The Principles of Fundamental Justice and the “Societal Consensus” Requirement

by

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Abstract

The Supreme Court of Canada’s test for delineating the principles of fundamental justice requires that a proposed norm enjoy “significant societal consensus that it is fundamental to the way in which the legal system ought to fairly operate”. The author examines the considerations that count in favour of recognizing that a proposed norm satisfies this requirement; they include: the standard employed—be it normative or empirical, the types of sources relied upon and the way a proposed norm is framed or reframed by the Court. The author argues a normative standard is preferable because it allows the Court to retain full competence to deal with those egregiously unfair outcomes that fall under section 7 but are unpredictable ex ante. It is the better standard for a liberal-democratic state which values dialogue as between the Court and Parliament. As for reformulating proposed principles, the author argues procedural safeguards should be introduced.
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This thesis is dedicated to my late father.
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1. Introduction

Section 7 of the *Canadian Charter of Rights and Freedoms* states that: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹ Section 7 protects individuals’ most basic interests—their life, liberty and security—but only if state action which affects those interests is fundamentally unjust. And there is much at stake in determining what are the “principles of fundamental justice.” The state is otherwise free to take away some part of an individual’s life, liberty and security, if he or she cannot *point* to a relevant principle of fundamental justice and then prove it has been infringed in a constitutional challenge under section 7.²

We now know that the principles of fundamental justice are both procedural and substantive.³ We also know that the Supreme Court of Canada’s test for delineating the principles of fundamental justice requires a proposed norm to meet three characteristics. The norm in question must: (i) be “a legal principle”; (ii) enjoy “significant societal consensus that it is fundamental to the way in which the legal system ought to fairly operate”; and (iii) be sufficiently precise so as to “yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”⁴ In this paper, I focus on the second of these three characteristics, which I refer to as the “societal consensus” requirement.

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 1, s 7 [Charter].

² But see Hamish Stewart, “Bedford and the Structure of Section 7” (2015) 60:3 McGill LJ 575. Stewart has suggested that the structural relationship between section 7 and section 1 has been fundamentally altered after *Canada (A.G.) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, opening the possibility that violations of section 7 may be saved under section 1.


Hamish Stewart has remarked that this requirement is the most difficult of the three characteristics to understand and apply. Peter Hogg on the other hand, has argued that the Court never intended to take the “societal consensus” requirement seriously. In his view, it is unclear how parties can go about proving “societal consensus” as a phenomenon and many of the currently recognized principles of fundamental justice lack popular support. Taken at the extreme, his view asserts that “judges will decide for themselves (and no doubt often disagree) on whether a societal consensus exists for a proposed principle of fundamental justice”. And finally, Nader Hasan has noted the idea of societal consensus is a “legal fiction” and appears “oxymoronic” to the purpose of the Charter.

But what are the considerations that count in favour of recognizing that a proposed principle of fundamental justice satisfies the “societal consensus” requirement? The answer depends on the standard employed, the sources relied upon and the way a proposed principle is either framed by party submissions or reframe by the Court.

First, it appears that the Supreme Court has implicitly rejected the possibility that the “societal consensus” requirement can be met by applying an empirical standard. In Rodriguez,
Malmo-Levine and Chaoulli, the criterion is explicitly associated with a standard of “general acceptance among reasonable people”. Like several other areas of the Charter, this assertion suggests the standard employed is normative as it involves a version of an objective legal standard. Under such a standard, the facts of a particular case do not alone determine the outcome and what ought to be the governing view in a reasonable Canadian society plays a role in the inquiry. But the section 7 caselaw reveals the Supreme Court has not always remained faithful to the normative standard. In some cases, the Court actually resorts to applying an empirical standard and the focus of the inquiry is on ascertaining what are the relevant attitudes of Canadians toward the proposed principle of fundamental justice at issue. The empirical-normative inconsistency is not something new. In the context of section 8 of the Charter, Hamish Stewart has shown the Court to oscillate between an empirical-centric approach and a normative-centric approach to determining what is a reasonable expectation of privacy. To a large extent those ideas find themselves here because in a similar vein, numerous section 7 cases show the Supreme Court has applied two competing understandings—one empirical, the other normative—with respect to how a party can go about proving a principle enjoys significant consensus by the public. When a normative standard is employed, the breadth of sources considered widen and their content considered meaningfully. But whatever standard is employed

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8 Rodriguez, supra note 4 at 607, Sopinka J; Malmo-Levine, supra note 4 at paras 112-113; Chaoulli, supra note 4 at para 127, McLachlin CJ, Major J and Bastarache J; See also at para 208, Binnie J and LeBel J, dissenting.

9 See for example section 8, infra note 10; See also section 24(2), the determination of whether the administration of justice would be brought into disrepute is not a purely factual question. The approach under section 24(2) is determined by considering an objective legal question, stated most recently in Grant, 2009 SCC 32 at para 68 [2009] 2 SCR 353 as follows: “whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.” On this point, see Alan Bryant, Sidney Lederman and Michelle Fuerst, The Law of Evidence in Canada, 4th ed (Markham, Ont: LexisNexis Canada, 2009) at Chapter 9, §9.51 (“[o]nce the Charter violation and circumstances surrounding it are proved, the inquiry departs the realm of pure fact and becomes concerned with matters that are not susceptible to proof in the ordinary sense…”).


11 Ibid.
by the Court, it seems highly unlikely it is prepared to accept any particular piece of evidence as conclusive of the outcome.

Second, the determination of whether a proposed principle meets the “societal consensus” requirement is highly dependent on how it is framed in the first place as a preliminary matter. Yet the Supreme Court has been poised on several occasions to reframe a proposed principle of fundamental justice without addressing whether it is at all bound by the formulation of lower courts or party submissions.

In this paper, I outline the general trend and argue that the empirical standard is not only incompatible with Court’s function on Charter review but also stifling to section 7. Section 7 is an important basket provision; it captures those situations of state action which are not necessarily represented by other legal rights under the Charter. These situations are often hard to envision. A normative standard allows the Court to retain full competence to deal with those egregiously unfair outcomes that fall under section 7 but are unpredictable ex ante. The standard also recognizes that in not all cases would following, rather than leading public opinion, result in the best interpretation of the “principles of fundamental justice” for a liberal-democratic state which values dialogue as between the Courts and Parliament. The standard permits the Court to fulfill its rights-protecting duty without unnecessary reservations.

With respect to reformulating proposed principles of fundamental justice, I argue that the practice could compromise the impartiality of the Court. I suggest that a presumption in favor of further party submissions could be a helpful procedural safeguard.

This paper will proceed as follows. Parts 2 and Parts 3 will illustrate how the two distinct standards have been employed in the section 7 caselaw. The analysis includes a consideration of more recent cases such as Federations of Law Societies of Canada and Kazemi Estate. Part 4
describes how in various cases the Court has reformulated proposed norms of fundamental justice without turning its mind to civil procedure. Part 5 highlights the problems associated with an empirical standard and argues a normative standard is preferable under section 7. Part 6 discusses how the practice of reformulating norms can result in unfairness and suggests procedural safeguards should be adopted by the Court. And finally, Part 7 concludes.

2. The Empirical Standard

In several cases the Supreme Court of Canada has applied empirical standard in its effort to determine whether a proposed principle of fundamental justice enjoys sufficient consensus such that it satisfies the second criterion of the three-part test under section 7. The standard is applied by the dissenters in the older cases of R v. D.B., and Chaoulli, but also, more recently by the majority in Kazemi Estate. The empirical standard is driven by facts about public opinion. Which means, the opinions of the public or their “notions of justice” are assumed to be ascertainable through empirical investigation. If it can be shown Canadians would in fact disagree with the proposition that a proposed norm is sufficiently fundamental to merit recognition under section 7, then the finding is fatal to the outcome. Thus, when the Court applies the empirical standard, the goal is to identify sources from which it could gather reliable knowledge of publically held attitudes relevant to drawing an inference.

