

THE PRINCIPLES OF FUNDAMENTAL JUSTICE, SOCIETAL INTERESTS AND SECTION 1 OF THE CHARTER

Thomas J. Singleton*
Halifax

In this article, the author discusses the approach of the Supreme Court of Canada to the treatment of societal interests in cases involving section 7 of the Charter. From a review of the cases where the Court has considered the issue of where to balance societal interests — in the determination of whether there has been a violation of the principles of fundamental justice or in the analysis under section 1 — it becomes apparent that the Court is far from having any conceptually coherent approach to this issue, which is often determinative of individual rights under section 7. The author demonstrates that there are, in fact, two radically different approaches to the treatment of societal interests in section 7 cases, resulting in a situation where the lower courts and the profession at large are effectively without direction from the Court on this extremely important issue. The author argues that the tendency of some justices to import societal interests into the determination of the principles of fundamental justice effectively emasculates the rights guaranteed by section 7 because the resulting additional burden of proof on the individual rights claimant is excessively onerous.

Dans cet article, l'auteur discute du traitement qu'accorde la Cour suprême du Canada aux intérêts de la société dans les causes impliquant l'article 7 de la Charte. L'auteur passe en revue les arrêts où la Cour a considéré la question de savoir où les intérêts de la société devaient être pris en compte — en déterminant s'il y a eu ou non violation des principes de la justice fondamentale ou dans l'analyse aux termes de l'article 1. De toute évidence, la Cour ne présente aucune cohérence dans son approche conceptuelle de cette question, laquelle bien souvent détermine les droits de l'individu aux termes de l'article 7. L'auteur démontre qu'il existe en fait deux approches diamétralement opposées au traitement accordé aux intérêts de la société dans les décisions de la Cour suprême, ce qui a pour résultat de laisser les tribunaux inférieurs et la profession en général, à toutes fins utiles, sans directives sur cette question extrêmement importante. Selon l'auteur, la tendance actuelle de certains juges de prendre en compte les intérêts de la société dans la détermination des principes de la justice fondamentale a pour effet d'émasculer les droits garantis par l'article 7 en imposant à l'individu un fardeau de la preuve additionnel qui est excessivement onéreuse.

* Thomas J. Singleton, LL.B., B.C.L., LL.M., of Singleton Murphy, Halifax, Nova Scotia. I would like to thank Professor Yves Ouellette of the Faculté de droit de l'Université de Montréal for having reviewed and commented on earlier drafts of this article. I would also like to thank Céline Frenette and William Laurence for their encouragement and assistance in this endeavour.

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 s. 7 rights. Societal interests are to be dealt with under s. 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 s. 7 should take place within the confines of s. 1 of the *Charter*.

(Lamer C.J.C. in *Swain*¹)

[...] this court has made it clear that the community's interest is one of the factors that must be taken into account in defining the content of the principles of fundamental justice.

(La Forest J. in *Thompson Newspapers*²)

Fundamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens.

(L'Heureux-Dubé J. in *Thompson Newspapers*³)

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I. Introduction

While Lamer C.J.C. may have been clear on where to deal with societal interests in *Swain*, the speeches of his colleagues, La Forest and L'Heureux-Dubé JJ., in *Thompson Newspapers* and other decisions demonstrate that the Supreme Court of Canada has rarely been consistent on whether the balancing of these interests⁴ with individual rights⁵ guaranteed by section 7 should take place within that

¹ *R. v. Swain* (1991), 125 N.R. 1 at 38 [hereinafter *Swain*].

² *Thompson Newspapers v. Canada*, [1990] 1 S.C.R. 425 at 541 [hereinafter *Thompson Newspapers*].

³ *Ibid.* at 583.

⁴ In this article the term "societal interests" is understood to include related terms such as "the public interest," "communal interests," "state interest" and other similar terms. Indeed, in discussing some cases these terms may be used interchangeably.

⁵ In this article, we refer to "individual rights" guaranteed by section 7 because the rights to life, liberty and security of the person generally have no application to corporations, except in limited circumstances where individuals are also involved; see *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927 and *Thompson Newspapers*, *supra* footnote 2, Lamer J.

section or under section 1 of the *Charter*.⁶ In fact, since the Court first considered section 7 in *Re B.C. Motor Vehicle Act*⁷ the issue of where to balance societal interests and individual rights has been the subject of marked disagreement between the majority and minority opinions⁸ or, alternatively, has been ignored altogether in cases where the Court has proceeded without dissent to import societal interests into the principles of fundamental justice, thus precluding any section 1 inquiry whatsoever.⁹ The cases where the Court has considered the principles of fundamental justice testify to the development of two competing approaches to the treatment of societal interests. The first, typified by the judgment of Lamer J. in *Re B.C. Motor Vehicle Act* and reaffirmed in later cases such as *Swain*, would only consider societal interests under section 1, while the second, typified by the reasoning of La Forest J. in cases such as *Lyons*, *Beare*, and *Thompson Newspapers*, that of L'Heureux-Dubé J. in *Thompson Newspapers* and by that of Sopinka J. in *Rodriguez*, would factor in these interests in the determination of the principles of fundamental justice. Indeed, cases such as *Thompson Newspapers*, *Swain* and *Rodriguez* demonstrate the lack of any conceptually coherent approach, with some justices agreeing with the inclusion of societal interests in the determination of the principles of fundamental justice in one case and insisting on a section 1 analysis in the other.¹⁰

As Lamer C.J. noted in *Swain*, where the balancing of societal interests and individual rights takes place can have important consequences for the burden of proof the section 7 rights claimant must meet. If the societal interests are considered uniquely under section 7 in the determination of whether a principle of fundamental justice has been infringed, the state has the advantage of not having to meet even the far less stringent requirements of the *Oakes* test — post

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. Section 7 reads:

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

Section 1 reads:

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.

⁷ [1985] 2 S.C.R. 486.

⁸ *Swain*, *supra* footnote 1 and *Rodriguez v. British Columbia (Attorney General)* (1993), 158 N.R. 1 (S.C.C.) [hereinafter *Rodriguez*] are two recent examples of cases where the disagreement on this issue was marked.

⁹ See for example, *R. v. Lyons*, [1987] 2 S.C.R. 309 [hereinafter *Lyons*]; *R. v. Beare*, [1988] 2 S.C.R. 387 [hereinafter *Beare*].

¹⁰ In *Swain*, *supra* footnote 1, L'Heureux-Dubé J. insisted that the balancing of interests occur in the determination of the principles of fundamental justice, but concurred in the opinion of McLachlin J. in *Rodriguez*, who was of the opinion that societal interests were to be considered under section 1 and not in the determination of the principles of fundamental justice in section 7. Sopinka J. concurred in the opinion of Lamer C.J. in *Swain*, but wrote the majority opinion in *Rodriguez* where he considered the societal interest uniquely in the determination of the principles of fundamental justice.

Edwards Books — to justify a restriction of a *Charter* protected right.¹¹ If the principles of fundamental justice are conceived as a balancing of interests, the individual claiming an infringement of a section 7 right must prove three separate elements: (1) that its interest is included under “life, liberty and security of the person,” (2) that a principle, or principles, of fundamental justice are infringed in the context in which the right is being vindicated, and (3) that this principle is not overridden by a valid state or communal interest in these circumstances. The addition of this third step has the consequence of imposing a much heavier burden of proof on an individual invoking a section 7 right. The normal burden for the individual in respect of other rights under the *Charter* is to prove that there has been a breach of a *Charter* right, with the burden

¹¹ In *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*] at 138-139, Dickson C.J. outlined the criteria to be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society in the following passage at:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *R. v. Big M Drug Mart Ltd.*, *supra* at 352 S.C.R. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R. v. Big M Drug Mart Ltd.*, *supra*. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair “as little as possible” the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra* at 352. Third, there must be proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance.”

In *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 [hereinafter *Edwards Books*], the Court would appear to have softened the stringent requirements laid out in *Oakes*. For a commentary on the Court’s dilution of the criteria in the *Oakes* test, see P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 852-889 and P. Hogg, “Section 1 Revisited” (1991) 1 Nat. J. Con. Law 1-24. See also: C. Dassios and C. Prophet, “Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada” (1993) 15 *Advocates’ Q.* 289-307; E.P. Mendes, “In Search of a Theory of Social Justice: The Supreme Court Reconceives the *Oakes* Test” (1990) 24 R.J.T. 1; G. Tremblay & S. Marsolais, “Reconnaître aux pouvoirs politiques une marge d’appréciation aux fins de l’article premier de la Charte canadienne” (1992) 52 *Can. Bar Rev.* 841-857; P. Blache, “The Criteria of Justification Under *Oakes*: Too Much Severity Generated Through Formalism” (1991) 20 *Man. Law J.* 437-450; A. Lokan, “The Rise and Fall of Doctrine Under Section 1 of the *Charter*” (1992) 24 *Ottawa L.R.* 163.

switching to the Crown to prove why an infringement is justified.¹² This paper takes the position that the importation of societal interests into the determination of the principles of fundamental justice effectively emasculates the individual rights guaranteed by section 7. An examination of the cases where the Court has taken this route will demonstrate that the individual will rarely, if ever, meet the additional burden imposed. In contrast, the results in the cases where the Court has proceeded to deal with societal interests under section 1 have generally been favourable to the individual rights claimant. This paper will critically examine both approaches to the treatment of societal interests in light of the theory of section 7 advanced by the Court in *Re B.C. Motor Vehicle Act* and argue that the consideration of societal interests in the determination of the principles of fundamental justice does not correspond with the "purposive" approach to the interpretation of *Charter* rights outlined in *Southam*¹³ and *Big M Drug Mart*.¹⁴ It will become clear that in decisions subsequent to *Re B.C. Motor Vehicle Act*, some justices have distanced themselves considerably from the approach outlined by Lamer J. and that the interpretative approach advanced by La Forest J. in *Lyons and Beare*, which involves a balancing of individual rights and societal interests in the determination of the principles of fundamental justice, has become the preferred vehicle to limit the application of the right to life, liberty and security of the person.

