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Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7

Lisa Dufraimont[*]

I. INTRODUCTION

The development of substantive limits on criminal law has been a controversial feature of Canadian constitutional law since the advent of the *Canadian Charter of Rights and Freedoms*.[1] Section 7 of the Charter provides: "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." The salience of section 7 for the criminal law has always been obvious because criminal law routinely operates to deprive people of their liberty through imprisonment. Yet, at the time the Charter was adopted, it was generally understood that the principles of fundamental justice were merely procedural norms, and that section 7 would not empower courts to exercise constitutional oversight over the substantive content of criminal laws.[2] Early on, the Supreme Court of Canada rejected this limited interpretation and determined that the principles of fundamental justice are both procedural and substantive.[3]

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[2] See, *e.g.*, Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 195, at 196: "[T]he framers of section 7…believed [it] would provide only procedural protections for life, liberty and security of the person" [hereinafter "Hogg"]; Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed. (Toronto: Carswell, 2014), at 69 [hereinafter "Stuart"].

[3] See *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.). Constitutional requirements of fault are among the substantive limits on the criminal law imposed by the principles of fundamental justice.

Among the substantive principles of fundamental justice that the Supreme Court has recognized under section 7 are the three overlapping requirements that criminal laws must not be arbitrary,[4] overbroad[5] or grossly disproportionate.[6] These principles have been hotly contested in two different ways. First, the applicable legal tests and the relationships between these principles have often been unclear and subject to frequent changes even within the judgments of the Supreme Court. Second, and more fundamentally, some criticize these principles on the basis that they inappropriately invite courts to evaluate the merits of legislative decisions in complex and controversial areas of public policy.[7] Others, of course, welcome the courts' intervention as a check on irrational, ideologically driven legislation.[8] What is clear is that, by requiring courts to examine the purposes and effects of legislative policy choices against broad substantive criteria, section 7 norms against arbitrary, overbroad and grossly disproportionate laws go to the heart of the debate over the Charter's democratic legitimacy.[9]

This paper examines the 2013 case of *Canada (Attorney General) v. Bedford*,[10] in which the Supreme Court restated the law on arbitrariness, overbreadth and gross disproportionality, and applied the latter two principles to strike down Canada's prostitution laws. In the first part of the paper, I will summarize the Supreme Court's findings on the section 7 issues. Next, I will comment on the far-reaching implications of the

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[4] For example, *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at para. 147 (S.C.C.) [hereinafter "*Rodriguez*"].

[5] For example, *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at para. 49 (S.C.C.) [hereinafter "*Heywood*"].

[6] For example *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 161 (S.C.C.) [hereinafter "*Malmo-Levine*"]. A fourth, related principle that criminal laws must not be vague was recognized in *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606, at para. 71 (S.C.C.) [hereinafter "*Nova Scotia Pharmaceutical Society*"].

[7] See, *e.g.*, Hogg, *supra*, note 2, at 209: The cases on arbitrariness, overbreadth and gross disproportionality cover "some of the most contested political issues in Canada … [and constitute] the most dramatic examples of the majoritarian critique of the Charter … that decries the shift of policy-making away from the elected, accountable legislative bodies and officials and over to the unelected and unaccountable judges".

[8] See Stuart, *supra*, note 2, at 140: "s. 7 Charter scrutiny by an independent judiciary … has in … [several] highly controversial contexts led to more balanced criminal law tempering the rigidity of law and order ideology"; Vanessa MacDonnell, "Developments in Constitutional Law: The 2011-2012 Term" (2012) 59 S.C.L.R. (2d) 51, at 55: "section 7 may impose a constitutional requirement … of some degree of evidence-based policy-making, at least where those policies engage the life, liberty and security of the person of individuals".

[9] See, *e.g.*, Hogg, *supra*, note 2, at 209.

[10] [2013] S.C.J. No. 72, 2013 SCC 72, 7 C.R. (7th) 1 (S.C.C.) [hereinafter "*Bedford* SCC"].

Bedford decision for the law on arbitrariness, overbreadth and gross disproportionality. Finally, I will consider how the Supreme Court's decision in *Bedford* limits Parliament's options for the future regulation of prostitution. The discussion will demonstrate that *Bedford* significantly advances the law on arbitrariness, overbreadth and gross disproportionality. The decision clarifies the definitions of these principles of fundamental justice, explains their interrelationships, and demonstrates that they remain vital and capable of constraining legislative choice on contested policy questions. With regard to the future regulation of prostitution, I argue that *Bedford* leaves it open to Parliament to criminalize prostitution itself.

II. *BEDFORD*: THE APPLICATION OF SECTION 7

The three applicants in *Bedford* were current and former prostitutes.[11] They brought an application in the Ontario Superior Court of Justice, seeking declarations that the three *Criminal Code*[12] prohibitions on prostitution-related activities — the bawdy house offences,[13] the offence of living on the avails of prostitution[14] and the prohibition on communicating in public for the purpose of prostitution[15] — were unconstitutional. The evidentiary record on the application was voluminous, including extensive evidence from prostitutes and experts regarding the risks facing prostitutes in their work.[16] The application judge determined that the impugned provisions were unconstitutional because they deprived prostitutes of security of the person in a way that

[11] I acknowledge that many workers in the sex trade identify themselves as "sex workers" and not "prostitutes", but I use the term "prostitute" here and elsewhere in the paper because that is the language adopted by the Court.

[12] R.S.C. 1985, c. C-46 [hereinafter "Code"].

[13] A bawdy-house is defined in s. 197(1) of the Code as a place "kept or occupied, or resorted to … for the purpose of prostitution or the practice of acts of indecency". Section 210 lays out offences for keeping, being an inmate of, or being found without lawful excuse in a common bawdy-house.

