

## *Bedford* and the Structure of Section 7

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Résumé de l'article

Dans l'affaire *Canada (P.G.) c. Bedford*, la Cour suprême du Canada a invalidé trois dispositions du *Code criminel* liées à la prostitution, statuant qu'elles avaient une portée excessive et un effet préjudiciable totalement disproportionné. Les répercussions de *Bedford* se ressentent bien au-delà du seul contexte du travail du sexe ou même du droit criminel. Premièrement, la Cour a statué que la portée excessive, l'arbitraire, et la disproportion totale sont trois notions distinctes. Elles ne découlent donc pas toutes d'une norme unique s'opposant à ce qu'une loi ait une portée excessive. Deuxièmement, la Cour a statué qu'un demandeur pouvait établir une atteinte aux droits garantis par l'article 7 de la *Charte* en démontrant qu'une loi a un effet excessif, arbitraire, ou totalement disproportionné sur la vie, la liberté ou la sécurité d'une seule personne. La Cour a également affirmé que l'efficacité de la loi dans la réalisation de ses objectifs n'est pas pertinente à l'évaluation de sa conformité avec ces trois normes constitutionnelles. Cette approche hautement individualiste à l'analyse de l'article 7 soulève certaines difficultés qui mènent à la troisième conséquence majeure de l'arrêt *Bedford*. En déplaçant toute considération de l'efficacité de la loi sous l'analyse de la proportionnalité de la limite des droits protégés par l'article 7, la Cour semble indiquer une volonté de faire quelque chose qu'elle n'a jusqu'ici jamais fait, c'est-à-dire reconnaître qu'une atteinte de ces droits puisse être justifiée sous l'article premier de la *Charte*. La clarification de la Cour concernant la relation entre les normes de la portée excessive, de l'arbitraire et de la disproportion totale est bienvenue, mais son articulation individualiste de ces normes est difficile à comprendre. Par ailleurs, sa suggestion qu'une atteinte aux droits garantis par l'article 7 serait maintenant plus facile à justifier sous l'article premier est troublante.

## BEDFORD AND THE STRUCTURE OF SECTION 7

*Hamish Stewart\**

In *Canada (A.G.) v. Bedford*, the Supreme Court of Canada invalidated three prostitution-related provisions of the *Criminal Code* on grounds of overbreadth and gross disproportionality. The implications of *Bedford* go well beyond the particular context of sex work and even of criminal law. First, the Court held that the three constitutional norms against overbreadth, arbitrariness, and gross disproportionality are distinct from each other rather than aspects of a single norm against overbreadth. Second, the Court held that a *Charter* applicant could establish a violation of section 7 by showing that a law is overbroad, arbitrary, or grossly disproportionate in its impact on the life, liberty, or security of only one person and that the effectiveness of the law in achieving its policy objectives was not relevant to these norms. There are some difficulties in understanding this highly individualistic approach to section 7, and those difficulties lead to the third implication. By deferring any consideration of the effectiveness of the law to the question of whether it is a proportional limit on a section 7 right, the Court may be indicating a willingness to do something it has never done before: recognize an infringement of a section 7 right as a justified limit under section 1. The Court's clarification of the relationship between the norms against overbreadth, arbitrariness, and gross disproportionality is welcome, but its individualistic articulation of those norms is difficult to understand and its suggestion that section 7 violations may now be easier to save under section 1 is troubling.

Dans l'affaire *Canada (P.G.) c. Bedford*, la Cour suprême du Canada a invalidé trois dispositions du *Code criminel* liées à la prostitution, statuant qu'elles avaient une portée excessive et un effet préjudiciable totalement disproportionné. Les répercussions de *Bedford* se ressentent bien au-delà du seul contexte du travail du sexe ou même du droit criminel. Premièrement, la Cour a statué que la portée excessive, l'arbitraire, et la disproportion totale sont trois notions distinctes. Elles ne découlent donc pas toutes d'une norme unique s'opposant à ce qu'une loi ait une portée excessive. Deuxièmement, la Cour a statué qu'un demandeur pouvait établir une atteinte aux droits garantis par l'article 7 de la *Charte* en démontrant qu'une loi a un effet excessif, arbitraire, ou totalement disproportionné sur la vie, la liberté ou la sécurité d'une seule personne. La Cour a également affirmé que l'efficacité de la loi dans la réalisation de ses objectifs n'est pas pertinente à l'évaluation de sa conformité avec ces trois normes constitutionnelles. Cette approche hautement individualiste à l'analyse de l'article 7 soulève certaines difficultés qui mènent à la troisième conséquence majeure de l'arrêt *Bedford*. En déplaçant toute considération de l'efficacité de la loi sous l'analyse de la proportionnalité de la limite des droits protégés par l'article 7, la Cour semble indiquer une volonté de faire quelque chose qu'elle n'a jusqu'ici jamais fait, c'est-à-dire reconnaître qu'une atteinte de ces droits puisse être justifiée sous l'article premier de la *Charte*. La clarification de la Cour concernant la relation entre les normes de la portée excessive, de l'arbitraire et de la disproportion totale est bienvenue, mais son articulation individualiste de ces normes est difficile à comprendre. Par ailleurs, sa suggestion qu'une atteinte aux droits garantis par l'article 7 serait maintenant plus facile à justifier sous l'article premier est troublante.

