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Teaching Bedford: Reflections on the Supreme Court's Most Recent Charter Decision

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Case commented on: *Canada (Attorney General) v Bedford*, [2013 SCC 72](#)

Much commentary has already been written on the Supreme Court's decision in *Bedford* and the implications the case has for the regulation of prostitution in Canada. My interest in this post is to reflect on how to approach *Bedford* when teaching constitutional law next term. I think *Bedford* brings some clarity to the case law on section 7 of the *Charter*, and as Sonia Lawrence has noted [here](#), the decision helps dispel some of the problematic thinking around "choice" and causation in constitutional cases, though I would have liked to see the Court go further here. The Court also could have done more by way of taking a contextual approach in its consideration of the prostitution laws. The evidence presented in the case clearly provided a compelling enough picture of the harms of these laws for the Court to find a violation of section 7, but it is disappointing to see no explicit references to the gendered and racialized nature of prostitution nor to the rich and diverse literature in this area, some of which was cited in the submissions of interveners (see e.g. [here](#), [here](#) and [here](#)). Finally, the case can also be seen as an example of the relative success that section 7 claims have had of late at the Supreme Court, especially in comparison to the lack of success of section 15 claims.

Doctrinal Clarity and Dismissal of Choice

Bedford is consistent with other recent decisions such as *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 (*PHS*) at para 93 (McLachlin CJ), where the Court found that the security of the person interest under section 7 of the *Charter* is engaged where laws or government actions threaten health and bodily integrity (in that case, by refusing to extend approval for a safe injection site for intravenous drug users). In *Bedford*, another unanimous decision written by the Chief Justice, the Court agreed with the applicants that the criminal prohibitions on bawdy-houses, living on the avails of prostitution, and communicating for the purposes of prostitution "do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks." (at para 60). The case applies rather than elaborates on previous definitions of security of the person. Like *PHS*, however, it is interesting to see that the Court in *Bedford* was not content to limit its analysis to the obvious violation of the liberty interest inherent in the criminal prohibitions against prostitution. In *Bedford*, the Court explained its rationale as follows:

The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* [Reference re ss. 193 and 195.1(1)(c) of the Criminal Code

(Man.), [1990] 1 SCR 1123] decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

(At footnote 1, emphasis in original)

Bedford also adds to the jurisprudence in its dismissal of the arguments of the Attorneys General of Canada and Ontario that "it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face" (at para 73). This argument is similar to that advanced by the AG Canada in *PHS* with respect to injection drug use. In *Bedford*, the Court clarified the case law by indicating that the appropriate standard of causation is the "sufficient causal connection" test, which requires "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" (at para 75, quoting from *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at para 60 (emphasis added in *Bedford*)). The Court also cited *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para 21 for the point that "A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities" (at para 76). Furthermore, causation should be assessed with attention to the context of the case at hand.

Applying this test to the facts in *Bedford*, the Court rejected the AGs' arguments about choice and lack of causation for several reasons. First, many prostitutes – especially those involved in street prostitution – have "no meaningful choice" but to engage in risky activities associated with prostitution. Here, the Court pointed to the marginalization of this group of prostitutes, and the ways in which "financial desperation, drug addictions, mental illness, or compulsion from pimps" may result in "little choice but to sell their bodies for money" (at para 86). Second, the Court noted that prostitution is not itself illegal, nor was this a case where the claim was "a veiled assertion of a positive right to vocational safety" (at para 88). Third, the fact that it is the actions of pimps and johns that are "the immediate source of the harms suffered by prostitutes" did not pose a causation problem, since the state still played a role "in making a prostitute more vulnerable to that violence" (at para 89). Fourth, the Court rejected the AGs' calls for deference to government policy decisions and for attention to the floodgates that a positive decision in *Bedford* would open up for similar claims. According to the Court, the principles of fundamental justice stage of section 7 analysis is the appropriate place to consider such arguments (at paras 90-91).

The Court's analysis of choice in *Bedford* builds on its ruling in *PHS*, where drug addiction was found to be an illness rather than a matter of personal choice, and where the federal AG's arguments about government policy choices were put off to a later stage of analysis (2011 SCC 44 at paras 101 and 104). The Supreme Court did not go as far as the Ontario Court of Appeal did in *Bedford*, however, on the role of choice. At the Court of Appeal, the Court rejected the implication "that those who choose to engage in the sex trade are for that reason not worthy of the same constitutional protection" (*Bedford v Canada (AG)*, 2012 ONCA 186 at para 123). This

is a more principled rejection of “choice” than that of the Supreme Court, which relied on the factual finding that the claimants’ actions were not actually a matter of choice. I also take issue with the Supreme Court’s suggestion that it might have rejected any claim of a “positive right to vocational safety.” This comment is rather troublesome in the Alberta context, where certain groups of workers are excluded from the *Occupational Health and Safety Act*, [RSA 2000, c O-2](#), and should surely have a decent claim to inclusion in the protections that that legislation provides to other workers. More broadly, this statement is another example of the Court’s reticence to protect so-called positive rights under section 7, which it has expressed in cases such as *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at paras 81-83.

