THE *CHARTER*'S BURDENS: THE RETURN TO THE "PRESUMPTION OF VALIDITY" IN SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

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The evolution of Canadian constitutional law since the introduction of the *Charter of Rights and Freedoms* in 1982 has been a study in contrasts. While the *Charter* provided a novel and powerful forum for the advancement of progressive ideals, the jurisprudence by degrees calcified and accreted into a fairly regular pattern, particularly in one important respect: it became an article of faith that it was up to the party alleging infringement to demonstrate it; once this was done, the onus switched to the state to justify the infringement if it could under the saving provisions of section 1. But in recent years, a line of jurisprudence has begun to deviate markedly from this norm: bluntly, the state's burden under section 7 of the *Charter*, which guarantees life, liberty and security of the person, has evaporated. The purpose of this paper is to outline the jurisprudence in which this has occurred and discuss the implications of the reversal for the future of *Charter* litigation.

Identifying the shift in the burden under section 7 begs the questions: *why* was the burden shifted? What is the *effect* of this shift? Do recent cases indicate that there is perhaps some value in erecting barriers to the use of the *Charter*, and in particular section 7, too aggressively? Is this simply an acknowledgment that the movement away from the "presumption of validity" — which had until the *Charter* given the state the benefit of the doubt on most constitutional questions — has been a failed experiment? Or is there something more at work here, a judicial progressivism wielding the burden as shield *and* sword?

BURDEN SHIFTS AS JUDICIAL TOOLS

It is a trite observation that one of the most effective ways to determine the likely outcome of a legal question is to examine what the burdens are and upon whom they lie. In deciding who has to prove what, and what standard of proof must be met, courts and lawmakers determine the "paths of least resistance" that the analysis will take. In essence, the burdens reveal the starting point for a decision, a judicial predisposition; beyond the *letter* of law, burdens reveal the law's *attitude*.

When a burden shifts through the development of jurisprudence, it is frequently an act of progressivism on the part of the court to bring the outcome of a given case in line with changing times and mores. The results of these burden manipulations can be startling and profound. In the aftermath of the Second World War, for instance, the young Justice Sir Alfred Thompson (later Lord) Denning shifted a single burden of proof and radically altered the benefits available to disabled veterans. Denning's decision in *Starr, Nuttall and Bourne* v. *Minister of Pensions*[1] re-empowered tens of thousands of citizens whose entitlement to benefits had pivoted on a single evidentiary hurdle. Denning held that veterans need not prove their injuries occurred during active duty. Ex-soldiers, Denning decided, need only demonstrate that they were fit going into the forces (something generally well documented) and unfit after their service; the burden would then rest on the state to prove that their ailments were *not* service-related. The *Starr* decision may have significantly shaped the social and political reconstruction of postwar England.[2]

Courts manipulate burdens to allow outcomes in accordance with prevailing social norms. As the norms shift, often, so do the burdens. For example, the famous "persons case" *Edwards* v. *Canada* overturned the presumption against women being included in the definition of "persons" who could serve in the Senate:[3]

> The word "person" ... may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case....

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[1] [1946] K.B. 345.

[2] For an excellent account of the circumstances surrounding this decision, see Doris Freeman, *Lord Denning: A Life* (London: Random House, 1993).

[3] *Edwards* v. *A.-G. (Canada)*, [1930] A.C. 124 (Privy Council).

In *Edwards*, social and political expectations had shifted towards a comprehension of the equality of women, the assumption of which was becoming the norm. Therefore, the newly "obvious" burden was established against anyone asserting that women were *not* equal, rather than those who said that they were.

Canadian constitutional jurisprudence reveals a burden that, while it has always existed, was not widely noticed until it was shifted. Our point in this paper is that, in placing the burden (on the state) in section 1, the *Charter* reversed the previous "presumption of validity" that had placed the burden on the party challenging the law and protected the state from overly ambitious litigants and overly progressive judges. Soon, that burden became settled into the case law to the point where it, too, almost disappeared in the legal consciousness; the real effects of such a legal burden did not become apparent until the series of section 7 *Charter* cases shifted it again. Under that section, recent cases indicate that it is the individual that must show that the *Oakes* criteria (used to determine a law's "reasonableness" and "justifiability") are *not* satisfied, rather than the state having to show that they are. Moreover, we will show how the *Oakes* burdens on the state under section 1 have been gradually weakened, while the test under section 7 that must be met by the individual remains robust and difficult to overcome.

