

File No. 40608

**SUPREME COURT OF CANADA**

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

**JOHN HOWARD SOCIETY OF SASKATCHEWAN**

**APPELLANT**

(Appellant)

- and -

**THE GOVERNMENT OF SASKATCHEWAN  
(ATTORNEY GENERAL FOR SASKATCHEWAN)**

**RESPONDENT**

(Respondent)

- and -

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## **INTERVENER'S FACTUM**

### **PART I – OVERVIEW AND STATEMENT OF FACTS**

1. This Court has not, since the adoption of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> comprehensively addressed the conceptual and concrete role of its s. 7 in relation to its ss. 8-14. In the recent cases of *R. v. J.J.* and *R. v. Brunelle*, majorities of this Court expressed the view that the relationship between s. 7 and ss. 8-14 of the *Charter* is context-specific.<sup>2</sup> The proper operation of this relationship in any particular case requires clarity on how s. 7 and ss. 8-14 relate to each other in a generalized sense. A symbiotic interaction between these provisions is especially relevant where, as in the present case, both s. 7 and one or more of ss. 8-14 are implicated. In fact, this case offers this Court an opportunity to provide clarity and guidance to litigants and lower courts alike as they grapple with these parallel claims.

2. The British Columbia Civil Liberties Association (“**BCCLA**”) submits that these provisions are mutually-reinforcing, with the notable result that s. 7 may provide protections comparable to those found in ss. 8-14 when these provisions do not apply. This interpretation of ss. 7-14 contributes to a coherent judicial development of s. 7 which accounts for its unique role in “express[ing] some of the basic values of the *Charter*”<sup>3</sup> and accords with principles of purposive *Charter* interpretation.

### **PART II – STATEMENT ON QUESTIONS AT ISSUE**

3. The BCCLA makes the following submissions:

- (a) Section 7 of the *Charter* plays a mutually-reinforcing conceptual role vis-à-vis ss. 8-14. This means that, in practice:
  - i) The guarantees set out in s. 7 can offer equivalent protection where a specific guarantee in ss. 8-14 does not apply; and
  - ii) Where a specific guarantee in ss. 8-14 of the *Charter* does apply, s. 7 remains relevant to the interpretation and application of that guarantee.

4. The BCCLA takes no position on the outcome or on the underlying facts of this case.

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<sup>1</sup> Part 1, *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, [1982, c 11](#) (“*Charter*”).

<sup>2</sup> *R. v. J.J.*, 2022 SCC 28, [para. 121](#) (“*J.J.*”); *R. v. Brunelle*, 2024 SCC 3, [paras. 66-70](#) (“*Brunelle*”).

<sup>3</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000 SCC 44](#), para. 188 (per LeBel J., dissenting in part) (“*Blencoe*”), endorsed by McLachlin J., writing for the majority in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [para. 82](#).

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**PART III – STATEMENT OF ARGUMENT**

**A. Section 7 of the Charter plays a mutually-reinforcing role vis-à-vis ss. 8-14**

5. In the past decades, judicial interpretation and refining of the *Charter's* legal rights guarantees – set out in ss. 7-14 – has focused on developing the content of individual *Charter* guarantees taken alone, to the detriment of elucidating the conceptual and interpretive relationship between s. 7 and ss. 8-14. Yet, maintaining clarity and coherence within this relationship is the only way to ensure that all of the implicated rights are given their full meaning.

6. Section 7 opens the “Legal Rights” sub-heading of the *Charter*. It enshrines the legal protections against deprivations of life, liberty or security of the person that do not accord with the principles of fundamental justice. These rights are triggered by “the state’s conduct in the course of enforcing and ensuring compliance with the law”,<sup>4</sup> whether in the context of criminal<sup>5</sup> or non-criminal<sup>6</sup> matters. Indeed, the content of s. 7 “does not turn on a formal distinction between the different areas of the law”.<sup>7</sup> The ensuing ss. 8-14 of the *Charter* illustrate specific instances of the broader legal guarantees protected by s. 7.<sup>8</sup>

7. Properly interpreted, s. 7 plays a mutually-reinforcing role vis-à-vis ss. 8-14. Two conclusions flow from this relationship.