Bedford also adds to the section 7 jurisprudence at the principles of fundamental justice stage. The Court provided the following introduction to those principles:

[96] The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

The Court acknowledged that there is overlap between these values, but maintained that they are distinct principles that can be defined on their own as well as in relation to each other (at para 107). Collectively, these principles are aimed at “two different evils”; first, “the absence of a connection between the infringement of rights and what the law seeks to achieve”, which embraces arbitrariness and overbreadth, and second, “depriving a person of life, liberty or security of the person in a manner that is … connected to the purpose, but the impact is so severe that it violates our fundamental norms” (i.e. gross disproportionality) (at paras 108-9).

In terms of the definitions of these principles, arbitrariness is “the situation where there is no connection between the effect and the object of the law” (at para 98). In other words, “There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person” (at para 111). Overbreadth occurs where “the law goes too far and interferes with some conduct that bears no connection to its objective” (at para 101). Laws that are overbroad are therefore arbitrary in part (at para 112). The Court also clarified the degree of lack of connection that is required for laws to be arbitrary or overbroad, which it left open in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 (paras 131-2 and 232) and *PHS* (para 132). According to the Court in *Bedford*, “the 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” (at para 119, emphasis in original). This lack of connection can occur when the effect of the law is to undermine its purpose, such that it is “inconsistent” with its objective, or when “there is simply no connection on the facts between the effect and the objective, and the effect is therefore “unnecessary”” (para 119). This approach thus encompasses both definitions of arbitrariness from *Chaoulli*.

Gross disproportionality, the third relevant principle of fundamental justice, occurs where “the effect of the law is grossly disproportionate to the state’s objective” (at para 103). The Court indicated that this principle “only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure” (at para 120). Put another way, “The connection between the draconian impact of the law and its object must be entirely

outside the norms accepted in our free and democratic society” (at para 120). The Court gave as an example a sentence of life imprisonment for the offence of spitting on a sidewalk.

The Court also clarified the interplay between section 7 and section 1 of the *Charter*. It specified that any beneficial impact that a law may have is not to be considered at the section 7 stage, rather section 1 is where to assess “whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest” (at para 125). This calls into question the majority’s analysis in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, where Sopinka J found that societal interests are an appropriate consideration under the principles of fundamental justice. Nor are the principles of fundamental justice concerned with numbers – arbitrariness, overbreadth and gross disproportionality are qualitative rather than quantitative assessments and a problematic effect even on one person may be sufficient to violate the relevant principle (at para 122). Lastly, the Court indicated that while violations of section 7 will normally be difficult to justify under section 1 of the *Charter*, there may still be cases where justification is possible, “[d]epending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case” (at para 129).

Applying these principles to the facts, the Court found that the harmful effects of the bawdy house provisions on the safety of prostitutes were grossly disproportionate to the purpose of the provisions, preventing nuisance (at paras 131, 134-6); the living on the avails provision was overbroad in that it did not distinguish between those who actually exploited prostitutes and those who might increase their safety and security (at para 142); and the communicating provision was contrary to the principles of fundamental justice because its “negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution” (at para 159). None of these violations of section 7 could be justified under section 1 of the *Charter*.

Context

The Court’s failure to take a fully contextual approach is something I have commented on in response to some of its recent decisions in the area of violence against women (for example, *R v Ryan*, [2013 SCC 3](#), commented on [here](#), and *R v JA*, [2011 SCC 28](#), commented on [here](#)). In *Bedford*, there is certainly some reference to the context of prostitution and its harms (see e.g. paras 64, 86-92), but there is no analysis of the gendered and racialized nature of these harms. For example, the only references to “women” in the judgment are in the Court’s description of the applicants’ evidence (at paras 9 to 14) and in the context of other decisions referred to by the Court. Again, this approach can be contrasted with the Ontario Court of Appeal judgment, where Justices MacPherson and Cronk acknowledged that it was overwhelmingly marginalized women who are prostituted (2012 ONCA 186 at para 358). As noted earlier, the Supreme Court also fails to cite to the literature on prostitution written by feminists, critical race scholars and NGOs. These omissions may be related to the Court’s holding that the application judge’s findings on social and legislative facts were entitled to deference (at paras 48-56), but this is still a disappointing aspect of the ruling.

Section 7 versus Section 15

I wrote about the relative success of section 7 claims redressing the harms of government (in)action as compared to equality rights claims under section 15 of the *Charter* [here](#). *Bedford* continues the trend of successful section 7 cases such as *PHS and Victoria (City) v Adams*, 2009 BCCA 563, which can be contrasted with the lack of success in section 15 cases such as *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396, *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670, and *Quebec (Attorney General) v A*, 2013 SCC 5. There are, however, other cases before the courts that will continue to push decision makers on equality rights and on the intersections between section 7 and section 15. For example, in *Carter v. Canada (Attorney General)*, [2013 BCCA 435](#), the Supreme Court is being called upon to reconsider the constitutionality of Canada's assisted suicide laws under both sections 7 and 15. The recent decision in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 is another example of how the harms of government action (in this case the failure to accommodate imprisoned women with children) can amount to violations of sections 7 and 15 of the *Charter*. And in the prostitution context more specifically, both section 7 and section 15 arguments are being raised in another challenge to the criminal prohibitions against prostitution (see *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45](#), [2012] 2 SCR 524, for the decision on standing in this case). It is to be hoped that in these cases, the courts will find the harms of inequality to be no less significant than the harms protected under section 7.

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