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## Introduction

In *Canada (A.G.) v. Bedford*,<sup>1</sup> the Supreme Court of Canada surprisingly—and unanimously—invalidated three prostitution-related provisions of the *Criminal Code*.<sup>2</sup> The decision has sparked an important public discussion about the appropriate regime for the legal regulation of sex work and a legislative response that emphatically reasserts the role of criminal prohibitions.<sup>3</sup> But the focus of this paper is not on sex work. It is rather on the broader implications of *Bedford* for section 7 of the *Charter*.<sup>4</sup> The decision suggests three important and related developments in the Court's understanding of the substance of certain principles of fundamental justice and how an infringement of those principles might be justified under section 1. The first development concerns the distinctiveness of the specific principles of fundamental justice that were raised in *Bedford*: the norms against arbitrariness, overbreadth, and gross disproportionality. Case law before *Bedford* suggested that these three norms might all be aspects of a more basic norm against overbreadth. But the *Bedford* Court confirmed that each of these norms is different from the others and has a distinct role to play in constitutional law. The second development concerns the content of these norms, or how to show that one of them has been violated. The Court held that each of these three norms can be infringed by the effect of a law on the life, liberty, or security of a *single* person. There are a number of difficulties in the application of this holding, but if the Court really means what it says, then there is a third development. There must be room, somewhere in *Charter* law, to consider what are often called societal or collective interests; that is, the interests of persons other than those whose section 7 interests are directly affected by the law in question. So if the principles of fundamental justice are entirely concerned with the rights and interests of the individuals directly affected, then the interests of others must be considered under section 1. Thus, the Court's new way of articulating the relationship between the principles of fundamental justice and the *Oakes*<sup>5</sup> test for justifying a limit on a *Charter* right may indicate an important shift in the Court's longstanding

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1 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], rev'g in part 2012 ONCA 186, 346 DLR (4th) 385 [*Bedford* Ont CA], aff'g in part 2010 ONSC 4264, 327 DLR (4th) 52 [*Bedford* Ont Sup Ct J].

2 RSC 1985, c C-46.

3 See Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (first reading 4 June 2014) [Bill C-36].

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

5 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

reluctance to uphold section 7 violations under section 1. The reasoning in *Bedford* likely makes it easier to establish a section 7 violation because the *Charter* applicant need only show that the interest in life, liberty, or security of one (possibly hypothetical) person is affected in a manner not in accordance with the principles of fundamental justice. But it might also make it easier to save a limitation of a section 7 right under section 1 because the societal interests that would previously have informed the content and application of the principles of fundamental justice will now be relevant to the question of proportionality. The Court's clarification of the differences between overbreadth, arbitrariness, and gross disproportionality is welcome, but its individualistic approach to those norms is likely to be difficult to apply. And the suggestion that infringements of these norms might be justified under section 1 may work for the norm against overbreadth, but if applied to other principles of fundamental justice may threaten the important principle that infringements of the very basic values protected by section 7 should indeed be very difficult to justify.

## I. An Overview of *Bedford*

Chief Justice McLachlin began her reasons in *Bedford* by reminding us that, under the previous criminal law regime, sex work was not a crime in Canada, but was hedged about with criminal restrictions that made it very difficult for sex workers to do their work in a lawful, safe, and business-like way.<sup>6</sup> In *Bedford*, three sex workers sought a declaration that three of those restrictions were unconstitutional: the offence of keeping a common bawdy-house (s. 210), the offence of living on the avails of prostitution (s. 212(1)(j)), and the offence of communicating in public for the purpose of prostitution (s. 213(1)(c)).<sup>7</sup> The applicants argued that these provisions prevented them from lawfully taking steps to protect themselves from the dangers of sex work, notably from the potential violence of their clients.

The principal challenge was based on section 7 of the *Charter*. There are two essential steps in a section 7 claim: first, the *Charter* applicant has to show that the legislation in question affects his or her life, liberty, or security of the person; second, the *Charter* applicant has to show that the legislation violates one or more of the principles of fundamental jus-

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<sup>6</sup> See *Bedford*, *supra* note 1 at para 1. The court for the most part uses the statutory term “prostitution,” but I will for the most part use the term “sex work.” An even broader challenge to the sex work offences is working its way through the British Columbia courts, though the only issue resolved so far is the standing of the applicants to bring the challenge: see *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

<sup>7</sup> *Criminal Code*, *supra* note 2.

tice. If both of these are demonstrated, then the applicant has shown that his or her section 7 right is violated. The government can then seek to show that the infringement of section 7 was justified under section 1, though the Supreme Court of Canada has yet to recognize a justified limit on a section 7 right.<sup>8</sup>

Because the impugned provisions were criminal prohibitions punishable by imprisonment, the section 7 right to liberty was of course engaged. But a section 7 claim based on the possibility of imprisonment for committing a prostitution-related offence was not helpful to these applicants; their complaint was not that they might be charged with an offence but that offences relating to sex work constrained the way they could conduct an otherwise lawful activity.<sup>9</sup> So they argued that the impugned provisions engaged the right to security of the person because of the danger that they created to sex workers who are attempting to comply with the law. The Court agreed: the provisions “prevent people engaged in a risky—but legal—activity from taking steps to protect themselves from the risks.”<sup>10</sup> In order to reach that conclusion, the Court had to consider three aspects of how the legislation works. First, what exactly was the reach of the legislation—that is, what conduct did it criminalize? Second, given that reach, how did it affect sex workers who were trying to conduct themselves lawfully? Third, should these effects have been attributed to the legislation itself or to the choice of sex workers to engage in sex work?

The Court answered these questions as follows. A bawdy-house was any “place” that is “kept or occupied” or “resorted to” for the purpose of acts of prostitution, including the prostitution of one sex worker.<sup>11</sup> Thus, the offence of keeping a common bawdy-house (s. 210)<sup>12</sup> had the practical effect of “confin[ing] lawful prostitution to two categories: street prostitution and out-calls.”<sup>13</sup> The offence of living on the avails of the prostitution of another (s. 212(1)(j))<sup>14</sup> criminalized not only those who were exploitative or parasitic but also those who “suppl[ied] a service to a prostitute, be-

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<sup>8</sup> See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) (structure of a s 7 claim at 21–22 and discussion of ss 7 and 1 at 287–305) [Stewart, *Fundamental Justice*].