Consider the dissenting opinion of Rothstein J in R v. D.B. In that case, the issue was whether the presumptive offences of young offenders in the Youth Criminal Justice Act\textsuperscript{12} violated section 7. Young people who committed the presumptive offences at issue attracted an adult sentence unless it could be proven otherwise that a youth sentence should be imposed. Likewise,

\textsuperscript{12} SC 2002, c 1.
the young person automatically lost the benefit of a publication ban unless, he or she could justify otherwise. The majority of the Supreme Court of Canada held that by placing the onus on young offenders, the offences violated the principle of fundamental justice that young persons are presumed to have diminished moral blameworthiness. But more importantly, the principle met all three elements of the three-part test. Rothstein J dissented by disagreeing with the content of the principle, and implicitly, the kind of standard applied under the “societal consensus” requirement. In his view, while he agreed that the presumption of reduced moral blameworthiness of young persons was a principle of fundamental justice, the presumption of lower sentences for young offenders could be dissected into a separate norm and then considered afresh on its own merits as a distinct proposed principle of fundamental justice. Proceeding to do so himself, Rothstein J considered the conclusions drawn by academics from survey evidence conducted in Ontario as indicative of popular sentiment in Canada. One survey found that 86 per cent of people interviewed thought youth sentences were not harsh enough on young offenders. Rothstein J’s conclusion was further supported by “frequent legislative reform” to young offender legislation which illustrated changes in public attitudes toward young offenders, particularly with respect to punitiveness. From his historical analysis, it was possible to infer in fact public disagreement over whether young offenders should be presumed to received lower sentences. Public attitudes are taken as conclusive proof that a proposed norm does not satisfy

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13 R v D.B. at paras 129ff.
14 R v D.B. supra note 4 at para 131, citing “studies on public perceptions of youth crime”, as also observed by Hasan, supra note 7. The citations include for example, A.N. Doob and C. Cesaroni, Responding to Youth Crime in Canada (Toronto: University of Toronto Press, 2004), at 3-13. Doob and Cesaroni at 5 in turn refer to survey evidence conducted by A.N. Doob, J.B. Sprott., V. Marinos & K.N. Varma, An exploration of Ontario residents’ views of crime and the criminal justice system (Toronto: Centre of Criminology, University of Toronto, 1998). The other sources cited by Rothstein J similarly do not seem to include survey evidence beyond those conducted in Ontario.
15 Ibid, Doob and Cesaroni at 5.
16 R v D.B. supra note 4 at para 132.
the “societal consensus” phenomenon, despite other circumstances and reasons which we may imagine are relevant under section 7.

In Chaoulli, the dissenting opinion of Binnie J and LeBel J likewise considers an empirical standard as key to ascertaining whether the “societal consensus” requirement is met, but this time, also finding expert evidence on the record as constituting a good source of proof to measure whether a particular kind of view exists or does not exist. Chaoulli involved the Quebec health care provisions which prohibited private health care insurance for services covered under the public health care system. The appellants argued the prohibition violated the life and security of the person by depriving access to health care services provided by private health insurers, which are free of waiting lists, unlike the public health care system. According to the majority, the provisions violated section 7 on the basis of a pre-existing principle of fundamental justice namely, that laws not be arbitrary. But while Binnie J and LeBel J disagreed with the majority’s outcome, they thought it was necessary to consider the merits of an alternative norm, which they went on to find did not satisfy any of the requirements of the three-part test. This so-called alternative norm, was awkwardly framed as “health care to a reasonable standard within reasonable time” probably because it was not a “legal” principle to begin with. Nonetheless, in deciding whether there was significant societal consensus that “health care to a reasonable standard within a reasonable time” was fundamental to the way in which the legal system ought to fairly operate, the dissent clearly applied an empirical standard. But this time, the sentiments of experts in the medical community, rather than those of the public at large, were taken as the nature of opinion relevant to the issue. Similar to the criminology sources cited in R v D.B., the dissenting judges relied on academic sources, and took medical literature as proof from which an

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17 Ibid at paras 2 and 14.
18 Ibid at paras 207 and 231.
19 Ibid at para 209.
empirical conclusion could be drawn. If academics in the relevant field of health care governance held there was no agreed upon standard for timely treatment of health care, then no consensus on the proposed norm could be possible as of fact. This conclusion was further supported by expert testimony which asserted that it was difficult to define a “reasonable waiting list” because of the diversity and multiplicity of opinions.\(^{20}\) The expert witness asserted: “you have a hundred (100) surgeons, you have a hundred (100) opinions, it’s very difficult to come to a consensus on these questions…”\(^{21}\) What mattered to the “societal consensus” inquiry conclusively was whether in fact most people disagreed over what constituted a reasonable waiting list, not the reasons why those disagreements exist.

Most recently, *Kazemi Estate* reinforced the Court’s tendency to apply an empirical standard to the “societal consensus” requirement, even though the case’s international dimension complicates the way the standard is applied. The plaintiffs, a Mr. Hashemi and his mother’s estate, instituted an action in Canada for damages against the Islamic Republic of Iran, particularly its head of state and two government officials for the detention, torture and murder of Mr. Hashemi’s mother, a Canadian citizen who was working as a freelance photographer and journalist in Iran. According to the majority, the *State Immunity Act*\(^ {22}\) barred the plaintiffs from bringing their action: subject to listed exceptions, section 3(1) prevented any foreign state from being sued for civil actions in a Canadian court.

The majority went on to consider whether section 3(1) engaged and violated section 7. Without firmly drawing a conclusion, the majority found that in theory, the provision—by preventing individuals from seeking civil redress and closure—could have the effect of causing a victim of torture or their next of kin psychological harm serious enough to impose limits on the

\(^{20}\) *Ibid* at para 212.
\(^{21}\) *Ibid*.
\(^{22}\) *RSC 1985 [SIA]*.
security of the person, thereby engaging section 7. The interest in finding closure after enduring torture or the effects of torture touches upon the core of human dignity.\(^{23}\) Essentially, the plaintiffs argued the obligation of a state to provide universal civil jurisdiction for a remedy to victims of torture was a principle of fundamental justice and supported by article 14(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\(^{24}\) Article 14 provides as follows:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

From the perspective of the majority, the proposed norm could be phrased in the same way advanced by the plaintiffs: “that a civil remedy be available to victims of torture committed in foreign countries”.\(^{25}\) The majority also recognized that there was another way the proposed principle could have been entrenched; it would have to be seen as attached or forming part of the content of an already recognized principle of fundamental justice—the jus cogens prohibition against torture.\(^{26}\) As far as the majority was concerned, the plaintiffs proffered two distinct sources of international law as evidence of a principle of fundamental justice, conventional law (CAT) and a higher form of customary international law (jus cogens norm).\(^{27}\)

\(^{23}\) Kazemi Estate, supra note 4 at paras 127-128 and 130.
\(^{24}\) 1465 UNTS 85 [CAT]; Ibid at para 136.
\(^{25}\) Ibid at para 136 and 140.
\(^{26}\) Ibid at 152.
The majority does not launch straight into the question of whether Canadians in fact would agree that it was vital to their notions of justice that Canadians tortured abroad receive civil recourse in Canada against foreign governments. Rather, the central focus of the reasoning seems to be whether international sentiment or attitudes in fact support either, the interpretation of article 14 advanced by the plaintiffs, or the understanding that the *jus cogens* norm against torture requires a civil remedy for those tortured abroad. An empirical standard is thus nevertheless applied, but the group of opinions relevant are not those of the Canadian public, but of national and international judges as found in adjudicative pronouncements with respect to their reading of article 14 and the *jus cogens* prohibition on torture.

Because there is an international dimension to *Kazemi Estate*, it is not easy to identify the majority’s application of the standard. We may be faced with a difficult question of methodological attribution: is the empirical standard employed in the name of the “societal consensus” inquiry or the “internalization” inquiry? The answer is both.

What do I mean by the “internalization inquiry”? According to the majority, before the Court can consider whether the international sources presented by the plaintiffs have constitutional implications, it must first be assured that these sources have been “received” or “internalized” in the domestic Canadian legal order. Otherwise, these international sources have no binding value. The nature of the international source at issue is particularly significant. Conventional law is only binding if implemented by domestic legislation, while customary

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29 More particularly, those opinions which could be inferred from international customs (state practice and *opinion juris*). This point is further developed below.
30 See *Kazemi Estate, supra* note 4 at para 150.
31 *Ibid* at paras 102 and 149-150. See also LeBel J and Chao, “The Rise of International Law in Canadian Constitutional Litigation” *supra* note 27 at 36: “…we emphasize that the reception of international law into the Canadian legal system must in itself form part of the argument advanced by counsel.”
32 The significance stems from Canada’s system of receiving international law which has been described as a “hybrid”: *Ibid* at 33.
international law on the other hand, is “directly incorporated into the common law of Canada and is effective immediately without the need for further legislative or executive action.”

So, before the CAT could be considered by the judges under section 7, the plaintiffs had to overcome a first hurdle: they had to illustrate its reception into the domestic legal system. Because the CAT was conventional law, the plaintiffs had to show not only that it was implemented into Canadian law through legislation but that their interpretation of the CAT too was implemented. And before turning to the section 7 analysis, the majority had already determined that SIA did not implement the plaintiff’s interpretation. Therefore, the only way the plaintiffs could succeed was to show that their interpretation of the CAT existed in customary international law. Likewise, for the majority, the only way the _jus cogens_ prohibition against torture could be understood to include the obligation of civil redress for victims tortured abroad was to show that this understanding was recognized in custom. The Court’s standard method for determining whether impugned custom is part of customary international law (what I termed above, the “internalization inquiry”) is subsumed into the Court’s approach to determining whether the “societal consensus” requirement is met. And how does the majority go about recognizing that a rule or norm is part of customary international law? By venturing into an empirical investigation.

