Some Reflections on *Re BC Motor Vehicle Act*

THE HONOURABLE FRANK IACOBUCCI, C.C., Q.C.*

This article discusses the reasons for judgment of Justice Antonio Lamer (as he then was) in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, which, to the surprise of many, mandated a substantive component—not just a procedural one—to the meaning of Section 7 of the *Canadian Charter of Rights and Freedoms*. The article also examines the methodology Justice Lamer provided to define "justice." Finally, the article also contains a brief discussion of some notable cases that subsequently shaped the concept of justice and concludes with a short section on what the future direction may be in the process of elaborating the meaning of justice.

Dans cet article, on discute des motifs du jugement du juge Antonio Lamer (tel était alors son titre) dans le *Renvoi sur la Motor Vehicle Act (C-B)*, [1985] 2 RCS 486, dans lesquels, à la surprise de bon nombre, il rend obligatoire une composante de fond—non pas seulement de nature procédurale—pour l'interprétation de l'article 7 de la *Charte canadienne des droits et libertés*. L'auteur de l'article examine en outre la méthodologie que le juge Lamer a suivie en vue de définir les « principes de justice fondamentale ». Enfin, l'article renferme une brève discussion de quelques-unes des décisions clés qui ont par la suite façonné la notion de justice et se conclut sur un bref aperçu sur ce que pourrait être l'orientation future suivie dans le processus d'élaboration du concept de justice.

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He would like to thank Steven Slavens of Torys LLP for his excellent assistance in the research and preparation of these remarks. They are based on an address given at the *Ottawa Law Review* Symposium, February 24, 2011, and are not intended as a comprehensive review of all the progeny of *Re BC Motor Vehicle Act* or of secondary commentary.

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I. INTRODUCTION

Re BC Motor Vehicle Act[1] was decided in 1985, when I was not on the Court and when the *Charter* was in its infancy. It is still very young today, but at that point even some of the most basic questions about how the *Canadian Charter of Rights and Freedoms*[2] would operate had yet to be asked, let alone answered. For example, I found it striking when I re-read the case that there was an entire section of the reasons devoted to "The Nature and Legitimacy of Constitutional Adjudication Under the *Charter*."There were indeed many questions left to answer.

One of those questions was whether section 7 was more than just a due process provision. Did the principles of fundamental justice have a substantive element, or did section 7 simply incorporate procedural protections into the *Constitution*?[3]

Many people presumed that the Supreme Court of Canada was going to treat section 7 as being about procedure, reflecting the views of senior government officials who worked on the preparation of the *Charter*. Those people were probably more than a little surprised when the reasons of Justice Lamer (as he then was) were released. So was I. Justice Lamer rejected the procedural/substantive dichotomy altogether. He drew on some of the language in *R v Big M Drug Mart Ltd*[4] when he asserted that "[t]he task of the Court is not to choose between substantive or procedural content *per se* but to secure for persons 'the full benefit of the *Charter*'s protection' ... while avoiding adjudication of the merits of public policy."[5] It is a very powerful idea, and one that necessarily requires both a substantive and procedural approach to section 7.

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1 [1985] 2 SCR 486, 24 DLR (4th) 536 [*BC Motor Vehicle* cited to SCR].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution*].

4 [1985] 1 SCR 295, 60 AR 161 [*Big M* cited to SCR].

5 *BC Motor Vehicle*, *supra* note 1 at 499.

By insisting on a substantive role for section 7, and not a merely procedural role, the judgment of Justice Lamer in *BC Motor Vehicle* posed a daunting and exciting challenge. It is a challenge that goes to the core of the role of a judge in judicial review, and more importantly, to the core of the human experience.

Above all, *BC Motor Vehicle* challenges us to define, as a country and as a society, what we mean when we say the word "justice." While courtrooms and judicial opinions are obvious places to meet this challenge, it is worth remembering that philosophers, scholars, governments and citizens have always sought to answer the question: What is justice? This is not solely a challenge for the courts, but rather for all of Canadian society, including our provincial and federal legislatures and governments. It is also not simply a question of how we identify principles of fundamental justice, but also how we think about life, liberty and security of the person.

The *BC Motor Vehicle* decision acknowledges that justice is defined through an evolutionary process. Just as our constitution is famously a living tree, growing to serve a just society, so must our concept of justice evolve and grow by a process of accrual.

As we consider the reasoning of Justice Lamer in *BC Motor Vehicle*, and the body of case law that continues to develop in its wake, we note that the Court has tried, and is still trying, to mediate between principles of fundamental justice promulgated by the courts, and those asserted by the Canadian public, legislatures and government.

In my time here today, I will discuss the challenge raised in *BC Motor Vehicle* as confronted by the Supreme Court. What is justice? What is it now, and what should it be in the future?