II. Principles of Fundamental Justice

Before proceeding to examine the treatment of societal interests in *Re B.C. Motor Vehicle Act* and subsequent decisions, it will be useful to summarize the Court's approach to the question — "What are the principles of fundamental

¹² See W.H. Charles *et al.*, *Evidence and the Charter of Rights and Freedoms* (Toronto: Butterworths, 1989) at 14-15. While the burden of proof, which should fall on the Crown under the *Oakes* test is onerous, there has been an unfortunate tendency on the part of some justices to simply state that the infringement is justified under section 1 on the basis of what amounts to taking judicial notice. See for example the approach of Pratte J.A. in *Gallant v. Canada*, [1989] 3 F.C. 329 (C.A.) [hereinafter *Gallant*]. Pratte J.A. would appear to have taken judicial notice of the justification under section 1 since he noted at 340, that the appellant had not addressed the point. He stated:

However, the answer to the question appears to me to be so obvious that I do not need any evidence or argument to conclude that, in a free and democratic society, it is reasonable, perhaps even necessary, to confer such a wide discretion on penitentiary authorities.

This approach to justification under section 1 of the *Charter* would seem to ignore completely the test elaborated by the Supreme Court in *Oakes*, *ibid.* and would appear to be a problematic extension of the situations where a judge is entitled to take judicial notice. See C. Fabien, "L'utilisation par les juges de ses connaissances personnelles dans le procès civil" (1987) 66 Can. Bar Rev. 433-489. *Contra*, Hogg in *Constitutional Law of Canada*, *ibid.* at 859, suggests that the Court should take a broader view of judicial notice in *Charter* cases.

¹³ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 [hereinafter *Southam*].

¹⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [hereinafter *Big M Drug Mart*].

justice?”. The manner in which the Court has endeavoured to answer this question has usually determined at what stage societal interests are considered.

In *Re B.C. Motor Vehicle Act*, Lamer J. had to determine whether section 7 was infringed by a section 94(2) of the British Columbia *Motor Vehicle Act* which mandated a sentence of imprisonment for an absolute liability offence.¹⁵ While the liberty interest was apparent, Lamer J. discussed the principles of fundamental justice holding that they are contravened where imprisonment is mandated by statute for absolute liability offenses. The approach to the principles of fundamental justice outlined by Lamer J. is important as it has generally been the starting point for any section 7 analysis. Lamer J. viewed the principles of fundamental justice as “a qualifier of the right not to be deprived of life, liberty and security of the person,”¹⁶ and went on to note that while the phrase “principles of fundamental justice” serves to establish the “parameters of the interests,” it cannot be “interpreted so narrowly as to frustrate or stultify them.”¹⁷ In discussing the scope of the principles of fundamental justice, Lamer J. warned that the term was not synonymous with natural justice and should not be interpreted so narrowly,¹⁸ rejecting the idea that the principles of fundamental justice have only a procedural content and allowing that these principles could have a substantive application.¹⁹ For Lamer J., “ss. 8 to 14 provide an invaluable key to the meaning of the principles of fundamental justice” because these rights have all been recognized as “essential elements of a system for the administration of justice which is founded upon a belief in «the dignity and worth of the human person» [...] and on the «rule of law»”.²⁰ Lamer J. elaborated what has come to be the central element in the approach of the Supreme Court to the principles of fundamental justice:

It is this common thread which, in my view, must guide us in determining the scope and content of “principles of fundamental justice”. In other words, 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

¹⁵ R.S.B.C. 1979, c. 288, s. 94(1), (2). Section 94(2) provided that driving without a valid driver’s licence or with a suspended driver’s licence was an offence of absolute liability in which fault could be established by proof of driving whether or not the driver knew of the prohibition or suspension.

¹⁶ *Supra* footnote 7 at 501.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 502. In subsequent decisions it became clear that procedural fairness was also encompassed by the principles of fundamental justice; see: *Jones v. The Queen*, [1986] 2 S.C.R. 284 at 322 Wilson J. [hereinafter *Jones*]; *Lyons*, *supra* footnote 9 at 361, La Forest J. In this context, consider the comments of Pratte J.A. in *Gallant*, *supra* footnote 12 at 338, to the effect that in comparison with the common law rules of procedural fairness and natural justice which can be modified by the legislature, the principles of fundamental justice can only be modified in accordance with section 1 of the *Charter*, and in this sense are not variable or flexible. In *Gallant*, Pratte J.A. balanced the competing interests of the inmate subject to transfer and the security interests of the penitentiary system under section 1.

¹⁹ *Re B.C. Motor Vehicle Act*, *supra* footnote 7 at 499.

²⁰ *Ibid.* at 503.

as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.²¹

On the key question of which principles are principles of fundamental justice, Lamer J. suggested how the Court would approach the issue but avoided any set definition:

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.²²

In *Re B.C. Motor Vehicle Act*, section 94 violated the principle that an individual should not be deprived of his liberty as punishment for an offence which had no *mens rea* requirement — which Lamer J. found was an "essential element" of our system of justice from "time immemorial."²³

Re B.C. Motor Vehicle Act was a case where it was relatively easy to identify the basic tenet of our legal system which had not been respected by section 94. However, the overall approach to the principles of fundamental justice in *Re B.C. Motor Vehicle Act* can be viewed as a reaction by the Court to concerns that a broad interpretation of section 7 would result in the courts usurping the powers of the legislature. These concerns were expressed in arguments by some academics²⁴ and endorsed in some lower court decisions²⁵ holding that the

²¹ *Ibid.* at 503. Lamer J. noted that the legislator had made a conscious choice to let the courts determine the content of the principles of fundamental justice (emphasis added).

²² *Ibid.* at 513. In her reasons, at 531, Wilson J. was no more specific than Lamer J. as to what are the principles of fundamental justice:

It will be for the courts to determine the principles which fall under the rubric "the principles of fundamental justice". Obviously, not all principles of law are covered by the phrase; only those which are basic to our system of justice.

²³ *Ibid.* at 513; Wilson J. was of the opinion, at 532-533, that the principle of fundamental justice infringed by section 94 was the principle that the punishment fit the crime and that imprisonment for an absolute liability offence was disproportionate. See also the discussion of *mens rea* in the context of regulatory offenses in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 184-189, Lamer C.J. and at 235-241, Cory J. [hereinafter *Wholesale Travel*].

²⁴ L. Tremblay, "Section 7 of the Charter: Substantive Due Process" (1984) 18 U.B.C. L.Rev. 201-254; J.D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 Man. L.J. 455-475; B. Schwartz, "The Charter and Due Process" and "The Charter and Economic Regulation" a panel discussion in (1983) *Issac Pitblado Lectures on Advocacy: Rights and Remedies - New Developments* (Winnipeg: Law Society of Manitoba, 1983) at 31-49; P. Garant, "Fundamental Freedoms and Natural Justice" in W.S. Tarnopolsky & G.A. Beaudoin, *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 257-290; P. Garant, "L'article 7 de la Charte — Toujours énigmatique après 18 mois de jurisprudence" (1983) 13 Man. L.J. 477-487.

principles of fundamental justice were procedural only. Lamer J. observed defensively that "they [the principles of fundamental justice] do not lie in the realm of public policy."²⁶ Rather the search for the principles of fundamental justice turns inward — focusing on the "inherent domain of the judiciary" — and of necessity, backward — to the historical development²⁷ of tenets or principles in that domain. The result is a narrow focus which has the potential of ignoring the development of fundamental values in society as a whole, which are peripheral to or occur outside that domain, narrowly defined. As well, the focus on "our legal system"²⁸ suggests that fundamental principles of justice which have developed and found acceptance in other legal systems may not be considered relevant. Yet, since the end of the Second World War, fundamental principles which transcend individual legal systems have developed in multi-national forums and found expression in international documents; for example, the *European Convention of Human Rights*²⁹ and the *Universal Declaration of Human Rights*.³⁰ To focus the search for the principles of fundamental justice inward and backward, and limiting it to our legal system is a restrictive interpretative approach to a *Charter* right. The term itself, "principles of fundamental justice," suggests the inclusion of principles which are universal and which transcend tenets of individual legal systems. In such an optic, some principles are so fundamental that their recognition should not depend upon whether they have been recognized by statute in Canada, or whether the common law in Canada has managed to catch up with developments which advance and protect individual rights such as life, liberty and security of the person in other jurisdictions.³¹ This point is not so theoretical when we consider