The approach was neatly summarized by LeBel J in a published paper:

> …two requirements must be met in order for a particular rule or principle to be considered an international custom. First, the principle or rule must be generally observed or accepted as a state practice. To determine whether this is so, one enquires as to whether the majority or states are adhering to the rule or principle in their physical acts, claims, declarations, laws and judgments. The rule must be recognized as a state practice by most, but not all nations…[t]he second requirement is that states follow the principle or rule out of a sense of legal obligation, not simply out of courtesy or morality. This is known as _opinio juris_, as the International Court of Justice held…”Not only must the acts concerned amount to a settled practice, but they must also be such,

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34. _Kazemi Estate_, _supra_ note 4 at paras 149-150. See also LeBel J and Chao, _supra_ note 27 at 34, noting problems in the reception process when implementing legislation only contains parts of the convention itself.
35. _Ibid_ at paras 58, 60, 61 and 149.
36. The inquiry has also been described as the “approach to domestic reception of customary international law”: LeBel J, “A Common Law of the World?”, _supra_ note 27 at 14.
or be carried out in such a way, as to constitute evidence of a belief by the state parties that a practice is rendered obligation by the existence of a rule of law requiring it.”

The majority found that international customary law did not support the interpretation of the CAT advanced by the plaintiffs, neither of the *jus cogens* prohibition against torture. Rather than extensively examine state practice to determine whether the proposed norms were custom, the majority deferred to the House of Lords and endorsed its treatment of state practice in the judgment of *Jones v Kingdom of Saudi Arabia*, which dealt with article 14. The judgment had been affirmed by the European Court of Human Rights. In *Jones*, the majority noted that a number of state parties interpreted article 14 as applying to acts of torture committed in its own territory, and not those committed in a foreign state. The majority also notes the International Court of Justice has not yet passed a decision interpreting article 14 in the way proposed by the plaintiffs. That the United Nations Committee against Torture—the body responsible for monitoring and enforcing state party compliance with the CAT—would make comments that hold otherwise “[i]f anything…only indicate[s] that there is an absence of consensus around the interpretation of article 14.” The Committee had remarked that it was particularly important for state parties to provide civil remedies to victims tortured or mistreated abroad especially when “…a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place.” The Court gave the Committee’s comments little weight. With respect to the *jus cogens* norm, LeBel J found that the plaintiff’s understanding of the norm was not

37 *Ibid* at 5-6.
38 *Jones v Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26; See also *Jones v United Kingdom*, Nos 34356/06 and 40528/06, ECHR 2014.
39 *Kazemi Estate*, supra note 4 at paras 141-144.
40 *Ibid* at para 144.
41 *Ibid* at para 147.
42 *Ibid* at para 146.
supported by state practice either. The majority considered how the ICJ and the ECHR already considered the question, which was also consistent with the practice of other state parties such as New Zealand.44

Because of the Court’s preoccupation with impugned custom, what mattered to the “societal consensus” inquiry were not necessarily the reasons why state practice leaned toward one interpretation of article 14 and the *jus cogens* prohibition against torture versus an other, but that no state practice could be identified as a fact. The lack of state practice and *opinion juris* was thus indicative of a lack of international opinion which in turn did not support the proposition that the proposed principles of fundamental justice at issue met the “societal consensus” requirement.

In any event, the standard employed in *Kazemi Estate* suggests that the outcome of the “societal consensus” inquiry is strongly affected by the choice of evidence submitted by the parties. Writing for the majority, LeBel J clarifies how international treaties such as the CAT cannot serve as evidence determinative to the “societal consensus” outcome:

> When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate. The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system…45

This passage may be seen to suggest international opinions cannot be taken as a reliable reflection of societal opinions in Canada. The majority goes on to say that even if the plaintiffs had succeeded in showing there was significant international consensus over the way the article should be interpreted, it was not conclusive. But the reason international treaties are also not

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45 *Ibid* at para 147 [internal citations omitted].
determinative is because of the impact saying so would have on our constitutional order. A strict treatment of international treaties would open the floodgates by encouraging parties to equate international commitments with the principles of fundamental justice which “might in effect be destroying Canada’s dualist system of reception of international law and casting aside the principles of sovereignty and democracy.”\footnote{Ibid at para 150. On the relationship between delineating new principles of fundamental justice and their effect on Canadian constitutional traditions, or the structure of our constitutional order, compare to \textit{R v Anderson}, 2014 SCC 41 at paras 31-32 [2014] 2 SCR 167.} For this reason, the majority specifies how international sources should be handled with care when used for the purposes of establishing the elements of the three-part test for recognizing new principles of fundamental justice.

International treaties must first and foremost be shown to be binding in Canadian law. This preliminary threshold question must be answered in the affirmative before considering the international instrument for weight as outlined in the excerpt above.\footnote{\textit{Kazemi Estate}, supra note 4 at para 149.} Despite the international dimension of the case, it is nevertheless possible to identify the application of an empirical standard to the “societal consensus” requirement at the forefront.

While LeBel J’s guidance is welcome, it still does not clarify the differences in community of opinions or attitudes relevant to the empirical standard. In the \textit{R v D.B.} dissent, the opinions that mattered were those of Canadians more generally and the sources relevant to the societal consensus criterion reflected just that, though not without difficulties.\footnote{See \textit{infra} note 14. The survey evidence implicitly relied upon through academic literature only appears to feature surveys of Ontario residents.} Likewise in \textit{Chaoulli}, LeBel J and Binnie J found the opinion of experts in the medical community mattered to the empirical standard, which explains the importance of academic literature and expert testimony. In \textit{Kazemi Estate}, the pronouncement of judicial authorities or more particularly speaking, state practice, were determinative of the outcome, though the Court cautions it may not
always be the case, given the complicated dualist system of applying international law in Canada.

Despite the standard employed, it is difficult to imagine the Court would consider any one source of opinion—be it academic literature, survey evidence, expert testimony, history, international treaties, or custom, as conclusive of the outcome. But the choice of standard employed by the Court does matter. A particular piece of evidence may support an opposite conclusion when a normative standard is applied. For the most part, Abella J’s reading of article 14 of the CAT illustrates this point, had she chosen to go on to consider the section 7 issue—an observation I return to toward the end of the following section.

3. The Normative Standard

Under the normative standard, the focus of the inquiry is on whether a reasonable person, fully appraised of the relevant sources and circumstances, including the proposed norm’s function, would conclude that it is fundamental to the general public’s perspective of fairness or “notions of justice” section 7 ought to protect. The fact that a particular type of public attitude or opinion relating to the proposed norm can be shown to empirically exist—that is, inferred from a variety of sources, is not determinative of the outcome. What matters are the reasons for those opinions and whether they ought to be given any value in light of the egregiously unfair outcomes section 7 is meant to prevent.

49 See also Kazemi Estate, supra note 4 at para 151 and LeBel J and Chao, supra note 27 at 33. In Kazemi Estate, LeBel J discusses how jus cogens norms can generally be equated with principles of fundamental justice. But there is uncertainty over how to recognize jus cogens norms.

50 With respect to the relationship between the normative standard and the sources of evidence, See Stewart, “Normative Foundations for Reasonable Expectations of Privacy” supra note 10 at 341.

51 See Hamish Stewart, Fundamental Justice, supra note 4 at 109 who supports “normatively infused legal argument” under the “societal consensus” requirement.
The Court’s application of the normative standard is obvious in *Canada (Attorney General) v Federations of Law Societies of Canada*. In that case, the Federation of Law Societies of Canada and several interveners challenged the constitutionality of certain provisions applicable to lawyers under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.\(^{52}\) Under the regulatory scheme created by the legislation, lawyers faced the threat of prosecution and imprisonment if they did not comply with obligations related to client identification, record keeping and the search and seizure of their offices—all of which were aimed at deterring illicit transactions.\(^{53}\) The majority of the Court found that the scheme violated the lawyer’s duty of commitment to the client’s cause, which was a principle of fundamental justice. Considering the duty’s function with respect to the way “the state and the citizen” interact, it was fundamental to the general public’s “notions of justice” that the duty be protected under section 7.\(^{54}\) Taking into account the Court’s own caselaw and the word of various international bodies, the fact it has been described as having an “ancient pedigree” or being considered by many as a matter of “high public importance” is not determinative. What matters are the reasons why and if these reasons ought to be fundamental to the general public’s perspective of fairness or “notions of justice”.\(^{55}\) The Court reasons that a reasonable Canadian society would consider the lawyer’s duty of commitment to the client’s cause fundamental because it is essential to maintaining public confidence in the administration of justice: the broader public has to feel confident that their interests represented by lawyers are perceived to be free from interference—be it from the state or any other obligations. Otherwise, trust and

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\(^{52}\) SC 2000, c 17.