Development of the Burdens in *Charter* Litigation

Many of the questions of justifying legislation that trouble the *Charter* were present during the largely ineffective tenure of the earlier *Canadian Bill of Rights*,[4] and have been carried forward into the *Charter* cases. For instance, the "rational connection" branch of the *Oakes* test is a natural extension of the "reasonable relationship" doctrine applied in *Bliss* v. *A.G. Canada*[5] and *A.G. Canada* v. *Canard*.[6] But under the various tests applied in *Bill of Rights* cases, the party challenging the state had to demonstrate that there was no "reasonable relationship." The difference in the *Charter* was that the wording itself seemed to shift the burden on the reasonableness question wholly onto the state:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This wording was interpreted by scholars and courts alike to mean that the "presumption of validity" was no longer available to the state, as noted by Yves Fricot in 1984:[7]

> [T]here is no presumption of the constitutionality of infringement in section 1 cases, and ... the doctrine [of reasonable relationship] ... runs counter to the use of the words "demonstrably justified" in section 1 and to the notion of proportionality....

We are not here interested in the burden on the individual to demonstrate *prima facie* infringement of a *Charter* right. While the courts' interpretation of the burdens imposed by the various sections of the *Charter* is interesting, deciding whether a protected right has been infringed in the first instance is a familiar problem for judges; they are well used to answering the question "was the rule breached?" Less familiar and more interesting are the burdens on the question "is it reasonable / justifiable / just to break the rule?" The difficulty, then, surrounds sections 1 and 7, the latter of which introduces a similar subjective "reasonableness" test into the protection of "life, liberty and security of the person."

Before we examine how the burden operates under section 7, though, it is necessary to briefly review how the question of burden developed under section 1.

Section 1 Burden Analysis Pre-*Oakes*: Limitations vs. Denials

Before the development of the *Oakes* test, the courts had some difficulty dealing with the questions of reasonableness and justification of restrictions under section 1. One method developed for dealing with them was to draw a distinction between whether a right had been denied outright or just limited. Section 1, according to the Supreme Court of Canada in *Quebec Association of Protestant School Boards* v. *A.G. Quebec*,[8] might operate to save a limitation on a right, but it could not be invoked when a right has been outright denied:

> The [provision in question] does not constitute a limitation, and even less a limitation "within reasonable limits, of the rights guaranteed by section 23 of the Charter. The [provision] is, for each citizen affected by it, a denial of the rights

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4. By "ineffective tenure" we are referring to the *Bill of Rights*' employment until 1985, when it was reinvigorated as a constitutional document in *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. However, as in *Singh*, the *Bill*'s protections have been largely superseded by *Charter* protections, and the *Bill*'s section 2(e), which roughly parallels aspects of the *Charter's* section 7, is usually ignored in favour of *Charter* analysis.
5. [1979] 1 S.C.R. 183.
6. [1976] 1 S.C.R. 170.
7. Y. Fricot, "Evidentiary Issues in Charter Challenges" (1984) 16 Ottawa L. Rev. 565 at 578.
8. [1984] 2 S.C.R. 66.

which the Canadian Charter guarantees him: the [provision] must, therefore, yield.

Clearly, at this early stage of *Charter* jurisprudence, there was a burden placed on Quebec, once an infringement had been demonstrated, to prove that the infringement was a "limitation" (and a reasonable one at that), not a "denial." So before *Oakes*, the situation existed in which the *burden* on the question had been established (principally through the wording of the *Charter* itself), but no one was yet quite clear on what the *question* was. The "limitation vs. denial" test used in the *Protestant School Boards* case was subjective to the point that it added little to the plain words of section 1 itself, and proposals for the framing of the inquiry began to emerge, eventually coalescing into the notorious test in *Oakes*.

THE EMERGENCE OF *OAKES*

The various elements of the *Oakes* test were there to see long before their adoption by the Supreme Court of Canada. In 1961, an article in the *Osgoode Hall Law Journal* proposed a series of criteria to determine when a limitation of rights was demonstrably justified. It involved:[9]

> [T]he existence of an evil to be curbed or a benefit to be provided, in the public interest ... the appropriateness of what is proposed as regulation to the end sought ... the extent to which individual privileges and liberties are encroached upon ... [and] the relationship between the degree of imposition and the good achieved.