<sup>9</sup> See *Bedford*, *supra* note 1 at para 58, n 1. The right to carry on an otherwise lawful activity, as such, is not protected by the section 7 liberty interest.

<sup>10</sup> *Ibid* at para 60.

<sup>11</sup> *Ibid* at para 61 [internal quotations omitted].

<sup>12</sup> *Criminal Code*, *supra* note 2.

<sup>13</sup> *Bedford*, *supra* note 1 at para 62.

<sup>14</sup> *Criminal Code*, *supra* note 2.

cause she is a prostitute.”<sup>15</sup> The practical effect of that provision was to prevent “a prostitute from hiring bodyguards, drivers and receptionists.”<sup>16</sup> The offence of communicating in public for the purpose of prostitution (s. 213(1)(c))<sup>17</sup> prevented street sex workers from attempting to screen their clients in any way.<sup>18</sup> The overall effect of these provisions was to make a lawful activity much more dangerous than it would have been without them. Nevertheless, the government argued, the dangers of sex work should not be attributed to the law but to the sex workers’ decision to go into sex work: anyone could both comply with the law and avoid the dangers of sex work by not engaging in sex work in the first place.<sup>19</sup> The Court rejected this argument on the basis that some people (especially some women) have “no meaningful choice” but to engage in prostitution.<sup>20</sup> Moreover—and perhaps more significantly—the Court emphasized that the choice to engage in sex work was a lawful one.<sup>21</sup> So, just as “a law preventing a cyclist from wearing a helmet” would affect security of the person by making the lawful activity of bicycle riding more dangerous, so the impugned provisions affected security of the person by making the lawful activity of “exchang[ing] ... sex for money” more dangerous.<sup>22</sup>

At the second step of the section 7 argument, the applicants had to show that the effect of the impugned provisions on their liberty, and espe-

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<sup>15</sup> *Bedford*, *supra* note 1 at para 66.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Criminal Code*, *supra* note 2.

<sup>18</sup> See *Bedford*, *supra* note 1 at paras 68–69.

<sup>19</sup> See *ibid* at para 79.

<sup>20</sup> *Ibid* at para 86.

<sup>21</sup> See *ibid* at para 87. The centerpiece of Bill C-36, *supra* note 3, is the new offence of purchasing sexual services: see *Criminal Code*, *supra* note 2, s 286.1. On this approach, sex work is, at least on one side of the transaction, no longer an otherwise lawful activity. This shift in legislative policy will have significant consequences for framing the inevitable constitutional challenge to the new legislative regime.

<sup>22</sup> *Bedford*, *supra* note 1 at para 87. The holding that security of the person is engaged when legislation (or other state action) prevents someone from taking steps to protect him or herself from the non-trivial risks of an otherwise lawful activity could have very significant implications for engaging section 7 in future cases. Every activity, lawful or unlawful, creates risks for the person carrying it out and for other persons. The Court’s proviso that the risk created by a law must be non-trivial (see *ibid* at para 91) to engage security of the person recognizes this reality; without this proviso, section 7 would apply to all laws regulating human activity—that is, to all laws. Nevertheless, this holding means that the section 7 interest in security of the person is engaged in a wide variety of contexts, such as the law of self-defence (see *Citizen’s Arrest and Self-defence Act*, SC 2012, c 9, enacting new provisions concerning self-defence and defence of property) and regulations limiting access to medical treatment (see *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*]).

cially on their security of the person, was not in accordance with the principles of fundamental justice. There are many principles of fundamental justice,<sup>23</sup> but the principles at play in *Bedford* all involve considering the effectiveness of legislation in achieving its purpose, in light of the legislation's impact on the interests protected by section 7 of the *Charter*. They are, in other words, principles concerning the rationality of legislation.<sup>24</sup> The three principles of fundamental justice invoked in *Bedford* were the norm against arbitrariness, the norm against overbreadth, and the norm against gross disproportionality. The Court explained these norms as follows. Legislation is arbitrary "where there is no connection between the effect and the object of the law."<sup>25</sup> Legislation is overbroad where it "goes too far and interferes with some conduct that bears no connection to its objective."<sup>26</sup> Legislation is grossly disproportionate where the seriousness of its impact on section 7 interests "is totally out of sync with the objective of the measure."<sup>27</sup>

Since these principles concern instrumental or means-ends rationality, it seems that a court should consider three issues in applying them: the objectives of the law in question, its effectiveness in achieving those objectives, and its effects on the interests protected by section 7. The first of these issues depends on the court's understanding of the purpose of the legislation and so is essentially an exercise in statutory interpretation. But the second and third appear to be empirical and possibly to require social science evidence concerning the impact of the law. In this respect, *Bedford* was an unusual case because extensive social science evidence was led at first instance and was the basis for some very specific factual findings. Justice Himel considered "[o]ver 25,000 pages of evidence in 88 volumes," comprising affidavits of the applicants and affidavits of numerous experts "accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents."<sup>28</sup> On the basis of all the evidence, Justice Himel made a number of findings of legislative fact. In particular, she found that "[p]rostitutes, particularly those who work on the street, are at a high risk of being the victims of physical

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<sup>23</sup> See Stewart, *Fundamental Justice*, *supra* note 8 (an attempt to provide a comprehensive list and analysis of the principles of fundamental justice that have been recognized so far at ch 4–5).

<sup>24</sup> See *ibid* at 151; Alana Klein, "The Arbitrariness in 'Arbitrariness' (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013) 63 *Sup Ct L Rev* 377.

