Case Comment: Missing the Forest for the Trees in *Canada (Attorney General) v Bedford*

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This case comment on Canada (Attorney General) v Bedford *examines the doctrinal developments of section 7 of the* Canadian Charter of Rights and Freedoms. *Specifically,* Bedford *discussed three critical aspects of section 7: 1) the role of* stare decisis, *2) the issue of causation, and 3) the substantive principles of procedural fairness analysis. The author identifies access to section 7 as the Supreme Court of Canada's predominant concern in the development of section 7 doctrine in* Bedford. *Unfortunately, this concern has not made for a necessarily more workable or more coherent doctrine. This paper attempts to show how the doctrinal developments in* Bedford, *especially those relating to the substantive principles of fundamental justice analysis, may 1) do little to benefit a marginalized claimant's opportunity to succeed, and 2) be inappropriate to resolve the complex systemic issues that section 7 readily attracts.*

Ce commentaire sur la cause Canada (Procureur général) c. Bedford *examine l'évolution de la doctrine de l'article 7 de la* Charte canadienne des droits et libertés. *Plus particulièrement, dans* Bedford, *on discuta trois aspects cruciaux de l'article 7 : 1) le rôle de* stare decisis, *2) la question de la causalité et 3) les principes de fond liés à l'analyse de l'équité procédurale. L'auteur identifie l'accès à l'article 7 comme étant la préoccupation prédominante de la Cour suprême du Canada par rapport à l'évolution de la doctrine de l'article 7 dans* Bedford. *Malheureusement, cette préoccupation n'a pas mené à une doctrine forcément plus viable ou plus cohérente. L'auteur de cet article tente de montrer comment les développements de la doctrine dans* Bedford, *notamment ceux qui se rapportent aux principes de fond liés à l'analyse de la justice fondamentale, peuvent 1) faire très peu pour avantager la possibilité de réussite d'un plaignant marginalisé et 2) être mal adaptés pour résoudre les problèmes systémiques complexes qu'attire facilement l'article 7.*

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I. Introduction

In an article celebrating the 30th birthday of section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"),[1] Professor Hogg noted that section 7 had a "brilliant career."[2] One only has to look at section 7's truly impressive roster of cases: youth welfare in *Gosselin v Quebec (Attorney General)*,[3] criminalization of marijuana in *R v Malmo-Levine; R v Caine*,[4] single-tier health care in *Chaoulli v Quebec (Attorney General)*,[5] extraterritorial interrogation and detention in *Khadr*,[6] and safe-injection sites in *Canada (Attorney General) v PHS Community Services Society*.[7] These cases confront some of Canadian society's most divisive issues and are often brought by some of Canada's most marginalized claimants. As the use and importance of section 7 grows, so too does the need to have a coherent and workable doctrinal framework that is accessible to all.

The Supreme Court of Canada ("SCC") has shown a clear concern for the accessibility of section 7 in the most recent landmark section 7 case of *Bedford v Canada (Attorney General)*.[8] In this paper, "accessibility" refers to the degree to which all people can meet the requirements in substantive law to succeed in a *Charter* challenge, as opposed to the more common meaning of "access to justice" as financial or material access to the courts. Both emerge from the underlying notion that everyone, regardless of financial resources or social status, should be equal under the eyes of the law.

Early *Charter* jurisprudence established that the purpose of the *Charter*, and indeed the rule of law, would be undermined if claimants had no access to the courts. Dickson CJC asked: "[h]ow can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined."[9] Despite acknowledging its importance, the concern of accessibility did not

1 *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*].

2 Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2d) 195 at 209–11 [Hogg].

3 2002 SCC 84, [2002] 4 SCR 429.

4 2003 SCC 74, [2003] SCR 571 [*Malmo-Levine*]. See also *R v Clay*, 2003 SCC 75, 3 SCR 735 [*Clay*].

5 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

6 *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

7 2011 SCC 44, [2011] 3 SCR 134 [*PHS*].

8 *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford SCC*].

