Section 7 – Life, liberty and security of the person

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Provision

7. 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.

Similar provisions

Similar provisions may be found in the following Canadian laws and international instruments binding on Canada: section 1(a) of the *Canadian Bill of Rights*; articles 6 and 9 of the *International Covenant on Civil and Political Rights*; articles 6 and 37 of the *Convention on the Rights of the Child*; articles 14 and 17 of the *Convention on the Rights of Persons with Disabilities*; and article I of the *American Declaration of the Rights and Duties of Man*.

See also the following international, regional and comparative law instruments that are not legally binding on Canada but include similar provisions: article 3 of the *Universal Declaration of Human Rights*; articles 4, 5 and 7 of the *American Convention on Human Rights*; articles 2 and 5 of the *European Convention on Human Rights*; the Fifth Amendment of the *Constitution of the United States of America* (the Due Process Clause).

Purpose

Section 7 of the Charter requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paragraph 19).

Analysis

Section 7 involves a two-step analysis:

1. Is there an infringement of one of the three (3) protected interests, that is to say a deprivation of life, liberty or security of the person?
2. Is the deprivation in accordance with the principles of fundamental justice?

This second step may be broken down into two steps, where it is necessary a) to identify the relevant principle or principles of fundamental justice and then b) to determine whether the deprivation has occurred in accordance with such principles. (*R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at paragraph 83; *R. v. White*, [1999] 2 S.C.R. 417 at paragraph 38; *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 at page 479).

There is no independent right to fundamental justice. Accordingly there will be no violation of section 7 if there is no deprivation of life, liberty or security of the person (*R. v. Pontes*, [1995] 3 S.C.R. 44, at paragraph 47).

1. Everyone

All individuals physically present in Canada will benefit from the protection of section 7 (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at page 202; *Charkaoui* (2007)*, supra*, at paragraphs 17-18). Where individuals are affected by a Canadian or foreign government action that took place outside Canada, the extent to which they may rely upon section 7 will depend on the circumstances, and may require the claimant to establish Canadian government "“participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations or fundamental human rights norms”" (*R. v. Hape*, [2007] 2 S.C.R. 292; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 at paragraph 14; see also: *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841). In extradition and deportation cases, where the government’s participation is a necessary precondition for the deprivation of the rights to life, liberty or security of the person by another state, and the deprivation is an entirely foreseeable consequence of the participation, deportations or extraditions must accord with the principles of fundamental justice (*United States v. Burns*, [2001] 1 S.C.R. 283, at paragraphs 59-60, 124; *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3, at paragraph 54; Application under section 83.28 of the *Criminal Code (Re)*, [2004] 2 S.C.R. 248, at paragraphs 75-76). For the extra-territorial application of the Charter more generally, see discussion under section 32.

Corporations do not have individual rights protected under section 7 and therefore cannot claim the benefit of section 7 in the same way that individuals can (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at pages 1002-3; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at pages 28 and 30). However, a corporation that is accused of a criminal offence, or that is

a defendant in a civil proceeding initiated by the state, may raise the Charter in its defence whether or not it enjoys the particular right or freedom in question (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pages 313-14; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154). See discussion under section 52 for more on the circumstances in which corporations may invoke Charter rights as a basis for invalidating legislation.

2. Life, liberty and security of the person

General

The guarantees under section 7 typically arise in connection with the administration of justice, which has in turn been defined as "the state's conduct in the course of enforcing and securing compliance with the law" (*Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 at paragraph 77; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paragraph 65; Prostitution Reference - Reference re: *Criminal Code*, section 193, paragraph 195.1(1)(c) *(Man. C.A.)*, [1990] 1 S.C.R. 1123; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). The administration of justice includes processes operating in the criminal law (*Gosselin* at paragraphs 77-78), as well as a variety of other circumstances including child protection proceedings and immigration proceedings where section 7-protected rights are at stake (*Blencoe; G.(J.); B.(R.); Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; *Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 S.C.R. 33, at paragraph 40). In addition, the Court has recognized that section 7 may apply to legislation or government action "entirely unrelated to adjudicative or administrative proceedings", provided that it impacts on the right to life, liberty and security of the person (*e.g.*, a legislative prohibition on obtaining private medical insurance that impacts on the right to life and security of the person — see *Chaoulli v. Quebec (A.G.)*, [2005] 1 S.C.R. 791 at paragraphs 124 and 194-199). To date, section 7 has not been interpreted as imposing a positive obligation on the state to ensure the enjoyment of life, liberty and security of the person, but the Court has not foreclosed this possibility (*Gosselin* at paragraphs 82-83).

A claimant must establish a "sufficient causal connection" between the impugned government action or law and the limit on life, liberty or security of the person. Although the government action need not be the only or the dominant cause of the limit, there must be a real, as opposed to a speculative, link. This standard is satisfied by a reasonable inference, drawn on a balance of probabilities (*Bedford v. Canada (A.G.)*, [2013] 3 S.C.R. 1101 at paragraph 76).

(i) Right to life

The right to life is engaged where the law or state action imposes death or an increased risk of death, either directly or indirectly (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 at paragraph 62; *Chaoulli* at paragraphs 112-124 and 200). Concerns about autonomy and quality of life are properly treated as liberty and security interests (*Carter* at paragraph 62). Although the sanctity of life is a fundamental societal value, the right to life does not give rise to a duty to live. Like other rights, the right to life can be waived (*Carter* at paragraph 63; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519).