I plan to spend some time discussing the reasons of Justice Lamer, and extracting some of the methods of defining justice that emerge from those reasons.

I will discuss some notable cases that have helped shape the way we think of justice in this country, and I will then conclude my remarks by looking at some cases that suggest where our concept of justice may be heading. Owing to time constraints, I shall be highly selective in the cases chosen for discussion.

II. WHAT *BC MOTOR VEHICLE* DECIDED

As you will recall, *BC Motor Vehicle* was about a piece of British Columbia legislation that established an offence with mandatory fines and imprisonment for driving without a valid license. It was essentially a given that this provision constituted a deprivation of liberty.

The real issue was whether that deprivation was in accordance with the principles of fundamental justice. The majority held that the pairing of absolute liability and imprisonment was contrary to the principles of fundamental justice and overturned the law. The majority took a purposive approach that shaped the rest of its analysis. It is an approach with roots in the seminal cases of

Hunter v Southam Inc[6] and in *Big M*, which had been decided just a few months earlier. The purposive approach insists on taking the animating principles of a provision into account, and tends to err on the side of greater protection of individual rights. In this case, that approach led the Court to address the relationship between section 7 and the rest of the *Charter*.

The reasons of Justice Lamer noted that the truly novel feature of the *Charter* was not that it invited substantive review of legislation, which had always been part of constitutional federalism adjudication, but rather that the *Charter* extended the scope of that review to individual rights, and not simply the powers of government. This expansion of the courts' jurisdiction is rooted in section 52 of the *Charter*. The purposive approach situates this new role as incorporating a substantive element into the principles of fundamental justice. By virtue of section 52, the courts were competent and required to consider the way that legislation impacts individual rights.

The purposive approach also led the majority to look at section 7 in the context of the other legal rights found in sections 8 to14 of the *Charter*. We often place little weight in headings when it comes to interpreting contracts or legislation, but in *BC Motor Vehicle* it was a key part of the Court's attempt to find and give life to the meaning of section 7. Sections 7 through 14 all fall under the heading of "Legal Rights" in the text of the *Charter*. To Justice Lamer and the majority, this placement of section 7 with the rest of the legal rights was highly relevant. Since sections 8 through 14 include substantive elements, the majority reasoned that section 7 must do so as well.[7] This view was not without controversy, but what it shows is the Court's attempt to work through the still very new *Charter* in a manner that is contextual and that sees the *Charter* as a well thought-out, carefully integrated and coherent document.

Perhaps it would have been easier over the years to adjudicate issues brought before the Supreme Court had section 7 been purely about procedural protections, but *BC Motor Vehicle* was not decided to make our jobs as judges, politicians and citizens easier. It was decided to provide the full benefit of the *Charter* to individuals without forcing the courts to wade too deeply into areas of public policy. Most importantly, *BC Motor Vehicle* correctly found that there is indeed a substantive element to section 7.

However, the real challenge of the decision of *BC Motor Vehicle* is to define the substance of our rights under section 7. In *BC Motor Vehicle*, Justice Lamer and the majority provided us with the starting point: that "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system."[8] That approach insists that the analysis be broad; that it look beyond centuries of judicial edicts and take into account society's view of what is fundamentally just. This approach, as

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6 [1984] 2 SCR 145, 55 AR 291.

7 *BC Motor Vehicle*, *supra* note 1 at 502-03, 512-13.

8 *Ibid* at 512.

well as *BC Motor Vehicle*'s liberal use of the pronouns "we" and "our," suggest that the societal consensus, or at least the Court's perception of that consensus, plays a vital role in defining the principles of fundamental justice.

To paraphrase Justice Douglas of the Supreme Court of the United States, one of the great challenges in this area of law is to differentiate between the role of being a supreme legislature and a supreme court.[9] As I move on from *BC Motor Vehicle* to discuss some of the other Supreme Court decisions, I will discuss how they have built on *BC Motor Vehicle*'s approach, and how they have tried to rule on the substance of enactments without judging on policy matters, which I admit is no easy task. That tension between legal and policy issues animates some of the most controversial Supreme Court rulings of the last 25 years, and it will continue to provide a special challenge in section 7 jurisprudence. This is so because there is no bright line separating legal decisions from policy decisions; often the two spheres overlap making differentiation most difficult to achieve.

III. JUSTICE TODAY: RULINGS FOLLOWING *BC MOTOR VEHICLE*

R v Vaillancourt[10] was one of the Supreme Court cases addressing section 7 that followed closely on the heels of *BC Motor Vehicle*. *Vaillancourt* dealt with section 213(d) of the *Criminal Code*, which codified the felony murder rule. That rule held that a person who kills someone in the commission of an offence is guilty of murder, even if he or she did not foresee bodily harm occurring.

