretation, and relying on evidence that the risk of reoffending by sexual offenders is substantial and that disassociation helps to reduce this risk,[11] the dissent concluded that the law was a reasonable restriction of liberty.

I do not propose to assess the process of statutory interpretation employed by either the majority or the dissent. Suffice it to say that the court was narrowly divided on the point and that the process can be indeterminate, with the court electing to consider or to refuse to consider various "aids" to interpretation.[12] It seems unfortunate to add this element of indeterminacy to a *Charter* case, particularly where there is relative agreement about the scope of the constitutional right or freedom. I will first deal with the court's s.7 discussion, in the course of which I hope to demonstrate that there was indeed a significant degree of agreement about the scope and application of that provision. I will then address the question of remedy, and suggest that the court should have utilized a more flexible approach in determining the appropriate remedy.

SECTION 7

As noted above, both the majority and the dissent agreed that liberty was restricted by the loitering law, and that restrictions of liberty may be imposed for the purpose of protecting the public. Constitutional difficulties arise only if the restrictions apply where there is no danger to the public sufficient to justify them.

While the court did not attempt to describe in any general way what might be a sufficient danger to the public to justify a particular restriction of liberty, it seems that the restriction of Heywood's liberty as imposed in the case was justifiable. Heywood had been recently convicted of sexual offenses involving children and he was loitering near a children's playground. None of the forms of overbreadth identified by the majority applied to him.[13]

The majority found a violation of the principles of fundamental justice by considering the scope of the *Criminal Code* provision "on its face," as it might be applied in other hypothetical cases. The majority further identified and applied a new principle of fundamental justice — overbreadth:[14]

> If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's right will have been limited for no reason. The effect of overbreadth is that *in some applications the law is arbitrary or disproportionate* (emphasis added).

The dissent implicitly agreed with the majority's position regarding section 7. Referring to the broad definition of loitering applied by the majority, the dissent held:[15]

> As Cory J. convincingly demonstrates, however, for such a broad prohibition to be

> constitutional, it would probably have to be accompanied by the same kind of guarantees present in the new section 161.

The addition of overbreadth to the list of principles of fundamental justice was thus apparently uncontroversial. In some ways, this is not surprising, as overbreadth seems to be a natural next step following upon the determinations that vagueness[16] and arbitrariness[17] violate fundamental justice. Vagueness and overbreadth may be related, in that vagueness may give rise to overbreadth.[18] Arbitrariness and overbreadth also are related concepts. Laws that are arbitrary are objectionable because they apply where no legitimate purpose will be forwarded. Determining arbitrariness involves balancing state and individual interests:[19]

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

Overbreadth analysis simply continues this process, finding a violation of fundamental justice where laws are "unnecessarily broad, going beyond what is needed to accomplish the governmental objective."[20]

Yet the determination that overbreadth is a principle of fundamental justice is surprising in other ways, and also is a very significant extension of section 7. The significance of the extension can be seen by comparing these principles to those involved in a section 1 analysis. The analogy is clear, and was expressly recognized by the court: where laws were found to violate fundamental justice due to arbitrariness or overbreadth, balancing of the public interest takes place under section 7 rather than section 1.[21]

Arbitrariness, which exists where a law "does little or nothing to enhance the state's interest"[22] parallels the first branch of the *Oakes* proportionality test, which requires that the means be rationally connected to the state objective.[23] Overbreadth, which occurs where the means are "too sweeping" or "broader than necessary" in relation to the objective,[24] parallels the second branch, the requirement that the means impair "as little as possible" the *Charter* right or freedom.[25] Determining overbreadth in the context of section 7 involves a degree of deference to legislative decision-making,[26] but this also applies to the minimal impairment test.[27]

The second branch of the *Oakes* test is clearly the most demanding part of the test, and the one which is most often invoked when the test is failed.[28] Equally, one can expect that overbreadth as a principle of fundamental justice will be more often violated than either of its predecessors, vagueness or arbitrariness.[29]

One surprising aspect of the inclusion of overbreadth within the principles of fundamental justice is that as recently as 1992, in *R.* v. *Nova Scotia Pharmaceutical Society*, the Supreme Court of Canada held that overbreadth was "subsumed under the 'minimal impairment branch' of the *Oakes* test," was "no more than an analytical tool to establish a violation of a Charter right" and had "no autonomous value" or "independent existence" under the Charter.[30] *Nova Scotia Pharmaceutical* was extensively cited by the majority in *Heywood* (including in a number of the quotations set out here), but the inconsistency was not discussed.[31]