(ii) Right to liberty

The liberty interest protected under section 7 has at least two aspects. The first aspect is directed to the protection of persons in a physical sense and is engaged when there is physical restraint such as imprisonment or the threat of imprisonment (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636 at 652), arrest (*Fleming v. Ontario*, 2019 SCC 45 at paragraph 65), custodial or non-custodial detention (*R. v. Swain*, [1991] 1 S.C.R. 933; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at paragraph 64; *R. v. Demers*, [2004] 2 S.C.R. 489 at paragraph 30), transfer to a more restrictive institutional setting (*May v. Ferndale Institution*, [2005] 3 S.C.R. 809, at paragraph 76), extradition (*Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 831; *United States v. Burns*, [2001] 1 S.C.R. 283 at paragraph 59), parole conditions (*Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 148-151), or state compulsions or prohibitions affecting one's ability to move freely (*R. v. Heywood*, [1994] 3 S.C.R. 761 at 789). The physical restraint can be quite minor to engage the liberty component, such that compelling a person to give oral testimony constitutes a deprivation of liberty (*Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425 at 536; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 479; *Branch, supra* at 26; Re: Application under section 83.28 of the *Criminal Code*, [2004] 2 S.C.R. 248 at paragraph 67), as does compelling them to give fingerprints (*R. v. Beare*, [1988] 2 S.C.R. 387 at 402). Deportation *per se* will not engage the right to liberty (*Charkaoui* (2007), *supra*, at 17; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paragraph 46), but deportation to a substantial risk of torture will (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 44).

Section 7 also protects a sphere of personal autonomy involving “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence” (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at paragraph 66; *Association of Justice Counsel v. Canada (Attorney General)*, [2017] 2 S.C.R. 456 at paragraph 49). Where state compulsions or prohibitions affect such choices, s. 7 may be engaged (*A.C. v. Manitoba (Director*

of Child and Family Services), [2009] 2 S.C.R. 181, at paragraphs 100-102; *Blencoe, supra* at paragraphs 49-54; *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at paragraph 45) This aspect of liberty includes the right to refuse medical treatment (*A.C.*, *supra*, at paragraphs 100-102, 136) and the right to make "reasonable medical choices" without threat of criminal prosecution: *R. v. Smith*, [2015] 2 S.C.R. 602 at paragraph 18. It may also include the ability to choose where one intends to live (*Godbout, supra*), as well as a protected sphere of parental decision-making for parents to ensure their children's well-being, *e.g.*, a right to make decisions concerning a child's education and health (*B.(R.), supra*, at paragraph 80). It does not, however, encompass lifestyle choices such as the smoking of marihuana (*R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571 at paragraphs 86-87; *R. v. Clay*, [2003] 3 S.C.R. 735 at paragraph 32). Conditions of employment requiring employees to be on standby duty, and therefore less available to their families for several weeks a year, do not engage the s. 7 liberty interest (*Association of Justice Counsel*, *supra* at paragraph 51).

While some lower court decisions have held that liberty in this context includes the right to work or do business (*Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566 (C.A.) (QL)), the Supreme Court has said that section 7 does not protect freedom to transact business whenever one wishes (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at page 786). Nor does it protect the right to exercise one's chosen profession: *Prostitution Reference, supra* at pages 1179. (See also *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407). The Supreme Court has also ruled that the ability to generate business revenue by one's chosen means cannot be characterized as a fundamental life choice and is not a right protected under section 7 (*Siemens, supra* at paragraph 46). Similarly, liberty under section 7 does not appear to protect freedom to contract or the freedom to choose a particular career (*Chaoulli, supra*, at paragraphs 201-202).

Privacy is constitutionally protected primarily under section 8 but it is generally understood that section 7 can offer a residual protection. The Supreme Court has not yet fully explored or developed the contours of a distinct privacy protection under section 7, other than to accept that privacy can be a protected component of the "liberty" and "security of the person" interests. Although there may be scope for potentially distinct privacy protection under section 7, courts have typically performed the requisite privacy analysis under section 8 (see *e.g.*, *R. v. Rodgers*, [2006] 1 S.C.R. 554, at paragraph 23; *Ruby v. Canada*, [2002] 4 S.C.R. 3, at paragraphs 32-33; *R. v. Mills*, [1999] 3 S.C.R. 668, at paragraph 88; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paragraphs 110-119; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at 369; *R. v. Beare*, [1988] 2

S.C.R. 387). A right to privacy under section 7 has, however, been directly applied in lower court jurisprudence (See: *Cheskes v. Ontario (Attorney General)* (2007), 87 O.R. (3d) 581 (Ont. Sup. Ct.)).

Individuals cannot enforce collective rights, such as the right to strike, through "liberty", as the right to liberty is an individual right (*I.L.W.U. v. A.G. of Quebec*, [1994] 1 S.C.R. 150).

(iii) Right to security of the person

Security of the person is generally given a broad interpretation and has both a physical and psychological aspect. The right encompasses freedom from the threat of physical punishment or suffering (*e.g.*, deportation to a substantial risk of torture) as well as freedom from such punishment itself (*Singh, supra* at 207; *Suresh, supra*, at paragraphs 53-55). It is also engaged where police use force to effect an arrest (*Fleming, supra*, at paragraph 65).