[14] The indictable offence of living "wholly or in part on the avails of prostitution of another person" is laid out in s. 212(1)(j).

[15] Section 213(1)(c) defines the offence of communicating for the purpose of prostitution, which includes stopping or attempting to stop anyone or communicating or attempting to communicate with anyone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

[16] For a description of the evidence on the application, see *Bedford* SCC, *supra*, note 10, at para. 15.

was not in accordance with the principles of fundamental justice.[17] The case was ultimately appealed to the Supreme Court, which considered arguments that the three prohibitions violated section 7 because they were arbitrary, overbroad and grossly disproportionate.[18]

Chief Justice McLachlin delivered the unanimous judgment of the Court striking down all three provisions. The Court found that the impugned laws all engaged security of the person because they had the effect of heightening the risks faced by prostitutes in their work, which the Court emphasized was itself a legal activity.[19] Specifically, the bawdy house provision prohibits in-call work, where the client comes to the prostitute at a fixed location, which the application judge determined was the safest form of prostitution.[20] The living on the avails provision criminalizes supplying a service to a prostitute because she is a prostitute, which effectively prevents prostitutes from taking the safety-enhancing step of hiring a bodyguard, driver or receptionist.[21] Finally, the communicating provision compromises prostitutes' safety in three ways: it prohibits face-to-face communication in public with prospective clients, which the application judge found was an "essential tool" for street prostitutes to screen clients for intoxication or propensity to violence;[22] it increases prostitutes' vulnerability by displacing them to more isolated areas;[23] and it prevents prostitutes from setting terms, like condom use, in advance.[24] The Court dismissed arguments that the dangers of prostitution were the result of prostitutes' choice to engage in a risky activity.[25] Security of the person was engaged because all three of the impugned laws had the effect of making a lawful activity more dangerous.[26]

Turning to the principles of fundamental justice, the Chief Justice explained that section 7 is directed at "inherently bad laws … that take

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[17] *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057, 2010 ONSC 4264, 80 C.R. (6th) 256 (Ont. S.C.J.) [hereinafter "*Bedford* ONSC"].

[18] These arguments were also considered by a five-judge panel of the Ontario Court of Appeal in *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186, 91 C.R. (6th) 257 (Ont. C.A.) [hereinafter "*Bedford* OCA"].

[19] *Bedford* SCC, *supra*, note 10, at paras. 59-60.

[20] See *id*., at paras. 62-63. Indeed, the Court noted at para. 64 that even resorting to safe houses could be prohibited by the bawdy-house provision.

[21] *Id*., at para. 66.

[22] *Id*., at para. 69.

[23] *Id*., at para. 70.

[24] *Id*., at para. 71.

[25] *Id*., at paras. 84-89.

[26] *Id*., at para. 87.

away life, liberty or security of the person in a way that runs afoul of our basic values".[27] These basic values include the norms against arbitrariness, overbreadth and gross disproportionality. The Court recognized that these three principles overlap and that they all represent what Hamish Stewart has labelled "'failures of instrumental rationality' — the situation where the law is 'inadequately connected to its objective or in some sense goes too far in seeking to attain it'".[28] The Court also quoted Peter Hogg's description of a law that runs afoul of these principles as "dysfunctional in terms of its own objective".[29]

According to McLachlin C.J.C., the norms against arbitrariness, overbreadth and gross disproportionality reflect a concern with two distinct "evils".[30] The first evil, a lack of connection between the rights infringement and the purpose of the law, lies at the root of concerns about arbitrariness and overbreadth.[31] The second evil is that of gross disproportionality between the law's objective and its impact on individual rights.[32]

The Court then elaborated on the individual norms against arbitrariness, overbreadth and gross disproportionality. A law is arbitrary, the Chief Justice explained, when it places limits on individuals' section 7 interests that bear "*no connection*" to the law's objective.[33] Overbreadth, on the other hand, occurs when "there is no rational connection between the purposes of the law and *some*, but not all, of its impacts".[34] An overbroad law is so sweeping that, in some applications, its purposes and effects are unrelated; it is "arbitrary *in part*".[35] Arbitrariness and overbreadth are distinct principles, but they are related because both rely on a finding that there is "*no connection* between the effects of a law and its objective"[36] with respect to some (for overbreadth) or all (for arbitrariness) applications of the law.

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27 *Id*., at para. 96.

28 *Id*., at para. 107, quoting Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 151 [hereinafter "Stewart, *Fundamental Justice*"].

29 *Bedford* SCC, *id.*, at para. 107, quoting Hogg, *supra*, note 2, at 209.

30 *Bedford* SCC, *id*., at para. 108.

31 *Id*.

32 *Id*., at para. 109.

33 *Id*., at para. 111 (emphasis in original).

34 *Id*., at para. 112 (emphasis in original).

35 *Id.* (emphasis in original).

36 *Id*., at para. 117 (emphasis in original).