\(^{53}\) *Federations of Law Societies of Canada*, supra note 4 at paras 11-12 and 18.

\(^{54}\) *Ibid* at para 95.

\(^{55}\) *Ibid* at para 96 (emphasis in original).
confident is undermined and interference with legal representation may compromise the guarantees of a free and democratic society.\textsuperscript{56}

Consider the majority opinion of \textit{R v D. B.} in light of the normative standard. In the majority’s view, a reasonable person would conclude that the presumption of diminished blameworthiness of young offenders is fundamental to the general public perspective of fairness because age plays a role in judgment and moral sophistication, while lack of judgment and knowledge also prevents young offenders from effectively participating in the court process. Further, youths also respond differently to punishment compared to adults.\textsuperscript{57} That legislative history confirms the legal principle is “long-standing” is not determinative. That academics and international instruments have expressed a consensus over the requirement of taking age into account in penal law is not determinative either. Rather, the reasons that underlie the requirement is what matters, and how they relate to what society ought to think with respect to the fair functioning of the legal system, or stated differently, their notions of fairness under section 7.

\textit{R v D.B.} is not an isolated case. The standard is applied by the Court in \textit{Canadian Foundation for Children}, where the provision at issue dealt with the exemption of assault charges for parents or teachers who applied force that was “reasonable under the circumstances”.\textsuperscript{58} The appellants argued the exemption violated section 7 and that “the best interests of the child” was a principle of fundamental justice. The Court disagreed and found that it was not vital or fundamental to society’s notion of justice under section 7, particularly given that the Court’s own caselaw showed how the relevance of the legal principle does not always override “other concerns in appropriate contexts”.\textsuperscript{59} That legislation and social policy show as of

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid} at paras 96-97.
\item \textit{R v D.B.}, supra note 4 at paras 59-68.
\item \textit{Criminal Code}, s 43, RSC 1985, c C-46. See \textit{Ibid} at para 1.
\item \textit{R v D.B.}, supra note 4 at para 10.
\end{enumerate}
\end{footnotesize}
fact that the best interests of the child is an important factor in various contexts is not conclusive. But what matters from the general public’s perspective is that no rationale or function underlying the legal principle could be identified, particularly with respect to “the dispensation of justice”. ⁶⁰

In *Kazemi Estate*, Abella J’s dissent did not address the section 7 violation because she would have interpreted section 3(1) of SIA as including an exception to state immunity in cases of torture for subordinate officials.⁶¹ Unlike the majority, she found that because the legislation did not mention lower-level individual officials, it was necessary to resort to customary international law to resolve the ambiguity. Despite her different approach to SIA, Abella J in essence considered the same impugned customs and instruments of international law as the majority, but reached a different outcome.

She concluded that *unsettled* customary international law could not block access to a civil remedy for an act that violates a *jus cogens* norm.⁶² Why do we care? Given her different treatment of the sources than the majority, it is highly likely that had she considered the section 7 issue, she would have applied a normative standard to the “societal consensus” requirement, perhaps to some proposed norm related to the “principle of reparation.” The “internalization” inquiry or more particularly, the empirical findings of state practice would not have been determinative of the outcome.⁶³ Because a reasonable person would also have considered “what the international community has said about individual redress for gross violations of peremptory norms”⁶⁴ and the “evolutionary nature of the law of immunity for torture.”⁶⁵ A full appraisal of

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⁶⁰ *Ibid.* See also *Malmo-Levine, supra* note 4 at paras 114 and 126. the majority could not identify a function associated with the ‘harm principle’ for precisely the reason that it did not consider it a principle at all: it was merely a “description of an important state interest.” This had ramifications for the finding that the societal consensus requirement was not met: “there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence”.

⁶¹ *Kazemi Estate, supra* note 4 at paras 184-186 and 227-229.


⁶³ In other words, the “internalization inquiry” is not determinative.

⁶⁴ *Kazemi Estate, supra* note 4 at paras 187.
the circumstances and a wider array of sources led her to find article 14 enshrined “the long-standing international acceptance of the principle of reparation…”66 The principle’s function is restorative and there is international consensus that it is foundational in domestic legal systems.67

With respect to the *jus cogens* norm against torture, while Abella J does not say so in so many words, but the focus of the reasoning seems to be that a reasonable person would not take the opinions of the majority of international judges as conclusive of what Canadians think but rather consider the nuances attached to those opinions, the issues of contention and how the general public would or would not consider them central to their notions of fairness. Why was it central to our notions of fairness that foreign officials be held criminally responsible in Canadian courts for acts of torture committed abroad, but not civilly responsible for those same acts? State practice established an exception to state immunity for criminal proceedings but not civil proceedings. Yet there was no principled basis for the distinction.68 Abella J remarks that the majority in *Jones v United Kingdom* noted that state practice was in a “state of flux” over whether torture could be lawfully within the scope of official authority for the purposes of state immunity in civil claims,69 the main reason being that some practice could not “see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person…”70 Added, she drew an implicit distinction between prohibitive custom and permissive custom. While state immunity was a general rule of customary international law, the rule does not require that a state

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65 *Ibid* at para 205. That customary international law favors a particular interpretation of article 14 is not conclusive. Further, a reasonable person would have looked at the sources a bit harder, and noted that ECHR noted explicitly that state practice with respect to whether torture can qualify as official state conduct “was in a state of flux”: *Ibid* at para 207.

66 *Ibid* at paras 174 and 188.

67 *Ibid* at para 189.

68 *Ibid* at paras 209, 229-230; compare to para 102, per LeBel J.

69 *Ibid* at para 207. As the ECHR said in *Jones v United Kingdom*, supra note 38, “[i]nternational opinion on the question may be said to be beginning to evolve” at para 213.

70 *Ibid* at paras 207, citing *Jones v United Kingdom*, supra note 38, Judge Kalaydjieva, dissenting.
provide immunity for acts of torture.\textsuperscript{71} This distinction had value for Abella J, despite its lack of significance in customary international law according to the majority.\textsuperscript{72}

4. Reformulating Proposed Principles of Fundamental Justice

Regardless of the standard applied by the Court, at the preliminary stage, the Court must always determine a series of important questions relating to the scope and substance of the proposed principle: what is the proposed principle at issue; whether it should reformulate the proposed principle determined by the lower courts; and/or, if it should reframe the proposed principles advanced by parties in their submissions. This “preliminary stage” of analysis has important implications for the final outcome of the three-part test, particularly whether it will lead to a finding that the ‘societal consensus’ requirement is satisfied.

Returning to \textit{Federations of Law Societies of Canada}, the Federation and interveners argued that the provisions offended the “independence of the bar,” which they contended was the principle of fundamental justice at issue in the case. Independence of the bar meant that lawyers were “free from incursions from any source, including from public authorities.”\textsuperscript{73} The British Columbia Court of Appeal had found that the provisions violated section 7, particularly on the basis that it had found the submissions were right, “independence of the bar” was a principle of fundamental justice. But that was not the proposed principle considered by the majority under the three-part test, nor the principle it went on to recognize. Instead, the proposed principle at issue was the lawyer’s duty of commitment to their clients’ cause.

\textsuperscript{71} \textit{Ibid} at para 211.
\textsuperscript{72} \textit{Ibid} at para 61. See also LeBel J, “A Common Law of the World?”\textit{, supra} note 27 at 16, holding that in Canadian caselaw, permissive norms in customs “are not automatically incorporated into our domestic law”.
\textsuperscript{73} \textit{Federations of Law Societies of Canada, supra} note 4, at paras 76-77, discussing the Court of Appeal’s reasons.
Before turning to the three-part test, the majority was of the view that there were two versions of the principle advanced by the parties and the lawyer’s duty of commitment to their clients’ cause was a “narrower version” most relevant to the case. As the majority concluded:

“the central contention is that this scheme substantially interferes with the lawyers’ duty of commitment to their clients’ cause because it imposes duties on lawyers to the state to act in ways that are contrary to their clients’ legitimate interests and may, in effect, turn lawyers into state agents for that purpose.”

The majority classified the proposed legal norm as part of a group of fiduciary and ethical duties that had already been found to have a constitutional dimension under s. 7: the group included solicitor-client privilege. The reasons justifying the constitutional status of solicitor-client privilege also applied to the lawyer’s duty of commitment to his or her client. Yet, the majority did not address the dissent’s contention that the operative principle of fundamental justice was solicitor-client privilege which had already been recognized under s. 7 by the Court. The preliminary stage of the analysis raises some important questions about how different versions of proposed principles affect the outcome of the three-part test. It also raises issues of procedure.