<sup>25</sup> *Bedford*, *supra* note 1 at para 98.

<sup>26</sup> *Ibid* at para 101.

<sup>27</sup> *Ibid* at para 120. These three principles are discussed in more detail in Part II, *below*.

<sup>28</sup> *Bedford* Ont Sup Ct J, *supra* note 1 at para 84.



violence” but that this risk could be reduced by taking measures such as working indoors, hiring staff (including drivers and security), taking time to screen clients, and using monitoring equipment.<sup>29</sup> The Supreme Court of Canada not only accepted these findings of legislative fact, but held that they were entitled to the same degree of deference as findings of adjudicative fact.<sup>30</sup> Yet, as discussed in more detail below, the Court’s new approach to the principles of fundamental justice suggests that this kind of fact-finding exercise should be conducted under section 1 rather than under section 7 of the *Charter*.

Given the factual findings and their determination of the purposes of the legislation, the Court found that two of the provisions at issue were grossly disproportionate and that one of them was overbroad. The Court did not decide whether any of them was arbitrary. The Court found that the offence of keeping a common bawdy-house was grossly disproportionate. Its purpose was not, as urged by the government, to deter prostitution as such, but “to combat neighbourhood disruption or disorder and to safeguard public health and safety.”<sup>31</sup> Its effect on sex workers who want to conduct their work lawfully was to force them to work in the streets or to engage in out-call work. By preventing the “basic safety precaution” of moving sex work indoors, the bawdy-house provision created a grossly disproportionate effect on “the health, safety and lives of prostitutes.”<sup>32</sup> But the Court did not consider the effectiveness of the provision in achieving its purposes. The Court’s assumption seems to be that even if it was completely effective, by eliminating all bawdy-houses, the nuisances thereby eliminated would not justify the increased danger to sex workers of forcing all lawful sex work to be conducted either in the streets or on an out-call basis.

The Court found the offence of living on the avails of prostitution to be overbroad. The purpose was not, as the government urged, to promote dignity and equality, but “to target pimps and the parasitic, exploitative conduct in which they engage.”<sup>33</sup> But the offence had been interpreted to penalize those who live on the avails in a non-exploitative, non-parasitic way, such as “legitimate drivers, managers, or bodyguards,” and so was

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<sup>29</sup> *Ibid* at para 421.

<sup>30</sup> See *Bedford*, *supra* note 1 at paras 48–56.

<sup>31</sup> *Ibid* at para 132.

<sup>32</sup> *Ibid* at paras 135, 136 [internal quotation omitted].

<sup>33</sup> *Ibid* at para 137.

overbroad.<sup>34</sup> The government argued that this overbreadth did not offend section 7 because of the evidentiary difficulty in detecting the difference between, for example, an exploitative pimp and a legitimate manager.<sup>35</sup> The Court deferred this consideration to section 1 of the *Charter*<sup>36</sup>—an important move that I discuss in Part III, below.

The Court found the offence of communicating in public for the purpose of prostitution to be grossly disproportionate. Its purpose was not, as the government argued, to eliminate street prostitution, but to get prostitution off the streets “in order to prevent the nuisances that street prostitution can cause.”<sup>37</sup> The effect of the prohibition on communicating in public was to prevent sex workers from using the “essential tool”<sup>38</sup> of screening clients before moving from the street to an indoor location (where both sex work and communicating would be lawful). Thus the prohibition created dangers for street prostitutes, an effect on security of the person that was grossly disproportionate to the purpose of the prohibition. As in the discussion of the bawdy-house provision, the Court seems to assume that even if the prohibition went some way toward achieving its purpose, the resulting abatement of nuisance would not justify the dangers: “If screening could have prevented one woman from jumping into Robert Pickton’s car, the severity of the harmful effects is established.”<sup>39</sup>

The Court found no section 1 justification for any of these violations of section 7. Given the Court’s previous reluctance to uphold section 7 violations under section 1, it was unsurprising that the government did not mount a vigorous section 1 argument. I will return, in Part III, below, to the question of the relationship between section 7 and section 1.

Finally, as to the remedy, the Court declared the communicating and living on the avails provisions to be unconstitutional, and declared that the word “prostitution” in the definition of “common bawdy-house” was unconstitutional.<sup>40</sup> But the Court suspended the declaration of invalidity

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<sup>34</sup> *Ibid* at para 142. The Court could have taken this case as an opportunity to reinterpret the offence so that its elements were more closely aligned with its purpose, but did not do so.

<sup>35</sup> See *ibid* at para 143.

<sup>36</sup> See *ibid* at para 144.

<sup>37</sup> *Ibid* at para 147.

<sup>38</sup> *Ibid* at para 148 [internal quotation omitted].

<sup>39</sup> *Ibid* at para 158.

<sup>40</sup> See *ibid* at para 164. Thus, the constitutionality of the offence of keeping a common bawdy-house for the purpose of the practice of acts of indecency is still a live issue, though perhaps not a practically important one. In light of *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728, which required a harm test to be met for indecency, it is very hard for

for one year so that prostitution would not be wholly unregulated by the criminal law while Parliament considered how to amend the law.<sup>41</sup>

## II. Revisiting the Principles of Fundamental Justice

The principles of fundamental justice at play in *Bedford* were, as noted above, the norms against arbitrariness, overbreadth, and gross disproportionality. Although each of these principles had been recognized in earlier cases,<sup>42</sup> there was considerable doubt about whether they were distinct from each other. Both the Supreme Court of Canada and the Ontario Court of Appeal had on occasion treated overbreadth as the central idea, with arbitrariness and gross disproportionality as subordinate aspects of that idea.<sup>43</sup> But in *Bedford*, the Court held that each of these norms is distinct from the other two. A law is arbitrary, the Court says, if there is no rational connection between its objectives and its effects on life, liberty, or security of the person.<sup>44</sup> The defect of an arbitrary law is that it affects the section 7 interests for no reason. The lack of connection that is the key to arbitrariness can be demonstrated by showing either that the law undermines its own purpose or that the law does not connect with that purpose at all.<sup>45</sup> A law is overbroad if it “is so broad in scope that it includes *some* conduct that bears no relation to its purpose”; an overbroad law “is arbitrary *in part*.”<sup>46</sup> The defect of an overbroad law is that the section 7 interests of some (though not all) people it applies to are affected for no reason. The norms against arbitrariness and overbreadth are, to that extent, re-

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the prosecution to prove that private, consensual, and otherwise lawful sexual acts between adults are indecent.