²⁵ See, for example, the following decisions where it was held that section 7 was procedural only: *R. v. Operation Dismantle* (1983), 3 D.L.R. (4th) 193 (F.C.A.); *Re Lathman and Solicitor-General of Canada et al.* (1984), 9 D.L.R. (4th) 393 (F.C.T.D.); *Re M.H. and The Queen (No. 2)* (1984), 16 D.L.R. (4th) 542 (Alta. Q.B.); *R. v. Cadeddu* (1982), 32 C.R. (3d) 355 (Ont. H.C.J.); *Re Jamieson and The Queen* (1982), 70 C.C.C. (2d) 430 (Qué. S. Ct.). In decisions such as *Wilson v. Medical Services Comm. [B.C.]* (1988), [1989] 2 W.W.R. 1 (B.C.C.A.), section 7 was held to have substantive as well as procedural content.

²⁶ *Re B.C. Motor Vehicle Act*, *supra* footnote 7 at 503.

²⁷ See *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 848, L'Heureux-Dubé J. [hereinafter *Kindler*]: "This may involve us in historic and comparative inquiries." L'Heureux-Dubé J., at 848-849, in discussing the extradition context, seemed to envisage a two part inquiry: "Is the impugned provision consistent with extradition practices, viewed historically and in the light of current conditions?" *Kindler* involved an analysis of the world-wide approach to capital punishment in an effort to determine if the extradition of an individual to a state where he may face the death penalty violated the principles of fundamental justice.

²⁸ *Re B.C. Motor Vehicle Act*, *supra* footnote 7 at 503 (emphasis added).

²⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955) 213 U.N.T.S. 221, CMD. 8969, E.T.S. 5.

³⁰ G.A. Resolution 217A (III) December 10, 1948, U.N. Doc. A/810, reprinted in [1948] U.N.Y.B. 465.

³¹ In *Rodriguez*, *supra* footnote 8 at 14, Sopinka J. emphasized that the principles of fundamental justice must have as their base a consensus that they are vital to our societal notion of justice: "A mere common law rule does not suffice to constitute a principle of

that some fifteen years elapsed following the decision of the House of Lords in *Ridge v. Baldwin*³² before the concept of procedural fairness in proceedings which were neither judicial or quasi-judicial was finally recognized by the Supreme Court of Canada.³³

In subsequent decisions, La Forest J. would use this restrictive interpretative approach to fashion a much narrower contextual application of the "basic tenets of our legal system" as the source of the principles of fundamental justice with results for the section 7 rights claimant radically different from that in *Re B.C. Motor Vehicle Act*. In *Lyons*, where the section 7 issue involved an indeterminate sentence imposed on an individual designated a dangerous offender under Part XXI of the *Criminal Code*,³⁴ La Forest J. outlined his approach to the principles of fundamental justice:

[...] to determine whether Part XXI violates the principles of fundamental justice by the deprivation of liberty suffered by the offender, it is necessary to examine Part XXI in light of the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions.³⁵

In *Lyons*, the "basic tenets of our legal system" became the "basic principles of penal policy" and La Forest J. considered the practices and procedures which "have animated" penal policy in Canadian and other jurisdictions to conclude that there was no violation of the principles of fundamental justice in the imposition of an indeterminate sentence on dangerous offenders.³⁶

In *Beare*, La Forest J. followed up with the approach he had applied in *Lyons* and considered the compulsory fingerprinting of accused, but not yet convicted,

fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required." Nevertheless, Sopinka J. went on to reject "respect for human dignity" as a principle of fundamental justice in *Rodriguez* at 16.

³² [1964] A.C. 40.

³³ *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1978] 1 S.C.R. 311 [hereinafter *Nicholson*].

³⁴ R.S.C. 1970, c. C-34.

³⁵ *Lyons*, *supra* footnote 9 at 327 (emphasis added). La Forest J. reiterated this point in *Beare*, *supra* footnote 9 at 402-403. An obvious problem with this approach is the possibility that the determination of the principles of fundamental justice becomes a captive of pre-*Charter* legislative and judicial pronouncements in much the same way that the guarantees contained in the *Canadian Bill of Rights* were interpreted to be those which were recognized prior to its adoption in 1960. In so far as the *Charter* is concerned, Dickson J. rejected such an approach in *Big M Drug Mart*, *supra* footnote 14 at 343-344. In *Thompson Newspapers*, *supra* footnote 2 at 539, La Forest J. at least recognized the pitfall of this approach when he discussed previous Canadian experience. He stated: "By this, I do not mean that we must remain prisoners of our past."

³⁶ *Lyons*, *ibid.* at 327-334. Lamer J., while agreeing with La Forest J. that the imposition of an indeterminate sentence did not violate the principles of fundamental justice, was of the opinion that there was a violation of section 11(f) in that the determination of whether an individual was a dangerous offender should have been made by a jury. Wilson J., dissenting, would have found a violation of section 7 on the grounds that the accused did not know the full extent of his jeopardy before pleading guilty. She did not elaborate on the issue of societal interests.

individuals under section 2 of the *Identification of Criminals Act*³⁷ "against the applicable principles and policies that have animated legislative and judicial practice in the field," to determine the content of the principles of fundamental justice in that context.³⁸ La Forest J. reviewed legislative and judicial practices in Canada, England and the United States in so far as fingerprinting was concerned and noted that it has been widely accepted as a law enforcement tool.³⁹ He observed that "the vast majority of judges who have had to consider the matter have not found custodial fingerprinting fundamentally unfair."⁴⁰ For La Forest J., while the common law is not determinative in assessing whether a particular practice violates the principles of fundamental justice, "it is certainly one of the major repositories of the basic tenets of our legal system referred to in *Re B.C. Motor Vehicle Act*, *supra*."⁴¹

Since La Forest J. had determined that the principles of fundamental justice were not violated by the fingerprinting provision, it was unnecessary to consider section 1 of the *Charter*. Arguably, the reasoning engaged in by La Forest J. in his analysis of the principles of fundamental justice is the kind of reasoning which would be expected under section 1 of the *Charter*. It was clearly open to the Court to conclude that the principle of fundamental justice violated by section 2 of the *Identification of Criminals Act* was the presumption of innocence,⁴² and the state justification for an infringement of that principle and

³⁷ R.S.C. 1970, c. I-1.

³⁸ *Beare*, *supra* footnote 9 at 402-403.

³⁹ In the United Kingdom the *Police and Criminal Evidence Act 1984*, (U.K.) 1984, c. 60, s. 61, was much more restrictive of police discretion than the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, and provided for the destruction of fingerprints where the individual was acquitted.

⁴⁰ *Beare*, *supra* footnote 9 at 406.

⁴¹ *Ibid*. Other arguments advanced by La Forest J. emphasized the requirement that the police have adequate and reasonable powers to investigate crime and the "sense of proportion" in terms of other incidents of being placed under arrest and charged with a criminal offence. In discussing the procedures, which left the police a large discretion as to who would or would not be fingerprinted, La Forest J. reiterated, at 412, the point he made in *Lyons*, *supra* footnote 9 at 362, that "the *Charter* guarantees fair procedures but it does not guarantee the most favourable procedures that can be possibly imagined." Thurlow J. had made the same point in *Howard v. Stony Mountain Institution*, [1984] 2 C.F. 642 (F.C.A.) at 661:

A further observation is that the standard of what is required to satisfy the section in its procedural sense, as it seems to me, is not necessarily the most sophisticated or elaborate or perfect procedure imaginable but only that of a procedure that is fundamentally just.

⁴² This was the principle which animated the judgments of Bayda C.J.S. and of Cameron J.A. at the Saskatchewan Court of Appeal in *Beare v. R.* (1987), 57 C.R. (3d) 193. Bayda C.J.S. posed the question, at 205-206: "What are the principles of fundamental justice the *Identification of Criminals Act* engages or depends upon to justify an impingement of the right to life, liberty and security of the person? There appear to be none. The purpose of the Act is clear. It is, as the title implies, to identify criminals." That the presumption of innocence is a principle of fundamental justice seems beyond doubt; see *Wholesale Travel*, *supra* footnote 23, Lamer C.J.

arguments relating to its proportionality should then have occurred under section 1 of the *Charter*.

