

# Principles of Fundamental Justice

## Purpose

Principles of fundamental justice (PFJs) are used to determine whether section 7 of the *Charter of Rights and Freedoms* has been violated. Section 7 establishes that “[e]veryone 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.”<sup>[1]</sup> This means that a party asserting a section 7 violation must demonstrate a breach of 1) life, liberty, or security of the person, and 2) at least one PFJ.<sup>[2]</sup> Claimants may base their arguments on already established PFJs or previously unrecognized principles that meet certain standards (see below).

## Criteria

PFJs are not defined in the *Charter*, so the criteria for what constitutes a PFJ had to be developed gradually through case law. Although originally thought to address procedural matters only, the Supreme Court of Canada’s *BC Motor Vehicle Act* judgment (1985) established that PFJs also include substantive ideals,<sup>[3]</sup> like the requirement of proving fault before imposing incarceration.<sup>[4]</sup>

In *R v Malmo Levine*, the Supreme Court provided additional clarification by establishing three requirements for legal recognition of a previously unrecognized PFJ:

1. They must be “legal principle[s].”<sup>[5]</sup>
2. There must be “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate.”<sup>[6]</sup>
3. They “must be identified with sufficient precision to yield a manageable standard.”<sup>[7]</sup>

## Examples

Courts have used the *R v Malmo Levine* criteria to recognize a wide range of PFJs (and recognized many PFJs before the establishment of these criteria). The most common PFJs used by the courts today are arbitrariness, overbreadth, and gross disproportionality,<sup>[8]</sup> which can be defined as follows:

- A law is arbitrary when its purpose fails to align with all of its effects.<sup>[9]</sup>
- A law is overbroad when its purpose is disconnected from some of its

effects.<sup>[10]</sup>

- A law is grossly disproportionate where its effects are unjustifiably excessive.<sup>[11]</sup>

Some other principles of fundamental justice that have been recognized by the courts — but are less commonly referenced — include the principle that criminal defences must be practically attainable,<sup>[12]</sup> the principle that nobody should be imprisoned without fault,<sup>[13]</sup> and the principle that criminal defendants have a right to prosecutorial disclosure.<sup>[14]</sup> This list is non-exhaustive, which means that courts may recognize additional principles of fundamental justice in the future.

[1] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] Peter W Hogg, *Constitutional Law of Canada*, 5th edition, vol 2 (Toronto: Carswell, 2019) at 47.10(a).

[3] *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at 513.

[4] Government of Canada, “Section 7 - Life, liberty and security of the person” (last modified 29 June 2023) at (i) “Substantive Fundamental Justice” (para 8), online: <[justice.gc.ca](http://justice.gc.ca)> [[perma.cc/52LS-9XG8](https://perma.cc/52LS-9XG8)].

[5] *R v Malmo-Levine*, 2003 SCC 74 at para 113.

[6] *Ibid.*

[7] *Ibid.*

[8] Peter W Hogg, “The Brilliant Career of Section 7 of the Charter” (2012) 58 SCLR 195 at 155.

[9] Government of Canada, *supra* note 4 at (i) “Substantive Fundamental Justice” (para 2).

[10] *Ibid.*

[11] *Ibid* at (i) “Substantive Fundamental Justice” (para 4).

[12] *R v Morgentaler*, 1988 CanLII 90 (SCC) at 33.

[13] *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at 515.

[14] *R v Stinchcombe*, 1991 CanLII 45 (SCC) at 336.