But in some cases, the Court does not contemplate whether a proposed norm is amenable to reformulation, even though disagreements in outcome may sometimes flow from differences in opinion over what the proposed norm at issue should be. Kazemi Estate is an excellent example. Recall, Abella J did not go on to consider whether the principle of reparation—which she found expressed in article 14 of the CAT—could have been seen as a proposed principle of fundamental justice under the three-part test. But she easily could have, particularly given the plaintiffs in the case did not formulate the principle of fundamental justice at issue explicitly but instead pointed to article 14 as evidence of a principle of fundamental justice. It would seem the

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74 Ibid at para 77.
75 Ibid at paras 82-83.
76 Ibid at paras 119-120, McLachlin CJ and Moldaver J, dissenting.
majority instead considered the proposed principle at issue as “the right to a civil remedy in Canada for victims of torture” (advanced by the Attorney General of Canada) which is much more specific than the principle of reparation.\textsuperscript{77} From this narrow formulation, the breadth and treatment of sources considered under the societal consensus inquiry will be much more limited.

Further, in \textit{Kazemi Estate}, the interveners had advanced an alternative proposed principle of fundamental justice, which the majority did not attempt to reformulate by identifying a “narrower version”, as had been done in \textit{Federations of Law Societies of Canada}; arguably, a different outcome would have been possible. The proposed principle was actually a legal maxim: “where there is a right, there must be a remedy for its violation”.\textsuperscript{78} The majority took a rather literal reading of the legal maxim when assessing whether the “societal consensus” requirement could be satisfied: “[r]emedies are by no means automatic or unlimited: there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation.”\textsuperscript{79} Had the majority taken the maxim and attempted a narrower reformulation, it might have led it to consider whether there was societal consensus certain types of remedies ought to be automatic, particularly in cases of \textit{jus cogens} violations. Both proposed formulation would arguably have been supported by the record.

The older caselaw seems more mindful of the preliminary stage of the three-part test. In \textit{R v D.B.}, Rothstein J discussed the exercise of formulating the proposed principle in his dissent by including the element of balancing.\textsuperscript{80} Writing for the majority Abella J did discuss the operative norm in the case as she chose a different formulation than the lower courts. The Ontario Superior

\textsuperscript{77} \textit{Kazemi Estate}, supra note 4 at para 137.
\textsuperscript{78} \textit{Ibid} at para 158.
\textsuperscript{79} \textit{Ibid} at para 159.
\textsuperscript{80} \textit{R v D.B. supra} note 4 at paras 143-144. His discussion focuses on the contextual nature of principles of fundamental justice and the balancing required.
Court of Justice relied primarily on a reference brought by the Quebec government to the Quebec Court of Appeal which itself had identified four separate fundamental principles of justice\textsuperscript{81} while the Ontario Court of Appeal identified two distinct principles.\textsuperscript{82} Commenting on the Quebec and Ontario Courts of Appeal, the majority noted that the recognized principles of fundamental justice were related, but conceptually distinct views of one governing principle: the presumption of reduced moral blameworthiness of young persons:

The Quebec and Ontario Courts of Appeal set out different but conceptually related views of the governing principle, both of them emphasizing that young persons should be dealt with separately from adults based on their reduced maturity. I agree that this is important, but do not see this as engaged in this case. As the YCJA confirms, there is in fact a separate legal system for young persons. Section 3(1) (b) confirms that “the criminal justice system for young persons must be separate from that of adults”.

What the onus provisions do engage, in my view, is what flows from why we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a presumption of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment.\textsuperscript{83}

As mentioned earlier, Rothstein J disagreed with the majority’s conception of the proposed principle, particularly the substance of what it entailed. He agreed with Abella J that the presumption of reduced moral blameworthiness satisfied the three-part test but disagreed with “what follows from this presumption of reduced moral blameworthiness”. In his view, it was worth considering whether the presumption of lower sentences for young offenders was a “necessary attribute” of the presumption of reduced moral blameworthiness.\textsuperscript{84} Saying of the majority opinion and the Ontario Court of Appeal’s decision:

\begin{quote}
[it] do[es] not expressly state that the presumption of youth sentences is a principle of fundamental justice. However, I think it must follow that if, as they hold, the principle of reduced moral blameworthiness leads inevitably to the presumption of youth sentences, the presumption of youth sentences must also be a
\end{quote}

\textsuperscript{81} Ibid at para 32 (emphasis in original).
\textsuperscript{82} Ibid at para 16.
\textsuperscript{83} Ibid at paras 40-41.
\textsuperscript{84} Ibid at para 126.
principle of fundamental justice. In other words, fundamental justice requires that there always be a presumption of youth sentences.\textsuperscript{85}

Rothstein preferred to find two distinct principles of fundamental justice and to offer an explicit qualification of what is not a principle of fundamental justice.\textsuperscript{86} The practice begs the question how justified the Court may be in reformulating proposed norms presented by the parties in a legal system committed to the adversarial model.

Likewise, in \textit{R v Malmo-Levine}, the Court was particularly mindful of the preliminary exercise in delineating the boundaries of a proposed principle of fundamental justice. Though it should be remarked, like Rothstein J’s dissent in \textit{R v D.B.}, the case makes reference to a balancing between individual and societal interests under section 7 as an essential part of the exercise.\textsuperscript{87} In \textit{Malmo-Levine}, no principle of fundamental justice could be recognized. The appellant argued the \textit{Narcotic Control Act}\textsuperscript{88} provisions prohibiting the possession and trafficking of marihuana violated section 7 of the \textit{Charter}. The proposed principle of fundamental justice at issue was the “harm principle”: and so the submission went, “unless the state can establish that the use of marihuana is harmful to others, the prohibition against simple possession cannot comply with s. 7”\textsuperscript{89} However, the “harm principle” was not explicitly advanced by the appellants \textit{per se} because their submissions consisted of a multitude of arguments “predicated on the requirement of harm.”\textsuperscript{90} It was the British Columbia Court of Appeal which found the “operative principle of fundamental justice” to be the “harm principle.”\textsuperscript{91} The Supreme Court found that the appellants had also tried to advance a “pleasure principle” which was utilitarian in nature and

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\item \textsuperscript{85} \textit{Ibid} at para 129
\item \textsuperscript{86} \textit{Ibid} at para 140.
\item \textsuperscript{87} See Stewart, \textit{Fundamental Justice}, supra note 4 at 110-113, discussing how the balancing exercise is relevant to elucidating a particular principle of fundamental justice. One clear example is the right to a fair trial, which “contains a balancing of interests within it.”
\item \textsuperscript{88} \textit{RSC 1985, c N-1}.
\item \textsuperscript{89} \textit{Malmo-Levine}, supra note 4 at para 102 [emphasis in original].
\item \textsuperscript{90} \textit{Ibid} at para 91.
\item \textsuperscript{91} \textit{Ibid} at para 95.
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more appropriately considered under section 1. The Court went on to consider whether there was evidence of consensus among people’s views that “the harm principle [be] the sole justification for criminal prohibition.” A narrower formulation of the principle could have led the Court to instead consider whether there was societal consensus that the harm principle be the sole justification for certain kinds of criminal prohibitions, such as those crafted with imprisonment. In essence, that was Arbour J’s focus of disagreement with the majority.

5. So What?

How the Standard Applied under Section 7 Matters

In our liberal-democratic state, there are good reasons to think the normative standard is preferable to an empirical standard under section 7. Like so many areas of the Charter, the question over which choice of standard the Court should employ under section 7 “may be seen as [an] iteration of a broader debate regarding the judicial role in a liberal democracy”. Scholars have repeatedly remarked that as a phase “the principles of fundamental justice” has challenged the Court throughout section 7’s history, primarily because the text is “extraordinarily open-ended”, “devoid of substantive content”, and highly elastic implicating concerns over the

92 Ibid at para 101.
93 Ibid at para 115. On a related point in this paper, see Stewart, Fundamental Justice, supra note 4 at 121, implicitly noting the standard applied under the societal consensus requirement was empirical and that a normative line of reasoning would have strengthened the Court’s conclusion.
94 Though Arbour J’s approach is not without difficulties, consider Hamish Stewart, “The Limits of the Harm Principle” (2010) 4 Crim Law and Phil 17.
95 Lawrence David, “Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court” (2015) 73 U Toronto Fac L Rev 35 at 38. See also Stewart, Fundamental Justice, supra note 4 at 311, noting “…all the constitutional questions about the appropriate role of judges in a democracy replicate themselves in a different guise.”
96 Ibid, Stewart, Fundamental Justice, at 97.
98 Jamie Cameron, “From MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7” (2006) 34 SCLR (2d) 105 at 105.
Court’s legitimacy and institutional competence.\textsuperscript{99} The Court is aware of this difficulty—it has noted that the process of delineating the principles of fundamental justice leaves “a great deal of scope for personal judgment”\textsuperscript{100} and the Court must ensure that a recognition of a principle of fundamental justice is not “created for the occasion to reflect the court’s dislike or distaste of a particular statute”\textsuperscript{101} since it would trump the democratic will.