Gross disproportionality, by contrast, may exist even when the impact of the law is related to its objective. The question is whether the effects of the law on section 7 rights are so grave that they are grossly disproportionate to its purpose. This test will be met in "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure"[37] and where, measured against its purpose, the law has a "draconian impact … entirely outside the norms accepted in our free and democratic society".[38] The Court concluded the discussion of arbitrariness, overbreadth and gross disproportionality by emphasizing that the relevant comparison in each case is between the rights infringement caused by the law on one hand and the objective of the law on the other — the effectiveness of the law is not a factor to be considered.[39]

The Chief Justice then applied these principles to the impugned laws. Looking first at the bawdy house provision, the Court considered prior cases and the legislative scheme and determined that the purposes of the law are not to deter prostitution generally but rather "to combat neighbourhood disruption or disorder and to safeguard public health and safety".[40] Measured against these purposes was the impact on individual safety of the bawdy house provision, which criminalizes prostitutes who take the simple, safety-enhancing step of moving indoors.[41] In this context, the threshold of gross disproportionality was met.[42] In the words of the Chief Justice, "Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes."[43]

Turning to the living on the avails offence, the Court held that the purpose of the prohibition was to target the parasitic and exploitative conduct of pimps.[44] However, the offence was overbroad because it did not distinguish between individuals who exploit prostitutes and individuals who pursue non-exploitative and potentially safety-enhancing business relationships with them, such as legitimate drivers or bodyguards. In this way, the offence extended to cover some conduct bearing no connection to its underlying purpose of preventing exploitation.[45]

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37 *Id*., at para. 120.
38 *Id*.
39 *Id*., at para. 123.
40 *Id*., at para. 132.
41 *Id*., at para. 135.
42 *Id*., at para. 136.
43 *Id*.
44 *Id*., at para. 137.
45 *Id*., at para. 142.

Finally, the Court considered the communicating provision and determined that, like the bawdy house provision, its purpose was not to deter prostitution generally but to prevent incidents of public nuisance associated with prostitution, in this case street prostitution.[46] In light of the application judge's finding that the ability to screen clients through face-to-face communication is essential to the safety of street prostitutes, together with the findings that the communicating provision had the effects of displacing prostitutes to less secure locations and impeding their ability to bargain for safer conditions, the Chief Justice concluded that the impact of the communicating provision on the safety of prostitutes was grossly disproportionate to the objective of preventing nuisance.[47]

The Chief Justice held, in brief reasons, that none of the impugned provisions could be saved under section 1. The bawdy house offence in section 210 as it relates to prostitution was therefore struck down,[48] as were the offences of living on the avails of prostitution and communicating for the purpose of prostitution in sections 212(1)(j) and 213(1)(c), respectively. The Court suspended the declaration of invalidity for one year.[49]

III. Implications for the Section 7 Analysis

Bedford has contributed significantly to the development of the law under section 7 of the Charter, particularly with respect to the principles of arbitrariness, overbreadth and gross disproportionality. In this part of the analysis, I will identify and comment on some implications of the *Bedford* decision for the law related to these principles of fundamental justice.

1. Arbitrariness, Overbreadth and Gross Disproportionality Are Vital Principles

Taking a broad view of the case and its significance within Canadian constitutional law, the main message of *Bedford* is that the

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[46] *Id*., at para. 147.

[47] *Id*., at paras. 155-159.

[48] The word "prostitution" was struck from the definition of a "common bawdy-house" for the purpose of that offence.

[49] *Bedford* SCC, *supra*, note 10, at para. 169.

norms against arbitrariness, overbreadth and gross disproportionality are very much alive and capable of placing meaningful limits on legislative choices.[50] *Bedford* thus accords with the decision two years earlier in *Canada (Attorney General) v. PHS Community Services Society*,[51] in which a unanimous Supreme Court found that the federal government's decision not to extend an exemption from the provisions of the *Controlled Drugs and Substances Act*[52] to a safe injection facility known as Insite was arbitrary and grossly disproportionate.[53] The government's decision meant that Insite would have to close, even though an extensive body of evidence showed that it protected the health and safety of injection drug users without any negative impact on the surrounding community.[54] Given that the purpose of the CDSA was to protect public health and safety,[55] the decision not to extend the exemption hindered rather than furthered that objective. The Court therefore ordered the Minister to grant the exemption.[56] The *PHS* case was hailed for its potential to limit government's freedom to make decisions and pass legislation supported by ideology rather than evidence where individuals' lives, liberty or security of the person are put at risk.[57] *Bedford* relies on a similar set of themes, and sends a similar message. The case arguably confirms Vanessa MacDonnell's prediction that *PHS* could become "a powerful tool in the hands of rights groups".[58]

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[50] See Stuart, *supra*, note 2, at 139: "the Court's applications of these principles to strike down all the prostitution-related offences appears to reinvigorate power for courts to strike down legislation judges found to be irrational when measured against the legislative objective".

[51] [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at paras. 129-135 (S.C.C.) [hereinafter "*PHS*"].

[52] S.C. 1996, c. 19 [hereinafter "CDSA"].

[53] *PHS*, *supra*, note 51, at paras. 132-133.

[54] *Id*., at para. 131.

[55] *Id*., at para. 110.

[56] *Id*., at para. 150.

[57] MacDonnell, *supra*, note 8, at 84: *PHS* has "potentially significant implications for the government's ability to act on politics rather than facts where individual lives are at stake"; Alana Klein, "The Arbitrariness in 'Arbitrariness' (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 377, at 378 [hereinafter "Klein"]: *PHS* suggests that "section 7 could play an important role in ferreting out government policies that affect the most fundamental of rights and that are based on ideology or stereotype over evidence".

[58] MacDonnell, *supra*, note 8, at 85.

2. Tests for Arbitrariness, Overbreadth and Gross Disproportionality Clarified

Doctrinally, the most obvious contribution *Bedford* makes to the section 7 jurisprudence is to clarify the tests for arbitrariness, overbreadth and gross disproportionality. The tests laid out in *Bedford* may be summarized as follows:

- A law is *arbitrary* when it limits section 7 rights in a way that bears no connection to its objective.
- A law is *overbroad* when some, but not all, of the limits it places on section 7 rights bear no connection to its objective.
- A law is *grossly disproportionate* in extreme cases where the law's impact on section 7 rights is so serious as to be totally out of sync with its objective.