The accused was party to an armed robbery at a pool hall. He testified that when he and his accomplice had planned the robbery, they agreed that they would not use guns. On the day of the robbery, the accomplice showed up with a loaded gun that he planned to use to hold up the pool hall. The accused agreed to go ahead with the plan, but only if the accomplice removed the bullets. The accomplice acquiesced and handed over the bullets. At that point, the accused was under the impression that the gun was not loaded, and that it would not be fired during the robbery. During the robbery, however, the accomplice fired the weapon and killed one of the pool hall's patrons.

The majority reasons were again written by Justice Lamer. Not surprisingly, the discussion of section 7 began with an acknowledgement that the *Charter* creates a duty for the courts to review the substance of criminal provisions.[11] It is still the role of Parliament to define the elements of an offence, but it is the duty of the court to ensure that those elements are in accordance with the principles of fundamental justice where a section 7 interest is at stake.

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9 See *Day-Brite Lighting, Inc v Missouri*, 342 US 421 (1952), 72 S Ct 405, Douglas J [cited to US] ("[o]ur recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare" at 423).

10 [1987] 2 SCR 636, 68 Nfld & PEIR 281 [*Vaillancourt* cited to SCR].

11 *Ibid* at 652.

The Court reviewed the murder and manslaughter provisions of the *Criminal Code* and identified the felony murder rule to be an outlier; it took what would usually be considered manslaughter (committing an act or being party to committing an act that could foreseeably result in death) and transformed it into a murder conviction by virtue of other circumstances not related to the *mens rea* of the accused.[12] This was certainly Parliament's intention, but was it just?

Here, the element of the crime under scrutiny was the mental state of the accused and of anyone else accused of felony murder. This case is interesting, in part, because it draws on the history of the felony murder rule, which has its roots in the 17th century. The Court, however, refused to rely on the longstanding precedent of the acceptance of the rule as support for it being in accordance with the principles of fundamental justice under the *Charter*. Instead, the Court followed *BC Motor Vehicle* and searched "the basic tenets of our legal system" for guidance.

For example, the reasons of Justice Lamer in *Vaillancourt* credit *BC MotorVehicle* with constitutionalizing the *mens rea* requirement for offences with imprisonment as a consequence.[13] This decision builds on that development by relying on the principle that the morally blameless are not to be punished, and on the principle that the criminal sanction is inappropriate until guilt is proved beyond a reasonable doubt.[14] These principles were certainly fundamental, but there was also consensus on the issue at hand, as the majority cited numerous scholars and the Law Reform Commission in support of its findings.[15]

Vaillancourt is notable for the way in which it broke with a long-recognized rule that had been adopted into the *Criminal Code* by Parliament. The case flowed from the evolutionary nature of the principles of fundamental justice that were drawn out so effectively by *BC Motor Vehicle*. Yes, the felony murder rule had long roots, but in 1987 the Court was willing to recognize that it was simply not just in a constitutional sense.

The Supreme Court heard the *R v Morgentaler*[16] case soon thereafter. I wish to note that I was the Deputy Minister of Justice and Deputy Attorney General of Canada when the judgment was released and I thereby witnessed first hand the huge political and societal controversy surrounding the case. At issue was the constitutionality of section 251 of the *Criminal Code*, which required abortions to be approved by a hospital committee. Essentially, the argument was that this process caused unnecessary delay and a loss of control over the process, which impinged on the security of the person for women seeking abortions.

It can be difficult to draw controlling precedents from *Morgentaler*, as there were four sets of reasons, none of which was signed by more than two justices. It is

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12 *Ibid* at 647-50, 659.
13 *Ibid* at 652.
14 *Ibid* at 653-54, 656.
15 *Ibid* at 647-50.
16 [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* cited to SCR].

still, however, a most important case in its application of the methods and reasoning of *BC Motor Vehicle*. It was a real test for the Supreme Court to deal with such a serious and emotionally charged issue that straddled both the worlds of criminal law and politics.

The reasons of Chief Justice Dickson and Justice Lamer, and the concurring reasons of Justices Beetz and Estey, avoided the substantive issue in this case, and focused on the procedural aspects of section 251 that led to the deprivation security of the person in the form of psychological stress and interference with bodily integrity.

The concurring reasons of Justice Wilson were of a different order; she felt the substantive issue should be dealt with first before going on to the procedural aspects. Her reasons began by addressing the issue as a matter of liberty. Like Justice Lamer in *BC Motor Vehicle*, she took a purposive approach to the *Charter* and its protections. Her reasons connected individual choice to the concept of human dignity and provided an impassioned plea for the importance of individual conscience and judgment to Canadian society. Accordingly, she found that denying a woman of the right to decide whether to continue her pregnancy engaged section 7 interests.[17]

Justice Wilson agreed with the other concurring Justices on the point that security of the person under section 7 protects both the physical and psychological integrity of individuals. She recognized that having to go through the process set out in section 251 of the *Criminal Code* would result in stress and anxiety for pregnant women, but her objections also went quite a bit further. She saw the process outlined in section 251 as transforming a pregnant woman into "a means to an end which she does not desire but over which she has no control."[18] These words are still striking today. Justice Wilson wrote that a pregnant woman under section 251 "is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life." She then asked: "Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person?"[19] In my view, these are very powerful observations.