8. **First**, due to the substantive convergence between s. 7 and ss. 8-14, the interpretation of a legal right or a principle of fundamental justice protected under s. 7 will necessarily inform and bolster the interpretation of the corresponding concept under ss. 8-14.<sup>9</sup>

9. **Second**, consistent with their differing natures – overarching in the case of s. 7 and specific in the case of ss. 8-14 – the content of s. 7 is not limited to the content of any of the rights protected

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<sup>4</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, [para. 65](#) (“*G.(J.)*”); *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 (“*BC Motor Vehicle Act*”).

<sup>5</sup> For example, *R. v. Mills*, [1999] 3 SCR 668 (“*Mills*”).

<sup>6</sup> *Charkaoui v. Canada (Citizenship & Immigration)*, 2008 SCC 38, [para. 53](#) (“*Charkaoui*”); *G. (J.)*, *supra* note 4. See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, pp. 1173-1175.

<sup>7</sup> *Charkaoui*, *supra* note 6, [para. 53](#).

<sup>8</sup> *BC Motor Vehicle Act*, *supra* note 4, [pp. 502-503](#); *R. v. Lyons*, [1987] 2 SCR 309, [para. 75](#) (“*Lyons*”); *R. v. Pearson*, [1992] 3 SCR 665, pp. 684-685 (“*Pearson*”).

<sup>9</sup> For example, *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [paras. 14-15](#) (“*9147-0732 Québec inc.*”); *Sahaluk v. Alberta (Transportation Safety Board)*, 2017 ABCA 153, [paras. 79-81](#).

by ss. 8-14.<sup>10</sup> This has implications for the respective roles of both s. 7 and ss. 8-14. Far from barring s. 7 from providing equivalent protections in contexts not contemplated by ss. 8-14, these latter sections instead illustrate specific contexts in which the rights contained therein cannot be subject to deprivation in accordance with the principles of fundamental justice.

10. These two conclusions are firmly grounded in a purposive interpretation of the implicated provisions, including their respective wordings.<sup>11</sup> As concerns the textual formulations in particular, the broad framing of s. 7 and its placement at the start of the “Legal Rights” sub-heading of the *Charter* underscores its role as a broad guarantee setting contextual limits on the means used by the state to pursue various social objectives.<sup>12</sup> The more specific wordings used in ss. 8-14, including qualifiers such as “on arrest or detention”, evidence the more limited scope and application of these provisions.

11. This mutually-reinforcing relationship and its two conclusions are consistent with the broader interpretive approach relied on to ensure coherence and consistency within the *Charter*. The interpretation of *Charter* rights “must not overshoot (or, for that matter, undershoot) the actual purpose of the right.”<sup>13</sup>

12. Crucially, the interpretation of s. 7 must account for its unique role in “express[ing] some of the basic values of the *Charter*”: “its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law.”<sup>14</sup> Similarly, looking to s. 7 when interpreting ss. 8-14 ensures that the actual purpose of these latter rights is determined and examined in the broader context of the legal rights guarantees provided for under the *Charter*.

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<sup>10</sup> *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [para. 169](#) (“*Malmo-Levine*”); *R. v. Wigglesworth*, [\[1987\] 2 SCR 541](#), p. 562 (“*Wigglesworth*”); *Schmidt v. The Queen*, [\[1987\] 1 SCR 500](#), p. 520 (“*Schmidt*”); *Luamba c. Procureur général du Québec*, 2022 QCCS 3866 (on appeal), [paras. 733-734](#).

<sup>11</sup> *R. v. Big M Drug Mart Ltd.*, [\[1985\] 1 SCR 295](#), p. 344; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [\[1990\] 1 SCR 425](#), p. 536 (“*Thomson Newspapers*”); *9147-0732 Québec inc.*, *supra* note 9, [paras. 8-18](#); *R. v. Poulin*, 2019 SCC 47, [paras. 53-54](#) (“*Poulin*”).

<sup>12</sup> *Lyons*, *supra* note 8, [paras. 76, 85](#); *BC Motor Vehicle Act*, *supra* note 4, [pp. 502-503, 511-513](#).

<sup>13</sup> *9147-0732 Québec inc.*, *supra* note 9, [para. 10](#). See also *R. v. Stillman*, 2019 SCC 40, [para. 21](#) (“*Stillman*”).

<sup>14</sup> *Blencoe*, *supra* note 3, [para. 188](#) (per LeBel J., dissenting in part), endorsed by McLachlin J., writing for the majority in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [para. 82](#).