These tests are clearly formulated and have now been endorsed by a unanimous Supreme Court. They should provide settled starting point for section 7 arguments in future cases.

Before *Bedford*, some uncertainty surrounded the applicable tests, especially the test for arbitrariness. In *Chaoulli v. Quebec (Attorney General)*, the Court split over the test for arbitrariness, with McLachlin C.J.C. determining on behalf of three judges that the impugned law was arbitrary because it imposed limitations that were "unnecessary" to achieve the law's objectives.[59] Writing in dissent on behalf of three judges, Binnie and LeBel JJ. rejected the idea that a law could be "invalidate[d] … simply because a court believes it to be 'unnecessary' for the government's purpose".[60] The dissenting judges preferred to insist on stricter compliance with the test for arbitrariness laid down in *Rodriguez*, requiring a law that "bears no relation to, or is inconsistent with" its own objective.[61] For Binnie and LeBel JJ., the shift from "inconsistent" to "unnecessary" marked an inappropriate broadening of the test for arbitrariness that would invite courts to pass on

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[59] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at para. 132 (S.C.C.) [hereinafter "*Chaoulli*"].

[60] *Id*., at para. 233. The seventh judge, Deschamps J., decided the case on the basis of Quebec's *Charter of Human Rights and Freedoms*, CQLR c. C-12, and did not address the section 7 Charter issues directly.

[61] *Rodriguez, supra*, note 4, at para. 147, quoted in *Chaoulli, supra*, note 59, at para. 234.

the merits of the legislature's choice among policy alternatives.[62] The 3:3 split in *Chaoulli* therefore introduced fundamental uncertainty into the law on arbitrariness, and this uncertainty persisted for almost a decade. In *PHS*, a unanimous Supreme Court acknowledged this uncertainty but declined to resolve it, finding instead that the government decision to close the safe injection facility was arbitrary on either definition.[63]

This uncertainty surrounding the law on arbitrariness has thankfully been resolved in *Bedford*. The Chief Justice explained:

> [T]he root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.[64]

While a test for arbitrariness framed in the language of necessity might appear to invite courts to measure legislation against other possible legislative schemes, the preceding passage suggests that the word "unnecessary" was never meant to open up a free-ranging inquiry into the legislature's policy options.[65] Nevertheless, the Supreme Court in *Bedford* did well to distance itself from the ambiguous language of necessity and to emphasize instead the presence or absence of a connection between a law's impact on section 7 rights and its purpose. Reformulated in this way, the test for arbitrariness remains strict and does not invite speculation about whether the legislature might have achieved its purpose in some other way.

Somewhat surprisingly, by distancing itself from the language of necessity, the Court also changed the test for overbreadth. Since the Supreme Court decided *R. v. Heywood* in 1994, the test for overbreadth has been whether the state's chosen legislative "means [are] necessary to

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[62] *Chaoulli*, *id*., at para. 234: "'unnecessary' simply means that the objective could be met by other means … [and] is a much broader term that involves a policy choice".

[63] *PHS*, *supra*, note 51, at paras. 129-135.

[64] *Bedford* SCC, *supra*, note 10, at para. 119 (italics in original, underlining added).

[65] This was the concern of Binnie and LeBel JJ. in *Chaoulli*, *supra*, note 59, at para. 234.

achieve the State objective".[66] The test for overbreadth has not attracted the same level of controversy as the test for arbitrariness, but the idea that a law is unconstitutionally overbroad whenever it goes farther than "necessary" to achieve its objective is obviously vulnerable to the same criticisms that surrounded the language of necessity in the context of arbitrariness. On its face, the *Heywood* test for overbreadth appears relatively easy to meet and seems to permit courts to second-guess legislative policy choices.[67] In *Bedford*, however, the Court implicitly but clearly rejected the *Heywood* test (with its reliance on the language of necessity) and embraced instead a test for overbreadth centred on whether some of the law's effects bear no connection to the legislative objective.[68] Moreover, the Chief Justice specified that she was speaking to "both arbitrariness and overbreadth"[69] when she determined that "the root question is whether … there is *no connection*, in whole or in part, between its effects and its purpose".[70]

3. Arbitrariness, Overbreadth and Gross Disproportionality Are Distinct

The relationships among the norms against arbitrariness, overbreadth and gross disproportionality have been a matter of long-standing controversy and confusion.[71] The main source of confusion has been the Supreme Court of Canada, which has sent conflicting messages about the relationships between these principles. A full history of this confusion would overwhelm this paper, so a few examples must suffice.

In the early overbreadth case of *Heywood*, for instance, a majority of the Court explained that "[t]he effect of overbreadth is that in some applications the law is arbitrary or disproportionate".[72] Building on this idea, the majority of the Court in *R. v. Clay* held that a finding of

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66 *Heywood*, *supra*, note 5, at para. 49.

67 See Stuart, *supra*, note 2, at 134 (under *Heywood*, overbreadth appears to present a relatively easy line of challenge for the defence).

68 *Bedford* SCC, *supra*, note 10, at para. 112 (overbreadth occurs when "there is no rational connection between the purposes of the law and *some*, but not all, of its impacts" (emphasis in original)).

69 *Id*., at para. 118.

70 *Id.*, at para. 119 (emphasis in original).