<sup>41</sup> See *Bedford*, *supra* note 1 at paras 166–69. The preamble to Bill C-36, *supra* note 3, speaks of Parliament’s concern about exploitation, objectification, commodification, and violence, and of its purpose to promote human dignity and equality. This is an obvious attempt to change the constitutional analysis by changing the Court’s assessment of the legislative purpose of the legal regime around sex work.

<sup>42</sup> The first arbitrariness case is arguably *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385. The norm against overbreadth was first explicitly articulated in *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348 [*Heywood*]. The precise origin of the norm against gross disproportionality is harder to identify, but it was established by the time *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*] and *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 [*Malmo-Levine*] were decided.

<sup>43</sup> See *R v Clay*, 2003 SCC 75 at para 38, [2003] 3 SCR 735; *Cochrane v Ontario (AG)*, 2008 ONCA 718 at para 18, 92 OR (3d) 321. See also Stewart, *Fundamental Justice*, *supra* note 8 at 151–55.

<sup>44</sup> See *Bedford*, *supra* note 1 at para 111.

<sup>45</sup> See *ibid* at para 119.

<sup>46</sup> *Ibid* at para 112 [emphasis in original].

lated. But the norm against gross disproportionality is quite different. A grossly disproportionate law is not necessarily arbitrary: whatever its other defects, it may well be rationally connected to its purpose.<sup>47</sup> Nor is it necessarily overbroad: it may affect only those people whom it needs to affect to achieve its purpose. But its impact on the life, liberty, or security of the person of those people “is so severe that it violates our fundamental norms.”<sup>48</sup> A grossly disproportionate law is one which, even if it achieves its purposes completely, does so at too high a cost to the life, liberty, and security of individual persons.

This clarification of the relationship between these three norms is welcome. Each of these norms points to a specific and distinctive defect in a law: a law that is effective in achieving its purposes but goes too far (overbreadth) is not the same as a law that is ineffective (arbitrary) or effective and suitably tailored but nonetheless excessively damaging to section 7 interests (grossly disproportionate).<sup>49</sup> The Court’s articulation of the differences among these three norms should assist litigants and judges in identifying the precise way in which, and the kind of evidence and argument required to demonstrate that, a law offends one of these norms.

But it is more difficult to understand the Court’s comments about how to demonstrate a violation of these norms. The Court held that any of these constitutional defects could be established by showing a certain effect on a *single* person, without regard for empirical evidence as to how well the law achieved its purposes:

[a]ll three principles—arbitrariness, overbreadth, and gross disproportionality—compare the rights infringement caused by the law with the objective of the law, not with the law’s effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone’s* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.<sup>50</sup>

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<sup>47</sup> See *ibid* at para 109.

<sup>48</sup> *Ibid*.

<sup>49</sup> For a more detailed presentation of this argument, see Stewart, *Fundamental Justice*, *supra* note 8 at 152–55.

<sup>50</sup> *Bedford*, *supra* note 1 at para 123 [emphasis in original].

This highly individualized reading of the three norms may sound plausible, but applying it is likely to be far from simple.

It is easy to see how a law can be overbroad as applied to one person. An overbroad law is one that affects the section 7 interests of more people than necessary to achieve its purposes: if it applies to only one person more than it needs to, that one person might say that even if the restriction of others' section 7 interests is necessary, his or her own section 7 interests have been affected for no reason. The law at issue in *Heywood*, which (the Court held) was designed to protect children but significantly restricted the liberty of certain people who posed no danger to children, is a good example. Indeed, *Heywood* shows that the impact on the section 7 interests of one reasonably hypothetical person is enough, since the particular scenarios that generated the finding of overbreadth were, though plausible, not in evidence and in no way resembled the facts that led to the charge against Heywood himself.<sup>51</sup>

It is a little harder, but still possible, to see how gross disproportionality can be shown with respect to only one person. The idea of proportionality, generally speaking, involves a comparison of the beneficial effect of a law on one interest or value with its harmful impact on another interest or value. In the context of section 7, the relevant comparison would be between the effectiveness of the law in promoting its purposes and the detrimental impact of the law on section 7 interests (life, liberty, and security of the person). If, for example, the law was somewhat effective in achieving its objective but the impact on security of the person was particularly severe, the law would offend the norm against gross disproportionality. But the comparison would not be individualized: it would be between the overall effects of the law on its objective and the overall effects of the law on the security of all affected persons. That is not the Court's understanding of gross disproportionality. Instead, the holding is that a grossly disproportionate law is one that has such a severe impact on section 7 interests that even the complete achievement of its objectives could not justify it. The overall assessment of its effects should be made instead at the final step of the *Oakes* proportionality test.<sup>52</sup> In other words, as the Court says, the appropriate comparison is between "the rights infringement caused by the law [and] the objective of the law."<sup>53</sup> A non-trivial impact on, for example, even one person's security of the person is always disproportionate to the complete achievement of a relatively unimportant objective, even if that objective is completely achieved—in *Bedford*, the danger to sex work-

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<sup>51</sup> See *Heywood*, *supra* note 42 at 794–801.