13. In the same way, all *Charter* rights, both beyond and within s. 7, must be examined and defined “in light of each other” “so that they do not conflict with each other”.<sup>15</sup> This ensures that no one right is neutralized by another.<sup>16</sup> Moreover, the principles of fundamental justice set out and analysed pursuant to s. 7 must also be defined in a way that promotes coherence within the *Charter* and that conforms to the respective roles of the judiciary and the legislature.<sup>17</sup>

14. In this regard, this interpretation accords with the role of the principles of fundamental justice in informing and modulating the legal rights guarantees provided for by ss. 7-14 of the *Charter*. These principles are identified and given concrete meaning through the judicial development of s. 7.<sup>18</sup> In the years since the adoption of the *Charter*, Canadian courts have identified the principles of fundamental justice with reference variously to legal principles receiving pre-*Charter* protection, an evolving set of national values tied to human dignity and autonomy, and matters unaddressed by the specific legal guarantees of ss. 8-14 of the *Charter*.<sup>19</sup>

15. Unfortunately, though conceptually clear, this mutually-reinforcing relationship has not translated into a consistent treatment of these principles in practice. This issue is perhaps most apparent in parallel *Charter* claims – cases in which both s. 7 and one of ss. 8-14 of the *Charter* are invoked.

16. Under one view, engaging with the alleged s. 7 violation is unnecessary.<sup>20</sup> Others have analyzed the alleged breaches exclusively under either s. 7 or the more specific guarantee as the “more appropriate” provision,<sup>21</sup> treated the two provisions at issue as coterminous,<sup>22</sup> adopted an approach that varied within the same case,<sup>23</sup> concluded that s. 7 is relevant only if no breach of the

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<sup>15</sup> *Mills*, *supra* note 5, [para. 21](#).

<sup>16</sup> For example, see *Dubois v. The Queen*, [\[1985\] 2 SCR 350](#), pp. 365-366.

<sup>17</sup> *R. v. Lloyd*, 2016 SCC 13, [para. 40](#) (“*Lloyd*”).

<sup>18</sup> *BC Motor Vehicle Act*, *supra* note 4, [p. 513](#).

<sup>19</sup> Nader R. Hasan, “Three Theories of “Principles of Fundamental Justice””, [\(2013\) 63 Sup. Ct. L. Rev. \(2d\) 339-375](#), pp. 341-342.

<sup>20</sup> *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [para. 76](#) (“*Whaling*”); *R v. Boudreault*, 2018 SCC 58, [paras. 4, 36, 95](#).

<sup>21</sup> *R v Pan*; *R v Sawyer*, [2001 SCC 42](#), para. 79 (analyzing the alleged breach under s. 7) (“*Pan*”); *R. v. Rodgers*, [2006] 1 SCR 554, [para. 43](#) (analyzing the alleged breach under s. 8).

<sup>22</sup> *R. v. Martineau*, [\[1990\] 2 SCR 633](#), pp. 646-647; *R v. S. (R.J.)*, [\[1995\] 1 SCR 451](#), paras. 191-193 (per Iacobucci J) (“*S. (R.J.)*”); *R v. Harrer*, [1995] 3 SCR 562, [para. 13](#).

<sup>23</sup> *R. v. St-Onge Lamoureux*, 2012 SCC 57, [para. 125](#) (per Cromwell J, dissenting in part) (“*St-Onge Lamoureux*”).

other provision is found,<sup>24</sup> or decided that the issue of determining a generalized interpretive approach should be left for another day.<sup>25</sup>

17. The BCCLA thus invites this Court to clarify the analytical approach applicable to a *Charter* challenge that implicates both s. 7 and a more specific legal guarantee found in ss. 8-14.

**i. Where ss. 8-14's guarantees do not apply, s. 7 may nonetheless offer protection**

18. Where a more specific legal rights guarantee does not apply, the more flexible content of s. 7 may nonetheless afford equivalent or “more compendious” protection to rights claimants.<sup>26</sup>

19. This Court recently explored this interaction in *Poulin*. In concluding that s. 11(i) “does not guarantee to every offender the benefit of *every* change in punishment in the interval between the commission of the offence and sentencing”, a majority of this Court explicitly left for a future case the question of whether an offender could be entitled to the benefit of a lesser sentence on which the offender actually relied “**either as a matter of s. 11(i), another section of the *Charter*, or common law principles**”.<sup>27</sup> This treatment of ss. 7-14 clearly contemplates that s. 7 could contain a more expansive version of the specific substantive right set out in s. 11(i).