In *Beare*, La Forest J. characterized the issue narrowly, in terms of the reasonableness of fingerprinting in the context of an individual charged with an offence, determining that there was no principle of fundamental justice which holds that an individual charged with an offence is not required to submit to fingerprinting before conviction. Clearly, when the issue involved is characterized in such narrow and essentially negative terms, it will not be difficult to conclude that no principle of fundamental justice has been violated. The other implication of the approach of the Court in *Beare* is that widespread, efficient and long standing law enforcement procedures seemingly become themselves "principles of fundamental justice," which compete with "principles" such as the presumption of innocence. For La Forest J., the principles of fundamental justice, which limit the rights to life, liberty and security of the person, are a balance between principles fundamental to an individual and those fundamental to the collectivity represented by the state.⁴³ This approach to the principles of fundamental justice was reiterated by La Forest J. and taken up by several other justices in decisions

⁴³ In *Léger v. Ville de Montréal*, [1986] D.L.Q. 391 (Que. C.A.), a matter involving the obligation under the *Code de la sécurité routière*, L.R.Q., c. C-24.1., to wear seatbelts, McCarthy J.A. expressed the opinion, at 393, that the principles of fundamental justice are not violated where a law has as its purpose the common good:

[J]e présume que l'article 7 de la Charte canadienne permet aux tribunaux d'examiner la substance d'une loi dûment mise en vigueur et que "les principes de justice fondamentale" ne permettent une atteinte à la "liberté" de l'individu que pour le bien commun. Il demeure qu'en l'espèce le bien commun est servi.

[Neither L'Heureux-Dubé nor Beauregard J.J.A. discussed this point as they found that the right invoked was not protected by section 7].

If the "common good" is to be the test for the validity of an infringement of a section 7 right then arguably any infringement is justifiable unless it can be demonstrated that the common good is not served by the law in question. While it is true that La Forest J. in *Beare*, *supra* footnote 9, and in *Lyons*, *supra* footnote 9, did factor into the section 7 analysis the public interest in law enforcement and penal policy, he did so in the process of demonstrating that in these contexts the principles of fundamental justice included these considerations. In contrast, for McCarthy J.A. the "common good" is invoked outside the context of any principle of fundamental justice and is applied as a substitute therefor. In our opinion this approach is inconsistent with the approach of the Supreme Court in *Re B.C. Motor Vehicle Act*, *supra* footnote 7, in that there is no identification of any basic tenet of our legal system which holds that "liberty" or "security of the person" must always give way to the common good. The very rationale for the protection of rights so basic as the right to life, liberty and security of the person is to circumscribe the power of the state to advance the "common good" at the expense of the individual. A further point to be made is that the state justification of a measure in terms of the common good is more appropriately undertaken under section 1 of the *Charter*.

Similarly, the term "in the public interest" has often been used to justify infringements of liberty and security of the person. In *R. v. Morales* (1992), 144 N.R. 176 at 193 (S.C.C.), in discussing the refusal of bail "in the public interest," Lamer C.J. stated:

The term provides no guidance for legal debate. The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit.

[...]

such as *Thompson Newspapers*, *Kindler*, *Chiarelli*,⁴⁴ *Wholesale Travel*, *Swain* and *Rodriguez*. The treatment of societal interests in these cases will be discussed in some detail below.

III. Societal Interests

A. The B.C. Motor Vehicle Act

The majority judgment of Lamer J. in *Re B.C. Motor Vehicle Act* is invariably the starting point for any analysis involving societal interests and the principles of fundamental justice, both because it was the first Supreme Court of Canada decision to attempt to lay out an approach to the interpretation of section 7 and, more importantly, because the Court's decision rejecting the idea of factoring in societal interests into the determination of the principles of fundamental justice has never been explicitly overturned.⁴⁵ In *Re B.C. Motor Vehicle Act*, Lamer J. discussed the approach of the British Columbia Court of Appeal which would have the "public interest" factored into the determination of the principles of fundamental justice:

If, by reference to public interest, it was meant that the requirements of public interest for certain types of offenses is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the Court as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

[...]

Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the *Charter* if as a result, anyone is deprived of his life, liberty or security of the person,

As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.

[...]

Nor would it be possible in my view to give the term "public interest" a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate.

⁴⁴ *Chiarelli v. Canada Minister of Employment and Immigration*, [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*].

⁴⁵ In *Re B.C. Motor Vehicle Act*, *supra* footnote 7, Lamer J. wrote the majority opinion on behalf of Dickson C.J., Beetz, Chouinard and Le Dain JJ. Wilson and McIntyre JJ. wrote concurring opinions. While *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [hereinafter *Singh*], actually preceded *Re B.C. Motor Vehicle Act* by several months, it is usually not taken as the authoritative case on section 7 because the Court was split evenly, with half the bench deciding the issue of the fairness of the *Immigration Act* procedures on the basis of section 2 of the *Canadian Bill of Rights* without reference to section 7.

⁴⁶ *Ibid.* at 517 (emphasis added).

*irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.*⁴⁶

Lamer J. went to discuss the principal argument supporting absolute liability, administrative expediency, making it clear that it is under section 1 and not under section 7 that such an argument should be made. Under section 1, Lamer J. allowed that administrative expediency could successfully come to the rescue of what would otherwise be a violation of section 7, "but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like."⁴⁷ In a concurring opinion, Wilson J. was even more demanding in regards to justification under section 1, outlining her approach to the relationship between the principles of fundamental justice and section 1 of the *Charter* in the following passage:

If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "democratically justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets the test, it still has to meet the tests in s. 1.⁴⁸

While Wilson J. did not directly address the point, a necessary implication of her approach is that some balancing of individual and societal interests will have to occur in the determination of the principles of fundamental justice, or alternatively the principles of fundamental justice will have to be interpreted very narrowly to avoid unduly restricting legitimate governmental activity. This would appear to be the rationale for the approach favoured by La Forest J. in cases such as *Lyons, Beare and Thompson Newspapers*. In subsequent decisions, Wilson J. would appear to have backed away from this somewhat doctrinaire position and adopted the approach favoured by Lamer J. — that a section 1 analysis is appropriate — even if she still held to her opinion that a violation of a section 7 right will rarely be justified under section 1.⁴⁹

⁴⁷ *Ibid.* at 518.

⁴⁸ *Ibid.* at 523-524.

⁴⁹ In *Jones*, *supra* footnote 18, Wilson J. reiterated her opinion that there could be no justification under section 1 for a violation of section 7, but recognized the possibility that she may be wrong in that regard. Wilson J. considered the state justification under section 1 but decided that it fell short of meeting the "stringent standard of justification" in *Oakes*. Wilson J. reiterated this point in her dissenting judgment in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1222-1223 [hereinafter *Prostitution Reference*], where she held that a violation of a right guaranteed elsewhere in the *Charter* was an infringement of the principles of fundamental justice, which could not be justified under section 1. (In the *Prostitution Reference*, Wilson J. had determined that section 195.1(1) of the *Criminal Code* violated s. 2(b) of the *Charter*.) Despite this comment, Wilson J. engaged in a section 1 analysis where she concluded that the sanction of imprisonment did not meet the test of proportionality. See also the opinion expressed by Wilson J. in *R. v. Swain*, *supra* footnote 1 at 110-111. In *Singh*, *supra* footnote 45, Wilson J. engaged in a section 1 analysis and did not comment on the issue of balancing in the determination of the principles of fundamental justice. The approach of Wilson J.

The Court's approach to societal interests in *Re B.C. Motor Vehicle Act* was relatively unambiguous, with Lamer J. clearly stating that societal interests were to be considered under section 1 and not imported into the determination of the principles of fundamental justice under section 7. Neither McIntyre J. nor Wilson J. indicated disagreement with this approach. However, the extremely limited circumstances outlined by Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act* in which a violation of section 7 could be upheld under section 1 made it inevitable that some justices would be tempted to interpret the principles of fundamental justice in a manner which would allow a greater latitude for the Court to consider societal interests. Our review of subsequent decisions will demonstrate that shifting majorities have frequently side-stepped, but not explicitly repudiated, the approach to the consideration of societal interests outlined in *Re B.C. Motor Vehicle Act*.

B. *Subsequent Decisions: A Court Divided*

In a series of cases involving issues as disparate as refugee claims, abortion, combines investigations, the insanity of accused persons and assisted suicide, societal interests have been considered under section 1 of the *Charter*. In cases such as *Singh*, *Morgentaler* and *Swain*, the majority of the Court followed this approach, while in cases such as *Jones*, *Thompson Newspapers* and *Rodriguez*, the minority judgments considered societal interests under section 1. While some justices appear to be consistent in their consideration of societal interests under section 1 in decisions they themselves have written, they have been less ready to dissent on this point in cases where societal interests have been imported into the determination of the principles of fundamental justice. Our analysis of this alternative line of judicial reasoning, involving issues as varied as indeterminate sentences, fingerprinting, combines investigations, extradition, national security and assisted suicide, will demonstrate that the principles of fundamental justice have been approached as a balancing of individual and societal interests. In cases such as *Jones*, *Lyons*, *Beare*, *Thompson Newspapers*, *Chiarelli*, *Kindler*, and *Rodriguez*, the majority interpreted the principles of fundamental justice in this manner, while in *Swain*, the minority pointedly dissented on this issue. The conflicting approaches to the treatment of societal interests in these cases will be examined below. While these cases are not the only section 7 decisions where the Court has considered societal interests, they demonstrate that on this issue the Court has been and remains divided.