It is for this very reason the Court requires that a proposed norm be considered sufficiently fundamental in the views of the public: the requirement enhances the legitimacy of judicial review and allows the Court to be careful that the principles of fundamental justice “do not become principles which are of fundamental justice in the eye of the beholder only”.\textsuperscript{102} An empirical standard is consistent with this view which at the extreme favours the “democratic” side of the liberal-democratic ledger. Assuming average Canadians had the requisite knowledge and sophistication to form opinions relevant to the proposed principles of fundamental justice—and—that it is too impractical to gather hard accurate data about those views, the empirical standard purports to be a prediction made by judges of what those views are to the best of their ability.

But this standard also has repercussions on the capacity for section 7 to work as a “futile” and “protean”\textsuperscript{103} site of constitutional litigation for parties who seek to begin a dialogue about their rights in a free and democratic society. If most issues considered under section 7 are some of the most controversial in our society, then a standard hinging strictly on popular consensus

\textsuperscript{99} See Alana Klein, \textit{supra} note 97 at 379 who notes that because of “the ambiguous constitutional text” which protects “fundamental but general concepts as liberty and justice”, the Court is placed in a difficult predicament in light of its duty to give meaning to the text. In such circumstances, both a narrow and liberal interpretation of the words trigger concerns of legitimacy: “is the Court overreaching and protecting more than the text of the provision provides?...[or] is the Court shirking its responsibilities to uphold constitutional standards?”.

\textsuperscript{100} \textit{Rodriguez supra} note 4 at 590.

\textsuperscript{101} \textit{Ibid} at 607.

\textsuperscript{102} \textit{Chaoulli, supra} note 4 at para 208, Binnie J and LeBel J, dissenting, citing \textit{Rodriguez supra} note 4 at 590 [emphasis in original].

\textsuperscript{103} Stewart, \textit{Fundamental Justice, supra} note 4 at 307.

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would most likely restrain the number of principles of fundamental justice recognized by the Court. The strict empirical standard might always lead to the conclusion that there will lack popular consensus on a proposed norm. After all, in all the cases discussed, the empirical standard employed always led to a finding that a principle of fundamental justice could not be recognized for lack of popular support. Proposed principles of fundamental justice are born out of a factual matrix that is inherently intertwined with controversial issues. But the controversial dimension should not be used as a reason to restrict the scope of section 7. An empirical approach would likely favour a restrictive view of section 7 which has been favored in the caselaw:

Section 7 gives rise to some of the most difficult issues in Canadian Charter litigation. Because s. 7 protects the most basic interests of human beings — life, liberty and security — claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society’s conception of “principles of fundamental justice” as to be constitutionally entrenched.

On the other hand, we must also understand that the “liberal” side of the ledger cannot be ignored—section 7 is supposed to contribute to the liberal-democratic project of the Charter. The Court has recognized that there is an inherent tension implicated in the “societal consensus” requirement:

On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of

\[104\] See Ibid at 109, noting how the circularity resulting from a pure historical analysis also applies to “a strict empirical investigation into societal views”. See also Rodriguez supra note 4 at 591-92 noting the use of historical review in delineating the principles of fundamental justice; compare to R v D.B. supra note 4 at para 132, Rothstein J, dissenting, particularly his historical analysis of young offender legislation.


\[106\] On the role of section 7 in the liberal-democratic project of the Charter, See Stewart, Fundamental Justice, supra note 4 at 313.
the wisdom of legislation. On the other hand, the Court has not only the power but the
duty to deal with this question if it appears that the *Charter* has been violated.\(^{107}\)

An interpretation about how we should go about recognizing the principles of fundamental
justice, particularly how a proposed norm could be said to satisfy the “societal consensus”
requirement, would have to account for what section 7 is supposed to do entirely. And the Court
has the competence and the duty to “give concrete meaning and application to the public values
embodied in the Constitution”.\(^{108}\) A normative standard recognizes that in not all cases would
following rather than leading public opinion lead to the best interpretation of the “principles of
fundamental justice” in a liberal-democratic society—that is, best account for what section 7
should do. Recall under the normative standard, the fact popular attitude relating to a proposed
principle of fundamental justice can be inferred from sources is not determinative of the finding
that the “societal consensus” requirement is satisfied or not. The standard invites the judge to
exercise some level of discretion by considering a multitude of other sources and factors in
deciding what a reasonable Canadian society would think. As in elsewhere in the *Charter*, where
a normative standard is applied to matters of public opinion—such as to whether the admission
of justice will be brought into disrepute under section 24(2), the standard under section 7 is able
to account for the reality that popular attitudes are often skewed against marginalized and
unpopular minorities which the *Charter* is designed to protect.\(^{109}\) The Court has an important
rights-protecting role for these individuals.\(^{110}\)

\(^{107}\) *Rodriguez*, *supra* note 4 at 589-90.

\(^{108}\) Owen Fiss, “The Social and Political Foundations of Adjudication” (1982) 6:2 Law & Hum Behav 121 at 125
[Fiss, “The Social and Political Foundations of Adjudication”].

\(^{109}\) See Hasan, *supra* note 7 at 367; relying on *R v Collins*, *supra* note 7 at para 282; See also Hogg, “The Brilliant
Career of Section 7” *supra* note 4 at 209 discussing dysfunctional laws that harm those who have “little popular
appeal or political power”. But See Owen Fiss, “The Forms of Justice” (1979) 93:1 Harv Law Rev 1 [Fiss, “The
Forms of Justice”] at 6, discussing footnote four of *United States v Carolene Products Co*, 304 US 144 (1938).

be bulwarks against the tides of public opinion…”.
Some critics may argue that the discretion afforded to judges under section 24(2), which is decided on a case-by-case basis, is very different than the discretion judges created doctrinally under section 7. Section 24(2) affords discretion to judges through the words of the text by asking judges to consider “all the circumstances”. And the consequences of finding that a proposed norm is so fundamental that it ought to be entrenched under section 7 is a question of law that has the effect of striking down statutes passed by Parliament. Section 24(2) does not have the same potential to intrude into the sphere of Parliament. It is in this context that critics might have reservations about a normative standard being applied under the “societal consensus” requirement. And so it goes, in comparison to the empirical standard, there is greater room for discretion and the insertion of personal values by judges under a normative standard as they determine what a reasonable Canadian society ought to think with respect to a proposed principle.\(^{111}\)

While the consequences of section 7 are significant indeed, the criticisms underestimate how the judiciary is equipped, by virtue of process, to apply a normative standard on a principled basis.\(^{112}\) Judges are fair and impartial. As Owen Fiss has famously noted, when speaking of judicial competence:

> It is not at all necessary…to ascribe to judges the wisdom of philosopher kings. The capacity of judges to give meaning to public values turns not on some personal moral expertise, of which they have none, but on the process that limits their exercise of power.\(^{113}\)

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\(^{111}\) See Dale Gibson, “Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms” (1983) 61 Can Bar Rev 377 at 379-380. Some might argue that “[t]here is room for considerable disagreement among reasonable observers”, and it is “very difficult for even the most objective judge to avoid substituting his or her personal values and reactions.”

\(^{112}\) It may also be argued that there should not be a presumption to the contrary given that the decision to entrench the Charter was one chosen by the Canadian people. See B.C. Motor Vehicle Reference, at 497. Following the logic, it raises the following question: why would the people assign the courts an interpretive role, if the courts would then proceed to defer to an interpretation by the general public? See also Friend v Alberta, [1998] 1 SCR 493 at para 132.