9 *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 229, 53 DLR (4th) 1 (Dickson CJC goes on to state that "[t]here cannot be a rule of law without access, otherwise the rule of law

appear to motivate many changes in early *Charter* jurisprudence.[10] It was not until the last decade or so that concerns about access to justice began taking central importance in the development of substantive law. In 2003, the SCC acknowledged the importance of access to justice when it created a new interim costs test for public interest litigation[11] and enabled tribunals to hear *Charter* questions.[12] In 2005, the formerly strict test for public interest standing was notably relaxed in *Chaoulli*.[13] In 2007, Chief Justice McLachlin gave a well-publicized speech entitled "The Challenges We Face" that focused entirely on access to justice[14] and a year later she formed the Action Committee on Access to Justice in Civil and Family Matters.[15] *PHS* emphasized the degree of marginalization suffered by the population in Vancouver's downtown eastside and arguably played a key role in the outcome of the decision.[16] More recently, the court has significantly broadened the test for public interest standing in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* ("*SWUAV*").[17] Commentators have noted that *SWUAV* represents a high point regarding the SCC's concern for accessibility.[18] *Bedford* should be read in light of *SWUAV* and the more general trend of increasing concern of *Charter* accessibility to marginalized claimants. The reasoning in *Bedford* could be seen as a relaxing or broadening of the section 7 analysis on several fronts. However, such a broadening of legal tests does not necessarily

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is replaced by a rule of men and women who decide who shall and who shall not have access to justice." at 230).

10 See June M Ross, "Standing in Charter Declaratory Actions" (1995) 33:1 Osgoode Hall LJ 151 [Ross].

11 *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371. See also Chris Tollefson, Darlene Gilliland & Jerry V Demarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83:2 Can Bar Rev 473.

12 *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504.

13 *Chaoulli*, *supra* note 5 at paras 186-89. See Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 UBC L Rev 255. Though other aspects of the judgment were roundly criticized on access to justice grounds: see Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 SCLR 297 [Jackman].

14 Beverly McLachlin, "The Challenges We Face" (Address delivered at the Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <www.scc-csc.gc.ca>.

15 The Action Committee's final report was released in 2013: Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Canadian Forum on Civil Justice, 2013), online: Canadian Forum on Civil Justice <www.cfcj-fcjc.org>.

16 *PHS*, *supra* note 7 at paras 1-15.

17 2012 SCC 45, [2012] 2 SCR 524 [*SWUAV*].

18 See e.g. Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*" (2013) 22:2 Const Forum Const 21 [Phillips].

make better doctrine, nor does it necessarily increase marginalized claimants' chances of success.

Bedford involved a *Charter* challenge to three prostitution-related Criminal Code provisions: the prohibitions on bawdy-houses,[19] living on the avails of prostitution,[20] and communicating in public for the purposes of prostitution.[21] The claimants argued that all three provisions contravened section 7 of the *Charter* and that the communication provision also contravened section 2(b). In a unanimous decision, the SCC ruled that all three provisions violated section 7 of the *Charter* and could not be saved under section 1. In doing so, the SCC clarified three important aspects of section 7 analysis: 1) the role of *stare decisis*, 2) the issue of causation, and 3) substantive principles of fundamental justice.

Although the doctrinal developments in *Bedford* reflect an admirable intention to address accessibility to section 7 by marginalized claimants, serious questions remain regarding the coherence of the section 7 analysis and its adequacy for addressing the inherently polycentric issues that most frequently arise with alleged infringements of life, liberty, and security of the person. In particular, the decision in *Bedford* creates a risk of focusing on the interests of the individual without sufficient attention being allocated to the broader social context of the issues in the case. In short, I argue that the Court appears to have missed the forest for the trees.

II. *Stare Decisis*

An unusual aspect of *Bedford* was that the constitutionality of the impugned provisions had previously been decided in the *Prostitution Reference*.[22] Thus, an important preliminary issue, especially for the lower courts, was whether they could even rule on the merits or whether the *Prostitution Reference* would bind their decision.

At the Ontario Court of Appeal (OCA), all five Justices agreed on a strict approach to the *stare decisis* question.[23] They agreed with the application judge that the section 7 claim could be opened for reconsideration. In so doing, the

19 *Criminal Code*, RSC 1985, c C-46, s 210.

20 *Ibid*, s 212(1)(j).

21 *Ibid*, s 213(1)(c).

22 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 56 CCC (3d) 65 [*Prostitution Reference*].

23 *Canada (Attorney General) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1 [*Bedford ONCA*] (using the language of "robust application" at para 83).

application judge had relied on the fact that some of the legal issues raised — the security of the person interest and the new substantive principles of fundamental justice analysis — were not considered in the *Prostitution Reference*. The OCA agreed, ruling that to reconsider an issue there must be substantial legal differences between the old case and the new case. The existence of a new legal argument (going to security of the person, rather than liberty) and of new legal doctrines (arbitrariness, overbreadth, and gross disproportionality) were sufficient to reopen the section 7 claim. However, on the section 2(b) claim, the application judge had relied on new evidence, including further evidence of harm to prostitutes, changing social, political, and economic assumptions, and new international legal regimes, all of which suggested that the communications provision should no longer be seen as a reasonable limit to the claimant's freedom of expression.[24] The OCA disagreed.