Singh v. Minister of Employment and Immigration (1985)

In *Singh*, Wilson J. found that the procedures set out in the *Immigration Act* for the determination of refugee status claims infringed the principles of

in *Re B.C. Motor Vehicle Act* was taken up by Sopinka J. in *Kindler*, *supra* footnote 27 at 793: "The situations in which a breach of section 7 can be justified under section 1 will be exceedingly rare."

fundamental justice which she determined included the rules of natural justice and procedural fairness. Having found a violation of section 7, she engaged in a section 1 analysis to determine if this procedural shortcoming could be justified, deciding that "the balance of administrative convenience" could not override the need to adhere to the principles of fundamental justice in the determination of refugee claims.⁵⁰

Jones v. The Queen (1985)

In *Jones*, La Forest J. determined that the principles of fundamental justice were not infringed by limitations on the proof of efficient instruction at home that an individual accused under the *Alberta School Act*⁵¹ could advance as a defence to counter a charge. In comparison to *Wilson J.*, who found that the evidentiary restriction in the *School Act* violated the notion of procedural fairness — which she considered to be the principle of fundamental justice at issue — and proceeded to a section 1 analysis, La Forest J. did not consider section 1 at all, balancing procedural fairness and administrative efficiency to determine that there was no violation of the principles of fundamental justice.⁵² La Forest J. characterized the principle of fundamental justice in terms of an administrative structure which "was not so manifestly unfair" and which was the result of a pragmatic balance between fairness and efficiency. In other words, the principles of fundamental justice would not be violated unless it could be shown that the administrative structure was "manifestly unfair." While procedural fairness has been recognized as a principle of fundamental justice and enshrined in our law since the decision of the Supreme Court in *Nicholson*,⁵³

⁵⁰ *Singh, ibid.* at 218-219. *Wilson J.* stated: "No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."

⁵¹ R.S.A. 1980, c. S-3, ss. 142(1), 143(1).

⁵² *Jones, supra* footnote 18 at 304, La Forest J. stated: "Some pragmatism is involved in balancing between fairness and efficiency. The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice." La Forest J. went on to add that there was no such violation in this case. La Forest J. took essentially the same approach in *R. v. Corbett*, [1988] 1 S.C.R. 670 at 745, in discussing the right to a fair trial in section 11:

It is true that s. 11 of the *Charter* constitutionalizes the right of an accused and not the state to a fair trial before an impartial tribunal. But "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.

⁵³ *Nicholson, supra* footnote 33.

administrative efficiency has usually been considered a variant of the sort of state or societal interest which would have to be justified under section 1.⁵⁴

R. v. Lyons (1987), *R. v. Beare* (1988)

While *Lyons* and *Beare* are the cornerstones of the modified approach to the principles of fundamental justice developed by La Forest J., these cases are also crucial to the concept of these principles as a balancing of individual and societal interests in any particular context and as such they will be examined together.

In *Lyons*, where the issue involved the imposition of an indeterminate sentence under Part XXI of the *Criminal Code*⁵⁵ on an accused, who had not been given notice that the Crown would seek such a sentence before having entered a plea of guilty, La Forest J. determined that there was no infringement of the principles of fundamental justice. The essence of his reasoning was that the protection of the public was a valid sentencing criteria and that this factor was to be incorporated in the determination of whether there had been an infringement of a principle of fundamental justice. There was no analysis of this societal interest under section 1 of the *Charter*.⁵⁶

The approach in *Lyons* was further refined by La Forest J. in *Beare*, where he determined that the principles of fundamental justice were not infringed by a provision of the *Identification of Criminals Act* permitting the fingerprinting of some accused, but not yet convicted, persons at the discretion of the police. La Forest J. did not engage in a section 1 analysis, but examined several possible justifications for the infringement of the right to liberty represented by compulsory fingerprinting, including the need "to arm the police with adequate and reasonable powers for the investigation of crime," in his determination of whether the principles of fundamental justice had been infringed. He rejected the conclusion of the Saskatchewan Court of Appeal that the discretion left to the police under the *Identification of Criminals Act* permitted arbitrary conduct and as such infringed the principles of fundamental justice. For La Forest J., this police discretion contributed to the efficiency of law enforcement and accordingly there was no infringement of the principles of fundamental justice.⁵⁷

⁵⁴ See *Singh*, *supra* footnote 45 at 218-219, Wilson J.

⁵⁵ R.S.C. 1970, c. C-34.

⁵⁶ *Lyons*, *supra* footnote 9 at 327-334. In a an opinion where he dissented in part, Lamer J. held that section 11(f) had been infringed and could not be justified under section 1. Wilson J. felt that the principles of fundamental justice were violated by the lack of notice that a designation as a dangerous offender would be sought before the accused entered his plea. However, she did not discuss section 1.

⁵⁷ It is interesting to compare the comments of La Forest J. in *Beare*, *supra* footnote 9 concerning "efficiency" with those of Wilson J. in *Singh*, *supra* footnote 45 at 218-219. Wilson J. was of the opinion that the balance of administrative convenience does not override the need to adhere to the principles of fundamental justice. However, in *Beare*, Wilson J. did not dissent when La Forest J. employed a similar argument.

In *Beare*, the principles of fundamental justice became a balance where society's interest in efficient law enforcement is played off against the presumption of innocence. The Court's conclusion after this balancing — where the burden of proof is at all times on the individual invoking the section 7 right — is that there was no violation of section 7 to be justified under section 1. *Beare* was a unanimous decision of the Court, with seven justices, including Lamer and Wilson JJ., concurring in the reasons of La Forest J. It is puzzling that there was no dissenting voice in *Beare* considering that the approach to societal interests contradicts that adopted by the Court in *Re B.C. Motor Vehicle Act*, without going so far as to expressly repudiate of the approach advocated by Lamer J. in that decision. One can speculate that individual justices agreed with the overall disposition in *Beare* and may not have sufficiently appreciated the long-term implications for the approach to the interpretation of section 7 outlined in *Re B.C. Motor Vehicle Act*.

R. v. Morgentaler (1988)

The same year, in *Morgentaler*, where the issue involved the restrictions on therapeutic abortions contained in section 251 of the *Criminal Code*, Dickson C.J., Wilson and Beetz JJ. — justices who had concurred in the reasons of La Forest J. in *Beare* — applied the approach to societal interests outlined by Lamer J. in *Re B.C. Motor Vehicle Act* and proceeded to a section 1 analysis after having found a violation of the principles of fundamental justice.⁵⁸ For Dickson C.J., “the structure — the system regulating therapeutic abortions — is manifestly unfair” and as such violated the principles of fundamental justice. As well, the defence to a charge under section 251 of the *Criminal Code* was “illusory or so difficult to attain as to be practically illusory,”⁵⁹ which Dickson C.J. found was itself a breach of the principles of fundamental justice. Dickson C.J. was of the opinion that the means chosen in section 251 were not reasonable or demonstrably justified in that none of the three elements for assessing the proportionality of means and ends were met. Accordingly, Dickson C.J. concluded that section 251 could not be salvaged.⁶⁰ For Wilson J., section 251 violated procedural fairness and did not accord with fundamental freedoms laid down elsewhere in the *Charter*. She applied the *Oakes* test to conclude that the violation of section 7 could not be justified because it amounted to a complete denial of a woman's right to liberty and security of her person, and could not meet the test of

⁵⁸ In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*], McIntyre and La Forest JJ. dissented, while Lamer J. concurred in the reasons of Dickson C.J.. Estey J. concurred in the reasons of Beetz J.. In his dissenting opinion, McIntyre J. concluded that there was no violation of a liberty or security of the person interest protected by section 7 and accordingly did not proceed to the second stage to consider if the principles of fundamental justice were violated.

⁵⁹ *Ibid.* at 70.

⁶⁰ *Ibid.* at 72-76.

proportionality.⁶¹ Beetz J. found that the principles of fundamental justice had been violated because the procedural requirements of section 251 were “manifestly unfair” in that they were unnecessary to attain Parliament’s objective and resulted in additional risks to the health of pregnant women. Beetz J. engaged in a section 1 analysis where he considered the balance Parliament had sought to achieve in section 251 of the *Criminal Code* between the protection of the foetus and the rights of the mother,⁶² ultimately concluding that the means chosen were not reasonable and demonstrably justified.