In her contemplation of whether the deprivations of liberty and security of the person are in keeping with the principles of fundamental justice, Justice Wilson followed *BC Motor Vehicle* and noted that the principles of fundamental justice can be found in "the basic tenets of our legal system." She was also careful to note that the section 7 inquiry should avoid the adjudication of matters of public policy. Her analysis relied heavily on a purposive and contextual approach that, like *BC Motor Vehicle*, considered section 7 in light of other *Charter* guarantees, most notably the

17 *Ibid* at 171-72.
18 *Ibid* at 173.
19 *Ibid* at 173-74.

guarantee of freedom of conscience in section 2(a), which was given an especially broad definition in this case.[20]

For Justice Wilson, the fact that section 251 breached both sections 2(a) and 7 of the *Charter*, was sufficient to put the impugned legislation in conflict with the principles of fundamental justice. She phrased the specific violation of the principles of fundamental justice as follows: "for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another."[21]

Taken to its extreme, I believe this sort of reasoning can be problematic; it requires great care and great restraint on the part of judges to apply it appropriately. For Justice Wilson, however, it was a means of meeting the challenge of *BC Motor Vehicle*: what is *just* in this situation? In her view, justice required the government to allow pregnant women the power and freedom to be seen as an end in and of themselves, and not as a means for producing future generations to serve God or the State. Moreover, in her view, justice required the law to value the individual and the individual's freedom of conscience with respect to life, liberty and security of the person.

The other concurring justices offered a less dramatic analysis on the principles of fundamental justice. Their approach, even though it left aside the substantive elements of section 251, was more closely in line with the approach of *BC Motor Vehicle*. One can argue that their approach took more care to stay out of issues of public policy. In this case, it was not necessary for them to judge whether the government should be in the business of placing restrictions on abortions. Instead, they looked at the procedures set out in section 251 and found them to be arbitrary.

By refusing to rule on the substantive issue of whether Parliament should be regulating abortions at all, these sets of reasons show the sort of restraint that is the foundation of an evolutionary model of justice; it builds on what came before in as incremental and limited a manner as the facts will allow. This is a different way of meeting the challenge set out by *BC Motor Vehicle*. It is a mode that reflects greater comfort ceding power to Parliament or a legislature in defining justice in a given situation. Had these justices been forced to rule on the substantive elements, there is no telling which way they would have decided. This approach is not inconsistent with *BC Motor Vehicle*'s commitment to avoid matters of public policy and to allow the law to grow organically.

Another particularly difficult case came to the court years later, while I was on the bench.[22] In 1993, Sue Rodriguez was a 42 year-old woman living with ALS, or Lou Gehrig's Disease, as it is commonly called. Her natural life expectancy was between 2 and 14 months. Her application was a challenge to section 241(b) of

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20 *Ibid* at 177-78.

21 *Ibid* at 179.

22 I served on the Supreme Court of Canada from January of 1991 until June of 2004.

the *Criminal Code*, which made it illegal to give assistance to commit suicide.[23] This was a very difficult case, and it attracted significant press coverage as a result of its controversial subject matter. The Court split 5 to 4 in favour of the provision's constitutionality. Justice Sopinka wrote the majority reasons in which I joined. But let me say personally that this case was one that gave me great anguish while on the bench mainly because it was a collision between my heart and my mind.

The views of Justice Sopinka, on determining the values at stake for the individual in the first part of the section 7 analysis, were rooted in his understanding that there is a strong "belief in our society that human life is sacred or inviolable," having what he calls "a deep intrinsic value of its own."[24] Nevertheless, Justice Sopinka built on *Morgentaler*—both the reasons of Justice Wilson and those of Chief Justice Dickson and Justice Beetz—and found that the impugned legislation deprived Ms. Rodriguez of her security of the person.

The analysis offered by Justice Sopinka, as to whether that deprivation was in accordance with the principles of fundamental justice, began by noting the Supreme Court's duty to weigh in on substantive issues, and expressing an understanding of the delicate nature of that task. He then provided some instructive ideas about what constitutes a principle of fundamental justice since *BC Motor Vehicle*. He distinguished between simple common law rules and fundamental principles on the basis that the latter are principles around which there is some consensus that they are vital to society's notion of justice. He also noted that they must be identifiable and understandable with some precision and that the ideas must be applicable in a practical sense.[25]

That approach seems almost intuitive, and I do not believe that the elaborations of Justice Sopinka on *BC Motor Vehicle* are surprising. What he really advocated for in his reasons was an approach that respected not just the role of the judiciary in defining justice, but also the views of society as a whole. This notion of consensus appears in *BC Motor Vehicle*, but not as centrally as it does in *Rodriguez*.