71 See, *e.g*., Stewart, *Fundamental Justice*, *supra*, note 28, at 152.

72 *Heywood*, *supra*, note 5, at para. 49.

overbreadth requires a finding of gross disproportionality.[73] As recently as 2012, in its unanimous judgment in *R. v. Khawaja*, the Court explicitly declined to decide "whether overbreadth and gross disproportionality are distinct constitutional doctrines".[74]

In other recent cases, notably *PHS*, the Court has treated arbitrariness, overbreadth and gross disproportionality as distinct grounds for a section 7 challenge.[75] Surveying the law before the Supreme Court's decision in *Bedford*, Hamish Stewart catalogued three possible understandings of the relationships among these principles of fundamental justice: (1) that overbreadth was the overarching principle; (2) that overbreadth was folded into arbitrariness and gross disproportionality; and (3) that all three principles were distinct and independent.[76] Stewart noted that each of these three conflicting interpretations found some support in the pronouncements of the Supreme Court, but favoured the third interpretation (distinctness) as the "most plausible view".[77]

In its careful and detailed reasons in *Bedford*, the Supreme Court has now clearly adopted the view that the principles are indeed distinct: "Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles."[78] Now that this basic conceptual issue has been resolved, one may expect courts and commentators to spend less time analyzing the relationships among these three principles and more time analyzing whether any of these basic defects is present in a given case.

One objection should be anticipated at this point. It might be argued that despite its explicit holding that these principles are distinct, the

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[73] [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735, at para. 38 (S.C.C.) [hereinafter "*Clay*"]: "Overbreadth … addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect." (emphasis in original).

[74] [2012] S.C.J. No. 69, [2012] 3 S.C.R. 555, at para. 40 (S.C.C.) [hereinafter "*Khawaja*"]. See also Hamish Stewart, "*R. v. Khawaja*: At the Limits of Fundamental Justice" in J. Cameron, B.L. Berger & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 403, at 410: "The Court, though declining to resolve the point explicitly, leans to the view that the two concepts are distinct" [hereinafter "Stewart, 'Limits'"].

[75] *PHS*, *supra*, note 51, at paras. 129-135.

[76] Stewart, *Fundamental Justice*, *supra*, note 28, at 152. A fourth view, that the other principles were "integrated under the umbrella of gross disproportionality", was discussed in John McIntyre, "*R. v. Nur*: The Need for the Supreme Court to Clarify Charter Standards for Mandatory Minimum Sentences" (2014) 7 C.R. (7th) 132, at 145 [hereinafter "McIntyre"].

[77] Stewart, *id.*, at 154.

[78] *Bedford* SCC, *supra*, note 10, at para. 107.

Supreme Court in *Bedford* failed to define arbitrariness, overbreadth and gross disproportionality in a way that supports that claim to analytical distinctness.[79] Specifically, one might argue that the Court undermined its own holding that arbitrariness and overbreadth are distinct by defining them in such a way that they are inseparable.[80] On this view, *Bedford* sends a confusing message that arbitrariness and overbreadth "are distinct yet essentially the same",[81] and this confusion should be resolved by explicitly merging these principles.[82]

While the definitions of overbreadth and arbitrariness in *Bedford* are undoubtedly closely aligned, I would argue that it goes too far to suggest that they are the same. This objection can be overcome by focusing on what it means for a constitutional principle to be distinct. Stewart has observed that if the section 7 norms against arbitrariness, overbreadth and gross disproportionality are independent, it must be "possible for a law to respect any two of them while nonetheless infringing the third".[83] As defined by the Supreme Court in *Bedford*, the norms against arbitrariness and overbreadth meet this test. A law that limits section 7 rights in a way that bears no connection at all to its objective will be arbitrary but not overbroad (because overbreadth applies only when "there is no rational connection between the purposes of the law and *some*, but not all, of its impacts"[84]). Conversely, a law that is overbroad in the sense that some but not all of the limits it places on section 7 rights bear no connection to its objective will not be arbitrary (because arbitrariness requires a lack of connection between the impact and objective in all applications of the law). This analysis reveals that the Supreme Court has defined overbreadth and arbitrariness in a way that makes these principles not only analytically distinct but also mutually exclusive. Defined in this way, no law can be both arbitrary and overbroad.

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[79] Such an argument may well underlie Don Stuart's suggestion that "[g]reater clarity might have been achieved by folding the three doctrines under the one heading of arbitrariness". Stuart, *supra*, note 2, at 138.

[80] See McIntyre, *supra*, note 76, at 146-47: *Bedford* "merged these two principles into one of arbitrariness, where a law can be invalidated for being either partially or fully arbitrary".

[81] *Id*., at 147.

[82] *Id*.

[83] Stewart, *Fundamental Justice*, *supra*, note 28, at 152.

[84] *Bedford* SCC, *supra*, note 10, at para. 112 (emphasis in original).

4. Mere Proportionality Not the Issue under Section 7

The constitutional norms against arbitrariness, overbreadth and gross disproportionality are frequently said to require courts to investigate the effectiveness of the challenged legislation.[85] Relatedly, the section 7 analysis under these doctrines is often described as involving a general proportionality inquiry akin to the *Oakes*[86] proportionality test under section 1 of the Charter.[87] The following passage exemplifies this line of argument:

> That the Court has coalesced around these three principles is notable, in part, because they mirror the analysis conducted under the *Oakes* test: arbitrariness equates with rational connection, overbreadth with minimal impairment and gross disproportionality with the proportionality of salutary and deleterious effects. In weighing a section 7 deprivation using these three principles, which essentially mirror the analysis under section 1, the Court also appears to have accepted the necessity of engaging in a balancing of societal and individual interests under section 7 itself, as opposed to doing so exclusively under section 1.[88]

Certain differences between the section 1 and section 7 analyses are, of course, well recognized, in particular the different allocation of burdens and the difference in standards implied by the phrase "gross" (as opposed to simple) disproportionality.[89] Nevertheless, some level of scholarly support has developed around the idea that section 7 analysis under arbitrariness, overbreadth and gross disproportionality requires courts to assess the effectiveness of the legislation of the challenged law in a proportionality analysis that is broadly similar to the *Oakes* test.