Security of the person is not engaged, however, by the determination of exclusion from refugee protection because the potential risks to health and safety are too remote given the availability of further proceedings prior to removal in which section 7 interests will be considered (*Febles v. Canada (Citizenship and Immigration)*, [2014] 3 S.C.R. 431 at paragraph 67; *B010 v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 704 at paragraph 75).

Security of the person includes a person's right to control his/her own bodily integrity. It will be engaged where the state interferes with personal autonomy and a person's ability to control his or her own physical or psychological integrity, for example by prohibiting assisted suicide or regulating abortion or imposing unwanted medical treatment (*R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 56; *Carter*, *supra*; *Rodriguez, supra; Blencoe, supra* at paragraph 55; *A.C., supra*, at paragraphs 100-102). Where a criminal prohibition forces a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law will infringe security of the person (*Smith*, *supra*, at paragraph 18).

Security of the person will be engaged where state action has the likely effect of seriously impairing a person's physical or mental health (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 55; *Chaoulli, supra* at paragraphs 111-124 and 200; *R. v. Parker*, 49 O.R. (3d) 481 (C.A.)). State action that prevents people engaged in risky but legal activity from taking steps to protect themselves from the risks can also implicate security of the person (*Bedford*, *supra*, at paragraphs 59-60, 64, 67, 71).

In addition, the right is engaged when state action causes severe psychological harm to the individual (*G.(J.), supra* at paragraph 59; *Blencoe, supra* at paragraph 58; *K.L.W., supra*, at paragraphs 85-87). To constitute a breach of one's

psychological security of the person, the impugned action must have a serious and profound effect on the person's psychological integrity and the harm must result from the state action (*Blencoe, supra* at paragraphs 60-61; *G.(J.), supra; K.L.W., supra*. The psychological harm need not necessarily rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility (*G.(J.), supra*). Although not all state interference with the parent-child relationship will engage the parent's security of the person, the state removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent *qua* parent and engages s.7 protection (*G.(J.), supra*, at paragraphs 63-64*; K.L.W., supra*, at paragraphs 85-87). The prohibition of marihuana does not generate a level of stress which engages section 7 (*Malmo-Levine, supra* at paragraph 88). The Court has signaled the possibility that victims of torture and their next of kin have an interest in finding closure that *may*, if impeded, be sufficient to cause such serious psychological harm so as to engage the security of the person (*Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176 at paragraphs 130, 133-34).

It is unclear whether security of the person encompasses the right to privacy comprising a corollary right of access to personal information (*Ruby, supra*).

Property or economic rights are not generally included under security of the person insofar as the deprivation does not fundamentally deprive a person of the ability to earn a livelihood. One's security of the person is not deprived when he or she is prohibited from pursuing a particular profession (*R. v. Weyer*, [1988] F.C.J. No. 137 (C.A.) (QL)) The S.C.C. has suggested in *dicta* that section 7 may protect against the deprivation of "economic rights fundamental to human… survival" (*Irwin Toy, supra*, at 1003; *Gosselin, supra*, at paragraph 80). The distinction appears to be between the regulation of economic activity which may have the effect of limiting profit or earnings (will not engage section 7) and the complete or effective deprivation of a livelihood (may engage section 7, as per *dicta* in *Gosselin; Irwin Toy; Walker; Singh* per Wilson J.). Similarly, section 7 does not shield individuals from the financial effects of the enforcement of a judgment rendered in Canada or elsewhere (*Beals v. Saldanha*, [2003] 3 S.C.R. 416), nor is section 7 engaged by statutory limitations on damages that may be recovered for personal injury (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273).

3. Principles of fundamental justice

General

The principles of fundamental justice are not limited to procedural matters but also include substantive principles of fundamental justice (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at paragraphs 62-67). The principles of fundamental justice are to be found in the basic tenets of our legal system, including the rights set out in sections 8-14 of the Charter (Re *B.C. Motor Vehicle Act, supra*, at paragraphs 29-30) and the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions (*R. v. Lyons*, [1987] 2 S.C.R. 309 at 327; *R. v. Pearson*, [1992] 3 S.C.R. 665 at 683).

Although *jus cogens* norms can generally be equated with principles of fundamental justice, the mere existence of an international obligation binding on Canada is not sufficient to establish a principle of fundamental justice (*Kazemi*, *supra*, at paragraphs 150-51).

Whether a principle may be said to be a principle of fundamental justice will depend upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves (Re *B.C. Motor Vehicle Act, supra*; *Chiarelli, supra* at 732). In order to be a principle of fundamental justice, a rule or principle must be (1) a legal principle (2) about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and (3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. (*Malmo-Levine, supra* at paragraph 113; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at paragraph 8; *R. v. D.B.*, [2008] 2 S.C.R. 3, at paragraph 46). The principles of fundamental justice find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens (*Canadian Foundation for Children, Youth and the Law, supra*).

