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# Section 7: Superhero, Mere Mortal or Villain?

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**Comment On**: Section 7 of the *Canadian Charter of Rights and Freedoms*

Many people love superheroes. My favourite was always Spider-Man – he had the most interesting back story, the coolest superpowers, and the grooviest soundtrack and visuals (at least in the cartoon of my youth). Section 7 could easily be seen as the superhero of the *Charter*. It has the power to strike down laws and government policies that increase the risk of death and bodily or psychological harm, as well as those that deprive people of the ability to make fundamental personal decisions free from state interference. Those powers have been used by the Supreme Court of Canada in ways that may make the members of the Court the actual superheroes in the eyes of many individuals and groups who are vulnerable to the effects of state (in)action (for recent examples see *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII), and *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII)).

But the courts do not always embrace the role of superhero. They can be timid Peter Parkers who are afraid to use their powers under section 7, especially when the use of those powers is seen as imposing positive obligations on governments. Conversely, section 7 powers may sometimes be used in ways that usurp the role of other *Charter* sections such as section 15, leaving equality rights and the individuals and groups who are the intended beneficiaries of that section in the dust. Alternatively, the courts, like Spider-Man, may be seen as villainous, fully intending to protect society but, by overextending their powers, harming society instead. Indeed, Asher Honickman, in The Case for a Constrained Approach to Section 7, argues that the Supreme Court has expanded section 7 beyond its proper limits.

My own view is that section 7 of the *Charter* should be given a robust interpretation by the courts that provides a strong check on government action and inaction. To use the examples I began with, in *PHS*, the Supreme Court ordered the Minister of Health to extend an exemption under the *Controlled Drugs and Substances Act* to Vancouver's Insite safe injection site, where the refusal to grant the extension was found to be an arbitrary and grossly disproportionate violation of the right to access lifesaving medical treatment and health-protecting services. In *Bedford*, the Court struck down three prostitution-related laws that were found to increase the risk of harm to the bodily and psychological integrity of sex workers in a manner that was overbroad and grossly disproportionate. In *Carter*, the Court declared void the *Criminal Code* sections prohibiting medically assisted dying, which were found to increase the threat of premature death, to deprive persons of control over their physical and psychological integrity, and to interfere with fundamental personal choices, all in ways which were overbroad.

These decisions altered the law or government policy in fundamental ways, based on strong evidence of how the underlying laws and policies impacted the marginalized individuals and groups who the *Charter* is intended to protect (although some people may disagree with the extent to which these decisions actually do promote the interests of vulnerable groups; see for

example the facta of interveners representing prostituted women in *Bedford* and some disability rights groups in *Carter*).

For all their seeming breadth, however, these decisions also contain carefully crafted limits, and maintain a strong role for legislators in responding to the Supreme Court's rulings. In this sense, the Court can be seen to abide by the wise words of Spider-Man's Uncle Ben that "with great power there must also come great responsibility." In *PHS*, the Court was very clear to indicate that its remedy did not "fetter the Minister's discretion with respect to future applications for exemptions, whether for other premises, or for Insite" (at para 151). Following *PHS*, the federal government passed Bill C-2, *An Act to amend the Controlled Drugs and Substances Act*, which makes it much more difficult for other cities to open safe sites for drug consumption. The amendments enacted by Bill C-2 affirm the ability of the legislature to respond to section 7 rulings that it might believe to be too expansive. The same is true with the federal government's follow-up to *Bedford*. The Supreme Court's remedy delayed the striking down of the relevant sections of the *Criminal Code*, allowing the unconstitutional provisions to remain in effect for one year. According to *Schachter v Canada*, [1992] 2 SCR 679 (CanLII), the suspension of a striking down remedy should be granted only in exceptional cases, as it allows the rights violation to persist for a period of time. In spite of *Schachter*, the Supreme Court has been fairly liberal in granting suspensions, thereby showing deference to government. Post-*Bedford*'s one year delay, Parliament ultimately enacted a law that was more restrictive than the Court's ruling, given the continued criminalization of sex workers in some circumstances (see Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford*). And in *Carter*, the Court was careful to restrict its decision to competent adults who clearly consent to the termination of life and have a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition (at para 127). It also declined to grant constitutional exemptions while giving the government time to develop its legislative response, until it extended, at government request, the suspended declaration of invalidity for four months in *Carter v Canada (Attorney General)*, 2016 SCC 4 (CanLII). The debate over Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, shows that both chambers of Parliament have an important role to play in developing policy that responds to the Supreme Court's section 7 rulings. Like Bill C-36 post-*Bedford*, Bill C-14 also exemplifies the government's ability to narrow the scope of the Court's rulings, as Parliament added reasonable foreseeability of death to the eligibility requirements for medically assisted dying.

In my view, we must be mindful of the fact that while the *Charter* binds all branches and levels of government, the government sometimes fails to give adequate consideration to its *Charter* obligations when crafting laws and policies. In *Schmidt v Canada (Attorney General)*, 2016 FC 269 (CanLII), the Federal Court upheld the standard of the federal Minister of Justice under which proposed legislation need not be reported to Parliament where there is a "credible argument" that it is not inconsistent with the constitution. As noted in commentary on this decision, the credible argument standard "equates to a low probability, or 'faint hope', of less than 5% confidence that the relevant legislation is consistent with the *Charter*". Given this low standard for examination and reporting of proposed laws for their constitutionality, courts must continue to act as guardians of the constitution. The courts' duty of constitutional review ensures that governments don't simply kowtow to majoritarian interests that disregard the needs and experiences of disadvantaged individuals and groups. As noted in *Reference re Secession of Quebec*, [1998] 2 SCR 217 (CanLII), the fundamental constitutional principle of democracy requires more than adherence to majority rule, and includes consideration of the impact of laws and government policies on minorities. The same can be said of the rule of law, which "provides

a shield for individuals from arbitrary state action" (*Reference re Secession of Quebec* at para 70). Most superheroes do use their powers for overall social good, and the Supreme Court's exercise of section 7 powers are no different in this respect.