<sup>52</sup> See *Malmo-Levine*, *supra* note 42 at paras 179–82.

<sup>53</sup> *Bedford*, *supra* note 1 at para 123.

ers on the one hand, and the abatement of street nuisances on the other. And, even if the objective is important and the law achieves it, disproportionality is shown if the effects of the law on even one person's section 7 interests are "so extreme that they are *per se* disproportionate" to that objective.<sup>54</sup> *Bedford* tells us that this kind of disproportionality can be established by an effect on only one person.<sup>55</sup>

While it may be possible to understand overbreadth and gross disproportionality in individualistic terms, it is very hard to understand the norm against arbitrariness in this way. A law is arbitrary if there is no rational connection between its objectives and its effects on section 7 interests. So, it seems that as long as a law goes some way to achieving its objectives, it is not arbitrary. For that reason, it seems that a court would need some empirical evidence concerning both the effectiveness of the law in achieving its purposes and its impact on section 7 interests. Instead, the Court said, an "arbitrary effect on one person is sufficient" to establish arbitrariness, and that "how well the law achieves its object" is not to be considered in determining arbitrariness.<sup>56</sup> It is unclear how a court is supposed to decide that a law has no rational connection to its objective without considering how well it achieves that objective; put another way, it is hard to see how a law's effect on one person, or any number of persons, can be said to be arbitrary without some assessment of whether that effect contributes in some measure to the achievement of the law's purpose.

Thus, while the Court's clarification of the differences between these three substantive norms of fundamental justice is welcome, its holding that they should be applied individualistically is more difficult to accept. The norms against arbitrariness, overbreadth, and gross disproportionality are in essence requirements that the law exhibit a certain degree of rationality: a *Charter* applicant who invokes them is not challenging the legitimacy of the state's objectives but the means used to reach those objectives in light of the effect of those means on the applicant's section 7 interests. So it is hard to see how one can assess such a challenge without considering the overall effectiveness of the means in achieving their objectives. Yet, by holding that a violation of one of these norms can be demonstrated by an impact on one (possibly hypothetical) person, the Court is asking us to do just that.

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<sup>54</sup> *Suresh*, *supra* note 42 at para 47.

<sup>55</sup> See *supra* note 1 at para 123.

<sup>56</sup> *Ibid.*

### III. Revisiting the Relationship between Section 7 and Section 1

In the past, the Court has often said that the content of the principles of fundamental justice should be constructed with reference to both individual and societal interests. Although there is no principle of fundamental justice that requires legislation to strike the right balance between individual and collective interests, the Court has said that some of the principles of fundamental justice reflect “a spectrum of interests [including] societal concerns.”<sup>57</sup> The Court has also said that it is very difficult to justify infringements of section 7 under section 1 and has never done so (though it has never said that it would be impossible).<sup>58</sup> And there is a good reason why that should be so. A section 7 violation requires a *Charter* applicant to demonstrate both an impact on life, liberty, or security of the person and noncompliance with a principle of fundamental justice. The principles of fundamental justice are those principles of procedural fairness and substantive justice that are fundamentally important to our sense of how the justice system should operate. The interests protected by section 7 are among the most basic individual rights recognized by the legal order. When those interests are affected by a law that is not fundamentally just—for example, when individual liberty is taken away in a grossly disproportionate manner—then there is indeed a very serious departure from the values that the legal system is supposed to respect, whatever its other objectives might be. And, before *Bedford*, section 1 justification was particularly difficult if the section 7 infringement involved one of the three substantive principles at issue in that case. A law that violated one of these norms, it seemed, would necessarily fail one or more of the three elements of the *Oakes* test for a proportional limit on a *Charter* right because the elements of proportionality seem to mirror the norms themselves. An arbitrary law was not rationally connected to its objective; an overbroad law was not a minimal impairment of the section 7 right; and the deleterious effects of a grossly disproportionate law on the section 7 right would necessarily outweigh its salutary effects on the legislative objective.<sup>59</sup>

*Bedford* casts doubt on this understanding of the relationship between section 7 and section 1, at least with regard to the norms against arbitrariness, overbreadth, and gross disproportionality. The highly individualistic focus of the section 7 analysis is complemented by an apparent willingness to consider societal interests at the section 1 stage, thus opening

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<sup>57</sup> *R v Seaboyer*, [1991] 2 SCR 577 at 603, 83 DLR (4th) 193. See also *Malmo-Levine*, *supra* note 42 at para 98.

<sup>58</sup> See Stewart, *Fundamental Justice*, *supra* note 8 (discussion of relevant cases at 289–92).

<sup>59</sup> See *ibid* at 297–305.

up the possibility of justifying a violation of a principle of fundamental justice. Since the section 1 analysis concerning the provisions at issue in *Bedford* itself is quite brief, it is difficult to be sure how exactly this relationship between section 7 and section 1 is supposed to work, and in particular how it avoids the seemingly logical claim that the steps of the *Oakes* proportionality test simply mirror the substantive norms against arbitrariness, overbreadth, and gross disproportionality. But it could work if there were a difference between the factors to be considered under section 7 and under the *Oakes* test. And that is just what *Bedford* indicates: the questions under section 7 are “whether the law’s purpose, *taken at face value*, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose.”<sup>60</sup> Taking the law’s purpose at face value must mean, at least for section 7 purposes, that the law’s purpose is constitutionally permissible and that it is at least conceivable that the law is effective in achieving its objective. Then, to determine whether the relevant section 7 principle is violated, a *Charter* applicant would only need to show that one (possibly hypothetical) person’s life, liberty, or security of the person was affected in a way that was arbitrary, overbroad, or grossly disproportionate. The government would then have the opportunity to show that this effect was justified under section 1. The logical claim that a law violating one of these principles could not pass the *Oakes* test must be reconsidered because a different set of considerations comes into play under section 1: not just the effect of the law on (at least) one person’s section 7 interests, but the effect of the section 7 violation in achieving the law’s policy objectives.