The principles of fundamental justice must be approached with a careful consideration of context and will vary according to the context in which they are raised (*Chiarelli, supra*, at 732-33; *Cunningham, supra*, at 152; *United States of America v. Cobb*, [2001] 1 S.C.R. 587 at paragraph 32; *Suresh, supra*, at paragraph 45). While achieving the "right balance" between individual and societal interests is not in and of itself a principle of fundamental justice (*Demers, supra*, at paragraph 45; *Malmo-Levine, supra* at paragraphs 96-97), determining the content and scope of the principles of fundamental justice that apply in a given context to set the boundaries of the rights in question involves the balancing of individual rights and societal interests (*R. v. Mills*, [1999] 3 S.C.R. 668 at paragraphs 61-68; *Malmo-Levine, supra*, at paragraphs 98-99*; Demers, supra*, at paragraph 45*;* Re Application under section 83.28 of the *Criminal Code, supra*, at paragraph 78), particularly societal interests that "directly engage the responsibility of judges 'as guardian[s] of the justice system'" (*Burns, supra* at

paragraph 71). Similarly, where the rights of different parties are at issue (*e.g.*, accused/complainant or parent/child), all must be considered in determining what is in accord with the principles of fundamental justice (*G.(J.), supra* at paragraph 76; *Mills, supra*; *K.L.W., supra* at paragraph 94; *R. v. Darrach*, [2000] 2 S.C.R. 443).

While national security is a state interest relevant to the determination whether an infringement of life, liberty or security of the person limits the principles of fundamental justice (*Charkaoui* (2007)*, supra*, at paragraphs 24-25, 27; *Suresh*, *supra*, at paragraph 47; *Ruby*, *supra*, at paragraphs 39-46; *Chiarelli*, *supra*, at pages 745-746), national security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the section 7 stage of the analysis (*Charkaoui* (2007)*, supra*, at paragraphs 23, 27).

(i) Substantive fundamental justice

The balancing of individual and societal interests within section 7 is relevant when elucidating a particular substantive principle of fundamental justice. However, societal interests or matters of public policy such as health care costs, which are unrelated to a principle of fundamental justice, should be considered under section 1 (*Malmo-Levine, supra* at paragraph 98; *Bedford, supra* at paragraphs 125-126).

The principles of fundamental justice include the principles against arbitrariness, overbreadth and gross disproportionality. A deprivation of a right will be arbitrary and thus unjustifiably limit section 7 if it "bears no connection to" the law's purpose (*Bedford*, *supra*, at paragraph 111; *Rodriguez*, *supra* at 594-95; *Malmo-Levine, supra* at paragraph 135; *Chaoulli, supra* at paragraphs 129-30 and 232; *A.C., supra*, at paragraph 103). The fact that a government practice is in some way unsound or that it fails to further the government objective as effectively as a different course of action would is not sufficient to meet the claimant's burden of establishing a lack of rational connection on a balance of probabilities (*Ewert v. Canada*, [2018] 2 S.C.R. 165 at paragraph 73).

Overbreadth deals with laws that are rational *in part* but that overreach and capture *some* conduct that bears no relation to the legislative objective (*Bedford*, *supra*, at paragraphs 112-113; *Heywood, supra*, at 792-93; *R. v. Clay*, [2003] 3 S.C.R. 735 at paragraphs 37-40; *Demers, supra*, at paragraphs 39-43). An appropriate statement of the legislative objective is critical to proper overbreadth analysis. The objective must be taken at face value — there is no evaluation of the appropriateness of the objective. The articulation of the objective should focus on the ends of the legislation rather than on the means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms: *R. v. Moriarity*, [2015] 3 S.C.R. 485 at paragraphs 26-30.

Determining legislative purpose involves consideration of legislative statements of purpose and the text, context and scheme of the legislation. Regard may also be had for extrinsic evidence such as legislative history and, where legislation is enacted in the context of international commitments, international law: *R. v. Appulonappa*, [2015] 3 S.C.R. 754 at paragraph 33.

Gross disproportionality targets laws that may be rationally connected to the objective but whose *effects* are so disproportionate that they cannot be supported. Gross disproportionality applies only in extreme cases where "the seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford*, *supra*, at paragraph 120; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paragraph 133; *Malmo-Levine, supra*, at paragraph 169; *Burns, supra* at paragraph 78; *Suresh, supra*, at paragraph 47; *Malmo-Levine, supra*, at paragraphs 159-160).

The analysis in relation to arbitrariness, overbreadth and gross disproportionality is qualitative not quantitative — an arbitrary, overbroad or grossly disproportionate impact on one person suffices to establish a breach (*Bedford*, *supra*, at paragraph 123). Further, the impugned effect is measured only against the law's purpose without regard to the law's efficacy (*Bedford*, *supra*, at paragraph 125).

The issue of disproportionate punishment (if it will be imposed by Canadian government action) should generally be approached in light of section 12 of the Charter (protecting against punishments that are grossly disproportionate, and thus "cruel and unusual"), not section 7 (*Malmo-Levine*, *supra*, at paragraph 160; *R. v. Lloyd*, [2016] 1 S.C.R. 130 at paragraph 43; *R. v. Safarzadeh-Markhali*, [2016] 1 S.C.R. 180 at paragraph 73). However, provisions that impact on sentencing or punishment can potentially be approached through the lens of section 7 overbreadth (see *e.g.*, *Safarzadeh-Markhali*, *supra*, in which provisions restricting enhanced credit for pre-sentence custody were found to be overbroad deprivations of liberty).