The most surprising aspect of the addition of overbreadth to the list of principles of fundamental justice can be seen by returning to the seminal case of *Reference re section 94(2) of the Motor Vehicle Act*.[32] That, of course, is the case in which the Supreme Court of Canada, rejected a substantive/procedural dichotomy and held that principles of fundamental justice might involve substance as well as procedure. But the principles of substantive fundamental justice were assumed to be different than a review of the reasonableness of a law under section 1. This follows from the court's description of the principles of fundamental justice as a qualifier to the right to life, liberty and security of the person.[33] A "qualifier" implies a limitation or restriction of the right. If a failure to meet the requirements of section 1, which qualifies all *Charter* rights and freedoms, would constitute a violation of fundamental justice, then the latter "qualifier" ceases to have any limiting effect.[34]

In addition, the court's efforts at defining the principles of fundamental justice in the *Reference* demonstrated a desire to circumscribe them and to identify "judicial" principles, as opposed to the assessment of the need for or reasonableness of a law:[35]

> ... the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

The court did not attempt to define what aspects of substantive fundamental justice were within the "basic tenets of our legal system" but there is no reason to think they would include a review of the objective and proportionality of a law as assessed under section 1.[36] Overbreadth analysis finds its source in the *Charter* and its entrenchment of rights and freedoms subject to reasonable state limitations under section 1. To describe overbreadth analysis as being within the inherent domain of the judiciary is ironic, because it is the separation between traditional judicial functions and the assessment of least restrictive means that has led to the court's sometimes reluctance to apply this branch of the *Oakes* test, and its incorporation of "flexibility" or deference to the legislature within the test. One could argue, perhaps, that a deferential review, a search for obvious overbreadth, is within the judicial realm, but this would ignore the difficulty involved in identifying even obvious overbreadth; in drawing a line between the provision of effective judicial review and undue intrusion into the legislative domain.[37]

The result of *Heywood* is that the principles of fundamental justice now include the basic parts of section 1 analysis. There is not yet a fundamental justice equivalent to the third branch of the *Oakes* proportionality test, the requirement of proportionality between the harmful effects of the law on *Charter* rights and its beneficial effects in terms of the state objective.[38] However, in view of the very limited effect of this part of the test, this is a minor difference.[39]

In one sense the inclusion within section 7 of a full-scale review of the substantive fairness of laws may be seen as a desirable development from the perspective of those desirous of fully protecting *Charter* rights and freedoms. However, there may be a price to pay for this. The court is likely to remain concerned with the problem initially addressed in the *Reference re section 94(2) of the Motor Vehicle Act*, of placing sufficient limits on section 7 to avoid a perceived over-intrusion by the courts upon legislative goals and actions. If the scope of section 7 is not to be limited through the definition of fundamental justice, it is likely that it will have to be through the definition of the protected interests in life, liberty and security of the person.[40] While it may be acceptable to have the courts reviewing criminal laws for overbreadth, a similar review of economic legislation could give rise to a Canadian version of the feared American "Lochner era," in which economic reforms were struck down by the courts as unduly interfering with freedom of contract and similar interests.[41] The Supreme Court of Canada has not yet clarified its position with regard to section 7 and economic interests,[42] but the broader the scope of fundamental justice, the more unlikely is its application to any form of economic interest.

I would agree that review of the substantive fairness of economic legislation is an inappropriate task for the courts, and this would be the case whether the court is assessing the rationality *or* the overbreadth of a law. On the other hand, review of procedural fairness, in the sense of the right to be heard, to know the case one must meet, and to have one's rights (including economic rights) determined by an impartial decision-maker, has been a part of the court's traditional role at common law. To permit such review under section 7 would give constitutional weight to the norms of natural justice and procedural fairness developed by the courts. It seems clear that these norms do reflect "basic tenets of our legal system."[43] Requiring legislatures to adhere to these principles, or to justify any departure from them, would promote justice much as the common law principles seek to do.[44] Had fundamental justice been restricted to procedural justice, or to substantive justice as reflected in the "basic tenets of our legal system," the court would have had less concern with a broad approach to the protected interests, and a broadly applicable constitutional stature for natural justice might have been achieved. But with every step down the road of substantive review, there is a greater impetus for the court to restrict the scope of that review by restricting the scope of the protected interests.[45] Even prior to *Heywood*, a significant step had been taken in this regard in the provision for rationality review, so there was already reason to restrict the scope of life, liberty and security of the person. The extension of substantive review to include overbreadth review strengthens this reason. Whether this gives rise to a good or bad result depends on one's assessments of the positive value of constitutionalizing natural justice as against the risk of allowing any form of judicial review of economic legislation.