The section 1 analysis in *Morgentaler* has been criticized by Peter Hogg as simply rehearsing points already discussed under the principles of fundamental justice.⁶³ However, in *Morgentaler*, the key point must surely be that the Court concluded that the state had not met its burden of proof to justify the societal interest it claimed was at stake under section 1. Indeed, Dickson C.J., Wilson and Beetz JJ. all identified principles of fundamental justice which they found were violated by section 251 of the *Criminal Code*. The Court did not impose the additional burden on Dr. Morgentaler of having to rebut competing principles advanced by the state in the determination of the applicable principles of fundamental justice.

Thompson Newspapers v. Canada (1990)

If it was difficult to reconcile the approach to societal interests in *Morgentaler* and *Re B.C. Motor Vehicle Act* with that of the Court in *Beare*, it was in the five separate opinions in *Thompson Newspapers* that the very real differences on this crucial question became apparent. In *Thompson Newspapers*, where the section 7 issue involved the compulsion of testimony in investigatory proceedings under the *Combines Investigation Act*, two justices (Wilson and Sopinka JJ.) followed the approach outlined by Lamer J. in *Re B.C. Motor Vehicle Act* and considered the state interest under section 1, while two other justices (La Forest and L’Heureux-Dubé JJ.) insisted that the principles of fundamental justice were a balancing of the individual and societal interests and that recourse to section 1 was unnecessary. Lamer J. would appear to have envisaged a section 1 analysis if the attack under section 7 had been made on the correct section of the *Combines Investigation Act*, but since he was of the opinion that the wrong section had been attacked, he did not definitively pronounce on the section 7 issue.⁶⁴

⁶¹ *Ibid.* at 183-184. In *Morgentaler*, Wilson J. seemed to have abandoned the idea, expressed in *Re B.C. Motor Vehicle Act*, *supra* footnote 7 that an infringement of section 7 could not be justified under section 1.

⁶² *Ibid.* at 122-129.

⁶³ *Constitutional Law of Canada*, *supra* footnote 11 at 886.

⁶⁴ *Thompson Newspapers*, *supra* footnote 2 at 488-490. Lamer J. was of the opinion that it was not section 17, but, rather section 20(2) of the *Combines Investigation Act*, which should have been attacked by the appellants because it was this section which actually infringed the common law right not to give self-incriminatory answers.

The determination of the principle of fundamental justice at issue was crucial to the treatment of societal interests in *Thompson Newspapers*; for Wilson and Sopinka JJ., the principle of fundamental justice infringed was that a witness may refuse to give an incriminating answer, while for La Forest and L'Heureux-Dubé JJ. fundamental justice was a balancing of that principle and the state's interest in obtaining information about the commission of an offence.⁶⁵ In the opinion of Wilson J., the impugned section of the *Act*, which had the effect of forcing individuals to testify against themselves, was out of proportion to the objective sought — the efficient conduct of combines investigations — and accordingly could not be salvaged under section 1. The approach of La Forest J. was quite different, conceptualizing the principles of fundamental justice as a balancing or accommodation of interests:

What these practices have sought to achieve is a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice.⁶⁶

In the context of an investigation under the *Combines Investigation Act* — the situation in *Thompson Newspapers* — La Forest J. defined the balancing to occur as follows:

We must remember that in defining the scope of immunity required by the Charter, we are called upon to balance the individual's right against self-incrimination against the state's legitimate need for information about the commission of an offence.⁶⁷

La Forest J. went on to consider a number of factors justifying the power of the state to compel testimony, including the possibility of more rapid and efficient investigations and the cost-effective use of limited resources on law enforcement, noting that the power to compel testimony augments the deterrent effect of the legislation in a regulatory area where enforcement is difficult.⁶⁸ La Forest J. factored in these state interests uniquely in the determination of the principles of fundamental justice obviating any recourse to section 1 of the *Charter*.

L'Heureux-Dubé J. followed the approach of La Forest J. envisaging the principles of fundamental justice as a balancing of interests.

[...] the Charter has not rendered obsolete society's interest in the enforcement of its laws [...]. This is especially true of s. 7, where the collective interest in law enforcement finds expression in the principles of fundamental justice, and must be balanced against the deprivation of individual rights to life, liberty and security of the person, as these rights have come to be recognized in our judicial system.

[...]

⁶⁵ *Ibid.* at 487. Wilson J. repeated her warning from *Re B.C. Motor Vehicle Act*, *supra* footnote 7 that it will be rare that a legislative provision can violate a principle of fundamental justice and still meet the test of section 1 of the *Charter*.

⁶⁶ *Ibid.* at 539. La Forest J. noted that in the area in question — self-incrimination and the use of derivative evidence as permitted by the *Combines Investigation Act* — “the interests [...] involve particularly delicate balancing.” La Forest J. went on to note that: “[...] this court has made it clear that the community interest is one of the factors that must be taken into account in defining the content of the principles of fundamental justice.”

⁶⁷ *Ibid.* at 556.

⁶⁸ *Ibid.*

Fundamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens.⁶⁹

The disagreement on where to consider societal interests in section 7 cases, which animated the judgments in *Thompson Newspapers*, would be increasingly evident in subsequent cases when the Court considered the principles of fundamental justice.

R. v. Wholesale Travel Group Inc. (1991)

In *Wholesale Travel*, where the section 7 issues involved the possibility of imprisonment as a sanction for a strict liability regulatory offence under the *Competition Act*⁷⁰ and the effective removal of a defence of due diligence by sections 37.3(2)(c) and (d) of the same Act, the treatment of societal interests was again the subject of differing opinions. While all justices were unanimous in their opinion that imprisonment as a sanction for such an offence did not violate the principles of fundamental justice, Lamer C.J. and Cory J. in their judgments approached the issue of societal interests differently. Lamer C.J. held that the principles of fundamental justice were not infringed as long as a defence of due diligence was open to an accused. He made a distinction between regulatory offenses and true criminal offenses, pointing out that the same degree of stigma did not attach to the former as attached to the latter. Cory J., on the other hand, incorporated a range of societal concerns into his determination that the principles of fundamental justice were not infringed by the establishment of negligence as the minimum fault standard:

Regulatory offenses provide for the protection of the public. The societal interests which they safeguard are of fundamental importance. It is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare.⁷¹

Cory J. did not proceed to a section 1 analysis, but he indicated that had it been necessary he would have concluded that strict liability offenses could be justified under section 1.⁷²

In so far as the issue raised by sections 37.3(2)(c) and (d) was concerned, all justices agreed that these provisions had the effect of removing a defence of due diligence. Lamer C.J., in an opinion concurred in by Sopinka J., held that the removal of the defence of due diligence violated the principles of fundamental justice and engaged in an analysis under section 1 where he concluded that the provision failed the second part of the *Oakes* test in that it did not impair the right protected by section 7 as little as possible. McLachlin J., in separate reasons, agreed with Lamer J. on this point. In determining that these provisions violated

⁶⁹ *Ibid.* at 579 and at 583 (emphasis added).

⁷⁰ R.S.C. 1970, c. C-23.

⁷¹ *Wholesale Travel*, *supra* footnote 23 at 239.

⁷² *Ibid.* at 252.

the principles of fundamental justice, Cory J. did not engage in an analysis of the competing interests because he followed the precedent in *Re B.C. Motor Vehicle Act*, where it had been held that such a provision was inconsistent with the principles of fundamental justice.⁷³

In *Wholesale Travel*, La Forest J., in a short opinion where he indicated his agreement with the approach of Cory J., made a distinction between other *Charter* rights, such as section 11(d), and section 7 in so far as societal interests are concerned. In the case of the former, the analysis is done under section 1, while in the case of the latter the analysis takes place uniquely within the section itself.⁷⁴ This observation was consistent with the approach to societal interests applied by La Forest J. in earlier cases such as *Lyons*, *Beare* and *Thompson Newspapers*.

Kindler v. Canada (Minister of Justice) (1991)

In *Kindler*, where the section 7 issue involved the extradition of a convicted murderer to the United States where he would face the death penalty, La Forest J., writing for the majority, concluded that extradition in the circumstances did not infringe the principles of fundamental justice. He reiterated his view that the determination of the principles of fundamental justice is a balancing process:

This Court has on previous occasions stated that in considering the issue of the principles of fundamental justice, it is engaged in a balancing process.⁷⁵

In his analysis of the principles of fundamental justice at issue, La Forest J. emphasized the important social goal of preventing Canada from becoming a haven for criminals:

[...] I am of the opinion that surrendering the appellant unconditionally would not violate the principles of fundamental justice under the circumstances of this case. I reach this conclusion principally for two reasons. First, I believe that extradition of an individual who has been accused of the worst form of murder, to face capital prosecution in the United States, could not be said to shock the conscience of the Canadian people nor to be in violation of the standards of the international community. Second, I find that it is reasonable to believe that extradition in this case does not go beyond what is necessary to serve the legitimate social purpose of preventing Canada from becoming an attractive haven for fugitives.⁷⁶

⁷³ *Ibid.* at 252-254.