Vagueness offends the principles of fundamental justice where the law, considered in its full interpretative context, is so lacking in precision that it does not provide sufficient guidance for legal debate as to the scope of prohibited conduct or of an "area of risk" (*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 626-627 and 643*; Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028 at 1070-72; *R. v. Levkovic*, [2013] 2 S.C.R. 204 at paragraphs 47-48). The doctrine of vagueness is directed at ensuring fair notice to citizens and limiting enforcement discretion of officials. (*Nova Scotia Pharmaceutical, supra; Canadian Foundation for Children, Youth and the Law, supra* at paragraphs 15-18). Where the state seeks to impose a criminal sanction, negligence is required as a minimum level of *mens rea*, in that at least a defence of due diligence must

be open to an accused, for an offence to accord with the principles of fundamental justice (*Re B.C. Motor Vehicle Act* at 492; *Wholesale Travel Group Inc., supra*). However, for some crimes, because of the special stigma attached to a conviction or the available penalties upon conviction, the principles of fundamental justice will require a higher level of *mens rea* (*Vaillancourt, supra*, at 653-54; *R. v. Martineau*, [1990] 2 S.C.R. 633 at 646-47). It is a principle of fundamental justice that "morally involuntary" conduct should not attract criminal liability (*R. v. Ruzic*, [2001] 1 S.C.R. 687, at paragraph 47).

It is a principle of fundamental justice that young persons are entitled, on sentencing, to a presumption of diminished moral culpability (*R. v. D.B. supra* at paragraphs 45-69).

It is a principle of fundamental justice that the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies (*D.B.*, *supra* at paragraphs 78 and 124).

It is a basic tenet of our legal system that an accused must be tried and punished under the law in force at the time the offence is committed (*R. v. Gamble*, [1988] 2 S.C.R. 595 at 647; *Prostitution Reference*, *supra*, at 1152; *R. v. Johnson*, [2003] 2 S.C.R. 357 at paragraphs 41-46).

The independence and impartiality of the judiciary is a principle of fundamental justice (Re Application under section. 83.28 of the *Criminal Code, supra*, at paragraph 81; *Charkaoui* (2007), at paragraph 32*).* Section 7 also protects a residual presumption of innocence outside criminal proceedings, although it does not necessarily require proof beyond reasonable doubt where the process in question does not involve a determination of guilt (*Pearson*, *supra* at 685; *Demers, supra* at paragraphs 33-34).

“Interrogation of a youth, to elicit statements about the most serious criminal charges” while the youth was detained in conditions that included scheduled sleep deprivation and no access to counsel, “and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects” and therefore unjustifiably limited the principles of fundamental justice (*Khadr* 2010, *supra*, at paragraph 25).

The lawyer’s duty of commitment to the client’s cause is a principle of fundamental justice. This means that where section 7 interests are engaged, the state cannot impose duties on a lawyer that undermine the lawyer’s compliance with that duty, either in fact or in the perception of a reasonable person (*Canada (Attorney General) v. Federation of Law Societies*, [2015] 1 S.C.R. 401 at paragraph 103).

The professional secrecy of lawyers and notaries is a principle of fundamental justice and must remain as close to absolute as possible (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at paragraphs 36-37; *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] 1 S.C.R. 336 at paragraph 28). However, the proper approach to constitutional issues arising from state interference with solicitor-client privilege is under s. 8 of the *Charter* (*Lavallee* at paragraph 34).

In the extradition and deportation contexts, both the governing legislation and exercise of discretion thereunder must accord with the principles of fundamental justice, although the exercise of discretion will attract considerable deference (*Suresh, supra* at paragraphs 39-41; *Burns, supra*, at paragraph 32; *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, at paragraph 34).

A particular extradition or deportation can be contrary to the principles of fundamental justice because of risks the individual would face in a foreign state post-removal. Generally, the test is whether the risks are so severe that the extradition or deportation would "shock the conscience" of Canadians. The phrase "shocks the conscience" should not be equated with an opinion poll but is intended to underline the very exceptional circumstances that would constitutionally limit the scope of permissible government action in removal cases (*Burns*, *supra* at paragraph 67; *United States v. Ferras*, [2006] 2 S.C.R. 77 at paragraph 85). An extradition that limits the principles of fundamental justice will always shock the conscience (*Burns, supra*, at paragraph 68).

The assessment involves a flexible, context-specific, and evolving balancing process that can be informed by international law. What will be judged as contrary to the principles of fundamental justice in a particular case varies considerably depending on the factors taken into account and their relative influence (*Kindler, supra* at 848; *Burns, supra* at paragraph 65; *Suresh, supra* at paragraphs 45-46; *Lake, supra* at paragraphs 31-32, 38-39; *Canada (Attorney General) v. Barnaby*, [2015] 2 S.C.R. 563 at paragraph 2).

Barring as yet unspecified exceptional circumstances, it would "shock the conscience" for Canada to extradite an individual to a State that may impose the death penalty, unless sufficiently reliable assurances that the death penalty will not be sought or carried out are first obtained (*Burns, supra* at paragraph 65). Similarly, deportation or expulsion to a substantial risk of torture will generally unjustifiably limit the principles of fundamental justice, subject to a potential allowance for "exceptional circumstances", the ambit of which has not yet been defined (*Suresh, supra* at paragraph 78). Note, however, that in *India v. Badesha*, [2017] 2 S.C.R. 127 at paragraphs 38, 42, the Supreme Court simply stated that extradition to a substantial risk of torture or mistreatment "will violate the principles of fundamental justice".

For a discussion of factors that inform the content of the principles of fundamental justice in the extradition context, see: *Burns, supra* at paragraphs 72; *Lake, supra* at paragraphs 38-39. See also *France v. Diab*, 2014 ONCA 374 at paragraphs 237-238, leave to appeal to SCC refused, [2014] S.C.C.A. No. 317 (discussing the use of torture-derived evidence in the prosecution by the requesting state).