THE REMEDY

Where the court is in agreement as to the requirements of the *Charter*, and differs only on statutory interpretation, the *Charter* remedy of reading down might operate to bring the two sides together. Reading down is a remedy that involves narrowing the application of the law to make it comply with the *Charter*. The court's jurisdiction to read down in *Charter* cases was confirmed, albeit in *dicta*, in *Schachter* v. *Canada*.[46] The decision dealt primarily with reading in, or extending the application of a law, but the discussion was broadly formulated and referred to reading down as well. Nonetheless, the use of reading down as a *Charter* remedy is still quite limited in application and perhaps in principle. One matter that remains unclear is the extent to which, if at all, reading down can override legislative intent.

The majority in *Schachter* offered a number of guidelines with respect to choice of remedy. Two of these were referred to in *Heywood*: whether reading in or down would constitute a lesser intrusion on the legislative objective than striking down the law, and whether the choice of means used by the legislature was so unequivocal that reading in or down would constitute an unacceptable intrusion into the legislative sphere.[47] While the court must be concerned with legislative intention in selecting an appropriate remedy, the concern should be with fundamental aspects of legislative intention, not the ordinary indications of legislative intention as revealed through the process of statutory interpretation. This is clear in *Schachter*, in which the legislature's intention to unconstitutionally limit the availability of a benefit was presumed. In discussing the appropriate remedy the court went behind ordinary legislative intention and looked to the legislature's underlying objectives. If reading in or reading down would result in a substantial interference with those underlying objectives, the remedy should not be employed.[48] Similarly, if the means selected by the legislature is fundamentally related to its objectives, and reading down would substantially change the means, then the remedy would be inappropriate.[49]

In addition to reading in or down as a remedy where legislation has been found to violate the *Charter*, *Charter* principles can also inform the court in the interpretation of ambiguous statutory provisions. This may occur implicitly, as seemed to be the case in the dissenting judgment in *Heywood*, or it may be explicit.[50] Thus there are arguably two forms of reading down: a "mild" form involving the incorporation of *Charter* values in statutory interpretation, and a "strong" form under section 52, which can override legislative intent.[51] But while *Schachter* confirmed the court's jurisdiction to grant a "strong" form of reading down, the court has nonetheless been remarkably reluctant to exercise this jurisdiction.

One reason for the court's reluctance may be that expressed by LaForest J. in his concurring judgment in *Schachter*. He drew a distinction between reading in to extend social assistance schemes and reading down to narrow laws that conflict with the *Charter* due to overbreadth. He held that where the liberty of the subject is at stake, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow to provide a corrective remedy. While the majority of the court has not expressly adopted this distinction, they may have done so implicitly. Reading in has now been applied by a majority of the court, permitting the extension of legislation in circumstances in which the legislature had unambiguously declined to extend it.[52] Reading down in similar circumstances has not yet been adopted.[53]

Reading down could have united the divided court in *Heywood*. Had the majority been prepared to override legislative intent and read down as a *Charter* remedy in a manner similar to the interpretation suggested by the minority, the forked paths would have rejoined. However, reading down was raised and quickly rejected by the majority. Reading down, they held, would not be appropriate because it would create a new scheme in conflict with Parliament's unequivocal approach. This amounts to relegating reading down to its "mild" form only — it was rejected for the same reason that the interpretation was rejected. There was no suggestion that reading down would have interfered with Parliament's underlying objectives. The minority judgment interpreting the section narrowly in view of its purpose, and even the Crown's position, seeking such an interpretation, would contradict any such suggestion.