In other words, pressing and substantial concern and proportionality, with proportionality in turn consisting of three elements — minimal impairment, careful design and proportion to the effect: this is the *Oakes* test in a nutshell.[10] The Rand criteria were applied by O'Leary J. in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home.*[11] But the Rand criteria were still, until the advent of the *Charter*, subject to the "presumption of validity" in which the onus favoured the state. Other elements of what became the *Oakes* test also had found their way into Supreme Court jurisprudence.[12] But it was not until *Oakes* itself that Canadian courts had a fairly defined set of criteria with which to analyze the state's burden under section 1.

We will not engage here in a discussion of how the *Oakes* test has evolved and sharpened in the intervening years. The important point is that there is an established test to be applied when questioning the reasonableness and justifiability of a law, and that the burden is on the state to meet each aspect of this test. Once that is accepted, we can move on to look at how this presupposition against the state has been undermined, and in particular how it has been reversed through the operation of section 7.

THE BURDENS IN SECTION 7

Section 7 of the Charter is different from others that guarantee rights in that it provides an *internal* qualification distinct from section 1's "saving provision." Section 7 provides that:

> 7. 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* [emphasis added].

This makes section 7 considerably more complicated, because section 1 (and thus *Oakes*) is triggered not simply by an infringement on the rights of life, liberty and security of the person, but by one not imposed in accordance with the principles of fundamental justice. If an infringement is not consistent with this principle, then the question in theory turns to the section 1 *Oakes* analysis. Yet this question is now inconsequential, because once an infringement has been found to be "fundamentally unjust," it will almost never be deemed "reasonable in a free and democratic society."[13]

Practically speaking then, the considerations that would be undertaken under a section 1 analysis arise earlier, when considering whether the infringement is compatible with "fundamental justice." In fact, as we shall see, the *Oakes* criteria have entrenched themselves fully into the section 7 "fundamental justice" portion of the test. Why is this important? In section 1, it is the state that must justify the legislation, whereas in section 7, the burden remains with the aggrieved party. If the courts are in effect doing away with the section 1 analysis in section 7 cases, then they are in fact absolving the Crown from justifying section 7 infringements.

It is apparent from the cases that, while the courts have transplanted section 1 considerations into the "fundamental justice" branch of section 7, they did not also import the state's burden to justify the infringement. Consider this quote from *R.* v. *Jones*:[14]

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[9] I. Rand, "Except by Due Process of Law" (1961) 2 Osgoode Hall L.J. 171 at 187.

[10] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[11] (1983) 44 O.R. (2d) 392, 4 D.L.R. (4th) 231 (Ont. H.C.).

[12] Y. Fricot, "Evidentiary Issues in Charter Challenges" (1984) 16 Ottawa L.R. 565.

[13] *Godbout* v. *Longueuil (City)* (1997) 3 SCR 844.

[14] [1986] 2 S.C.R. 284 [emphasis added].

> I have already stated *if it can be established* that the ... action is exercised in an unfair or arbitrary manner, then the courts can intervene.

Similar wording is found in *Rodriguez* v. *British Columbia*[15] at para. 21:

> The issue is whether ... the appellant's situation is contrary to the principles of fundamental justice.

And later, at para. 29:

> The [issue is] whether the blanket prohibition on assisted suicide is arbitrary or unfair ... and lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

Arbitrariness and unfairness, of course, are usually considered as part of the section 1 *Oakes* analysis. Here, they are included in the analysis of the breach of section 7, and the wording clearly indicates that the burden is on the aggrieved party to establish arbitrariness, not on the Crown to prove its absence.

"Fundamental Justice" Generally

The process for determining whether section 7 has been unjustifiably breached is set out most helpfully in *Rodriguez*. To remain consistent with the principles of fundamental justice, a law must be based on some social consensus that the prohibition is correct and that a fair balance is struck between the interests of the state and those of the individual. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question. Also, it is open to the court to consider the rationale behind the practice itself (in *Rodriguez*, the continued criminalization of assisted suicide) and the principles that underlie it.[16]

In *Cunningham* v. *Canada*,[17] McLachlin J. concluded that the appellant had been deprived of a liberty interest protected by section 7. She then considered whether that deprivation was in accordance with the principles of fundamental justice:[18]

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally ... In my view the balance struck in this case conforms to this requirement.

It is this second stage of the section 7 inquiry, the "fundamental justice" stage, that requires the "fair balance" analysis usually considered under section 1. Why then is the fundamental justice stage of section 7 even necessary, if section 1 covers the same ground? Perhaps the answer to this is that the *only* practical difference is the burden on the parties in each section.