The need to understand and apply the principles of fundamental justice also arises in *BC Motor Vehicle*. It is all part and parcel of the purposive approach. After all, the only way to protect individual *Charter* rights is to define them in a manner that is actionable and does not put other rights in jeopardy unnecessarily.

The way that these two aspects of the principles of fundamental justice, viz. consensus and practicality, affect the section 7 analysis is really one of the major themes in *Rodriguez* and the later cases.

One of the most interesting aspects of this judgment was the consensus issue. Here, the reasons of Justice Sopinka turned on the issue of whether there was consensus in society that it is unjust to deprive a terminally ill patient of the right

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23 See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 531, 107 DLR (4th) 342 [*Rodriguez* cited to SCR].

24 *Ibid* at 585.

25 *Ibid* at 590-91.

to have his or her end of life hastened by a physician. The majority reasons cited the history of suicide laws and the evolving medical opinion on assisted suicide, as support for the fact that there was no consensus that preventing assisted suicide constitutes an unjust deprivation of a patient's rights. What consensus the majority found was in support of the principle "that human life must be respected" and "we [the courts] must be careful not to undermine the institutions that protect it."[26] In the majority's view, this approach protected vulnerable patients from mistakes as to their intentions, and from pressure to end their lives as a means of easing a perceived burden on loved ones.

Rodriguez was obviously a difficult case, and it dealt with tragic facts and a very controversial issue. The majority's approach recognized that controversy existed in Canadian society. Every case under section 7 will have its controversies, but every principle of fundamental justice must be able to transcend that sort of controversy. The majority in *Rodriguez* was simply not satisfied that the interest that terminally ill patients had in being able to end their own lives was able to trump the longstanding, and still widely agreed upon, principles that the vulnerable should be protected, and that the sanctity of life of should be upheld. In the majority's estimation, those principles were fundamental to society's ideas about justice.

Perhaps, if the case were tried again today, or if it were tried 50 years from today, there would be a different outcome. Our concept of justice is evolving over time, and it will continue to do so. Indeed, in my view, the majority reasons in *Rodriguez* do not prevent Parliament from enacting an assisted suicide provision along with some protections for the vulnerable. While the principles of fundamental justice are enduring, they are not perpetually stationary. As consensus evolves, so will the section 7 jurisprudence.

There is no simple way to set out each and every principle of fundamental justice in the absence of relevant facts and real disputes. The civil code system reaches back to animating principles and the common law takes guidance from precedent, but this nation's body of law and its concept of justice is applicable today and tomorrow, not just yesterday. The genius of section 7 jurisprudence is that every time a new set of facts demands resolution, the courts must approach the issues anew and meet the challenge of *BC Motor Vehicle* by further elaborating on the definition of justice.

Another case that, in some respects, addresses the definition of justice is *R v Malmo-Levine*.[27] The case involved a challenge to the criminal offence of marijuana possession. There was no question that the liberty interest was engaged. The question raised by the accused was whether the harm principle, that is, the idea that in order to set up a prohibition, there must be a corresponding harm to others, was a principle of fundamental justice.

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26 *Ibid* at 608.

27 2003 SCC 74, [2003] 3 SCR 571 [*Malmo-Levine*].

In determining whether that deprivation ran afoul of the principles of fundamental justice, the majority structured its analysis more elaborately than that of prior cases. The majority reasons, written by Justices Gonthier and Binnie, set up a three-part test to decide whether a given principle is one of fundamental justice. In that test, outlined below, there are certainly echoes of *BC Motor Vehicle*.[28]

The first step is that the principle in question "must be a *legal* principle."[29] This is not so far off from the idea that the principles of fundamental justice should be taken from "the basic tenets of our legal system."

The second step is that there must be "societal consensus that it is *fundamental* to the way in which the legal system ought to fairly operate."[30] In my opinion, this requirement is a bulwark against wholesale intrusions into public policy. For a principle to be fundamental to the fairness of the legal system it must be more than a simple preference of one policy option over another; it must be at the foundation of society's sense of what is fair and just.

The third step echoes *Rodriguez* in its requirement that the principle "must be identified with sufficient precision to yield a manageable standard against which to measure deprivations"[31] under section 7. Again, I see this requirement as being connected to the purposive approach outlined by Justice Lamer in *BC Motor Vehicle*, as it allows some consideration of the interests of society as a whole to enter the analysis. To protect people's rights under the *Charter*, there must be practical considerations taken into account. Recognizing an unmanageable or unworkable right is recognizing no right at all.