The court's treatment of reading down in *Heywood* raises questions as to the court's real commitment to this remedy in anything other than a mild form. Perhaps this may be explained on the policy ground referred to in the concurring judgment of LaForest J. in *Schachter*, that where the liberty of

the subject is involved, the courts should not adopt an approach that would permit or could even encourage overbroad legislation. But the result of an inflexible insistence on striking down overbroad laws is that the *Charter* is converted into a requirement for precise law-making, even where less precise laws are not demonstrably being applied in such a way as to interfere with rights and freedoms. I would argue that legislative precision is not a *Charter* value, unless an impact or chill upon rights or freedoms is demonstrated. Where there is only an abstract discussion of "reasonable hypotheticals," the *Charter* is reaching further than it needs to. This may be justified in certain circumstances, where there are significant problems with a law.[54] But mere potential overbreadth for a law that addresses a serious and legitimate problem does not require such extreme action. In such cases there is no reason why persons like Heywood, who lack any *Charter* stake in the case, should acquire incidental benefits or "*Charter* windfalls" as a result of the process. This is a much more significant and unnecessary intrusion upon legitimate legislative objectives than reading down would create.❑

June Ross
Faculty of Law, University of Alberta.

Endnotes

1. (1994) 120 D.L.R. (4th) 348 (S.C.C.). The majority judgment was written by Cory J. and concurred in by Lamer C.J. and Sopinka, Iacobucci and Major JJ. The dissenting judgment was written by Gonthier J. and concurred in by La Forest, L'Heureux-Dubé and McLachlin JJ.

2. See for example the commentary in S. Fine, "Ban on Loitering Struck Down — Sex Offenders' Rights Violated," Globe and Mail (25 Nov., 1994); S. Fine, "Middle Kingdom — Why He's Allowed to Watch," Globe and Mail (30 Nov., 1994).

3. An accused's standing to rely on the *Charter* rights of others has been established since *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.). There are many examples of cases in which an accused has benefitted from the invalidation of a law without a showing that the application of the law would have violated his or her own *Charter* rights. For example, in *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.) the court invalidated the reverse onus clause in section 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, because it was irrational to presume that an accused in possession of only a small amount of a narcotic, was in possession for the purpose of trafficking. Oakes, however, was in possession of a significant amount.

4. See for example the court's approach to the "civil" declaratory application brought in *Hy and Zel's Inc.* v. *Ontario (A.G.)* (1993), 107 D.L.R. (4th) 634 (S.C.C.).

5. Other photos seized in his residence and at the drugstore where he developed pictures contained similar scenes.

6. *Supra* note 1 at 382 per Cory J., noting that the Crown had not argued otherwise. Gonthier J. for the dissent did not discuss the violation of liberty as such, but did identify the primary *Charter* concerns as overbreadth and vagueness, issues pertaining to the section 7 requirement of fundamental justice. Further, Gonthier J. characterized Cory J.'s section 7 argument as "convincing," but found it to be inapplicable due to his narrower interpretation of the *Criminal Code* provision (*ibid.* at 364).

7. *Ibid.* at 382 per Cory J. See also p. 365 per Gonthier J.

8. *Ibid.* at 381.

9. The majority pointed in contrast to the subsequently enacted section 161 of the *Criminal Code*, which permits a court to make an order prohibiting a person who has committed an offence against a child under age 14 from attending at areas where children under 14 are likely to be present. The majority also expressed a concern that Heywood had not been formally notified of the prohibition, as would occur under section 161 (*ibid.* at 389-391).

10. *Ibid.* at 364. This was the interpretation advanced by the Crown.

11. *Ibid.* at 355-356. The minority also rejected challenges based on sections 9, 11(d), 11(h) and 12 of the *Charter*, which were not reached by the majority.

12. For example, the majority indicated that legislative debates should not be examined for proof of legislative intent, but only for the more general purpose of showing the mischief sought to be addressed (*ibid.* at 380).

13. Apart from the issue of retroactivity, Heywood would appear to be subject to a prohibition order under the new section 161 of the *Criminal Code*, described *supra* note 9. As further noted *supra* note 9, the majority expressed a concern that Heywood was not formally notified, as he would be under section 161. However, it was not clear that this factor alone would have made the restriction fundamentally unjust.