The following have been found **not** to be principles of fundamental justice:

- a child's presumed testimonial incompetence (*R. v. J.Z.S.*, 2008 BCCA 401 at paragraph 54, upheld [2010] 1 S.C.R. 3);
- the “best interests of the child” — although it is an established legal principle in international and domestic law and is a factor for consideration in many contexts, it is not a foundational requirement for the dispensation of justice (*Canadian Foundation for Children, Youth and the Law, supra*, at paragraphs 9-11);
- the “harm principle”, pursuant to which only conduct that is harmful could attract penal liability (*Malmo-Levine*, *supra*, at paragraphs 131, 135);
- the availability of a civil remedy in domestic courts for torture committed abroad or, more generally, the maxim that “where there is a right, there must be a remedy for its violation” (*Kazemi Estate v. Islamic Republic of Iran, supra* at paragraphs 157-59);
- a requirement that Crown prosecutors consider the Aboriginal status of the accused prior to making decisions that limit a judge’s sentencing options (*R. v. Anderson*, [2014] 2 S.C.R. 167 at paragraph 29); and
- proportionality in the sentencing process — proportionality is a foundational principle of sentencing but the constitutional standard against which it is measured is that of *gross* disproportionality under section 12 (*R. v. Safarzadeh-Markhali*, *supra*, at paragraphs 72-73).

(ii) Procedural fundamental justice

The principles of fundamental justice incorporate *at least* the requirements of the common law duty of procedural fairness (*Singh, supra*, at 212-13; *Lyons, supra,* at 361; *Suresh, supra* at paragraph 113; *Ruby, supra* at paragraph 39). They also incorporate many of the principles set out in sections 8-14 of the Charter (*Re B.C. Motor Vehicle Act*, *supra*, at paragraphs 29-30) and are “inextricably intertwined” with the requirements of s. 11(d) (*R. v. Rose*, [1998] 3 S.C.R. 262 at para. 95]. Context is particularly important with respect to procedural fundamental justice — the more serious the infringement of life, liberty and security of the person, the more rigorous the procedural requirements (*Suresh, supra*, paragraph 118; *Charkaoui* (2007), *supra*, paragraph 25; *Charkaoui v. Canada (Citizenship and Immigration*, [2008] 2 S.C.R. 326, at paragraphs 53-58). The protections are *generally* more stringent in the criminal

law context than in other areas of law (*Chiarelli, supra* at 743; *Ruby, supra* at paragraph 39). However, the guiding question is always the severity of the impact on protected interests rather than a formal distinction between the different areas of law (*Charkaoui* (2008), *supra* at paragraph 53).

Deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself. This list of factors is non-exhaustive in determining the procedures demanded by the principles of fundamental justice (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 23-27; *Suresh, supra* at paragraph 115; *Charkaoui (2008)*, at paragraph 57).

In the criminal context, the right to a fair trial is a principle of fundamental justice (*R. v. Harrer*, [1995] 3 S.C.R. 562 at paragraph 13). The right to a fair trial encompasses the right to make full answer and defence, which depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution (*R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 608). This principle is not unqualified, however. Relevant evidence can be excluded where such exclusion is justified by a ground of law or policy, such as where the evidence is unduly prejudicial or likely to distort the fact-finding process (*Seaboyer* at 609; *R. v. Mills*, [1999] 3 S.C.R. 668 at paragraphs 74-75; *R. v. St-Onge Lamoureux*, [2012] 3 S.C.R. 187 at paragraphs 71, 74). It can also be excluded to protect informer privilege, subject only to the innocence at stake exception (*R. v. Basi*, [2009] 3 S.C.R. 389 at paragraph 43; *R. v. Barros*, [2011] 3 S.C.R. 368).

The right of an accused to cross-examine Crown witnesses without significant and unwarranted constraint is a key element of the right to make full answer and defence (*R. v. Lyttle*, [2004] 1 S.C.R. 193 at paragraphs 41-43; *R. v. R.V.*, 2019 SCC 41; but see *R. v. Khelawon*, [2006] 2 S.C.R. 787, at paragraphs 47-48) and generally includes the right to see the witness's face (*R. v. N.S.*, [2012] 3 S.C.R. 726 at paragraph 27). The right to cross-examine witnesses does not apply at a preliminary hearing (*R. v. Bjelland*, [2009] 2 S.C.R. 651, at paragraph 32).

The right to receive disclosure is also an aspect of the right to make full answer and defence (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80 at paragraph 37; *R. v. Taillefer*, [2003] 3 S.C.R. 307 at paragraph 61). This right imposes a duty

on the Crown to make reasonable inquiries of other government entities that could reasonably be considered to be in possession of relevant information (*R. v. McNeil*, [2009] 1 S.C.R. 66, at paragraphs 49-50), including disclosure of evidence gathered by Canadian officials outside of Canada in the context of a foreign criminal proceeding if Canada was participating in the activities of a foreign state or its agents that are contrary to Canada's international obligations (*Khadr* (2008), *supra* paragraph 18).

It is a principle of fundamental justice that an accused has the right to control his or her own defence (*Swain* at 971-72).