As long as the Court adheres to both dialogue and independence, in otherwords, the “two qualities of process”\textsuperscript{114}, we have every reason to feel confident that the Court will give the principles of fundamental justice the best legal meaning in line with Charter values. And the Court has subscribed to this understanding of judicial competence.\textsuperscript{115} But an empirical standard applied under section 7 is fundamentally incompatible with this understanding of judicial competence since the requirement of \textit{ex ante} popular approval of a proposed norm compromises the independence of the Court.\textsuperscript{116}

\textbf{Independence and Dialogue}

What exactly do I mean by independence? Independence refers to “political insularity”, “[i]t requires that the judiciary be independent of political institutions and the public in general.”\textsuperscript{117} The assumption is that the Constitution is best interpreted by those who are free from

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\textsuperscript{114} Ibid.
\textsuperscript{115} See for example, \textit{B.C. Motor Vehicle Reference}, supra note 4 at para 497, Lamer J notes how judicial competence is tied to constitutional design and process provisions such as sections 1, 33 and 52. See also, \textit{Vriend v Alberta}, [1998] 1 SCR 493 at paras 136ff, Iacobucci J, dissenting.
\textsuperscript{116} As Owen Fiss writes, legitimacy depends on the two qualities of process and not on “the willingness of the people to consent to particular outcomes or on people’s capacity to appoint or remove the individuals who hold the public office.”: Fiss, “The Social and Political Foundations of Adjudication”, supra note 108 at 125. Compare to Gibson, supra note 111, who would consider popular consent as the source of the Court’s legitimacy for enforcing judgements. In his view, the average man and woman are those “whose numbers and whose potential for disaffection carry a significant threat to the legal establishment” at 379.
\textsuperscript{117} Owen Fiss, “The Limits of Judicial Independence” (1993) 25:1 Yale L Rev 57 [Fiss, “The Limits of Judicial Independence”] at 59; That is not to say that I borrow these ideas by Owen Fiss completely without qualification. According to Fiss, independence also means being “independent of the desires or the preferences both of the body politic and of the particular contestants before the bench”; See Fiss, “The Social and Political Foundations of Adjudication” supra note 108 at 125. This conception of independence has been subject to criticism: it begs the question whether the content of independence required in the context of constitutional litigation (or as Fiss calls it “structural reform”) is the same as the content of independence required in the ordinary context of dispute resolution, where a Court is merely called upon to adjudicate facts—something that courts do best. The reason the question arises is because of “the high risk of error in structural reform as opposed to dispute resolution”: Fiss, “The Forms of Justice” supra note 109 at 31 (discussing the “instrumental critique”). While Fiss concedes that the risk of judicial error in the adjudication of facts is not as great as in structural reform, he asserts, “[i]n the first place it is not clear why any social institution should be devoted to one and only one task, even the one it does best.” at 32. It is not necessary for the purposes of the present paper to ascribe fully the concept of independence as employed by Fiss. In any event, my view is that such a concept would have to be molded to the unique design of the Canadian constitution. What matters is that from the standpoint of constitutional design, the understanding is that courts are equally equipped to interpret Charter rights on their own, as they are in adjudicating facts—better equipped than the other institutions of government. Whatever risk of error may result in the context of interpreting law can be remedied by either evoking the notwithstanding clause.
political control. These individuals are most likely to do what is right, rather than what is popular. Given the design of our constitution, the requirement of independence is understood to be a necessary precondition of constitutional adjudication, without which the Court could not properly discharge its function. Iacobucci J has eloquently described the relationship between the courts, the other organs of government and popular will:

…it was the deliberate choice of our provincial and federal legislatures in adopting the Charter to assign an interpretive role to the courts…the consequential remedial role of the courts were [thus] choices of the Canadian people through their elected representative as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes concerning their interpretation was a necessary part of this new design.

So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen…

Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed…¹¹⁸

How can we say that the Court’s interpretation of the principles of fundamental justice is a true product of independent judgment if the analysis itself defers to what is “universally acclaimed”? By applying an empirical standard, the Court does not “do what is just” but rather “what is politic”.¹¹⁹ It essentially amounts to an assertion that the principles of fundamental justice are those which are “most desired by the public”. Under such a standard, the public has a strong hand in the Court’s interpretive work. But didn’t the very same public, at the time of Charter entrenchment, deliberately understand their views were not the best means of giving life to the content and scope of their Charter rights? Further, for the most part, giving effect to popular opinions is the job of the legislature and not the judiciary:

¹¹⁸ Vriend v Alberta, supra note 115 at paras 132, 134-136.
¹¹⁹ See Fiss, “The Limits of Judicial Independence” supra note 117 at 60.
…the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.120

By embarking on an empirical investigation of popular views, the Court in some way, usurps the role of the legislature. Particularly given that the text of the Constitution does not invite judges to consider popular opinion.121

That is not to say that the democratic will does not matter and that judges will not be held accountable for their decisions under section 7 if a normative standard is applied to the “societal consensus” requirement. While judges cannot enforce their own judgments, “the capacity of the people to respond to judicial decisions” through dialogue—be it by participating in litigation, by spurring a response by Parliament or by evoking the notwithstanding clause for example122—is what preserves the “consensual character of the system as a whole”123 and thus its legitimacy.124

By choosing to adopt a normative view of the “societal consensus” requirement, the Court reinforces and facilitates its commitment to dialogue. Reconsider Federations of Law Societies of Canada. The challenged scheme of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act attempted to account for solicitor-client privilege. Not only did the Court find Parliament had not designed the scheme in compliance with the Charter principles governing solicitor-client privilege, but had breached a principle of fundamental justice that had not yet been recognized: the lawyer’s duty of commitment to the client’s cause. Solicitor-client privilege could not entirely account for the constitutional defect—the scheme turned lawyers

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120 Vriend v Alberta, supra note 115 at para 136.
121 In contrast to s. 24(2), which explicitly invites judges to consider societal views by virtue of the text of the Constitution itself.
122 See Peter Hogg and Allison A Bushell, “The Charter Dialogue between Courts and Legislatures” (Or Perhaps the Charter of Rights isn’t such a Bad Thing After All”)” (1997) 35 Osgoode Hall LJ 75.
124 See Vriend v Alberta, supra note 115 at para 139, “a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other…. [t]his dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.”
effectively into state agents not only with respect to search and seizure. A normative standard allows Parliament to know how it could carry out its objective of combating money laundering and terrorist financing without interfering with the integrity on which the administration of justice rests. Suppose the Court employed an empirical standard. Relevant to the inquiry would most likely be public sentiment over whether lawyers should be required to hand over personal information about dealings with their clients. The finding would decisively determine the outcome. But we don’t know the why. Why are those sentiments important to maintaining our society free and democratic? We wouldn’t really know the essence of the Charter values implicated. Parliament would not necessarily be reminded that the lawyer’s duty of loyalty is essential to maintaining public confidence in the administration of justice. Neither that “[p]ublic confidence depends not only on fact, but also on reasonable perception”. A normative standard gives Parliament and the parties the requisite information necessary to engage in intelligible dialogue over Charter values. And at times, the much needed refresher session. Peter Hogg has noted “the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision.”

Kazemi Estate is problematic because the majority misapprehends the real issue at hand, and the empirical standard works as a diversion. The real issue is whether Canada’s decision to foreclose civil redress for citizens tortured abroad, in favour of foreign state immunity, is compliant with Charter values under section 7. By applying an empirical standard in the section 7 analysis, the Court focuses on what is the state of customary international law on the proposed norms at issue. The finding is conclusive. The Court’s treatment of international decisions and

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125 Federations of Law Societies of Canada, supra note 4 at para 96.
126 Hogg and Bushell, supra note 122 at 79. But see Iacobucci J, “Some Reflections on Re BC Motor Vehicle Act”, supra note 105 at 322, noting the ramifications of dialogue theory in the context of section 7, it may be difficult to discern the boundaries between law and policy, “[t]he potential is for the courts to evaluate the effectiveness of government measures, as opposed to the justice of government action.”
state practice does not explain exactly why state immunity must yield in criminal proceedings against foreign states but not civil proceedings, particularly with respect to the same *jus cogens* violations, and why this distinction ought to be consistent within the *Charter*.

Suppose Parliament had not contemplated exceptions to state immunity in years, relying on an older version of SIA. Suppose the number of Canadians tortured abroad grew exponentially. If there were Canadians who suffered severe and immediate psychological harm because the government impeded their ability to seek civil redress for the torture of loved ones or even themselves by a foreign state, still citing principles of “state immunity” as a matter of “domestic choices”\(^\text{127}\), the Court would have to pinpoint what it was about justifications of state immunity in Canadian society today that does or does not comply with *Charter* values. In *Kazemi Estate*, the majority opinion stated as follows:

“…the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad.”\(^\text{128}\)

But was it not also an issue in the case, whether it was abhorrent or illegal to deny victims of torture redress under section 7, notwithstanding whether it was supported by customary international law or the choice of Parliament? LeBel J’s preoccupation with how international law could disturb our constitutional order is overstated in the context of section 7. Why should the internalization inquiry play such a conclusive role in interpreting the principles of fundamental justice?

Had Abella J gone to consider the section 7 issue based on her reading of article 14 of the CAT, she would have considered whether in circumstances of torture, the principle of reparation, which is restorative in nature was sufficiently fundamental to the fair operation of the legal

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\(^{127}\) *Kazemi Estate*, supra note 4, at para 45.