    The dissent supported the restriction as applied to Heywood. Having indicated that malevolent intent must be proved, the dissent went on to hold that it was clear that Heywood "had a malevolent purpose related to the predicate offenses" (*ibid.* at 368). The

dissent also expressly disavowed the provision of formal notice as a principle of fundamental justice: *ibid.* at 366.

14. *Ibid.* at 384 per Cory J.

15. *Ibid.* at 366 per Gonthier J.

16. *R.* v. *Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36 (S.C.C.).

17. *Rodriguez* v. *British Columbia (A.G.)* (1993), 107 D.L.R. (4th) 342 (S.C.C.).

18. *R.* v. *Nova Scotia Pharmaceutical Society, supra* note 16 at 51-52.

19. *Rodriguez* v. *British Columbia (A.G.), supra* note 17 at 396.

20. *R.* v. *Heywood, supra* note 1 at 385.

21. *Ibid.* at 384, 391.

22. *Supra* note 17 at 396.

23. *R.* v. *Oakes, supra* note 3 at 227 (S.C.C.). In defining the rational connection test, Dickson C.J.C. indicated that the measures adopted must not be "arbitrary, unfair or based on irrational considerations."

24. *R.* v. *Heywood, supra* note 1 at 384.

25. *R.* v. *Oakes, supra* note 3 at 227. The court states expressly that an overbroad law would fail the minimal impairment branch of the section 1 test in *R.* v. *Heywood, ibid.* at 391.

26. *R.* v. *Heywood, ibid.* at 384-385.

27. *Irwin Toy Ltd.* v. *Quebec (A.G.)* (1989), 58 D.L.R. (4th) 765 (S.C.C.).

28. For a review and assessment of the case law to this effect, see P. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at 35-27 — 35-28.

29. In an annotation of *R.* v. *Heywood,* D. Stuart suggests that the case has "breathed new life into the doctrine of void for vagueness, under what the majority describes as a separate but related aspect of overbreadth": (1995) 34 C.R. (4th) 135.

30. *Supra* note 16 at 50, 52.

31. See also D. Stuart, *supra* note 29.

32. (1985) 24 D.L.R. (4th) 536 (S.C.C.).

33. *Supra* note 31 at 548.

34. It may still have an impact on the right. There are principles of fundamental justice that are more specific than those similar to s.1 analysis, such as the requirement of a "guilty mind" and various procedural rules. These may provide additional focus to section 7 analysis where they are implicated.

35. *Supra* note 31 at 550.

36. E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms," (1989) 68 Can. Bar Rev. 560 argued that section 7 should be concerned with "legal means rather than social ends" (at 561), and that although the concept of legal means could not be confined to narrowly procedural matters, it should not extend to a "full power of substantive review, including the power to measure the substantive objectives of legal rules against the standards of fundamental justice" (at 573).

37. For example, see the different views in *McKinney* v. *University of Guelph* (1990), 76 D.L.R. (4th) 545 (S.C.C.).

    An argument may also be made that a determination of arbitrariness is not included in the "basic tenets of the legal system:" see Hogg, *supra* note 28 at 44-16, 44-17, taking this position and Colvin, *supra* note 36 at 581-83, arguing to the contrary.

38. *R.* v. *Oakes, supra* note 3, as modified in *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12 (S.C.C.).

39. For a review and assessment of the case law to this effect, see P. Hogg, *supra* note 28 at 35-32 — 35-33.

40. As was done by Lamer J. (as he then was) in a concurring judgment in *Reference re ss. 193 and 195.1 of the Criminal Code,* [1990] 4 W.W.R. 481 (S.C.C.).

41. See P. Hogg, *supra* note 28 at 44-8 for a brief description and further references.

42. Corporate economic interests are not included in section 7: *Irwin Toy, supra* note 27. However, the majority of the court left open in *Reference re ss. 193 and 195.1 of the Criminal Code, supra* note 40 and in *Pearlman* v. *Manitoba Law Society Judicial Committee* (1991), 84 D.L.R. (4th) 105 (S.C.C.) whether individual economic or professional interests might be included.

43. J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51 develops this thesis. Accord, see Hogg, *supra* note 28 at 44-36 and cases cited therein.

44. Evans, *ibid.*, although he does not take a position as to the appropriate scope of the protected interests under section 7.