20. In fact, s. 7 has played this precise role in previous prison disciplinary cases. In *Howard*, and in *Brandon*, the Federal Court of Appeal and the Manitoba Court of Queen's Bench, respectively, concluded that s. 7 protects an inmate's right to counsel and right to procedural fairness in the context of prison disciplinary proceedings.<sup>28</sup> More recently, in *Currie*, the Alberta Court of Queen's Bench found that though s. 11(d)'s independence and impartiality guarantee does not apply to prison disciplinary hearings, s. 7 nonetheless guarantees the independence and impartiality of a prison disciplinary tribunal.<sup>29</sup>

21. Recognizing that s. 7 can, on a case-by-case basis, offer equivalent protection where one of ss. 8-14 does not apply does not “render nugatory” or “meaningless” that specific legal guarantee.<sup>30</sup>

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<sup>24</sup> *R. v. Ladouceur*, [1987 CanLII 6863 \(ON CA\)](#), appeal to the SCC dismissed: [1990 CanLII 108](#); *St-Onge Lamoureux*, *supra* note 23, [para. 20](#) (per Deschamps J).

<sup>25</sup> *J.J.*, *supra* note 2, [paras. 114-115](#).

<sup>26</sup> *R. v. Généreux*, [1992] 1 SCR 259, [p. 310](#), cited in *Whaling*, *supra* note 20, [para. 76](#).

<sup>27</sup> *Poulin*, *supra* note 11, [paras. 112-114](#) (emphasis added).

<sup>28</sup> *Re Howard and Inmate Disciplinary Court*, [1985 CanLII 5581 \(FCA\)](#) (“*Howard*”). *Brown v. Brandon Correctional Institution*, 1990 CarswellMan 526, [paras. 14, 17-19, 23, 25](#) **Intervener British Columbia Civil Liberties Association's Book of Authorities, tab 1**.

<sup>29</sup> *Currie v. Alberta (Edmonton Remand Centre)*, [2006 ABQB 858](#) (“*Currie*”).

<sup>30</sup> Factum of the Intervener Attorney General of British Columbia in this file, para. 12, [p. 3-4](#) (“**AGBC Factum**”), citing *Lloyd*, *supra* note 17, [para. 41](#); Factum of the Intervener Attorney General of Ontario in this file, para. 38, [p. 10](#) (“**AGO Factum**”).

Conceptually, the specific legal guarantee has not been supplanted; it continues to operate within its lane. It may simply fail to address a given factual context because its threshold conditions – such as being “a person charged with an offence”, for s. 11 rights, or being under “arrest or detention”, for s. 10 rights – are not met.<sup>31</sup>

22. Nor does this role for s. 7 unduly stretch the text of the *Charter*. The additional “layer” of *Charter* protection offered by s. 7 in these cases remains constrained by a proper purposive interpretation of that section, including notably its text and by the limiting mechanism of the principles of fundamental justice.

23. For example, s. 7 cannot be interpreted as offering more than a “fair trial” – and consistent with s. 7’s flexible approach, the requirements of a “fair trial” necessarily depend on the context-specific circumstances of each given case.<sup>32</sup> As this Court noted in *Pearson*, the “particular requirements [of the presumption of innocence under s. 7] will vary according to the context in which it comes to be applied.”<sup>33</sup> This flexibility does no violence to the “textual bounds” of s. 7 or of ss. 8-14, contrary to what the Attorney General for British Columbia submits.<sup>34</sup>

24. To the contrary, the proposition that s. 7 can never offer protection broader than what the internally-limited contents of ss. 8-14 guarantee would neutralize s. 7 altogether. Such an outcome stands in contradiction to this Court’s repeated affirmations as to the overarching and flexible role of s. 7.<sup>35</sup> The enshrinement of a particular protection under ss. 8-14 does not “exhaust” or “diminish” the role of that protection within s. 7.<sup>36</sup>

25. In this regard, it is crucial to distinguish the principles of fundamental justice from the substantive content of the rights protected under s. 7: “the concern that there be no incongruity between ss. 7 and 8-14 relate[s] to the principles of fundamental justice and not to the scope of

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<sup>31</sup> See, for example, *Brunelle*, *supra* note 2, [para. 68](#).

<sup>32</sup> See *Lyons*, *supra* note 8, [paras. 85, 88, 90](#).

<sup>33</sup> *Pearson*, *supra* note 8, [p. 684](#).