In *Bedford*, the Supreme Court resisted this line of reasoning almost entirely. According to the Supreme Court, the effectiveness of the legislation is immaterial to the section 7 analysis under all three principles; the Court is

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[85] See, *e.g.*, Hogg, *supra*, note 2, at 204: gross disproportionality and overbreadth amount to "authority for the Court to undertake a review of the efficacy of the means enacted to achieve a legislative objective"; Stewart, *Fundamental Justice*, *supra*, note 28, at 143: "applying the norm against arbitrariness requires … an empirical assessment of the effectiveness of the law or decision in achieving those purposes".

[86] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

[87] For example, Klein, *supra*, note 57, at 392 (describing the s. 7 analysis as a proportionality analysis and comparing it to the *Oakes* test); Stewart, "Limits", *supra*, note 74, at 411.

[88] Patrick Monahan & Chanakya Sethi, "Constitutional Cases 2011: An Overview" in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 1, at 22.

[89] See, *e.g.*, Klein, *supra*, note 57, at 392. Under s. 7, the Charter claimant bears the burden of establishing the law's inconsistency with the principles of fundamental justice, while the Crown bears the burden to justify rights infringements under s. 1.

not called on to balance the good effects of the challenged law against the bad; and the section 1 proportionality analysis is distinguishable in kind from the analysis required under arbitrariness, overbreadth and gross disproportionality. Chief Justice McLachlin explained:

> All 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.[90]

The Court in *Bedford* recognized that there are parallels between the section 1 analysis and the section 7 analysis of arbitrariness, overbreadth and gross disproportionality.[91] However, McLachlin C.J.C. went on to emphasize differences that go beyond the allocation of burdens and the different thresholds of gross versus simple disproportionality. The section 7 analysis is narrower, the Chief Justice explained, and requires the Court to take the legislative objective at "face value" and measure it against the negative effects of the law on individual rights.[92] By contrast, the section 1 analysis centres on "[t]he question of justification on the basis of an overarching public goal",[93] a matter that "plays no part"[94] under section 7. The Court concluded that section 1 and section 7 are "analytically distinct",[95] and that the possibility that a government could justify a section 7 violation under section 1 was real.[96]

Thus, *Bedford* indicates that it would be a mistake to equate the section 7 analysis under arbitrariness, overbreadth and gross disproportionality with a mere proportionality analysis.[97] A generalized balancing of

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90 *Bedford* SCC, *supra*, note 10, at para. 123 (emphasis in original).

91 *Id*., at para. 124.

92 *Id*., at para. 125.

93 *Id*.

94 *Id*.

95 *Id*., at para. 128.

96 *Id*., at para. 129.

97 Admittedly, the *Oakes* test itself is multi-faceted, and describing it as a "mere" or "general" proportionality test is itself an oversimplification. Looking more closely at the steps of the *Oakes* test reveals some features that are closely aligned with the principles of fundamental justice

salutary and deleterious effects finds a place in the section 1 analysis, but the section 7 analysis is far more focused: the effectiveness of the law, its social benefits, and even the quantitative aspect of its negative effects (*i.e.*, the number of people it affects negatively) are all immaterial. The analysis is confined to measuring the rights infringement flowing from the law against the law's objective. What remains to be seen is whether these analytical boundaries so carefully crafted in *Bedford* will be respected in future cases. Given the richness of the evidentiary record about general social effects in cases like *PHS* and *Bedford*, one suspects that courts grappling with issues of arbitrariness, overbreadth or gross disproportionality in similar cases might be tempted, despite the guidance of the Court, to consider such factors as the challenged law's effectiveness and the number of people it harms and benefits.

5. The Section 7 Analysis Leaves Room for Expression of Judicial Preferences

Despite the analytical limits drawn by the Court around the section 7 analysis, the doctrines of arbitrariness, overbreadth and gross disproportionality inescapably require courts to assess legislative policy choices. These doctrines therefore remain open to the charge that the results of a constitutional challenge may "[reflect] little more than judges' policy preferences".[98] The Court has taken pains in *Bedford* to explain in detail the factors to be weighed within the constitutional analysis, so it would seem uncharitable to suggest that judicial preferences alone drive results. Nevertheless, certain steps within the section 7 analysis leave courts with substantial interpretive freedom, and this freedom creates space for the expression of policy preferences.

Since an analysis under arbitrariness, overbreadth or gross disproportionality requires the court to measure the rights-infringing impact of the law against its purpose, identifying the law's purpose is a crucial step that largely determines the constitutional claim's chance of success. For instance, in *PHS*, the Supreme Court defined the purpose of the CDSA as protecting public health and safety, which enabled the

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under s. 7, such that certain violations of those s. 7 principles probably can't be justified under s. 1. For example, it is difficult to see how a law that is arbitrary in the sense that its impact on rights bears no relationship to its objectives could ever be seen rationally connected to its objective, let alone minimally impairing of rights. I am indebted to Ben Berger for raising this point.

[98] Klein, *supra*, note 57, at 384.

