

The Evisceration of Liberty in Canadian Courts

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The classical liberal philosopher, J.S. Mill, said of liberty:

The only [liberty] which deserves the name is that of pursuing our own good, in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. (Mill, 1859/1974: 72)

Mill's concept of liberty is powerful and robust. It protects the so-called "negative" freedom of individuals, permitting them to be self-determining, free *from* state interference of any kind, unless it is to prevent harm to another.

Unfortunately, this concept of liberty is almost completely foreign to Canadian constitutional law jurisprudence. Our courts are out of step with the classical liberal philosophical foundations of our own political system. In fact, the courts in Canada have eviscerated the concept of liberty.

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The Canadian Charter of Rights and Freedoms was adopted in 1982. The Charter is a constitutional document that is the supreme law of Canada. It is the standard by which all federal and provincial laws are measured. Most importantly, it limits the authority of government. It does this by prohibiting the government from enacting laws that violate individual freedoms without justification. This is one of the chief purposes of the Charter.

The Charter offers explicit protection for liberty. Section 7 reads:

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

Having a cursory understanding of the structure of the Charter is important for understanding how the courts have treated liberty. Legal analysis under section 7 of the Charter has three important and distinct steps. And when a Charter right or freedom has allegedly been violated by legislation or other government action, the Court will come to one of four possible conclusions.

First, the court inquires whether the right to life, liberty, or security of the person is affected by a government's action. If none of these rights are affected, then the government's action has not breached section 7 and legal analysis stops. But if the courts determine that an individual's right to life, liberty, or security of the person is affected by the government's action, legal analysis proceeds to the next step.

Step two is for the court to inquire into whether the government's action accords with the principles of fundamental justice. If the government has acted in accordance with the principles of fundamental justice, the government's actions have not breached section 7 and legal analysis stops. But if the government's actions have not accorded with the principles of fundamental justice, the government has violated section 7.

Third, once a section 7 violation is established, the legal analysis will proceed to section 1 of the Charter to determine if the government's action or legislation was demonstrably justified as a reasonable limit prescribed by law. Section 1 of the Charter reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

If the court finds the government action that violated section 7 is justified as reasonable, then the government action is vindicated as legitimate. But

if the court finds both that the government's action has violated section 7 and that the violation is not justified under section 1, the government's action will be considered an unconstitutional breach of a Charter right.

A constitutional guarantee of liberty, to be consistent with J.S. Mill's description, should ensure that everyone has the right to freely pursue their own happiness as long as their actions do not harm others. Such a constitutional guarantee would protect individuals from unjustified state interference with their chosen way of life. But there are many ways in which the courts in Canada have permitted the government to impede individual liberty.

For example, the government may confiscate your property without compensation (*R. v. Tener*). It can force you to have your photo taken even if it conflicts with your deeply held religious beliefs (*Alberta v. Hutterian Brethren of Wilson Colony*). It can force parents to educate their children in a particular fashion (*R. v. Jones*). It can force individuals to pay union fees even if they are not union members (*Lavigne v. Ontario Public Service Employees Union*). It can punish you for putting certain substances in your body (*R. v. Malmo-Levine*; *R. v. Caine*). And it can prohibit you from entering into mutually agreeable contracts with other individuals (*Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*).

In each of these instances, the government may take these steps regardless of whether anyone is harmed.¹ And the government has demonstrated no hesitancy about arguing that its coercive actions further a public good or that it is advancing your interests—whether you recognize it or not. Government acts of this type are an affront to individual liberty. And if section 7 of the Charter had a robust and meaningful guarantee of liberty, each of these government acts would be constitutionally suspect.

By way of illustration, Michael Schmidt, a client of the Canadian Constitution Foundation, has operated a cow-share in rural Ontario since the early 1990s. Cow-shares are contractual arrangements between individuals who co-own cows in common with other owners, and farmers who tend to the cows. The farmer will typically provide food, land, and other necessities of life to the cow, and make the cow's milk accessible to the owner. In the English Common Law, this arrangement is known as a contract of agistment, with the farmer being called the agister.

As expected, Schmidt, acting as an agister, not only tended the cows in his care, he also provided raw milk from the cows to the cows' owners. It is not illegal to consume raw milk in Ontario. It is illegal, however, to "sell, offer for sale, deliver or distribute" unpasteurized milk. As a

1 The Supreme Court of Canada rejected J.S. Mill's harm principle as a principle of fundamental justice in *Malmo-Levine*. By so doing, the court held that the government may curtail the liberty of individuals whose actions cause no harm to others.

result, the Government of Ontario charged Schmidt with 19 violations of Ontario's Health Protection and Promotion Act and Milk Act. If Schmidt were convicted under these acts, he would face probation or a fine under the Ontario Provincial Offences Act.