The Court prized the "self-evident" rationale behind *stare decisis* as "it promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances legitimacy and acceptability of the common law."[25] These values would be jeopardized if new evidence could be used to reopen an issue — especially a *Charter* issue, given that section 1 justification analysis relies so heavily on evidence and legislative facts.[26] The Court concluded with a colourful analogy: "Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced."[27]

The approach to *stare decisis* endorsed by the OCA was subject to criticism by prominent constitutional lawyer Joseph Arvay and his colleagues. In an article in the *Supreme Court Law Review*[28] Arvay noted that *stare decisis* is a common law doctrine and thus needs to be modified (if not abandoned) in a *Charter* challenge if the principle of constitutional supremacy is to be respected:

> In our opinion, section 52 of the *Constitution Act, 1982* effectively imposes a constitutional duty on a trial court to distinguish, where appropriate, a prior Charter decision on the basis of a change in legislative and social fact. To fail to distinguish a

24 *Bedford v Canada*, 2010 ONSC 4264 at para 83, 102 OR (3d) 321 [*Bedford ONSC*].

25 *Bedford ONCA*, *supra* note 23 at para 56.

26 *Ibid* at para 83.

27 *Ibid* at para 84.

28 Joseph J Arvay, Sheila M Tucker & Alison M Latimer, "'*Stare Decisis*' and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?" (2013) 58 SCLR (2d) 62 [Arvay, Tucker & Latimer].

> prior Charter decision where such distinguishing is warranted amounts to a refusal by a trial court to subject a law to Charter scrutiny.[29]

Moreover, while the OCA favoured a narrow approach to *stare decisis* because legislative and social facts play such a large role in the *Oakes* test,[30] Arvay argued that it is precisely because context is so important to the analysis that it necessitates a weak doctrine of *stare decisis*:

> *Stare decisis* in its traditional form recognizes that the process of judicial reasoning can be fundamentally different because of different jurisprudential developments. Given the fact that judicial reasoning in a Charter section 1 analysis is "rooted in the facts", how can it not be the case that the process of judicial reasoning in this context is fundamentally different when there are fundamentally different legislative and social facts?[31]

The SCC agreed with Arvay's position[32] and endorsed the two-branch framework that Himel J used at the Ontario Superior Court of Justice, which the Court characterized as being: 1) "if new legal issues are raised as a consequence of significant developments in the law" or 2) "if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[33] The SCC further emphasized the fact that the threshold for this test "is not an easy one to reach."[34]

Applying this test, the SCC concluded that section 7 could be revisited under the first branch of the test — as was held by the courts below. On the section 2(b) issue, while affirming the Superior Court's "circumstances or evidence" test as a legitimate route into revisiting precedent, the SCC held that the new evidence and perspectives did not meet the threshold of "fundamentally shift[ing] the parameters of the debate."[35]

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29 *Ibid* at 74 [footnotes omitted].

30 *Bedford ONCA*, *supra* note 23 at para 83.

31 Arvay, Tucker & Latimer, *supra* note 28 at 78 [footnotes omitted].

32 Arvay had a chance to argue his position in front of the SCC as counsel representing the intervener, the David Asper Centre for Constitutional Rights. The SCC was explicit in endorsing his view: *Bedford SCC*, *supra* note 8 at paras 43, 44. Arvay was also counsel for the appellants in *Carter*, dealing with assisted suicide, in which the issue of reopening decided jurisprudence (in that matter, *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342) was also before the Supreme Court of Canada. The SCC applied the two-branch framework from *Bedford* and found that both branches were met: *Carter v Canada*, 2015 SCC 5 at paras 45-48 [*Carter SCC*].

33 *Bedford SCC*, *supra* note 8 at para 42.

34 *Ibid* at para 44.

35 *Ibid* at para 46. This test is to be used for lower courts. Thus, the SCC could revisit the issue despite the test not being met. However, the SCC decided not to revisit the section 2(b) precedent as the case could be resolved on section 7 grounds alone: *ibid* at para 47.

Commentary

The use of the "new legal issues" branch of the test is not surprising; all levels of court had agreed it was a viable path to revisit a *Charter* issue. The more interesting development is the second branch — the "circumstances or evidence that fundamentally shifts the parameters of the debate" test — and the appropriate threshold the claimant must satisfy to meet this test.