Court to find that the government's decision to close the safe injection facility ran contrary to the underlying legislative purpose. However, as Alana Klein has pointed out, if the Court had defined the purpose of the CDSA, quite plausibly, as discouraging illicit drug use, the government's decision might not have seemed so arbitrary.[99] The definition of the legislative purpose played a similar defining role in *Bedford*. The success of the challenge to the prostitution laws depended, in large measure, on the Court's interpretation of the bawdy house and communicating provisions as having relatively unimportant, nuisance-related purposes.[100] To be fair, the Court in *Bedford* was not entirely unconstrained in its determination of legislative purpose; the Supreme Court had previously ruled that these provisions were directed at combatting public nuisances.[101] Still, in declining the Crown's invitation to take a broader view of the legislative purpose,[102] the Court made a decision that greatly enhanced the strength of the constitutional challenge. In sum, judges' interpretive role in determining the purposes of the impugned legislation under section 7 gives them substantial power to shape results according to their preferences.[103]

A similar argument can be made regarding judges' power to interpret the meaning and scope of the challenged legislative provision. The section 7 doctrine of vagueness almost never results in a successful challenge, in part because courts use their power to interpret statutes to resolve vagueness problems instead of striking down vague enactments.[104] Overbreadth problems can be, and frequently are, solved in a similar way: instead of striking down an overbroad provision, courts can interpret the

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[99] *Id*., at 385.

[100] See Janine Benedet, "*Bedford*: The Pimping Offence Should Have Been Upheld" (2014) 7 C.R. (7th) 57, at 57 [hereinafter "Benedet"].

[101] The Court in *Bedford* relied on the *Prostitution Reference* (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Prostitution Reference*"]) in defining the purpose of the communicating provision, and on *R. v. Rockert*, [1978] S.C.J. No. 27, [1978] 2 S.C.R. 704 (S.C.C.), in identifying the purpose of the bawdy-house provision.

[102] The Crown had argued that the provisions aimed at deterring prostitution: *Bedford* SCC, *supra*, note 10, at paras. 131-132 and 147.

[103] See Klein, *supra*, note 57, at 387: "courts may strike down, uphold, or craft the meaning of legislation through the way in which they cast legislative purpose against which to assess arbitrariness, overbreadth and gross disproportionality"). See also Hogg, *supra*, note 2, at 203: "a judge who disapproves of a law will always be able to find that it is overbroad".

[104] This "tendency … to reject frontal vagueness attacks by first reading in clarifying requirements" (Stuart, *supra*, note 2, at 128) largely explains why Don Stuart describes vagueness doctrine as having "no teeth" (*id*., at 127).

law more narrowly.[105] Notably, in *Bedford*, the Court elected *not* to take this approach, even though it was available as a way of saving the prohibition on living on the avails of prostitution. The Ontario Court of Appeal had recognized that the provision was overbroad because it would cover non-exploitative business relationships, but cured the constitutional problem by reading in a requirement of "circumstances of exploitation".[106] Without any analysis, the Supreme Court rejected this option and struck the provision down. *Bedford* thus demonstrates that courts retain a significant measure of interpretive freedom, which may function as a way of expressing judicial attitudes about the merits of challenged legislation.

IV. LIMITS ON THE FUTURE REGULATION OF PROSTITUTION

The most controversial question flowing from the Supreme Court's decision in *Bedford* is how it will affect the future regulation of prostitution in Canada. Since *Bedford* was released, debate has raged about how best to regulate prostitution, and the options discussed have ranged from the New Zealand model of full decriminalization to the Nordic or Swedish model of criminalizing the purchase, but not the sale, of sex.[107] In June 2014, the Conservative government proposed new legislation that, like the Nordic model, would make it an offence to

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[105] For an example of a recent case where the Supreme Court used this approach to overcome an overbreadth challenge, see *Khawaja*, *supra*, note 74.

[106] *Bedford* SCC, *supra*, note 10, at para. 27, citing *Bedford* OCA, *supra*, note 18, at para. 267. See also Benedet, *supra*, note 100, at 57, favouring the Ontario Court of Appeal's "compromise position".

[107] On the New Zealand model, see New Zealand, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008). That report concludes that decriminalizing prostitution in New Zealand "has had little impact on the numbers of people working in the sex industry" (*id.*, at 13). Proponents of the Swedish model claim that it has reduced the number of women involved in prostitution and the harms associated with the sex trade. See, for example, the controversial report by Canadian Conservative M.P. Joy Smith, "The Tipping Point: Tackling the Demand for Prostituted/Trafficked Women and Youth" (February 2014) online: <http://www.joysmith.ca/assets/the%20tipping%20point%20-%20mp%20joy%20smith%20-%20feb%2018%202014.pdf>. The claimed benefits of the Nordic model are contested by researchers who point to evidence that, in Sweden, the new regime has resulted in the sex trade being displaced, not reduced, and in the trade becoming more violent: see, *e.g.*, Sandra Ka Hon Chu & Rebecca Glass, "Sex Work and Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta. L. Rev. 101 [hereinafter "Chu & Glass"]; Susanne Dodillet & Petra Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects" (Paper presented at the International Workshop on Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, March 3-4, 2011) online: <http://gup.ub.gu.se/records/fulltext/140671.pdf>.

purchase sexual services.[108] The proposed reforms to Canada's prostitution laws are complex: for example, in addition to criminalizing the purchase of sex, the new laws would criminalize advertising the sexual services of others and communicating for the purpose of selling sex in a public place in or near a school ground, playground or daycare.[109] A full review of the proposed legislation goes beyond the scope of this paper, but, as the centrepiece of the proposed reforms, the plan to criminalize the purchase of sex merits some discussion. This part of the proposed legislation would break new ground by directly criminalizing prostitution itself, albeit on an "asymmetrical" basis.[110] It is worthwhile to consider whether such criminalization might pass constitutional muster after *Bedford*.