The fines Schmidt was exposed to were potentially ruinous. Under these Acts he could be ordered to pay \$10,000 per day for each day he is found to have violated Ontario law.

The government's actions against Schmidt cannot be reconciled with Mill's concept of liberty. Schmidt and the owners of the cows he tends have willingly entered into a mutually agreeable contractual arrangement. The cows' owners believe that consuming raw milk is beneficial to their health. And there is no evidence of anyone becoming sick or suffering any ill-health as a result of drinking the raw milk from Schmidt's farm. If liberty under the Charter were a robust and powerful concept like Mill's, there would be no obvious justification for charging Schmidt.

But it is worse yet. Not only does the Charter guarantee of liberty fail to protect Schmidt from an unjustified, coercive, and paternalistic law, the courts do not acknowledge that exposing individuals like Schmidt to financial ruin has an impact whatsoever upon their liberty.

Section 7 of the Charter is recognized to be relevant in circumstances where a government action has placed an individual's life, liberty, or security of the person in jeopardy. An individual may therefore successfully advance a section 7 Charter argument if his right to life, liberty, or security of the person has the potential of being infringed. How have the courts understood the terms life, liberty, and security of the person?

The right to life is easily understood. Any government act that endangers the life of an individual will engage the Charter. Security of the person is less obvious, but it has been recognized to include, among other things, an individual's psychological integrity. For example, security of the person is affected when the government threatens to remove a child from a parent's care (*New Brunswick (Minister of Health and Community Services)*). But what about the right to liberty? Under what circumstances do the courts recognize that the government has violated an individual's right to liberty?

The Canadian courts have recognized that a potential restriction on an individual's freedom of movement triggers the section 7 right to liberty (*Re B.C. Motor Vehicle Act*). But liberty may protect more than this. In *Blencoe v. British Columbia*, Chief Justice McLachlin said,

The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint.

And in *B. (R.) v. Children's Aid Society*, Justice La Forest said,

... the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy ...

Even though the courts have said they are willing to interpret the right to liberty broadly, they have been reluctant to recognize that being exposed to ruinous financial penalties should trigger section 7. Sufficiently large monetary penalties can have a more severe, longer-lasting impact on a convicted individual's liberty than short-term imprisonment. And it is contrary to good reason that the possibility of imprisonment triggers the section 7 right to liberty while the possibility of financial ruin cannot. Yet that is how our courts have interpreted section 7.

It has become almost a mantra for legal commentators and the courts to intone that section 7 rights do not include economic or business-related liberty. However, during the early years of Charter jurisprudence, the Supreme Court of Canada was generally careful not to completely close the door to interpretations of section 7 that might include economic components. In *Irwin Toy v. Quebec*, the case most often cited by lawyers, law-students, politicians, and the like, as standing for the legal proposition that section 7 does not protect economic liberty, the court said,

This is not to declare, however, that no right with an economic component can fall within "security of the person." Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property—contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section. (*Irwin Toy v. Quebec* at para. 95.)

As can be seen, although the Supreme Court is confusing "claim" rights such as a right to social security and adequate food that can only be realized by violating another person's freedom, with economic liberty, *Irwin Toy v. Quebec* did not definitively conclude that economic rights, which includes protection of property rights and contract rights, are excluded from section 7 protection. Yet there is an overwhelming tide of

opinion that the Charter does not and should not protect economic liberty. This tide includes Peter Hogg, a widely quoted scholar of Canadian Constitutional Law. Hogg asserts that “there are good reasons for caution in expanding the concept of liberty in s. 7” (2009: 1,080) to include economic liberty. However, the reasons he sets out in his textbook would not likely persuade anyone who agrees with J.S. Mill.

Mill’s definition of liberty aside, according to a wide variety of dictionaries, two of the most important definitions of the word “liberty” revolve around the notions of freedom of choice and the absence of external constraints. In the economic realm, “liberty” is often taken to mean the right to earn an honest living in the occupation of your choice.

The definition of “liberty” was unencumbered by judicial interpretation when the Charter became part of Canada’s constitution in 1982. But the courts have virtually eviscerated it since then. The earliest instance of this curtailment of the scope of “liberty” occurred in 1985, when Justice Bertha Wilson wrote:

Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. (*Re B.C. Motor Vehicle Act*)

In other words, Justice Wilson deliberately chose to curtail the plain, broad meaning of the word “liberty.” Instead of applying the test contained in section 1 of the Charter to determine when legislative violations of liberty were justified in a free and democratic society, she simply defined away a vast portion of the word “liberty.” Subsequent courts have followed this example, reluctant to engage in section 1 analysis (perhaps out of fear of being accused of usurping the role of the legislature).

The current state of section 7 jurisprudence sets the bar extremely high for section 7 violations. It is exceedingly difficult to demonstrate to a court’s satisfaction that section 7 has been violated. But in the rare instance that a section 7 violation is found, the courts find scant justification for it under section 1.