\(^{128}\) *Ibid* at para 53.
system in Canada particularly given the unsettled state of customary international law on whether torture can constitute official acts for purposes of immunity. Her inquiry would have answered why or why not there is a distinction between criminal and civil proceedings that may be defensible under the Charter. While writing for the majority, LeBel J states that “principled grounds justify the distinction”\textsuperscript{129}. But in no way are these grounds considered in light of Charter values or more specifically what a reasonable Canadian public might think. What really matters is the fact “[t]he two types of proceeding are seen as fundamentally different by a majority of actors in the international community.”\textsuperscript{130}

Nevertheless, even if the Court opts for a normative standard under section 7, which is the preferable choice, recall that a problem remains: the reformulation of proposed norms under section 7. I discuss the nature of this problem in the next section and follow by offering a possible solution.

6. Alternative Proposed Norms and the Need for Procedural Safeguards

The Court’s laissez-faire approach to reformulating proposed principles of fundamental justice is potentially at odds with the principle of party presentation. The principle asserts that in order to remain impartial and fair—judges—when adjudicating, must rely on the ways parties have framed the issues before them. The principle plays an important role in maintaining the adversarial character of our legal system. As noted by the Court itself, the stakes are as follows:

When a judge or appellate panel of judges intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias… It is for this reason that an

\textsuperscript{129} Ibid at para 103.
\textsuperscript{130} Ibid at para 104. But see para 105, LeBel J’s statement about practical difficulties. It is arguable whether this point renders the distinction between civil and criminal jurisdiction more defensible.
important tenet of our appellate system is for the court to respect the strategic choices made by parties in framing the issues ... 131

The Court’s practice of reformulating proposed principles of fundamental justice may be seen by parties as unfair.132 As I have discussed earlier, the way a proposed principle of fundamental justice is framed has a significant impact on the determination of whether it will meet the three-part test and thus become entrenched under section 7. The “preliminary stage” of the analysis may invite a results-oriented sort of reasoning.

Moreover, from the standpoint of procedural law, it is not at all clear whether alternative versions of proposed norm are genuinely new issues or not. The jurisprudence defines a “new issue” as follows:

An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties...and cannot be said to stem from the issues as framed by the parties.133

In *Federations of Law Societies of Canada* and *R v D.B.* it would seem the majorities considered the reformulated norms as rooted in the submissions of counsel. But even if in those cases there was considerable overlap, what about evidentiary matters relating to the “societal consensus” requirement? It is not at all obvious whether the evidence adduced on the record to demonstrate that a proposed norm ‘x’ satisfies the societal consensus requirement will be relevant and conclusive to whether reformulated proposed norm ‘y’ enjoys societal consensus on appeal.134

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131 *R v Mian* 2014 SCC 54 at paras 38-39 (internal citations omitted), [2014] 2 SCR 689.
132 *Ibid* at para 42.
133 *Ibid* at para 30.
The jurisprudence recognizes that the Court may be justified in raising a new issue without procedural prejudice to the parties when failing to do so would risk an injustice.\textsuperscript{135} However, this is less helpful in the context of section 7. Whether the Court should recognize a proposed norm as a principle of fundamental justice will always be a new issue of law. Failing to do so will almost always risk an injustice especially with the life, liberty and security interests at stake. The Court has stated that the test for considering new issues is a stringent one, but it is hard to imagine it operating in such a way under section 7.\textsuperscript{136}

One solution may involve self-imposed safeguards. Under the current case law, despite the risk of an injustice, the Court will not consider a new issue without alleviating procedural prejudice by asking parties for further submissions. In the context of section 7, a presumption in favour of further submissions\textsuperscript{137} could be introduced to remedy any unfairness to the parties and any appearance of judicial bias.\textsuperscript{138}

Most recently in \textit{R v Mian}, the Court held that an appellate court must follow certain procedural guidelines when exercising its jurisdiction to raise a new issue. According to the Court in \textit{Mian}, the appropriate procedure for an appellate court to follow should be decided on a case-by-case basis.\textsuperscript{139} But two components are essential: notification and an opportunity to respond. The Court recognizes that in crafting a procedural requirement, the content of notice and the requirements of response are important factors that vary depending on several considerations such as, the nature of the issue considered by the appellate court, the face of the record and the juncture at which appellate courts become aware of the new issues.\textsuperscript{140}


\textsuperscript{137} I am grateful to my supervisor for encouraging me to pursue and develop this point.

\textsuperscript{138} Compare to \textit{R v Mian}, supra note 131 at para 53.

\textsuperscript{139} \textit{Ibid} at para 56.

\textsuperscript{140} \textit{Ibid} at para 58.
But in the context of section 7, we can anticipate a more rigid rule-based procedural requirement may work since the issue we are talking about will consistently be an entirely distinct issue—a new proposed principle of fundamental justice, separate from the one initially suggested in party submissions.\textsuperscript{141}

That is not to say \textit{Mian} does not provide some guiding principles. According to Rothstein J writing for a unanimous Court, the content of notification cannot give away too much detail since it can suggest that the Court has already formed an opinion. On the other hand, there must be enough detail to allow parties to form informed response.\textsuperscript{142} With respect to whether oral or written argument will suffice, the Court has stated that “[t]he overriding consideration is that natural justice and the rule of \textit{audi alteram partem} will have to be preserved.”\textsuperscript{143}

Aside from protecting the impartiality of the Court, the requirement of procedural safeguards also recognizes the value of party submissions in giving content to \textit{Charter} rights. Party submissions in the course of litigation proceedings are key to interpreting various statute and instruments, including the \textit{Charter}. By participating in the litigation process, individuals further the liberal-democratic project of the \textit{Charter} by having a role to play in the dispute or dialogue over the content of individual rights and freedoms.

\textbf{7. Conclusion}

The Court has never stated the purpose of section 7, but certain assumptions can be made based on what we do know. In our constitutional order, section 7 is supposed to guard against egregiously unfair outcomes brought on by the state. Some of these outcomes are otherwise

\begin{itemize}
\item \textsuperscript{141} Compare to \textit{Ibid} at para 55, “Requiring that strict procedural standards be followed would fail to recognize that the issue may arise in different circumstances in different cases”.
\item \textsuperscript{142} \textit{Ibid} at para 58.
\item \textsuperscript{143} \textit{Ibid} at para 59. However, the Court does say that should a party ask to file written submissions there should be a favourable presumption granting the request.
\end{itemize}
unamenable to challenge under other parts of the Charter.\textsuperscript{144} Violations of section 7 rights also have the capacity of hurting individuals in a free and democratic society, in such a way that other rights and fundamental freedoms protected under the Charter are rendered meaningless, particularly because section 7 protects basic interests.\textsuperscript{145} Given the high stakes and the multitude of unforeseeable scenarios that may cause such outcomes to arise, it can be said that one problem with section 7 is that these outcomes are only ascertainable \textit{ex post}. But are such outcomes best ascertained by the consensus of the general public on an \textit{ex ante} basis?

The answer is no. In a liberal-democratic democracy, the general public should not be given an overriding say on what are the principles of fundamental justice. It is rather the Court’s job to interpret what these principles are, and fully within its competence—it means some sort of discretion by way of normative argument is required in order for the Court to fulfill its rights protecting role. That is not to say that popular opinion cannot be a factor among many to be considered in the analysis. But an empirical standard completely forecloses the possibility that considerations extending beyond those which relate to popular belief are significant to satisfying the “societal consensus” requirement of principles of fundamental justice.\textsuperscript{146} A normative standard provides Parliament the requisite information it needs to engage in adequate dialogue with the Court over Charter values.\textsuperscript{147} It also saves the Court from a series of technical problems that accompany an empirical standard.

Whatever standard the Court chooses to fully adopt, an additional consideration should be taken into account: the practice of reformulating proposed norms of fundamental justice. This

\textsuperscript{144} Stewart, \textit{Fundamental Justice, supra} note 4 at 307.

\textsuperscript{145} As Stewart puts it: “The right to vote or to express oneself freely is of little value to a person deprived of liberty or security following an unfair hearing, on the basis of a fundamentally unjust law, or by means of arbitrary state action.”: \textit{Ibid} at 310.

\textsuperscript{146} See Stewart, “Normative Foundations for Reasonable Expectations of Privacy” \textit{supra} note 10 at 345, discussing how something being empirically possible decisively has an impact on the outcome.

\textsuperscript{147} Compare to Hamish Stewart, \textit{Fundamental Justice, supra} note 4 at 121-122, noting instances where the Court’s reasoning would be much stronger if normative-infused arguments were considered.
practice is potentially at odds with the principle of party presentation and thus may be seen as unfair by the parties before the Court. Procedural safeguards such as notification and the opportunity to respond could remedy the concerns associated with this practice. To conclude, parties in litigation proceedings should consider the kind of standard employed under the “societal consensus” requirement, the sources of evidence relied upon and the formulation of proposed principles of fundamental justice—doing so is significant to the future of section 7 and the quality of dialogue.
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