⁷⁴ *Ibid.* at 210. La Forest J. stated:

While, in my view, in the regulatory context in which the provisions operate a requirement that a reasonable doubt be raised by the accused that he or she has exercised due diligence meets the requirements of fundamental justice (under s. 7 of the *Charter*) in these circumstances, a requirement that the accused prove due diligence on the balance of probabilities goes too far. The same is true under s. 1 of the *Charter* if one approaches the issue in terms of s. 11(d).

The principal point on which the majority and minority judgments in *Wholesale Travel* differed concerned the reverse onus provision in the *Competition Act*; the majority felt it violated section 11(d) but could be justified under section 1, while the minority held that it did not meet the proportionality requirements of the *Oakes* test.

⁷⁵ *Kindler*, *supra* footnote 27 at 833.

In *Kindler*, when La Forest J. states that "extradition in this case does not go beyond what is necessary" it is difficult not to conclude that he is applying the proportionality test of section 1 within section 7 itself. What is clear is that La Forest J. does not proceed to section 1 where the burden of proof is on the state.

McLachlin J. followed the same approach and factored in the state interest in extradition in the determination of the principles of fundamental justice without proceeding to a section 1 analysis. In her section 7 analysis, she considered factors such as "the importance of maintaining effective extradition arrangements" and the "danger that Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty."⁷⁷

It would appear that McLachlin J. considered that the burden of proof rests on the individual at all stages in the section 7 analysis:

I conclude that *the fugitives have not established* that the law which permits their extradition without assurances that the death penalty will not be applied in the requesting state offends the fundamental principles of justice enshrined in s. 7 of the Charter.⁷⁸

In *Kindler*, the Court expected that the individual invoking a right guaranteed by section 7 rebut the state's contention that Canada may become a safe haven for U.S. criminals seeking to avoid the death penalty. As well, the individual would appear to have the burden of demonstrating that effective extradition arrangements with other countries did not depend on extraditing *Kindler* to the United States in such circumstances. Failure to disprove these state contentions under section 7 would appear to have been fatal to Mr. *Kindler's* case.

R. v. Swain (1991)

While we have referred to the conflicting approaches to societal interests in *Swain* in our introduction to this article, it will be useful to examine this case in some detail because the Court clashed directly on the issue of where to consider societal interests in section 7 cases. The societal interests issue was central to all three judgments, with two justices who concurred in the result, dissenting strongly on this point. In *Swain*, the section 7 issue concerned the validity of the common law rule which permitted the Crown to call evidence on the question of the insanity of the accused. In his majority judgment, Lamer C.J. identified the principle of fundamental justice as the right of an accused to control the conduct of his own defence and squarely rejected the inclusion of societal interests — that an insane person not be convicted for otherwise criminal behaviour and the related interest in the integrity of the judicial system — at this stage of the analysis.⁷⁹ Sopinka and Cory JJ. concurred in the approach of Lamer C.J., while Wilson J. wrote a separate concurring opinion where she

⁷⁶ *Ibid.* at 839 (emphasis added).

⁷⁷ *Ibid.* at 852-853.

⁷⁸ *Ibid.* at 854 (emphasis added).

⁷⁹ *Swain*, *supra* footnote 1 at 38. The passage from *Swain* is reproduced above.

indicated her agreement with his treatment of societal interests. However, Gonthier J. in a short opinion concurred in by La Forest J., agreed with the result but emphasized his disagreement in so far as the majority approach to the principles of fundamental justice was concerned.⁸⁰ Gonthier J. acknowledged that the *Oakes* test provided “a useful analytical framework” to assess the conformity of the existing common law rule [that permitting the Crown to raise the issue of the accused’s insanity] to the [...] *Charter*” but concluded that “it is not a necessary one.”⁸¹ He went on to express his disagreement with the approach of Lamer C.J. to societal interests:

I would however depart from the analysis made by the Chief Justice in as much as he considers that the latter principle [the right of the Crown to raise the issue of the accused’s sanity] should not necessarily enter into the determination of a breach of fundamental justice under s. 7 of the Charter.⁸²

Gonthier J. based his approach, in part, on his opinion that the principle [the sanity of the accused] pertains to the integrity of the justice system itself. This idea was echoed by L’Heureux-Dubé J., in her dissenting opinion, where she went into some detail in her analysis of the Common Law rule allowing the Crown to independently raise evidence of the accused’s insanity:

The two distinct principles of fundamental justice that my colleagues identify, i.e., that of an accused’s right to fully control his or her defence and the fundamental rule that insane persons not responsible for their conduct should not be convicted for otherwise criminal behaviour, find appropriate expression in the balance achieved through the proper application of the common law rule. There can be no doubt that the two principles identified above are properly labelled, in the language of s. 7, “fundamental”. This court has, on numerous occasions, addressed the fundamental nature of these principles.

[...]

Regardless of how one chooses to label or characterize the principle that an individual should not be convicted absent fault, i.e., as one adhering to the accused or as a purely societal interest, I am not convinced that it is properly dealt with under s. 1. Since in my view, the common law rule reflects an appropriate balance between the two principles identified above, I will necessarily address the concerns raised by them within s. 7.⁸³

L’Heureux-Dubé J. went on to outline her view of the interdependence of the principles of fundamental justice:

The principles of fundamental justice do not spring up independently of one another but evolve gradually in what can be seen to be a mutually nourishing process. Our legal system is not a system of rules and principles operating singly, each within its own limited sphere. Any analysis requiring an examination of these principles, be it mandated constitutionally or otherwise, must respect this integrity. [...] I thus respectfully disagree with the Chief Justice’s approach.

[...]

⁸⁰ *Ibid.* at 116.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.* at 123-124.

The fundamental principles of justice that my colleagues prefer to separate from its mix, combine to fashion a larger principle, one informed in appropriate measure by concerns underlying the principles that nourish it.⁸⁴

The comments of L'Heureux-Dubé J. suggest that to avoid a section 1 analysis — where it has the burden of proof — the state merely has to argue that a competing principle of fundamental justice, which incorporates the societal interest the state desires, should apply. This would oblige the Court to engage in a balancing of that principle [societal interest] and the individual's section 7 right in the determination of whether there has been a violation of the principles of fundamental justice. This approach has the effect of raising the threshold for the individual invoking the section 7 right in that he must show, not only a violation of a principle of fundamental justice, but must also show that that principle is not counterbalanced by whatever principle the state has advanced. This additional burden effectively "thwarts the exercise of the accused's right," to use the words of Lamer C.J. in *Swain*.⁸⁵ Furthermore, to interpret the principles of fundamental justice in a manner which involves balancing the individual right against the interests of the collectivity ignores the larger character and objects of the *Charter* itself which, by definition, must include the carving out and protecting of certain individual rights from encroachment by the state. A "purposive interpretation" of the rights to life, liberty and security of the person must surely avoid placing a burden on the individual invoking these crucial rights that is so onerous as to have the effect of negating these rights altogether.

While the majority in *Swain* followed an approach which considered societal interests under section 1, it has been the approach followed by Gonthier and L'Heureux-Dubé JJ. — i.e., the position of La Forest J. in *Beare* — which appears to have carried the day in subsequent decisions. In *Chiarelli*, Sopinka J., for a unanimous bench, factored in societal interests uniquely in the determination of the principles of fundamental justice, while in *Rodriguez*, he wrote the majority judgment which applied the same approach.

R. v. Chiarelli (1992)

In *Chiarelli*, which involved the deportation of a permanent resident convicted of an offence punishable by more than five years imprisonment, the Court considered two section 7 issues. The first, the substantive issue was whether sections 27(1)(d)(ii) and 32(2) of the *Immigration Act* violated the principles of fundamental justice because of the mandatory requirement that deportation be ordered without regard to the circumstances of the offence or the offender. Sopinka J. (for a unanimous nine member bench) was of the opinion that the principles of fundamental justice were not violated by these provisions, applying an approach to the issue of societal interests which was essentially that employed by La Forest J. in *Lyons*:

⁸⁴ *Ibid.* at 124-125.

⁸⁵ *Ibid.* at 38.

The *C.S.I.S. Act* and the Review Committee Rules recognize *the competing individual and state interests and attempt to find a reasonable balance between them*. The Rules expressly direct that the Committee's discretion be exercised with regard to this balancing of interests.⁸⁶

For Sopinka J., the principles of fundamental justice did not require that attenuating circumstances be considered before ordering the deportation of a permanent resident who had violated the condition that he not be convicted of an offence punishable by imprisonment of more than five years.⁸⁷ Yet it can be argued that it is a basic tenet of our legal system that the circumstances of an offence and the offender be considered; for example, the *Criminal Code* rarely provides for minimal sentences leaving a large discretion to the judge in which to consider such circumstances. The case law on sentencing makes it clear that a judge must consider the circumstances of the offence and the offender.⁸⁸ It is rather the exception in our legal system that sanctions are employed without regard to the particular circumstances of the offence or the offender. The argument that deportation is not a sanction and that therefore this principle does not apply ignores reality; deportation may frequently be a much more severe sanction than that actually imposed under the *Criminal Code* with enormous consequences for the individual concerned. Up until recent times, exile or banishment was frequently imposed as a sanction for criminal behaviour and was much feared because it involved, the often permanent, separation from family and friends.⁸⁹

In regards to the second section 7 issue in *Chiarelli*, Sopinka J. concluded that the procedures under the *CSIS Act*, which permitted *in camera* hearings and which did not permit a permanent resident faced with deportation to cross-examine witnesses testifying against him, did not violate the principles of fundamental justice. Sopinka J. considered the state interest in "effectively conducting national security and criminal investigations and in protecting police sources" which he balanced against the individual's right to a fair procedure in his determination that there was no violation of the principles of fundamental justice.⁹⁰

⁸⁶ *Chiarelli*, *supra* footnote 44 at 745. The approach of Sopinka J. to the principles of fundamental justice was essentially that outlined by La Forest J. in *Lyons and Beare*, *supra* footnote 9. He stated at 733: "[I]n determining the scope of the principles of fundamental justice as they apply in this case, the Court must look to the principles and policies underlying immigration law" (emphasis added).

