Interpreting Section 7 of the Charter: Clarity, Vagueness and Overbreadth

Introduction

Two principles of legality state that laws must be sufficiently clear and precise. According to the principles of legality, if a law is vague, or overbroad, respectively, it is not a valid law. A law must be clear enough to be understood and must also be precise enough that it only applies to activities connected to the law's purpose. These principles are codified in section 7 of the *Charter or Rights and Freedoms*. The effect of section 7 is that all laws, regulations, and orders in Canada must conform to these principles of clarity and precision. If a law does not conform to these principles, it will violate section 7 and will likely be struck down as unconstitutional.

Background

The common principle behind both vagueness and overbreadth is the requirement that laws have a minimum degree of certainty. As Joseph Raz puts it, the rule of law prescribes that the "law must be capable of guiding the behaviour of its subjects."[1] If law is not capable of guidance, individuals will not know how to operate safely within the bounds of the law nor understand the ramifications of their actions.

Part of the genius of the Western legal tradition is the 1215 *Magna Carta*. The *Magna Carta* limited the King's ability to decree arbitrary and unknowable commands. Individuals failed to follow the King's law with certainty, since it has "no rational pattern and [is] not governed by ascertainable rules or policies."[2] In an attempt to bind the unknowable will of the king, the *Magna Carta* codified a set of predictable, public, and specific rules so that citizens could know they were obeying the law. The Supreme Court of Canada has endorsed these principles of legality inherent in the *Magna Carta*: "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.[3]"

Vagueness

In Canada, individuals are constitutionally protected from vague laws. Section 7 of the *Charter* 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.

It is a principle of fundamental justice that vague laws are invalid. Generally, if (1) a law is vague, and (2) deprives one of life, liberty, or security of the person, the law is void. This principle is called the "void for vagueness" doctrine. Peter Hogg states the rationale for applying this doctrine to vague laws thus:

First, the [vague] law does not provide fair notice to persons of what is prohibited, which makes it difficult for them to comply with the law. Secondly, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement.[4]

But how does one determine that a law is too vague? The standard set by the courts, ironically, is rather vague itself. The test is that an unconstitutionally vague law does not provide the basis for a legal debate.[5] It is difficult to imagine many situations where a court will find a law too vague. Some commentators note that even the vaguest laws could be the basis of legal debate.[6] To be unconstitutional, it would appear a law must be so unintelligible that people could agree that they have no reasonable idea what the law could mean. To be "void for vagueness" a law must be very poorly drafted. Recently, this test has been reformulated somewhat for criminal contexts. "A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction."[7] Courts have tended to uphold laws that some think are too vague. Laws prohibiting communicating for the purposes of being involved in prostitution were not void for vagueness.[8] Courts have also upheld criminal offences that were not explicitly codified.[9] The word "terrorism" was found to be not unconstitutionally vague.[10] Nor was the term "criminal organization."[11]

Overbreadth

Canadians are also constitutionally protected from overbroad laws through section 7 of the *Charter*. Fundamental justice requires laws to impair fundamental rights only as far as necessary to achieve specific objectives set by the legislature passing them. Laws that go too far in the means they employ in implementing a legislative objective are considered overbroad, or unnecessarily "sweeping," in scope and therefore invalid.[12] An overbroad law differs from a vague law in that an overbroad law may be perfectly clear, but go too far in impairing an individual's liberty. The Supreme Court in *R. v. Heywood* discussed how to identify an overbroad law:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose.…If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been

limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.[13]

The test for determining whether a law is overbroad is also found in *Heywood*:

1. What is the purpose of the legislation?

2. Are the means enacted to accomplish the legislative objectives "tailored to effect this purpose"?

3. Is the limitation of a right to life, liberty, or security of the person impaired "beyond what is necessary to accomplish" the governmental objectives?[14]

If the answer is "no" to questions (2) and (3), the law is overbroad and violates section 7 of the *Charter*. The Court expressed doubt that an overbroad law could ever be justified by section 1 of the *Charter*.[15] An overbroad law would not "minimally impair" the affected right to life, liberty, or security of the person as little as possible.[16] The Court has subsequently clarified that in an overbroad law, assuming the legislature acted rationally to legislate a legitimate state interest, the right affected by an overbroad law must be "grossly disproportionate" to the government's objective.[17]

The problem with an overbroad law is not only that it impairs a protected right, but also that the law can be almost unlimited in scope. For example in *Heywood*, a law which made it illegal for an individual convicted of a sexual assault to be "found loitering in or near a schoolground, playground, public park or bathing area" was found to be overbroad for a number of reasons.[18] First, the law also applied to individuals who did not pose any danger to children; second, the prohibition applied to areas (i.e., public parks) where children may not be found; third, the prohibition lasted for life without any opportunity to appeal it; and finally, an individual convicted of sexual assault is not given notice that they are prohibited from traveling to specific areas.[19] A failure to give such notice violates the principle of legality that laws must conform to.