<sup>34</sup> AGBC Factum, *supra* note 30, paras. 14-15, [p. 5](#).

<sup>35</sup> *Wigglesworth*, *supra* note 10, [para. 25](#); *R. v. Shubley*, [\[1990\] 1 SCR 3](#), p. 23, citing *Wigglesworth*, *supra* note 10, [para. 20](#); *S. (R.J.)*, *supra* note 22, [paras. 91-95](#); *R. v. Potvin*, [\[1993\] 2 SCR 880](#), pp. 899-900 (per Laforest J.), pp. 915-916 (per Sopinka J) (“*Potvin*”); *R. v. Brown*, 2002 SCC 32, [paras. 90-95](#) (“*Brown 2002*”).

<sup>36</sup> These comments were made in the context of the presumption of innocence: *Pearson*, *supra* note 8, [p. 683](#); *R. v. Oakes*, [\[1986\] 1 SCR 103](#), p. 119 (“*Oakes*”). See also *Brunelle*, *supra* note 2, [para. 68](#) (context of abuse of process).



life, liberty and security of the person.”<sup>37</sup> For example, the fact that the meaning of gross disproportionality, as it is relevant to both ss. 7 and 12, is always coextensive<sup>38</sup> does not mean that the actual content of s. 12 is necessarily coextensive with the substantive content of s. 7.<sup>39</sup> Concretely, this means that, contrary to what the Attorney General of Quebec submits, a party can in fact invoke the “*garanties générales de l'article 7 de la Charte canadienne pour obtenir ce qu'une disposition spécifique ne lui accorde pas.*”<sup>40</sup>

26. Indeed, a proper purposive interpretation of ss. 7-14 does not support the novel proposition, advanced by various Attorneys General in this appeal, that the content of ss. 8-14 circumscribes the content of s. 7. The respective texts of ss. 7-14 do not set out or reference any such limitation or interaction. “Except in accordance with the principles of fundamental justice/*qu'en conformité avec les principes de justice fondamentale*” represents the only textual qualification within s. 7. In contrast, elsewhere in the *Charter*, explicit language such as “subject to/*subordonnés à*”, “except/*sauf si*” and “only to such...limits/*que...dans des limites*” are used to limit rights or impose internal exceptions<sup>41</sup> and the term “notwithstanding/*independamment de*” is used to manage potential conflicts between rights.<sup>42</sup> Most *Charter* rights are not subject to internal exceptions.<sup>43</sup>

27. Moreover, their proposed interpretation would run afoul of principles of *Charter* interpretation and established Canadian s. 7 jurisprudence. Indeed, allowing ss. 8-14 to fix the substantive content of s. 7 would simultaneously “overshoot” the respective purposes of these provisions and “undershoot” the actual purpose of s. 7.

28. If we take the s. 11 guarantees as an illustration, concluding that s. 7 cannot provide protections equivalent to s. 11 in cases where s. 11 does not apply would run directly contrary to established Canadian caselaw holding that s. 7 can protect, in settings not captured by s. 11, the right to independent and impartial decision-making,<sup>44</sup> the right against self-incrimination,<sup>45</sup> the

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<sup>37</sup> *Mills*, *supra* note 5, [para. 87](#), citing *R. v. CIP Inc.*, [1992] 1 SCR 843, p. 854.

<sup>38</sup> *Lloyd*, *supra* note 17, [paras. 40-47](#); *Malmo-Levine*, *supra* note 10, [para. 160](#); AGO Factum, *supra* note 30, para. 42, [p. 12](#).

<sup>39</sup> *Malmo-Levine*, *supra* note 10, [para. 169](#).

<sup>40</sup> Factum of the Intervener Attorney General of Quebec in this file, para. 41, [p. 14](#), see also paras. 42-45, [p. 14-15](#).

<sup>41</sup> See [ss. 1, 4\(2\), 6\(3\), 11\(f\)](#) of the *Charter*, *supra* note 1.

<sup>42</sup> See [s. 28](#) of the *Charter*, *supra* note 1.

<sup>43</sup> *Stillman*, *supra* note 13, [para. 29](#).

<sup>44</sup> *Currie*, *supra* note 29.

<sup>45</sup> *Brown 2002*, *supra* note 35, [paras. 90, 94](#); *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3, [paras. 2-5, 31-43](#); (“*Branch*”); *S. (R.J.)*, *supra* note 22,

right to be tried within a reasonable time,<sup>46</sup> the presumption of innocence,<sup>47</sup> and the right not to be charged or disciplined twice on the same charge for the same offence,<sup>48</sup> to name a few.