And as a result of this reluctance to find violations of section 7 or to rely on section 1, Canadian courts have ruled that a wide variety of activities which would certainly fall within the dictionary definition of “liberty” do not fall within the concept of “liberty” for the purposes of section 7. For instance, liberty in section 7 of the Charter “is not synonymous with unconstrained freedom” does not include “an unconstrained right to transact business whenever one wishes,” according to the court in *R. v. Edwards Books and Art Ltd.* But by any standard dictionary, that is

precisely what liberty does include: an absence of external restraint, and freedom of choice.

Likewise, the courts have held that section 7 liberty does not include the right to smoke marijuana for recreational purposes in the privacy of one's own home (*R. v. Malmö-Levine*; *R. v. Caine*), or even the right for a doctor to practice his profession (*Mussani v. College of Physicians and Surgeons of Ontario*). It would have made much more sense, and would have accorded far better with the plain use of language, for the courts to have acknowledged that the laws restraining business hours, drug use, and medical licensing were indeed restrictions on liberty but were justified under section 1 of the Charter.

By tightly circumscribing the scope of section 7, what the courts have effectively accomplished is not the trivialization of the Charter so feared by Justice Wilson in 1985, but the far worse trivialization of Canadians' liberty (*Re B.C. Motor Vehicle Act*). What, indeed, remains within section 7 liberty after the courts have finished emptying it out? Not much. By the time of the *R. v. Morgentaler* decision in 1988, liberty had been boiled down to the highly subjective catch-phrase, "decisions of fundamental personal importance."

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance. (*R. v. Morgentaler*)

At times, even the Supreme Court of Canada has ignored its own cautionary stance taken in *Irwin Toy v. Quebec* and joined in reciting the "no economic liberty" mantra. The issue in *Siemens v. Manitoba* was whether the Province of Manitoba had the constitutional authority to pass legislation making municipal plebiscites on video gaming terminals legally binding. The town of Winkler had earlier held a plebiscite banning video lottery terminals (VLTs). The appellants operated a business in Winkler and challenged the legislation as an unjustified impediment to liberty. In the end, the constitutional challenge was unsuccessful because,

... the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter. (*Siemens v. Manitoba* at para. 46)

The *Morgentaler* decision and those that follow from it seem to indicate that the Charter protects us from violations of our liberty regarding the big, important decisions in our lives—decisions that may perhaps come along once in a lifetime—yet does not protect us from the minor, day-to-day violations of our liberty that occur routinely, over and over. This reasoning is problematic in several respects.

First, the dividing line between a “decision of fundamental importance” and one that is insignificant or trivial is highly subjective. Why does the legal permission to abort a foetus (*R. v. Morgentaler*) qualify as more important than the ability of a doctor to practice his profession (*Mussani v. College of Physicians and Surgeons of Ontario*)? There is no scale, and no units, by which such things can be measured, and it is unlikely that any two people would ever rank the vast panoply of lifetime decisions in the same order of importance.

Second, it is absurd to think that minor violations of liberty, aggregated together, do not eventually add up to a full-blown case of totalitarianism. Suppose, for instance, that the state decided to prescribe what time we must rise in the morning, what colour clothing we must wear, how often we can visit the toilet, how many hours of television we can watch, and how many times we must chew our food before we swallow. Each of these rules in itself might be described as a trivial regulation not worthy of constitutional protection. But could anyone honestly believe we would still be living in a free country? How many trivial violations of liberty can the state heap upon us before we are forced to admit that this is stifling authoritarianism and not freedom at all?

Third, it seems logically backwards to have liberal rules for decisions of fundamental importance, and restrictive rules for decisions of trivial importance. If citizens are so unintelligent or irresponsible that they cannot handle minor decisions without direction from the state, how can they ever be expected to acquire the wisdom and character to handle the big, momentous decisions that occasionally intrude into their lives?

Fourth, who are the lawgivers with the wisdom and intelligence to decide all those little matters for us, when they themselves are citizens who likewise cannot be trusted to make little decisions for themselves? How does being elected to office suddenly elevate political candidates from the status of ignoramuses who cannot be trusted to make everyday decisions about their own lives, into sage lawmakers who can make such decisions not only for themselves but for everyone in the country?

The courts in Canada have defined away a vast portion of the word “liberty” to avoid applying the test contained in section 1 of the Charter. As such, the country’s governments are not called upon to defend intrusive legislation under section 1 of the Charter because the Supreme Court of Canada has decided that what are in fact infringements of liberty are

not infringements of liberty for the purposes of section 7 of the Charter. If Mill is correct and “the only [liberty] which deserves the name is that of pursuing our own good, in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it” (Mill, 1859/1974: 72), it is not hyperbole to say that our courts have eviscerated the concept of liberty.

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