The majority reviewed a huge trove of often conflicting evidence about the potential for harm that results from marijuana use, and ultimately rejected the view that the harm principle was a principle of fundamental justice. In rendering its judgment, the majority focused on the fact that there was no consensus in society with respect to the harm principle and that it would not create a workable standard. Part of the difficulty the majority observed was the definition of the word harm, especially when scholars and judges try to differentiate between trivial and non-trivial harm, and the challenge of assessing harm on a net benefit basis.[32]

According to the majority, that difficulty meant that the harm principle was not sufficiently understandable and applicable to be a principle of fundamental justice. For that reason, the government was allowed to regulate the use and possession of marijuana, even if its harms were mostly minor and mostly impacted the drug user.[33]

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28 *Ibid* at paras 112-13.
29 *Ibid* at para 113 [emphasis added].
30 *Ibid* [emphasis added].
31 *Ibid*.
32 *Ibid* at paras 127-29.
33 *Ibid* at paras 129, 133.

The two most recent cases that I am going to deal with are *Charkaoui v Canada (Citizenship and Immigration)*[34] and *Canada (Prime Minister) v Khadr*.[35] The reasons in those cases were released three years apart from each other, but they are both unanimous decisions that deal with the interaction between section 7 and national security in the post 9/11 context. In that respect, they are both valuable examples of the application of the *Charter* to some of the most pressing issues of our time.

Charkaoui was about the security certificate process, which allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring a foreign national inadmissible to Canada. Section 7 interests were engaged in this case not because of the potential for deportation, but as a result of harms that could befall an individual following their deportation and as a result of the potential for detention and loss of liberty under the security certificate regime.[36]

The analysis with respect to the principles of fundamental justice cited and was guided by the three-branch test from *Malmo-Levine*, but did not take a slavishly step-by-step approach through its branches. Instead, it looked directly at the justness of the process in terms of basic fairness. The Court noted that it is a principle of fundamental justice that "before the state can detain people for significant periods of time, it must accord them a fair judicial process."[37] The Court recited some of the procedural safeguards that it contemplated as follows: "It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*."[38]

This set of procedures was not based on social science evidence or anything of the sort. The decision of the Court in *Charkaoui* is a prime example of how "the basic tenets of our legal system" have formed a body of law over hundreds of years that still helps to define what is just in a given situation. The Court was also careful to note that these procedural requirements are still contextual. Canadian society has a real and valid interest in protecting its institutions and people from the threat of international terrorism, and the manner in which procedural safeguards are applied will vary and evolve as required by the context.[39]

Notably, and to many observers somewhat controversially, the Court did not take an absolute stand with respect to whether a deportation that could foreseeably lead to torture will always be in breach of section 7.[40] Instead, this ruling shows restraint in keeping with the basic idea that the nation's concept of justice should

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34 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].
35 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*].
36 *Charkaoui*, *supra* note 34 at paras 14-18.
37 *Ibid* at para 28.
38 *Ibid* at para 29 [emphasis in original].
39 *Ibid* at paras 58-61.
40 *Ibid* at para 15.

evolve as necessary, and that the Court should refrain from stepping ahead of the facts presented.

The 2010 decision in *Khadr* garnered significant attention from the media and members of the legal community. It dealt with the prolonged detention of Omar Khadr at Guantanamo Bay for alleged war crimes that began when he was 16 years old.

There was no question that his liberty interest was engaged. Like in *Charkaoui*, the Court in *Khadr* did not conduct a step-by-step analysis of the three-branch test in *Malmo-Levine*, but it did cite the test as a guide to its analysis.[41] The government conduct at issue in this case pertained to the interrogations conducted by Canadian officials at Guantanamo Bay, and the sharing of information about Mr. Khadr with his American captors. The Court did not set out specific principles with which the government's conduct was out of step, but it is clear that there were both a procedural element and substantive element at play.

The Court held that Canadian officials' sharing the "fruits of an interrogation" of a youth without a lawyer present, where that interrogation elicited "statements about the most serious of criminal charges," did not accord with the principles of fundamental justice, particularly where a youth is being detained indefinitely under horrible conditions.[42]

From a procedural point of view, the sharing of information and the conducting of an interrogation without a lawyer present were in violation of the principles of fundamental justice. From a substantive point of view, Canadian complicity in some of the questionable treatment to which Mr. Khadr was subject—sleep deprivation particularly—was deemed to be out of step with Canadians' view of justice.[43]

In crafting a remedy in *Khadr*, the Supreme Court was cautious in that it did not to wade too deep into policy. Mr. Khadr's team sought an order forcing the Canadian government to request his immediate release from Guantanamo. In ordering a section 24(1) remedy, the Court was unwilling to plunge wholesale into foreign affairs. Instead, it called on the government to remedy the error as it saw fit. Of course, subsequent proceedings contesting the government's response to the Court's decision came to no end since Mr. Khadr was subsequently convicted by the United States Military Tribunal.