29. By way of illustration, taking the Attorneys' General proposed interpretation of s. 7 to its logical conclusion would mean that there could be no protection for fair trial rights under s. 7 in extradition proceedings, contrary to what this Court has repeatedly held.<sup>49</sup>

30. Indeed, an interpretation pursuant to which the inclusion of a given substantive right *with* textual exceptions under one of ss. 8-14 excludes any equivalent treatment of that right *without* textual exceptions under s. 7, would effectively impose the outdated "occupied field" federalism approach<sup>50</sup> on the interpretation of *Charter* guarantees.

31. This Court should reject the invitation to narrow s. 7's role and scope in this way. Properly interpreted, s. 7 can afford robust protection even where the threshold conditions of specific guarantees are not met, just like it can bolster the protection offered by a specific *Charter* guarantee when that latter guarantee is found to apply.

**ii. Where a specific legal guarantee under ss. 8-14 applies, s. 7 remains relevant**

32. The applicability of a specific legal guarantee does not render s. 7 irrelevant. To the contrary, s. 7 continues to play a crucial interpretative and conceptual role by informing the analysis under that specific legal guarantee, without subsuming it.<sup>51</sup> In parallel, judicial engagement with the interaction between the specific legal guarantee and s. 7 contributes to the coherent development of s. 7.

33. For example, in the recent *Brown* case,<sup>52</sup> this Court dealt with alleged breaches of ss. 7 and 11(d) sequentially. Considerations of fundamental justice permeated the Court's s. 11(d) analysis: in fact, this Court held that by inviting convictions without requiring that the Crown prove the voluntariness of the impugned conduct, the contested provision violated both the requirement of voluntariness – a principle of fundamental justice under s. 7 – and the presumption of innocence

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[paras. 91-95, 189, 191-193, 204](#). See also David M. Paciocco, "Self-Incrimination: Removing the Coffin Nails", [\(1989-1990\) 35 McGill L.J. 73-116](#).

<sup>46</sup> *Potvin*, *supra* note 35, [pp. 899-900](#) (per Laforest J.), [p. 915](#) (per Sopinka J.).

<sup>47</sup> *Oakes*, *supra* note 36, [para. 29](#); *Pearson*, *supra* note 8, [p. 688](#).

<sup>48</sup> *R. v. Dobson*, (*Ont. C.A.*), 1987 O.J. No. 842, paras. 41-42, **Intervener British Columbia Civil Liberties Association's Book of Authorities, tab 2**; *Pan*, *supra* note 21, [paras. 113-114](#).

<sup>49</sup> *Schmidt*, *supra* note 10, [paras. 38, 40, 55-56](#); *United States of America v. Cobb*, [2001 SCC 19](#), para. 34.

<sup>50</sup> *Canadian Western Bank v. Alberta*, [2007 SCC 22](#), paras. 73-75.

<sup>51</sup> For example, see *Mills*, *supra* note 5, [paras. 87-89](#); *R. v. Darrach*, [2000 SCC 46](#), paras. 23-31.

<sup>52</sup> *R. v. Brown*, [2022 SCC 18](#) ("**Brown 2022**").

as applied under s. 11(d).<sup>53</sup> The Court's approach in *Brown* thus further lends support to the view that s. 7 plays a mutually-reinforcing role in the case of parallel *Charter* claims.

34. The idea that the contents of one *Charter* right can influence the content of another is far from controversial. As this Court explained in *Mills*, rights must be interpreted "in a contextual manner – not because they are of intermittent importance but **because they often inform, and are informed by**, other similarly deserving rights or values at play in particular circumstances."<sup>54</sup>

35. Recognizing this interpretative role for s. 7 vis-à-vis ss. 8-14 is consistent both with a proper interpretation of the *Charter*'s "Legal Rights" sub-heading as well as with principles of *Charter* interpretation more broadly. Indeed, this Court has already recognized that specific legal rights enshrined in ss. 8-14 must be interpreted in light of other *Charter* rights. In *Seaboyer* and *Osolin*, the majority opinions emphasized the role of ss. 15 and 28 in interpreting the substantive content of s. 11(d)'s rights to a full answer and defense and to cross-examine, respectively.<sup>55</sup>