Some have argued that any law criminalizing prostitution — even one that targets only purchasers — would be unconstitutional.[111] In my view, however, two features of the constitutional analysis in *Bedford* suggest that criminalizing prostitution may be permissible. The first of these features is the emphasis in the judgment on the fact that prostitution is not currently illegal. It is fair to characterize the lawfulness of prostitution as a dominant theme, perhaps the dominant theme, of the Supreme Court's judgment in *Bedford*. The Chief Justice began her reasons by observing that "[i]t is not a crime in Canada to sell sex for money"[112] and reaffirmed the lawfulness of prostitution half a dozen times throughout the analysis.[113] In essence, what was objectionable about the existing prostitution laws was that they made a "lawful activity more dangerous".[114] Whether a similar constitutional analysis could be sustained in relation to a criminal activity is open to question. It is true that on a model of asymmetrical criminalization, selling sex would still not be an offence. However, the apparent intent of criminalizing the purchase of sex is to outlaw prostitution itself in a way that directs

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[108] 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, cl. 20 [hereinafter "Bill"].

[109] *Id*., cls. 20 and 15(3).

[110] The model of criminalizing only the purchase and not the sale of sex has been labelled "asymmetrical criminalization": *e.g*., Chu & Glass, *supra*, note 107, at 102.

[111] See *id*.; Sex Workers United Against Violence *et al.*, *My Work Should Not Cost Me My Life: The Case Against Criminalizing the Purchase of Sex in Canada* (Vancouver: Pivot Legal Society, Sex Workers United Against Violence & the Gender and Sexual Health Initiative, 2014) online: <http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/615/attachments/original/1401811234/My_Work_Should_Not_Cost_Me_My_Life.pdf?1401811234> [hereinafter "Sex Workers United"].

[112] *Bedford* SCC, *supra*, note 10, at para. 1.

[113] *Id*., at paras. 5, 60, 61, 62, 87 and 89.

[114] *Id*., at para. 87.

enforcement against purchasers. Consequently, to the extent that the constitutional analysis in *Bedford* is based on the legality of prostitution, that analysis would apply awkwardly, if at all, to a new law criminalizing the purchase of sex.

The second salient feature of the section 7 analysis is the Court's reasoning about legislative objectives. In the *Prostitution Reference*, Dickson C.J.C. rejected the suggestion that the communicating provision aimed "to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution".[115] By contrast, a criminal prohibition on prostitution itself could be directed at those very problems, as the preamble to Bill C-36 attests.[116] These exploitation and equality-related objectives would seem considerably weightier than the nuisance-related purposes ascribed to the laws struck down in *Bedford*, and for this reason a section 7 challenge to a law directed at these new objectives would be considerably more difficult to sustain. Adding to the difficulty of challenging a criminal prohibition on prostitution on arbitrariness, overbreadth or gross disproportionality grounds is the fact that the Court specified in *Bedford* that the effectiveness of the law should not be considered in the section 7 analysis. One might reasonably object that a law whose purpose was to eliminate prostitution would be doomed to failure,[117] but the Supreme Court's judgment in *Bedford* makes that ineffectiveness constitutionally irrelevant under section 7.

This is not to say that a constitutional challenge to a criminal prohibition on prostitution would necessarily fail. Even if the prohibition applied only to the purchase and not the sale of sex, there is little doubt that such a law would have negative impacts on prostitutes' section 7 rights, especially security of the person, by pushing prostitution underground into more dangerous social spaces.[118] The problem is that this objection could be levelled against any number of criminal laws, such as those prohibiting the sale of illicit drugs. It should be no news to anyone that criminalizing activity creates black markets and makes participation in those activities more dangerous. Recognizing a section 7

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[115] *Supra*, note 101, at 1134-35.

[116] The preamble of the Bill, *supra*, note 108, provides in part: "[T]he Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it … [and] recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity."

[117] See, *e.g.*, Sex Workers United, *supra*, note 111, at 5.

[118] See *id.*, at 6-11; Chu & Glass, *supra*, note 107.

claim against laws with such effects would have potentially far-reaching consequences for the criminal law.

Lest I be misunderstood, I am not advocating for a criminal prohibition on prostitution. I think prostitution should be regulated in whatever way will be most conducive to protecting vulnerable people, especially marginalized women, from exploitation and violence. There is considerable debate and, I would argue, real uncertainty about what regulatory regime would best accomplish that goal. My purpose in this part of the analysis has been to illuminate what I see as an opening, created by the Court's reasoning in *Bedford*, to "solve" the constitutional problem with prostitution laws by criminalizing prostitution itself. The existence of that opening suggests that while the section 7 doctrines of arbitrariness, overbreadth and gross disproportionality impose some real limits on legislative choice, they leave significant room for Parliament to manoeuvre in regulating prostitution.

V. CONCLUSION

Bedford is clearly a landmark case, both in terms of the public importance of the prostitution-related issues and from the point of view of the development of Canadian constitutional law more broadly. Given the highly charged nature of the issues, it is remarkable that the Court was unanimous in striking down all of the criminal prohibitions related to prostitution. Parliament has already begun the process of framing a legislative response to *Bedford*, and a new round of constitutional litigation can be expected in the coming years. While section 7 precludes certain legislative strategies, *Bedford* gives reason to think that Parliament retains some choice among a range of options for the future regulation of prostitution.

On the broader question of the section 7 principles of fundamental justice against arbitrariness, overbreadth or gross disproportionality, *Bedford* has contributed to the development of the law in a number of significant ways. It has clarified the applicable legal tests and the nature of the relationships among these norms. Most importantly, it has shown that the section 7 substantive limits on the criminal law can impose meaningful constraints on legislative choice.