In *Godbout* v. *Longueuil (City)*,[19] LaForest J. (with McLachlin and L'Heureux-Dubé JJ. concurring) attempted to clarify some aspects of the section 7 analysis, holding, among other things, that a broader view of the liberty interest must be taken. The line of cases culminating with *Godbout* is very important for the purposes of our paper, because they reveal the other side of section 7 developments. For all the barriers erected in the path of section 7 redress, the Canadian courts are nonetheless experimenting with a more progressive approach to the *breadth* of section 7 protections. The potential of this approach will be discussed briefly in our conclusion.

For the time being, we will return to our assertion that the tests in section 1 and the "fundamental justice" branch of section 7 have become virtually identical, save the opposite burden in each.

The *Oakes* Criteria as Indicia of Breaches of "The Principles of Fundamental Justice"

At one time, it was accepted that there were two considerations in deciding whether a rule or law breached the principles of fundamental justice under section 7. The first was to ask whether the rule was in accordance with fundamental tenets of the legal system, as for instance in the *mens rea* requirement in serious criminal cases.[20] The second was to consider whether the law was manifestly unfair, as was asserted unsuccessfully in *Rodriguez*. These two broad notions inevitably invited consideration of many of the same factors that weighed in the traditional section 1 analysis, and a *de facto* consideration of these factors was adopted gradually by the Supreme Court of Canada. As mentioned, it also became quickly apparent that any legislation challenged under section 7 that would fail a section 1 analysis would also fail the "fundamental

[15] [1993] 3 S.C.R. 519.
[16] *Supra* note 15 at 589-608.
[17] [1993] 2 S.C.R. 143.
[18] *Ibid.* at pp. 151-52.
[19] *Supra* note 13.
[20] *Re Section 94(2) of the Motor Vehicle Act of B.C*, [1985] 2 S.C.R. 486.

justice" provisions, and perhaps vice-versa, as in *R.* v. *Heywood*:[21]

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act, supra* at 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes section 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the section 1 analysis.

But isn't "overbreadth" supposed to be weighed under section 1? While the *Oakes* test is not applied specifically in the initial stage of section 7 analysis, it is safe to say that the factors taken into account when considering "fundamental justice" tend to fit into the categories covered by *Oakes*. So, while the *Oakes* test may not be determinative in considering the fundamental justice of a section 7 matter, it is an accepted and stringent analysis, and it is apparent that *Oakes* sets out the fundamental framework through which a section 7 analysis may proceed.[22]

The examples of *Oakes*-type questions being asked at the fundamental justice stage are legion. The recent case of *Godbout,* considered "pressing and substantial concerns" (analogous to the first branch of the *Oakes* test). *Jones* and *Rodriguez,* considered the "arbitrary or unfair" effects of legislation, straight out of the second branch. Minimal impairment, from the next part of the second branch of *Oakes*, was considered in *Heywood* and *Godbout*. Proportionality between effects on individual vs. state interest weighed in during the fundamental justice considerations in *Rodriguez, Godbout* and *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*.[23]

Even the principle, most frequently argued under section 1, that the courts must behave more deferentially in cases involving broad policy has been applied to section 7's "fundamental justice" analysis. In particular, a deferential approach has been held to be appropriate in reviewing legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives.[24] Likewise, *Rodriguez* held that when dealing with contentious and morally laden issues, Parliament should be given wide latitude.

In *Rodriguez*, Justice MacLachlin objected to the majority's inclusion of certain elements of the *Oakes* test in the "fundamental justice" analysis (discussed earlier), arguing that the effect of this was to relieve the heavy burden upon the Crown and place it on the individual:[25]

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's section 7 rights. Societal interests are to be dealt with under section 1 of the Charter, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by section 7 should take place within the confines of section 1 of the Charter.
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> I add that *it is not generally appropriate that the complainant be obliged to negate societal interests at the section 7 stage, where the burden lies upon her, but that the matter be left for section 1, where the burden lies on the state.*

Nonetheless, in the recent decision in *Godbout,* the inclusion of *Oakes* criteria in the section 7 analysis was accepted by La Forest J., with L'Heureux-Dubé and McLachlin JJ. concurring:[26]

> I should explain that I see no need to examine the issues in this appeal under the rubric of section 1 of the Charter, given *that all the considerations pertinent to such an inquiry have, I think, already been canvassed in the discussion dealing with fundamental justice.* Moreover, and as this Court has previously held, a violation of section 7 will normally only be justified under section 1 in the most exceptional of circumstances, if at all .... Such circumstances do not exist here [emphasis added].