45. Colvin, *supra* note 36 argues in favour of a limited and largely procedural version of fundamental justice and and notes that this would be compatible with a broad scope for the protected interests of life, liberty and security of the person, although he does not discuss economic interests. Evans, *ibid.* also notes that the greater the scope of interests protected under section

7, the greater will be the call for judicial restraint with regard to the principles of fundamental justice, referring however to restraint in the development and application of principles of procedural justice.

46. (1992) 93 D.L.R. (4th) 1 (S.C.C.).

47. Other factors included the extent of the conflict between the law and the *Charter*, whether adequate remedial precision could be achieved, the social significance of the law, and the impact on budgetary decisions.

48. An example referred to was *Osborne* v. *Canada (Treasury Board)* (1991), 82 D.L.R. (4th) 321 (S.C.C.). Sopinka J. held that reading down, while available in principle, should not be applied in the case. The court should "refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the Charter." "Reading down may in some cases be the remedy that achieves [these] objectives." But the law in issue, banning political activity by public servants, would be invalid in many of its applications and would, "as a result of wholesale reading down, bear little resemblance to the law that Parliament passed...In these circumstances it [was] preferable to strike out the section."

49. For example in *R.* v. *Seaboyer* (1991), 83 D.L.R. (4th) 193 (S.C.C.), the majority referred to reading down and the constitutional exemption as techniques to declare "valid in part" legislation, and held that the doctrine of constitutional exemption should not be applied because the result would not substantially uphold the law as enacted. "It would import into the provision an element which the legislature specifically chose to exclude — the discretion of the trial judge. Add to this the host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation, and the will of the legislature becomes increasingly obscured. The exemption, while perhaps saving the law in one sense, dramatically alters it in another."

50. The dissent did not directly refer to *Charter* values, but did refer to a policy or presumed legislative intention avoiding "excessive intrusiveness" of the provision, so it seems fair to conclude that *Charter* concerns affected the interpretation of the statute: *ibid.* at 362.

    Cases in which the Supreme Court of Canada has explicitly taken into account *Charter* principles in interpreting ambiguous statutory provisions include *Slaight Communications Inc.* v. *Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) and *Hills* v. *Canada (A.G.)* (1988), 48 D.L.R. (4th) 193 (S.C.C.). In *Canada (A.G.)* v. *Mossop* (1993), 100 D.L.R. (4th) 658 (S.C.C.) the court restricted this principle of interpretation to circumstances of ambiguity, holding that where statutes are unambiguous, the *Charter's* role is a more powerful one, to ensure compliance with it. *R.* v. *Butler* (1992), 89 D.L.R. (4th) 449 (S.C.C.), like the dissent in *Heywood*, is another example of a decision in which the court did not expressly refer to the *Charter* in interpreting an apparently sufficiently ambiguous statute, but in which it seems undeniable that *Charter* concerns shaped the process of statutory interpretation.

51. K. Roach, *Constitutional Remedies* (Aurora, Ont.: Canada Law Book, 1994) at 14-22 and 14-23.

52. *Miron* v. *Trudel,* [1995] S.C.J. No. 44.

53. In *R.* v. *Grant*, [1993] 3 S.C.R. 323, section 10 of the *Narcotics Control Act*, authorizing warrantless searches of places other than dwelling-houses, was read down to permit such searches only in exigent circumstances. While this does seem to be a strong form of reading down, there were special circumstances in the case. The Crown had conceded that the statute should be read down to this extent, and had also conceded that so read down the statute did not authorize a particular search of concern in the case. Thus the accused had no interest in advocating otherwise.

    In *R.* v. *Laba* (1994), 34 C.R. (4th) 360 (S.C.C.) the court read down, but whether this was a strong or mild form of reading down was not clarified. Sopinka J. for the court found that a reverse onus provision under section 394 of the Criminal Code, requiring persons selling precious metals to establish that they are the owner or agent of the owner, unconstitutionally infringed the presumption of innocence, but that an evidentiary burden could constitutionally be imposed in this context. Rather than strike down the section, he chose to read it down, so that an evidentiary burden would be imposed. However, he noted that the same result could have been reached as a matter of statutory interpretation.

54. *Schachter* v. *The Queen, supra* note 46 suggests that where a law has an improper purpose or where it is irrational, the law as a whole should be struck down.