However, this judgment is interesting in that it hearkens back to the intuitive sort of analysis used in *BC Motor Vehicle*. As noted, the Court did not adhere to the letter of the three-branch test from *Malmo-Levine* and did not go to great lengths to elucidate precisely which principles of justice were at play. The Court exercised its judgment based on the facts before it, and applied widely held ideas about justice that came from sources in international law and the Canadian legal system. Its

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41 *Khadr*, *supra* note 35 at para 23.

42 *Ibid* at paras 25-26.

43 *Ibid* at paras 24-25.

decision is of limited precedential value because the finding was so fact-specific. One can take issue with the Court's remedy, which leaves it up to the government to decide how to comply with its judgment. However, in directing us toward "the basic tenets of our legal system" and urging courts to be wary of treading into policy areas, *BC Motor Vehicle* suggested a similar approach. Although not free from an opposing view, the Supreme Court in *Khadr*, and to a certain extent in *Charkaoui*, did what courts do admirably: it contributed to our notion of justice by rendering judgments based on the principles that arise from the facts before it, and did not wander away from that mission.

In walking you through these cases, my aim is not to explain all of the various section 7 tests, or to provide a comprehensive view of the principles of fundamental justice that have been recognized by the courts. Instead, my goal has been to give a snapshot of how the Supreme Court has worked to define justice since *BC Motor Vehicle* presented us with its challenge. I wish to convey that it has been a process of evolution, both in the conclusions that the Supreme Court has reached, and in the approaches it has chosen to take. The search for a Canadian definition of justice is a long one—and it is still ongoing.

IV. WHAT SHOULD JUSTICE BE?

It is in that spirit that I embark on what will be a brief discussion of what I perceive to be the second part of the challenge presented by *BC Motor Vehicle*. I have discussed what justice is, but what about the normative question of what justice should be. What will or should our idea of justice encompass in the future? My purpose here is not to answer those questions in the abstract, but to suggest some of the issues that will likely arise in having to answer those questions in the future.

As a means of situating this discussion, I will discuss two more section 7 cases: *Gosselin v Québec (Attorney General)*[44] and *Chaoulli v Québec (Attorney General)*.[45] You might think it odd that I chose these cases for my discussion of the future of section 7 and the future of justice in Canada, since neither case is particularly recent. However, I believe these cases are indicators as to where the frontiers might be in our country's continuing exploration of the concept of justice.

Gosselin was decided almost 10 years ago, but it is a truly interesting case, and something of an oddity, considering the fact that by the time the Supreme Court heard it the impugned Québec legislation had been repealed. In that case, the Supreme Court heard a challenge of a Québec welfare system that withheld some financial support from young adult recipients unless they took part in government-led training and education programs, which were aimed at integrating them into the workforce and off of social assistance.

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44 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

45 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

Chief Justice McLachlin wrote the majority reasons in this case, which outline some of the tensions that the Court was trying to reconcile. Significant questions were raised. Could section 7 apply to matters outside the administration of justice? Could the guarantees in section 7 extend to economic rights? Could section 7 impose a positive obligation on the government to actively provide life, liberty and security of the person?

Ultimately, the majority judgment was restrained. In adopting *BC Motor Vehicle*'s evolutionary mindset, the Court was careful not to stunt the development of section 7. In answering the questions posed by *Gosselin*, the majority in that case tried not to pronounce sweeping holdings on a single set of facts. On the question of when section 7 should apply, the majority suggested that our sense of the administration of justice should grow incrementally, and stated that the Supreme Court had never required an adjudicative context to apply section 7. The majority was also open to the idea that economic rights may be protected under section 7 given the appropriate set of facts.[46]

The majority's decision to uphold the law was based primarily on the issue of whether section 7 created a positive obligation. It is on this point that the majority is most skeptical, but even here, Chief Justice McLachlin was careful to restrict her ruling by defining the issue with respect to the facts at hand. In discussing the importance of an approach to section 7 that embraced the evolutionary model that emerged from *BC Motor Vehicle*, she wrote that "[t]he question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards."[47]

I believe that this was the correct decision in this case. I should think so; I signed on as part of the majority. I suggest, however, that the really interesting part of this case, and the part that may illuminate for us some of the places that section 7 may take us, is the dissent written by Justice Arbour.

Whether or not one agrees with her reasons in this case, I believe they are quite instructive. She essentially started from scratch on section 7. She took a unique approach to the text and some earlier judgments that dealt with section 7, and found that new kinds of interests, removed from the administration of justice, could be adjudicated under section 7. Her approach to section 7 was an especially dramatic break with much of what came before it, as it argued that there are distinct and free-standing rights in section 7: "the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." She argued that this meant that the government did and does have a positive obligation to provide life, liberty and security of the person to its citizens.[48]

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46 *Gosselin*, *supra* note 44 at paras 78-83.