It is a principle of fundamental justice that officials exercising prosecutorial discretion must not act for improper purposes, such as purely partisan motives (*R. v. Cawthorne*, [2016] 1 S.C.R. 983; *R. v. Regan*, [2002] 1 S.C.R. 297). Such individuals are, however, entitled to a strong presumption that they exercise their prosecutorial function independently of such motives. This presumption is not displaced by the fact that the individuals may *also* exercise partisan duties (*e.g.*, as a member of Cabinet). The bar for a finding that a prosecutor acted for an improper purpose is "very high," and prosecutors are entitled to act for purposes that are "political" in the sense of being motivated by the government's conception of the public interest (*Cawthorne* at paragraphs 26-28, 34).

The common law doctrine of abuse of process in the criminal context has been merged with section 7 of the Charter such that an abuse of process will constitute a violation of the principles of fundamental justice (*R. v. O'Connor, supra*; *R. v. Nixon*, [2011] 2 S.C.R. 566, at paragraphs 36-37). While some types of abuse of process (*e.g.*, delay) may be better considered in relation to other Charter protections, abuse of process captures at least two residual aspects of trial fairness: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*O'Connor, supra*, at paragraph 73). The test for abuse of process is whether "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" (*Nixon, supra*, at paragraph 40). See the section 24(1) Charterpedia summary for a discussion of remedies for abuse of process (*e.g.*, stay of proceedings).

The following are procedural principles of fundamental justice that have been found to apply outside the criminal context: the right to a hearing before an independent and impartial tribunal (*Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 at paragraph 38; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at 883; *Charkaoui* (2007), *supra*, at paragraphs 29, 32); the right to a fair hearing, including the right to State-funded counsel

where circumstances require it to ensure an effective opportunity to present one's case (*G.(J.)*, *supra* at paragraphs 72-75 and 119; *Ruby, supra*, at paragraph 40); the opportunity to know the case one has to meet (*Chiarelli, supra*, at 745-46; *Suresh, supra* at paragraph 122; *May v. Ferndale Institution*, *supra*, at paragraph 92; *Charkaoui* (2007), *supra*, at paragraph 53), including, where the proceeding may have severe consequences, the disclosure of evidence (*Charkaoui* (2008) at paragraphs 56, 58; *Harkat, supra* at paragraphs 43, 57, 60); the opportunity to present evidence to challenge the validity of the state's evidence (*Suresh, supra* at paragraph 123; *Harkat, supra*, at paragraph 67); the right to a decision on the facts and the law (*Charkaoui* (2007), *supra*, paragraphs 29, 48); the right to written reasons that articulate and rationally sustain an administrative decision (*Suresh, supra*, at paragraph 126); and the right to protection against abuse of process (*Cobb, supra*, at paragraphs 52-53). The application of these principles is highly contextual, but it may be assumed that if they apply outside the criminal context, they apply with greater force in the criminal context.

The principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition receive a meaningful judicial determination of whether the case for extradition has been established. This requires an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence ant the law (*Ferras*, *supra* at paragraphs 19-26, 85-87).

Procedural fairness under section 7 does not guarantee the most favourable procedures imaginable (*Lyons, supra*, at 361; *Mills, supra*, at paragraph 72; *Ruby, supra*, at paragraph 46) or a "perfect" process (*Harkat* at paragraphs 43, 69). Oral hearings will not be required in every case in the administrative context (*Singh, supra*, at 213-14; *Suresh, supra* at paragraph 121) as the appropriate level of protection will vary depending on a number of factors, including the seriousness of the individual interest at stake, the complexity of proceedings and other factors outlined above (*G.(J.), supra* at paragraphs 72-81).

The principles of fundamental justice do not generally include a right of appeal whether in the criminal (*R. v. Meltzer*, [1989] 1 S.C.R. 1764 at 1774-75) or quasi-criminal/administrative context (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at 69-70; *Huynh v. Canada*, [1996] 2 F.C. 976 (C.A.), at paragraphs 14-20 (leave to appeal to SCC refused); *Charkaoui* (2007), *supra*, at paragraph 136).

Denial of an access to personal information request based on the "foreign confidences" or "national security" exemptions in the *Privacy Act*, limits on the extent of disclosure, and the provision for *ex parte* and *in camera* proceedings do not necessarily limit the principles of fundamental justice (*Ruby, supra* at paragraph 51; *Charkaoui* (2007), *supra*, at paragraphs 58-60). Notice and

participation are not invariable constitutional norms but are part of a contextual approach to procedural fairness (*Charkaoui* (2007), *supra*, at paragraph 57; *Rodgers, supra*, at paragraph 47).

The principles of fundamental justice also include a residual protection against self-incrimination (*R. v. P. (M.B.)*, [1994] 1 S.C.R. 555 at 577; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 512; *R. v. Jarvis*, [2002] 3 S.C.R. 757 at paragraph 67). This protection requires that a person compelled to give incriminating evidence be protected against the subsequent use of that evidence in a criminal prosecution or any proceeding engaging section 7 of the Charter (Application under section 83.28 of the *Criminal Code, supra*, at paragraphs 77-79).This protection extends to subsequent use of derivative evidence which could not have been obtained or its significance appreciated but for the compelled testimony (*S. (R.J.), supra*, at 454-55; *Branch, supra* at 31-32). The residual protection also encompasses a constitutional exemption providing complete immunity from compelled testimony where such proceedings are undertaken or used predominantly to obtain evidence for the prosecution of the witness (*Branch, supra; Phillips v. Nova Scotia* (Commission of Inquiry into the *Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Jarvis, supra*; Application under section 83.28 of the *Criminal Code, supra* at paragraphs 70-71). The residual protection also applies in the context of solicitor-client privilege to the "privilege holder" who gave incriminating statements to his or her solicitor when those statements are subsequently ordered disclosed by a court, pursuant to a *McClure* application (*R. v. Brown*, [2002] 2 S.C.R. 185). In the context of a judicial investigative hearing (pursuant to section 83.28 of the *Criminal Code*), the protection against subsequent use extends beyond the criminal context to include any proceeding which engages section 7, including extradition and deportation hearings (Re Application under section 83.28 of the *Criminal Code, supra* at paragraphs 77-79).