Remember that inclusion of *Oakes* criteria in the section 7 analysis was found to be unacceptable to MacLachlin J. in *Rodriguez*, as noted above. Resistance in the Court to this important change has apparently disappeared.

There are indications that the Court would like to treat section 7 questions generally with more deference to government than it does elsewhere. For instance, in

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[21] [1994] 3 S.C.R. 761.

[22] We say "may" here, rather than "must," because the Supreme Court has yet to offer a definitive instruction in this respect.

[23] [1990] 1 S.C.R. 425.

[24] *Ontario* v. *Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

[25] *Supra* note 15 at 621-622 [emphasis added].

[26] *Supra* note 13 at 909 [emphasis added].

considering whether a practice offends the principles of fundamental justice, it is appropriate to consider whether the "vast majority" of judges have not found it so. This is true whether the practice has its origins in statute or the common law. It is also appropriate to consider whether legislative practice has been similar.[27]

Further, it has been held in *Rodriguez* that "principles which are 'fundamental' [are ones that] would have general acceptance among reasonable people."[28] If the *Oakes* criteria are indeed to be considered in the "fundamental justice" analysis, then the burden would be on the individual to demonstrate this "general acceptance." When one considers the poor ability of individuals, particularly criminal defendants, to marshal the resources to present such a case, and combines that consideration with the overall burden shift that we demonstrate here, the result appears clear: the inertia of the criminal law will not be lightly interfered with.

So we find that under section 7, the Court has methodically made relief under section 7 more difficult for the individual and eased the burden on the state. But while this process was underway, there was a corresponding lessening of the state's burden under the *Charter* generally. The cases in which this has occurred indicates something close to a wholesale return to the "presumption of validity" doctrine that the *Charter* was thought to have retired.

The Lightening of the State's Burden under Section 1

The relief on the state's burden under section 1 of the *Charter* is most apparent by examining the sort of evidence that has been required for the "reasonableness" onus to be met. We have discussed already the difficulty faced by an individual (particularly a criminal defendant or other private party) in showing a breach of "fundamental justice" under section 7. However, the state has been able to avail itself of very relaxed evidentiary requirements under section 1. Sometimes, no evidence has been presented or even requested. The majority in *Jones* in effect took judicial notice of the satisfaction of the *Oakes* criteria, and even LaForest J., who did engage in the *Oakes* exercise, held that "a court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society."[29]

Similarly, in *Gray* v. *R.*,[30] the Manitoba Court of Appeal found that in its section 1 analysis, "it is undesirable to proceed on the basis of evidence." The court was happier with undertaking its section 1 analysis on the basis of "common sense."

Clearly, these decisions were signaling a discomfort in the judiciary with forcing the state to comply with the rigorous *Oakes* analysis, at least when enforcing the minutiae of criminal law. The courts apparently thought the burden on the Crown was unnecessary in many cases, and were content just to deem the point moot. This was similar to the approach taken in several other *Charter* cases, such as *Bonin* v. *R.*[31] In that case, the B.C. Court of Appeal found that previous section 1 findings, in theory findings of fact, could have precedential value through judicial notice. In doing so, the Court of Appeal seemed to elevate findings of fact in section 1 cases into findings of law,[32] so further reducing the Crown's burden.

And yet, as the section 1 burden on the state is relaxed, there has been no reduction of the parallel burden on the individual in section 7; in fact, as we have seen, it has if anything increased. He or she is still expected to present convincing evidence that justice demands change, whereas the state benefits from the presumption that change is not necessary — the "presumption of validity" *redux*.

Conclusion: The Burden Shift and the Future of Section 7

If we accept, as MacLachlin J. warned in her *Rodriguez* dissent quoted above, that there has been a shift of the burden in section 7 cases effected by the introduction of the *Oakes* criteria into the "fundamental justice" stage, what is the effect of this?

Section 7 is perhaps the most broad and inclusive of the *Charter*'s provisions. Its guarantees of "liberty" and "security of the person" captures (and in effect puts into question) any criminal law that could result in imprisonment.[33] Before the *Charter*, anyone seeking to

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[27] *Beare* v. *R.*, [1988] 2 S.C.R. 387.