Arvay makes a convincing argument as to why this second branch should be included. *Charter* litigation is heavily context-dependent, especially with section 1. New evidence that sheds light on how harmful an activity is, or on innovations in foreign jurisdictions intended to target such harmful activities, may play a critical role in the *Oakes* test. However, breaches of section 7 are rarely saved under section 1, which is often not even argued. Indeed, as this paper further discusses below in the principles of fundamental justice section, the SCC seems to have backed away from a contextual understanding of section 7 altogether. Thus, this second branch of the test may be of dubious utility to section 7 claims.

More concerning though, is the SCC's conception that new "circumstances or evidence" includes "attitudes and perspectives."[36] This seems to import some form of a societal or community standards test. The use of such a test in other contexts has been heavily criticized. For example, in the context of criminal indecency, McLachlin CJC for the majority of the Court asked:

> How does one determine what the "community" would tolerate were it aware of the conduct or material? In a diverse, pluralistic society whose members hold divergent views, who is the "community"? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges and jurors. In the end, the question often came down to what they, as individual members of the community, would tolerate.[37]

More specifically in the *Charter* context, assessing community attitudes raises the spectre of placing too much emphasis on majority preferences.[38] Moreover,

36 *Ibid* at para 46.

37 *R v Labaye*, 2005 SCC 80 at para 18, [2005] 3 SCR 728. The majority of the court replaced the community standards test with a harm-based test.

38 This concern has been echoed in other areas of *Charter* jurisprudence, such as section 2(b): Elaine Craig, "Section 2(b) Advertising Rights on Government Property: *Greater Vancouver Transportation Authority*, A New Can of Worms and the Liberty Two-Step" (2010) 33:1 Dalhousie LJ 55 ("For the purposes of circumscribing constitutional freedoms and protections, determining

marginalized groups often hold or support unpopular or minority opinions. It is unclear how a community attitudes test may actually benefit such groups in accessing and revisiting *Charter* rights.

There is the additional question of what constitutes a "fundamental shift in the parameters of the debate." The Court gives no examples or clarification as to what it means, only that the threshold is high,[39] and that the changes in the evidence or circumstances regarding the communication provision were insufficient to meet this test.[40]

The absence of a clear threshold is not only limited to the second branch of the test, but to the "new legal issues" branch as well. Are all section 7 issues decided before the doctrines of arbitrariness, overbreadth, and gross disproportionality were developed now open for challenge?[41] It may well be that developments in freedom of association meet this test, as *Health Services* introduced collective bargaining as a separate interest with its own test under 2(d).[42] Yet what about areas where the changes in the law are not as clear-cut as to produce entirely new doctrines? For example, areas in which there are important conceptual changes to existing doctrines — such as freedom of religion[43] or where the court oscillates between frameworks — such as section 15?[44] If one takes Arvay's argument that we should value constitutional correctness over *stare decisis* seriously, then courts should perhaps be lenient in these situations and claimants seeking to re-litigate issues would probably be best served by bringing their claims immediately after a landmark decision that changes the law in their area.

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what is offensive should not be done on majoritarian notions of decency. This risks both justifying government censorship based on majoritarian attitudes and perspectives as well as failing to protect an 'insignificant segment of the population' from content that the majority of the population would not find offensive." at 76).

39 *Bedford SCC*, *supra* note 8 at para 44.

40 *Ibid* at para 46.

41 *Carter SCC*, *supra* note 32, appears to suggest that this is the case.

42 *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

43 See Faisal Bhabha, "From *Saumur to L.(S.)*: Tracing the Theory and Concept of Religion Freedom under Canadian Law" (2012) 58 SCLR (2d) 109.

44 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483. In *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, four justices of the SCC appear to believe that the *Kapp* framework imports new "prejudice" and "stereotype" tests into section 15(1), whereas five justices believe the *Kapp* framework simply reverts back to framework in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1. Even more confusingly, the four justices who argued that *Kapp* incorporated new tests still found precedential value in *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325, which was decided under the framework in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

The danger of not having a clear threshold is the risk of judges prejudging a case. They will be willing to reopen a decided issue only if they believe the claimants will win, and use *stare decisis* if they believe the claimants will lose. In essence, judges may be tempted to substitute the question of assessing the degree to which the law or the evidence has changed with the question of assessing the claimants' chances of success. Hopefully the SCC will give further clarification as to the appropriate threshold to avoid this possibility.