The scope of the principle against self-incrimination is determined by a contextual analysis. Relevant factors include the presence or absence of: (1) real coercion by the state in obtaining the statements; (2) an adversarial relationship between the accused and the state at the time the statements were obtained; (3) an increased risk of unreliable confessions; and (4) an increased risk of abuses of power by the state (*R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at paragraphs 21-25; *R. v. White*, [1999] 2 S.C.R. 417 at paragraph 51).

The principle against self-incrimination is not limited by the use against a person, in regulatory proceedings with a penal consequence, of information they are required routinely to produce under a regulatory scheme in which they elect to participate (*Fitzpatrick, supra*, at paragraph 54) or for income tax purposes (*R. v. Wilder*, 2000 BCCA 29, leave to appeal to SCC refused, [2000] S.C.C.A. No.

279). It would be compromised, however, by the admission into evidence in a criminal trial of statements made by the accused to police under the compulsion of provincial highway safety legislation (*White*, supra, at paragraphs 53-66).

The principle of protection against self-incrimination will not come into play where the required testimony is that of a third party, regardless of the relationship to the accused. As such, state action forcing a person to give incriminating testimony against another person is not contrary to the principles of fundamental justice (*Del Zotto v. Canada*, [1999] 1 S.C.R. 3).

The principle against self-incrimination also informs the common law rule of evidence governing the use of Mr. Big confessions, pursuant to which such confessions are presumptively inadmissible, with the Crown bearing the burden of establishing that the probative value of the confession outweighs its prejudicial effect (*R. v. Hart*, [2014] 2 S.C.R. 544 at paragraphs 84-87, 123).

Section 7 also encompasses a residual protection for the right to silence in the pre-trial context. A detained person must be in a position to make a free choice on the matter of whether to speak to the authorities or to remain silent (*R. v. Hebert*, [1990] 2 S.C.R. 151 at 178; *R. v. Liew*, [1999] 3 S.C.R. 227 at paragraphs 36-37; *R. v. Singh*, [2007] 3 S.C.R. 405, at paragraphs 43-46). The right to silence protects against the *eliciting* of statements by undercover agents but permits *observation* of the accused by such agents (*Hebert*, *supra*, at pages 307).

An accused's silence at trial may not be treated as evidence of guilt and no adverse inference may be drawn from the failure to testify: *R. v. Noble*, [1997] 1 S.C.R. 874 at paragraph 72; *R. v. Prokofiew* at paragraph 64).

Section 1 considerations specific to this section

The Supreme Court has repeatedly stated that infringements of section 7 "are not easily saved by section 1" and has in some cases suggested that section 1 justification may only be possible "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like" (Reference Re section 94(2) of the *Motor Vehicle Act (B.C.)* at paragraph 85; *Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paragraph 99; *Heywood; Burns; Suresh* at paragraph 128; *Ruzic* at paragraph 92; *Charkaoui* (2007) at paragraph 66). However, in other cases, the Court has emphasized the differences between section 7 and section 1, suggesting that section 1 justification may be possible where the law serves the broader societal values underlying a free and democratic society, such as promoting respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the

participation of individuals and groups in society (*Bedford*, *supra*, at paragraphs 113, 124-29); *Mills, supra*, at paragraphs 66-67; *Malmo-Levine, supra*, at paragraph 98; *Charkaoui* (2007), *supra* at paragraph 66). There may also be room for section 1 argument when dealing with residual section 7 protections which overlap with those found in other sections of the Charter, where section 1 justifications have been successful (see generally *D.B., supra*, at paragraphs 85-91).

In terms of the specific principles against arbitrariness, overbreadth and gross disproportionality under section 7, although there may be parallels with the elements of the test under section 1, the two sections remain distinct. As noted above, the analysis under section 7 is qualitative — in the sense that an arbitrary, overbroad or grossly disproportionate impact on one person is sufficient to establish a breach — and measures the effect of the impugned law against the law's purpose without regard to the law's efficacy. In contrast, the analysis under section 1 is both qualitative and quantitative, and allows for the Crown to call the social science and expert evidence required to justify the law's impact in terms of society as a whole (*Bedford*, *supra*, at paragraphs 126-127). Enforcement practicality is not relevant to overbreadth under section 7 but may potentially be relied on to justify an overbroad law under section 1 (*Bedford*, *supra*, at paragraph 113). These differences in the frameworks under section 7 and section 1 were relied upon to uphold a section 7 infringement as a reasonable limit under section 1 in *R. v. Michaud*, 2015 ONCA 585, leave to appeal to SCC refused, [2015] S.C.C.A. No. 450.

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