[28] *Supra note 15* at para. 54.

[29] *Supra* note 14 at 299.

[30] (1989), 44 C.C.C. (3d) 222 (Man. C.A.).

[31] (1989), 47 C.C.C. (3d) 230 (B.C.C.A.).

[32] This assumes, of course, that one accepts that one indication of whether a question is one of fact or law can be in part determined by asking "could a precedent on this question be binding?" If the answer is yes, it is almost certain that the court is viewing the question as one of law and not fact, as the latter would be limited *ipso facto* to the circumstances of the case.

[33] While section 7 has of course not been restricted in its application to the criminal sphere, it is fair to say that Canadian courts have been reluctant and cautious in applying it elsewhere. See for instance the various (and contradictory) decisions on the application of section 7 to Human Rights tribunals, such as *Watson* v. *British Columbia Council of Human Rights*, [1994] B.C.J. No. 3196 (B.C.S.C.); *Saskatchewan Human Rights Commission* v. *Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *Nisbett* v. *Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.); *Blencoe* v. *B.C. Human Rights Commission* (May 11, 1998)

challenge an established criminal law under the *Bill of Rights* or the constitution (written or otherwise) would face the difficulty of proving its unjustifiability. In other words, the criminal law in particular existed for hundreds of years with the state relying on the assumption of validity.

On the face of it, the *Charter* appeared to remove this blanket presumption from the arsenal of the state. It would, on a plain reading of section 1, force the state to actively and convincingly justify every aspect of each and every criminal or penal provision whenever challenged to do so. It would require the courts to micromanage every aspect of a system that had evolved over centuries of cases and legislation. Remember the Court had already said that a deferential approach should be taken in relation to section 7 review of legislative enactments with legitimate social policy objectives.[34]

If the burden remained on the state to justify all infringements of, for instance, liberty, it would permit a complete reconstruction of the criminal law at the whim of the Supreme Court of Canada. This would be daunting enough with a *narrow* interpretation of "life, liberty and the security of the person," in other words one where section 7 was *restricted* to the criminal sphere. It would be virtually impossible if the court wanted to take a more broad and progressive approach to these words, as they have shown themselves willing to consider in cases like *Rodriguez*, which explored the liberty and security interests in controlling one's own body, and as for instance the majority of the B.C. Court of Appeal did in *Blencoe*, anticipating the "direction" of the Supreme Court jurisprudence.[35]

So the court has returned to the old doctrine of the "presumption of validity" at least with respect to section 7, and they have done this apparently to protect the bulk of the criminal law from constitutional evisceration. But at the same time, the court has begun to consider the application of section 7 far beyond the criminal realm.

To this end, it is instructive that the cases in which the more progressive possibilities of section 7 are explored are also the ones that most concretely establish the *Oakes* test at the "fundamental justice" stage. So perhaps the shift of the onus onto the individual in section 7 cases is not as restrictive as it appears, and may in fact be necessary in order to allow the courts to expand the interests protected by section 7 beyond their traditional bounds. Essentially, the message from the courts might be "we're willing to look at section 7 very broadly, but apply it slowly; the burden must thus be on the person seeking the application to a particular prohibition or restriction." This is why we say that the burden may be manipulated as both shield *and* (albeit indirectly) as a sword under section 7.

Nonetheless, the clear inertia remains with the state, who as we have seen can uphold laws under section 1 without evidence, based on judicial notice or simply "common sense." Conversely, where under section 7 the individual bears the complete burden, one can not conceive of success without convincing evidence that the law does *not* satisfy the *Oakes* criteria. So not only is the burden shifted under section 7, it is arguably considerably heavier as well. This may in part account for the dismal success rate of section 7 arguments at the highest level.

But optimistically, while the jurisprudence on section 7 appears to have developed more restrictive rules than other sections, in the long term this may not be as regressive as it appears. Tightly controlling access to section 7 relief through the burden-shift that we have discussed here might be the first step in broadening its protection further beyond the circumscribed field of the criminal law. If this is indeed the case, then we might look forward to the next decade, when the Court might begin to progressively expand section 7 protections in new and innovative ways.❑

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[34] *Ontario* v. *Canadian Pacific Ltd*, *supra* note 24.

[35] The court in *Blencoe* used section 7 to protect reputational and other interests in the face of the stigma triggered by a complaint of sexual harassment.