⁸⁷ *Chiarelli*, *ibid.* at 734. In discussing the principles of fundamental justice, Sopinka J. merely asserts that the condition "represents a legitimate, non-arbitrary choice by parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country."

⁸⁸ See, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1074, Lamer J.; *R. v. Hinch and Salanski* (1968), 62 W.W.R. 205 (B.C.C.A.), Robertson J.A..

⁸⁹ See generally: E.O. Wright, *The Politics of Punishment* (New York: Harper & Row); R. Cross, *Punishment, Prison and the Public* (London: Stevens & Sons, 1971).

⁹⁰ *Chiarelli*, *supra* footnote 44 at 744.

In *Chiarelli*, there was no recourse to section 1 to justify the legitimate state concerns in regard to national security, criminal investigations and in protecting police sources, which concerns would appear to be the very *raison d'être* for that section of the *Charter*. National security and related interests are precisely the kind of concerns that the framers of the *Charter* must have had in mind in incorporating section 1 which has no counterpart in the American Constitution. The problem with importing such concerns into the determination of the principles of fundamental justice is that, by their very nature, national security and related interests are inevitably in serious conflict with the fundamental rights of individuals.

That the Court was unanimous in *Chiarelli* is surprising given that several justices had previously expressed such strong opinions on where societal interests should be addressed in cases such as *Re B.C. Motor Vehicle Act*, *Thompson Newspapers* and *Swain*. It may be that the Court as a whole is much more deferential to law enforcement and national security interests and that justices are willing to sacrifice a conceptually consistent approach to societal interests to remain on the right side of such decisions. This would explain the lack of a dissenting opinion in both *Beare* and *Chiarelli*. The following year in *Rodriguez*, where the issue could not be readily characterized as law enforcement or national security, the unanimity on the issue of societal interests which characterized the *Chiarelli* decision disappeared.

Rodriguez v. British Columbia (Attorney General) (1993)

In *Rodriguez*, where the section 7 issue involved the *Criminal Code* prohibition against assisted suicide, Sopinka J. — writing for the majority — applied the same approach to the consideration of societal interests as in *Chiarelli* and did not engage in a section 1 analysis. He balanced the societal interest in protecting the vulnerable against the individual's section 7 right in autonomy over her person to conclude that section 241(b) of the *Criminal Code* — which prohibited assisted suicide — did not infringe the principles of fundamental justice.⁹¹ In contrast to the deferential position adopted by Sopinka J., McLachlin J. (dissenting) followed the approach of Lamer C.J. in *Swain*, stating:

I add that it is not generally appropriate that the complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state.⁹²

McLachlin J. admitted that there may be some principles of fundamental justice which will only be comprehensible if the state's interest is taken into account at the section 7 stage and where the *Charter* complainant may be called upon to

⁹¹ *Rodriguez*, *supra* footnote 8. In *Swain*, *supra* footnote 1, Sopinka J. concurred in the opinion of Lamer C.J. where the societal interest would be considered under section 1 and not in the determination of the principles of fundamental justice.

⁹² *Rodriguez*, *ibid.* at 10.

bear the onus of showing that a long-established or *prima facie* necessary practices do not accord with the principles of fundamental justice. However, for McLachlin J. the inquiry is different when the issue is an arbitrary legislative scheme:

The state will always bear the burden of establishing the propriety of an arbitrary legislative scheme, once a complainant has shown it is arbitrary. It will do so at the s. 1 stage, where the state bears the onus, and where the public concerns which might save an arbitrary scheme are relevant.⁹³

L'Heureux-Dubé J. concurred in the reasons of McLachlin J. despite the fact that her approach to the consideration of the societal interest was diametrically opposed to that which she herself espoused to the position she herself had espoused so forcefully in *Swain and Thompson Newspapers*. Cory J., in a short dissenting opinion, indicated his agreement with McLachlin J. without specifically addressing the issue of when to consider the societal or state interest. Lamer C.J., dissenting, decided the issue on the basis of section 15(1) and did not consider arguments based on sections 7 and 12 of the *Charter*.

IV. Conclusion

The best that can be said, after *Rodriguez*, is that the Court remains divided on the issue of when to factor in societal interests in section 7 cases. It is equally apparent that some individual justices seem inconsistent in their approach and would appear to deal with the issue of societal interests on a case by case basis. Twelve years after the coming into force of the *Charter*, the Supreme Court has yet to develop a conceptually coherent approach to the consideration of societal interests with important differences remaining among justices on this point which is so crucial to the determination of individual rights under section 7. The comments of McLachlin J. in *Rodriguez*, that some principles of fundamental justice will only be comprehensible if the state's interest is considered in the section 7 stage, offer a rationale for the confusion evident in the Court's approach to the issue, but do not offer a practical guideline as to when such interests should be considered under section 7 and not under section 1. To make recourse to section 1 obligatory when the infringement is occasioned by an "arbitrary legislative scheme," but not in cases of other infringements of section 7 rights occasioned by state action — a distinction McLachlin J. seems to make in *Rodriguez*, raises some problems. Since most legislative schemes are arbitrary in one sense or another, which will merit a section 1 analysis and which will be considered in determining whether the principles of fundamental justice are violated? If arbitrary legislative schemes merit a section 1 analysis, what about arbitrary common law rules which permit the state to infringe section 7 rights? If common law rules do not require state justification under section 1, then what of equivalent civil law rules which happen to be expressed in legislative form; for example, the *Québec Code des Professions*.⁹⁴ These

⁹³ *Ibid.* at 11.

⁹⁴ R.S.Q., c. C-26.

concerns suggest that the approach hinted at by McLachlin J. offers no solution to the problem of societal interests and the principles of fundamental justice.

The cases we have reviewed demonstrate that the importation of societal interests into the determination of the principles of fundamental justice has usually been fatal to the position of the individual invoking a section 7 right. On the other hand, when societal interests have been factored in under section 1, the results have been more balanced and in cases such as *Re B.C. Motor Vehicles Act*, *Singh*, *Morgentaler* and *Swain*, have favoured the section 7 rights claimant. Accordingly, the result for an individual invoking a section 7 right, will often be determined by the manner in which a court will approach the consideration of societal interests in a particular case. The problem for the rights claimant is that he or she cannot know which approach a judge will adopt because the Supreme Court has failed to reach a consensus on the issue of societal interests — a situation which permits the adoption of either approach by the lower courts. The rights claimant does not know if he will be obliged to rebut societal interests at the section 7 stage — where he has the burden of proof — or whether the issue will be considered under section 1, where the burden lies on the state. This situation creates obvious difficulties for counsel in planning and preparation for trial, as well as imposing a serious additional financial burden on the rights claimant.

The failure of the Supreme Court to reach a consensus on the consideration of societal interests in section 7 cases unnecessarily complicates the revindication of the rights to life, liberty and security of the person because no clear direction has been provided to the profession and to the lower courts. The rights to life, liberty and security of the person are the hallmark of western liberal democracies and are far too important to be consigned to the legal limbo which is the result of the Supreme Court's inability to develop a conceptually consistent approach to the consideration of societal interests.⁹⁵

⁹⁵ In *R. v. R.J.S.* (1995), 177 N.R. 81, which was decided well after this article was written, the issue of whether to consider societal interests under section 1 or in the determination of the principles of fundamental justice under section 7 was not discussed. However, the three justices who wrote the major opinions, Iacobucci, Sopinka and L'Heureux-Dubé JJ., all balanced the state interest in having every person's evidence with an accused's right against self-incrimination uniquely in the determination of the requirements of fundamental justice under section 7 without recourse to section 1 of the *Charter*. Lamer C.J., in a short judgment where he concurred in part with both Iacobucci and Sopinka, JJ.'s judgments, did not discuss the issue. This case may well be one of those where the principle of fundamental justice may actually require a consideration of the competing state interest to be comprehensible as per the comments of McLachlin J. in *Rodriguez*, *supra* footnote 8 at 10.