This approach can be illustrated with respect to the norm against overbreadth. Whenever a law is conceived of as an instrument to achieve purposes that are defined independently of the law itself,<sup>61</sup> as was the case in *Bedford*, there is likely to be some degree of overbreadth; there are likely to be some individual cases where the application of the law would not advance its purposes. The laws regulating highway traffic provide a simple example. These laws are supposed to provide a fairly clear set of rules that both facilitate the use of the roads and promote their safe use. But it is easy to think of cases where violating those rules would both facilitate the use of the roads and be perfectly safe: disobeying a stop sign or red light when there is no other traffic on the road, or driving above the speed limit on a clear, straight, dry, empty road. More serious offences

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<sup>60</sup> *Bedford*, *supra* note 1 at para 125 [emphasis added].

<sup>61</sup> Not all laws are of this kind. The law of homicide can be understood simply as prohibiting unlawful killings because they are wrong in themselves, not as aiming at some purpose that is independently desirable and is promoted by defining certain killings as wrongful and then prohibiting them.



sometimes have the same structure. Subsection 150.1(1) of the *Criminal Code* sets the age of consent to sexual conduct at sixteen years, subject to several exceptions that prevent the criminalization of consensual sexual activity between young persons who are close in age.<sup>62</sup> The purpose of setting an age of consent is to protect young people from premature sexual activity. But perhaps some people under sixteen are sufficiently mature to make reasoned choices about engaging in sexual activity. To that extent, subsection 150.1(1) is overbroad. It restricts the liberty of some persons under the age of sixteen and their older sexual partners. The older partner's liberty is restricted by the penalty of imprisonment for the offence, while both partners' liberty is restricted by state interference with his or her choice of sexual partner, a decision of fundamental personal importance that is likely protected by section 7.<sup>63</sup> So the law affects the liberty interest of both the older partner and the underage complainant. But according to *Bedford*, if it is possible to identify one (possibly hypothetical) case where these restrictions on sexual activity do not serve the interests of the statute, the law is overbroad. One might think of an emotionally mature complainant who is fifteen years and eleven months old and who is in a non-exploitative sexual relationship with a twenty-two-year-old accused. On the basis of this kind of case, it might well be argued that subsection 150.1(1) violates section 7 of the *Charter* because, in its overbreadth, it restricts liberty in a manner not in accordance with the principles of fundamental justice. But this limit on section 7 could readily be justified under section 1: the government could show why this overbreadth was reasonably necessary for effective regulation of the problem in question. The overall purpose of subsection 150.1(1) is to protect young people from premature sexual activity. Within that overall purpose, the pressing and substantial objective of choosing a bright line rule, rather than a vaguer standard of, for example, "sufficient maturity to make reasoned choices about sexual activity" is to avoid the evidentiary difficulties of determining whether an individual complainant did or did not meet that standard—particularly bearing in mind that the Crown would have to prove beyond a reasonable doubt that he or she did not. The overbroad restriction on sexual activity is rationally, indeed necessarily, connected to that objective. It might be thought that because the law is overbroad at the section 7 stage, it cannot survive the next step of the *Oakes* test—the

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<sup>62</sup> The age of consent, the exceptions, and the associated fault elements are discussed in Hamish C Stewart, *Sexual Offences in Canadian Law* (Aurora, Ont: Canada Law Book, 2004) (loose-leaf revision 14), ch 4:500 [Stewart, *Sexual Offences*].

<sup>63</sup> On this aspect of the liberty interest, see Stewart, *Fundamental Justice*, *supra* note 8 at 74–78.

minimal impairment branch.<sup>64</sup> But the government could show that, as compared to other conceivable laws that would also necessarily suffer from a degree of overbreadth in achieving their purpose, setting the age of consent for most purposes at sixteen, while granting the “close in age” exceptions, is minimally impairing. Setting the age at eighteen or twenty-one, or removing the “close in age” exemptions altogether, would impair the section 7 right even more severely; setting the age at ten or twelve would be grossly inadequate to the objective of protecting young people; and the exact choice of an age (fourteen, fifteen, sixteen) is no doubt within the margin of appreciation that the Supreme Court of Canada will grant at the minimal impairment step of the *Oakes* test.<sup>65</sup> Finally, it is likely that, with the assistance of social science evidence, the government could show that the salutary effects of the overbroad law in protecting young persons from premature sexual activity would exceed the deleterious effects on the section 7 liberty interests. These effects are, according to the approach in *Bedford*, not relevant to the section 7 overbreadth claim but can be considered under section 1.

In *Bedford* itself, the Court suggested this kind of approach with respect to the applicants’ claim that the living on the avails offence was overbroad because it applied to individuals who were not exploitative or parasitic of prostitutes. The government resisted this argument on the ground that the law had to be drawn broadly because of evidentiary difficulties in distinguishing between those who are and those who are not exploitative or parasitic; some degree of overbreadth was unavoidable if the law was to serve its purpose. The Court held that this issue was to be considered not as part of the section 7 overbreadth analysis, but as part of the question whether an overbroad law could be justified under section 1: “enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.”<sup>66</sup> Similarly, the Court said that the “negative effect” of a grossly disproportionate law might be justified under section 1, depending on the evidence.<sup>67</sup>

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<sup>64</sup> As Justice Cory once said, “[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.” *Heywood*, *supra* note 42 at 802–803.