A major criticism of *Heywood*, and the Canadian doctrine of overbreadth itself, is the Court's use of hypotheticals to invalidate law.[20] This argument urges the courts to play a more restrained role in identifying overbreadth. In *Heywood*, the law was deemed overbroad because it *could* have hypothetically restricted the liberty of an innocent individual who posed no risk to children from entering a public park. In actuality, *Heywood* was an appeal by a man with a telephoto lens who was caught taking pictures of young children's underwear at a children's playground in Victoria. The law's objectives, to protect children, were being achieved here by the law in question. "After all, if the hypothetical cases are realistic, there will be future opportunities to review the law when it is applied too broadly."[21]

Courts have looked at many different laws to determine if they are overbroad. The Supreme Court found that a law making an absolute discharge (a criminal

sentence where the accused is found guilty, but no record of the conviction is registered), unavailable for permanently unfit accused individuals (here a mentally ill person), to be overbroad, as the net effect was that the mentally ill could be convicted of serious crimes, but not be "forgiven" for very minor offences.[22] A law making the unauthorized release of "secret" or "official" government information a criminal offence was also found to be overbroad because the government had no formal means of identifying what documents were considered "secret" or "official".[23] A prohibition on possessing child pornography was deemed to be overbroad insofar as it prohibited possessing self-created material.[24] In the latter case the accused had written stories meant only for his personal consumption. On the other hand, laws permitting parents to use reasonable force on their children for correction have not been found to be overbroad, as the law set "real boundaries and delineates a risk zone for criminal sanction and avoids discretionary law enforcement."[25] Laws prohibiting simple marijuana possession are not overbroad as they "were not grossly disproportionate to the state interest in avoiding harm to users and others caused by marijuana consumption."[26]

Conclusion

A law that is too vague is one that is incomprehensible. To break a law one must be capable of understanding it. A law that is overly broad can cover too many situations, whereby even the innocent can be convicted of a crime through an inadvertent act. In either situation common citizens must have the intent (the *mens rea*) to knowingly break a law, accordingly they must be able to understand the law they are breaking too. It is important to understand that the common law still presumes that ordinary citizens "know the law." Having laws declared void for uncertainty or for being overly broad are rare events.

Further Reading

Jonathan Daniels, "Valid Despite Vagueness: The Relationship Between Vagueness and Shifting Objective" (1994) 58 Sask. L. Rev. 101.
Timothy Endicott, *Vagueness in Law* (New York: Oxford University Press, 2000).
Peter Hogg, *Constitutional Law of Canada: Student Edition 2004* (Toronto: Thomson Canada Ltd., 2004).
Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004).
R. v. Heywood, 3 S.C.R. 761.
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606.

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[1] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 214.
[2] Edgar Bodenheimer, *Jurisprudence* (Cambridge: Harvard University Press,

1967) at 167.
[3] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; (1998), 161 D.L.R. (4th) 385; (1998), 55 C.R.R. (2d) 1; 1998 CanLII 793 (S.C.C.), para. 70, on line:http://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.html.
[4] Peter Hogg, *Constitutional Law of Canada: Student Edition 2004* (Toronto: Thomson Canada Ltd., 2004) at 1039. See also the comments of Justice Gonthier in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639 .
[5] *Nova Scotia Pharmaceutical Society*, *supra* note 4 at 639, 643. See also *Suresh v. Can.*, [2002] 1 S.C.R. 3 at paras. 80-99 .
[6] Hogg, *supra* note 4 at 1041; Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004) at 138.
[7] *Canadian Foundation for Children, Youth and the Law v. Attorney General of Canada*, [2004] 1 S.C.R. 76 at para. 16 [McLachlin C.J.C.].
[8] *Re ss. 193 and 195.1 of Criminal Code*, [1990] 1 S.C.R. 1123.
[9] *United Nurses of Alberta v. Alberta*, [1992] 1 S.C.R. 901.
[10] *Suresh*, *supra* note 5.
[11] *R. v. Terezakis*, 2007 BCCA 384; *R. v. Smith*, 2006 SKQB 132.
[12] *R. v. Heywood*, 3 S.C.R. 761 at 792 .
[13] *Heywood*, *supra* note 120 at 792-793.
[14] *Heywood*, *supra* note 12 at 794.
[15] Terry Romaniuk, "The Oakes Test" *Centre for Constitutional Studies* (20 August 2007).
[16] *Heywood*, *supra* note 12 at 802-803.
[17] *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 38 .
[18] *Heywood*, *supra* note 123 at 800-801.
[19] Hogg, *supra* note 4 at 1035.
[20] See Hogg, *supra* note 4 at 1036-1037.
[21] *Ibid*. at 1037.
[22] *R. v. Demers*, [2004] 2 S.C.R. 489.
[23] *O'Neill v. Canada (Attorney General)* (2006), 82 O.R. (3d) 241, para 53.
[24] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 59, 115.
[25] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *supra* note 7.
[26] See *Clay*, *supra* note 177.