36. Similarly, judicial treatment of the interaction between the specific legal rights set out in ss. 8-14 and s. 7 clarifies the scope and content of the interests and principles protected pursuant to s. 7, as illustrated by this Court's recognition of the protection of solicitor-client privilege as a principle of fundamental justice under s. 7 in its adjudication of a s. 8 claim in *Lavallee*.<sup>56</sup>

37. Importantly, in conducting such analyses, a distinction must be maintained between s. 7 and ss. 8-14. Failing to do so creates the risk that the analysis of one guarantee be subsumed within the analysis of the other, which could result in internal limits being improperly imposed on the wrong right:<sup>57</sup> for example subjecting s. 12 to a principle of fundamental justice other than gross disproportionality or imposing the qualifier of "on arrest or detention" on the scope of life, liberty and security of the person under s. 7. Where parallel claims are made under s. 7 and ss. 8-14, s. 7's broad, rights-conferring nature should not be distorted to the point of imposing restrictions on rights which do not otherwise result from their own texts.<sup>58</sup>

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<sup>53</sup> *Brown 2022*, *supra* note 52, [paras. 96-105](#), [107](#) *in fine*.

<sup>54</sup> *Mills*, *supra* note 5, [para. 61](#) (emphasis added).

<sup>55</sup> *R. v. Seaboyer*; *R. v. Gayme*, [\[1991\] 2 SCR 577](#), pp. 603-604 (per McLachlin J), pp. 698-699 (per L'Heureux-Dubé J) ("*Seaboyer*"); *R. v. Osolin*, [\[1993\] 4 SCR 595](#), p. 669 (per Cory J.). See also *Mills*, *supra* note 5, [paras. 90-94](#).

<sup>56</sup> *Lavallee*, *Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R v. Fink*, [2002 SCC 61](#), para. 35; Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege", [\(2003\) 20 Sup. Ct. L. Rev. \(2d\) 213-247](#), pp. 226-227.

<sup>57</sup> *J.J.*, *supra* note 2, [para. 114](#).

<sup>58</sup> *J.J.*, *supra* note 2, [para. 354](#) (per Rowe J, dissenting).

38. Maintaining this distinction is also crucial to avoid conflating the respective contents of each specific guarantee with that of s. 7.<sup>59</sup> Not only would this commingling create problematic redundancy within the *Charter* itself, but it would also run roughshod over s. 7's unique analytical framework, namely the qualifying role played by the principles of fundamental justice, by dangerously importing considerations relevant to s. 1 into the principles of fundamental justice analysis under s. 7. Whereas s. 7 focuses on *delineating* the substantive boundaries of the rights engaged, s. 1 asks whether the *violation* of those boundaries may be justified.<sup>60</sup> This distinction is thus necessary to avoid improperly using and developing s. 7 to impose the limits that s. 1 would otherwise impose on a specific legal guarantee.<sup>61</sup>

39. Ultimately, looking to s. 7 to inform the analysis of the specific legal guarantee actually reduces the risk of one *Charter* right rendering another “nugatory”, by ensuring that both rights develop in a coherent and consistent fashion.<sup>62</sup> As concerns s. 7 in particular, this judicial engagement with the substantive content of s. 7 allows this right, through *stare decisis*, to continue to fulfill its unique role within the *Charter* and safeguard individual rights and liberties from state coercion.<sup>63</sup>

#### **PARTS IV AND V - SUBMISSIONS ON COSTS AND ORDERS SOUGHT**

40. The BCCLA seeks no costs and requests that none be awarded against it. The BCCLA takes no position with respect to the disposition of the present appeal.

Montréal, August 30, 2024



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Montréal, August 30, 2024



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<sup>59</sup> *J.J.*, *supra* note 2, [paras. 403-407](#) (per Rowe J., dissenting).

<sup>60</sup> *Mills*, *supra* note 5, [para. 66](#).

<sup>61</sup> *Charkaoui*, *supra* note 6, para. 23; *J.J.*, *supra* note 2, [paras. 430-431](#) (per Rowe J., dissenting)

<sup>62</sup> *Lloyd*, *supra* note 17, [para. 41](#).

<sup>63</sup> Andrew Menchynski & Jill R. Presser, “A Withering Instrumentality: The Negative Implications of *R. v. Safarzadeh-Markali* and Other Recent Section 7 Jurisprudence”, [\(2017\) 81 Sup. Ct. L. Rev. \(2d\) 75-96](#), p. 89.

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**Paragraph(s)**

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