<sup>65</sup> The general age of consent was fourteen until 2008: see Stewart, *Sexual Offences*, *supra* note 62, ch 4:100.

<sup>66</sup> *Bedford*, *supra* note 1 at para 144. When the Court reached the section 1 stage, it rejected the argument because the law went beyond those who might justifiably be swept in on account of evidentiary difficulties to include “clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes” (*ibid* at para 162). So *Bedford* should not be taken as holding that avoiding these evidentiary difficulties could never justify an overbroad law.

<sup>67</sup> *Ibid* at para 125.

But just as it is harder to see how the individualized approach to arbitrariness is supposed to work, so too is it harder to see how an arbitrary law can be justified even under the new approach. At the section 1 stage, if it is indeed the case that the effects of the law in general have no connection with its objectives, then it surely cannot survive the rational connection step of the proportionality test.<sup>68</sup> But if arbitrariness can be established by an effect on one person, without consideration of the effects of the law in general, then it might still be open to the government to argue along the same lines as the justification of an overbroad law.

On the new approach, it will still be very difficult, if not impossible, for the government to justify a grossly disproportionate law. In assessing gross disproportionality, the Court is indifferent to the question whether the law achieves its objectives and to the social benefits that might be achieved,<sup>69</sup> but asks whether the effect on individual section 7 interests are so severe as to be “totally out of sync” with those objectives or so “draconian” as to be “entirely outside the norms accepted in our free and democratic society.”<sup>70</sup> Again, an effect on one person is sufficient to establish the section 7 violation.<sup>71</sup> The Court gives the hypothetical example of “a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk.”<sup>72</sup> In principle such a grossly disproportionate law might be justified under section 1. At that point the government would be permitted to show the pressing and substantial objective that required a grossly disproportionate law and might well be able to show that it was rationally connected (it is reasonable to assume that harsh penalties would deter spitting) and possibly even minimally impairing (perhaps no milder penalty could achieve that purpose). It should not be assumed that the law would automatically fail the final step of the proportionality test because the considerations at play are different: under section 7, the court considers the impact of the law on individuals without regard to social interests, while under section 1, the court compares the salutary effects of the law in achieving its objectives with the deleterious effects of the law on life, liberty, or security. Nevertheless, it is hard to imagine that a court would accept that a law could be justi-

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<sup>68</sup> See *Chaoulli*, *supra* note 22 at para 155.

<sup>69</sup> See *Bedford*, *supra* note 1 at para 121.

<sup>70</sup> *Ibid* at para 120.

<sup>71</sup> See *ibid* at para 123.

<sup>72</sup> *Ibid* at para 120. Such a law would also violate the section 12 right against cruel and unusual punishment or treatment and, because grossly disproportionate in the section 12 sense, could not be justified under section 1. Compare *R v Nur*, 2015 SCC 15 at para 118, aff'g 2013 ONCA 677, 303 CCC (3d) 474; *R v Michael*, 2014 ONCJ 360 at para 116, 314 CCC (3d) 180. A more telling example for section 7 purposes would be a law that affects someone's life, liberty or security other than by punishment.

fied by its social benefits if its impact, even on only one particular individual, was so draconian as to fall entirely outside the norms of Canadian legal and political culture. Perfectly clean streets could not justify even the threat of even one life sentence.

In *Bedford*, only the three principles of fundamental justice relating to overbreadth, arbitrariness, and gross disproportionality were at issue. The case did not involve other recognized principles of fundamental justice, such as the right to procedural fairness or the principles relating to constitutionally required fault in penal law. Nevertheless, *Bedford* raises the intriguing and troubling possibility that violations of such principles of fundamental justice might also be more readily justifiable under section 1.<sup>73</sup> Further exploration of that possibility is beyond the scope of this comment, but it is at least as troubling as the thought that an arbitrary or grossly disproportionate law might be justifiable.

## Conclusion

Writing before the Supreme Court of Canada's decision in *Bedford*, Alana Klein argued that the three principles of fundamental justice at issue in that case, taken together, could be seen as constituting a "right to proportionate government action."<sup>74</sup> She suggested that whenever a law affected life, liberty, or security of the person, this right required courts to engage in empirical analysis of the instrumental or means-ends effectiveness of the law in achieving its purpose, so that the court could assess whether the law's impact on section 7 interests was proportionate to the problem the law was intended to address. *Bedford* clarifies the differences among the three principles of fundamental justice that together constitute the suggested right to proportionate legislation, but it also suggests a different understanding of the place of proportionality. According to *Bedford*, determining whether the law violates norms against overbreadth, arbitrariness, and gross disproportionality apparently does not require any empirical analysis of the effectiveness of the law; instead, the Court asks whether the effect of the law on the section 7 interests of any one person is overbroad, arbitrary, or grossly disproportionate in light of the purposes the law is intended to serve. I have pointed to some difficulties in the application of this individualized approach to these norms. A further question is whether what Klein called the "right to proportionate lawmaking"<sup>75</sup>

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<sup>73</sup> As Kent Roach has long, though in my view unwisely, urged. See e.g. Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61:4 UTLJ 545 at 574–76.

<sup>74</sup> *Supra* note 24 at para 1.

<sup>75</sup> *Ibid* at para 37.

is now not a right at all but rather an aspect of section 1 proportionality, where empirical questions about the relationship between a restriction on a section 7 right and the objective of that restriction once again become relevant. If this analysis is correct, *Bedford* has fundamentally altered the structural relationship between section 7 and section 1 of the *Charter*, at least with respect to the norms against overbreadth, arbitrariness, and gross disproportionality, but perhaps more broadly. If that is so, *Bedford* has opened up the troubling possibility that violations of section 7 may be easier to justify than they have ever been.

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