In the context of responding to judicial decisions legislatively, governments can also invoke the ultimate superpower of the *Charter*, section 33, although much has been written on the political consequences of doing so, perhaps making section 33 the *Charter*'s kryptonite rather than superpower (and I do realize that I am mixing superhero metaphors here).

As for the contention that an expansive reading of the *Charter* may lead to uncertainty in terms of legal rights and obligations, I would note that the scope of the rights to life, liberty and security of the person have been interpreted fairly consistently over the years and are relatively predictable in their application. This is especially so if one considers the breadth of these rights, even in textual terms. *PHS*, *Bedford* and *Carter* do not add much that is new to the scope of liberty and security of the person when compared to *R v Morgentaler*, [1988] 1 SCR 30 (CanLII). And in *Carter*, the Court declined to rule on whether the right to life protects a more qualitative right, once again showing restraint in deciding only what was necessary for the resolution of the issues in that case. If our concern should be more focused on the uncertainty of the principles of fundamental justice, and in particular the application of arbitrariness, overbreadth and gross disproportionality, it is significant that the Court recently ruled in *Bedford* and *Carter* that violations of section 7 can be saved under section 1 where societal concerns merit such an outcome.

In addition, it must be noted that many of the laws that the Court has struck down under section 7 were themselves uncertain in ways that rendered them unconstitutional. In *Morgentaler*, for example, the unpredictable application of the "health" criterion in the *Criminal Code* abortion provisions led, in part, to their demise. The same concerns arise for the reasonable foreseeability of death requirement for access to medically assisted dying in Bill C-14. Section 7 must be interpreted broadly enough to protect against laws that violate life, liberty or security of the person by virtue of being unduly vague.

What about the Supreme Court's use of section 7 in cases involving government inaction? Although, as Honickman notes, the Court left open the possibility of doing so in *Gosselin v Québec (Attorney General)*, 2002 SCC 84 (CanLII), it has not taken this path in subsequent cases. The most recent example of this reticence can be seen in *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410 (CanLII), aff'd 2014 ONCA 852 (CanLII), where the Supreme Court denied leave to appeal on the question of whether section 7 protects a right to adequate housing (see also *Canadian Bar Association v Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of Canada and Legal Services Society*, 2008 CanLII 39172 (SCC), denying leave to appeal on the scope of government obligations to provide legal aid under section 7; both cases also involved section 15 arguments). I believe the Court is not using section 7 powers to the extent that it should in these kinds of cases. Canada is bound by international human rights obligations to give effect to social and economic rights under the *International Covenant on Economic, Social and Cultural Rights*, and the Court's failure to consider so-called government inaction under section 7 does not give adequate effect to these obligations. Moreover, the distinction between action and inaction (or negative versus positive rights and obligations) is not a compelling one (see here at note 112). For example, the government's refusal to extend an exemption for Insite could be characterized as either action or inaction; the Court's order requiring the government to extend the exemption in *PHS* could be seen as imposing a positive obligation or as requiring the state to refrain from prosecuting Insite's clients, a more negative conception of its section 7 duties. To the extent that this

purported distinction forestalls legitimate section 7 claims, it is itself productive of uncertainty and undermines the rule of law.

There could be a role to play for section 15 of the *Charter* in cases where section 7 is (mis)interpreted to include only exercises of state power that actively interfere with the rights of disadvantaged individuals. But the Supreme Court's reliance on section 7 at the expense of section 15 in cases such as *Carter* has deprived section 15 of some of its powers. David Lepofsky gave a persuasive presentation at Osgoode's Constitutional Cases conference in April 2016 arguing that *Carter* was a missed opportunity for the development of the disability equality guarantee under section 15. Indeed, section 7's protection against laws that are grossly disproportionate largely replicates section 15's protection against adverse effects discrimination, and the way that arbitrariness has crept in to section 15 analysis also shows the influence of section 7 on equality rights (see for example *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII), where the Court repeatedly referred to discrimination as "arbitrary disadvantage"). The problem here is that the Court's restrictive interpretation of section 15 has made it harder to succeed in *Charter* claims where section 7 is not available on the facts. In *Taypotat*, for example, a residential school survivor was unsuccessful in his claim that his First Nation's requirement of a minimum level of educational attainment to run for election as Chief or band councillor amounted to discrimination under section 15. As I have argued previously, framing government (in)action as a violation of life, liberty or security of the person is a promising strategy for some *Charter* claimants, but not all government harms can be captured under section 7, and the particular harms protected against by section 15 must be given their due. To return to my metaphor, section 7's superpowers should not be used so as to undermine the power of other *Charter* sections. Real superheroes may legitimately battle for control of who gets primacy in fighting for the good (see Batman versus Superman: Dawn of Justice), but this should not be taken as a script for how the courts should interpret and apply the *Charter* in cases of social injustice.

In conclusion, I stand proudly on the side of those who argue for an expansive interpretation of section 7 of the *Charter* for the reasons articulated here. To return to my Spider-Man analogy, despite his flaws and occasional missteps, he ultimately provides for a better society, as does a broad interpretation of section 7 powers by the courts. To paraphrase another superhero, this – more so than a restrictive, originalist application of section 7 – is the path of truth, justice and the Canadian way.

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