47 *Ibid* at para 82.

48 *Ibid* at paras 336, 340, 377.

Her reasons dismissed the Government of Québec's rationale for the policy. The government's belief was that if it could make full assistance available to young people as they received job training, there would be less of a chance of those young people falling into a lifetime of reliance on social assistance. People will disagree about the wisdom of such a policy, but I believe that, in general, the people will want a say in those types of policies and a say in how they are enacted. This is exactly what I think most people who believe in democratic institutions expect that those institutions are designed to do.

While Justice Arbour supports democratic institutions, she saw this issue in terms of justice, not policy. The product of that premise is that the government cannot rely on its electoral mandate, but must instead prove that its policy is effective. In this case, Justice Arbour found that proof wanting. Young people were paying for the privilege of sitting in the kitchen eating left-over food from people's plates in restaurants, and most of them were not taking advantage of the training programs set up by the government. These conditions were deplorable. I do not think there was much doubt about that. The policy was bad policy, and it did not seem to be working, but on the Supreme Court, only Justice Arbour saw this as a section 7 issue, and therefore, an issue that could be decided with reference to "the basic tenets of our legal system." Justices Lebel and Bastarache dissented for other reasons.

To me, the key aspect of the dissent of Justice Arbour is with respect to the future of the Canadian definition of justice. The line between matters of law and matters of policy is not clearly discernable, and as society's thinking changes, that line may receive more elaboration. As a result, ideas of social justice, and differing ideas about the role of government, will have a huge impact on how we define justice.

The Supreme Court had to deal with a similarly fraught issue in *Chaoulli*, where the Québec legislation outlawing the sale and purchase of private health insurance was challenged. The argument was that the inability to buy private health insurance kept people from taking advantage of some of the private health care offerings in that province, which consequently had the effect of causing stress and possible physical harm to patients who had to wait for medical procedures. In this case, the Supreme Court was essentially asked to determine whether the Québec government's model for the allocation of resources and provision of care was unjust.

Here, the majority of the Court, in a split decision, found that the policy was unlawful, but the Court actually divided evenly on the section 7 analysis. The tie-breaking vote came from Justice Deschamps and it was made on the basis of the Québec *Charter of Human Rights and Freedoms*.[49]

Chief Justice McLachlin and Justice Major co-authored the reasons for finding a section 7 violation. They found a deprivation of security of the person owing to the long wait times in the public system. It is interesting that these Justices, who had formed the majority in *Gosselin*, took the position that the issue in *Chaoulli* was one of justice, and not simply public policy.

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49 *Charter of human rights and freedoms*, RSQ C-12.

As such, the government was compelled to prove its belief that allowing the sale of private health insurance would undermine the public system. Its failure to do so in the *Chaoulli* case resulted in a finding that the law was too arbitrary to be in accordance with the principles of fundamental justice. The Court reviewed evidence from other provinces, and reviewed reports from various international jurisdictions that allocated resources and regulated the provision of health care differently. They found that support for the public health care system did not necessarily decrease when private care was made available.[50]

On the issue of whether this sort of judgment steps into the realm of public policy, Professor Kent Roach was cited for the proposition that "[j]udges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process."[51]

The potential ramifications of this decision and its approach are far-reaching. The potential is for the courts to evaluate the effectiveness of government measures, as opposed to the justice of government action. When one really considers the range of effects of government policy in areas like environmental regulation, national security issues and the provision of police services, it is hard to imagine the courts having something to add to all manner of policy areas. That ultimately may or may not be a good thing. This evolution is a natural outgrowth of *BC Motor Vehicle*'s insistence on substantive review of legislation, but it is one that risks overstepping into the areas of public policy that Justice Lamer considered off-limits for the courts. Leaving that aside, I offer these comments to suggest future issues for possible section 7 elaboration and resolution.

V. CONCLUSION

As Canadians continue to face *BC Motor Vehicle*'s challenge, the boundaries between law and policy will continue to be redrawn to meet our country's evolving definition of justice. It may be that the ambit of substantive judicial review under section 7 will narrow in upcoming decades, or it may be that the courts will play an even greater role in areas that were once considered pure public policy for the domain of the legislature and executive branches. Whatever approach the courts take over the next few years is sure to evolve over time to suit our needs as a society.

Justice Lamer was very proud of his reasons in *BC Motor Vehicle*, and he had every reason to be. That decision deserves to be celebrated by this 25th Anniversary Symposium and I commend the organizers for their efforts. I believe that as a country, our enduring and civil debates on what constitutes a just society are, in part, a product of *BC Motor Vehicle* and its challenge to define justice: what it is, and what it should be.

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50 *Chaoulli*, *supra* note 45 at para 84.

51 *Ibid* at para 89, citing Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup Ct L Rev (2d) 49 at 71.