Despite its flaws, it should not be forgotten that the development of such a broad *stare decisis* test is beneficial to the claimant and to justice more generally. The broad test should make it easier for claimants to be heard. It will also allow for lower courts to develop a full analysis of the merits of the case. It seems likely that the interest of the marginalized claimant was at the forefront of the considerations underlying adding the second branch of the test. Indeed, inherent in Arvay's argument, which the SCC accepted, is the fundamental role of the *Charter* in protecting the claimant's interests. For example, when responding to the OCA's contention that a broad *stare decisis* test would prejudice government enforcement, Arvay responds bluntly that "[t]he Charter was not designed to protect government rights."[45] The development of this claimant-friendly test foreshadows the tone of the SCC decision throughout the remaining judgment in *Bedford*.

III. Causation

The SCC's discussion of causation in *Bedford* was again in a tone favourable to claimants while being quite critical to the government. The SCC had to decide between three different tests of causation: a "sufficient causal connection" test adopted by the application judge, a general "impact" approach adopted by the OCA,[46] or an "active, foreseeable and direct" causal connection test argued by the Attorneys General.[47] The SCC concluded that the "sufficient casual connection test" was correct.

The sufficient causal connection test occupies a middle ground between the general "impact" test and the "active, foreseeable and direct" test. As the OCA described the general impact test, it approached a de minimis rule: "Where the limitation on security of the person is in the nature of an increased risk of

45 Arvay, Tucker & Latimer, *supra* note 28 at 82.

46 *Bedford ONCA*, supra note 23 ("the court must take the impact of the legislation as it is found to be, and determine whether that impact limits or otherwise interferes with an individual interest protected by the concept of security of the person." at 109).

47 *Bedford SCC*, *supra* note 8 at para 74.

serious physical harm or worse, virtually any added risk that is beyond de minimis is sufficient to constitute an infringement on security of the person."[48] By contrast, the "active, foreseeable and direct" test requires state action to be "a foreseeable and necessary cause" of the prejudice to the claimant's section 7 interest.[49] The "sufficient causal connection" standard adopted by the SCC is one that is "flexible" and "sensitive to the context of the particular case."[50] It occupies ground somewhere below needing the state action to be the "only or the dominant cause of the prejudice suffered by the claimant" but also requires "a real, as opposed to a speculative, link."[51] Further, the test can be "satisfied by a reasonable inference, drawn on a balance of probabilities."[52]

While the description provided by the SCC of the chosen "sufficient causal connection" test is rather vague, perhaps the more important consideration is whether the claimant's exercise of choice, or action by third parties, can negate causation by state action. The Attorneys General argued that it was not the state causing prejudice to the claimant's section 7 interests, but rather the harm flowed from the prostitute's own choice to engage in an inherently risky activity and from third parties like abusive johns and pimps. The SCC displayed little patience for these arguments.[53] First, they dismissed the choice claim by asserting that "many prostitutes have no meaningful choice" to engage in such a risky business,[54] and even if they did, it still does not change the fundamental fact that the impugned laws are making the lawful activity of prostitution more dangerous.[55] This latter argument was also used to counter the third party argument:

> It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.[56]

Finally, the SCC repudiated the government's call for deference at this stage, stating that deference is a question arising under the principles of

48 *Bedford ONCA*, supra note 23 at para 117.
49 *Bedford SCC, supra* note 8 at para 77
50 *Ibid* at para 76.
51 *Ibid.*
52 *Ibid.*
53 This was foreshadowed by their dismissal of similar arguments in *PHS, supra* note 7 at paras 97-106.
54 *Ibid* at para 86.
55 *Ibid* at para 87.
56 *Ibid* at para 89.

fundamental justice analysis rather than at the stage of assessing causation to determine an infringement to the claimants section 7 interests.[57]

Commentary

Though the discussion on causation is rather brief, it plays a critical role in the case. Arguably, the framing of the impugned laws as increasing the risk of harm to a legal activity was decisive to the outcome of this case. Such a finding was sufficient to meet the causation test. The motivation in setting this lower threshold flows from the same concern evidenced by the broad *stare decisis* test — accessibility to section 7. In the causation section of the judgment, the SCC is quite clear about this concern. The Court notes, "from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims ... to set the bar too high risks barring meritorious claims."[58] This concern may be particularly salient given the finding that "street prostitutes, with some exceptions, are a particularly marginalized population."[59]

Despite the admirable intention to open section 7 to marginalized claimants via a lower threshold for causation, the test itself raises significant issues. Most glaringly, the SCC provides very little guidance on what the sufficient casual connection test actually entails. Clearly, the test is meant to be "flexible" and "sensitive to the context,"[60] but where the bar is actually set between the OCA's general impact test and the Attorney General's direct and foreseeable test is unknown. The application of the sufficient causal connection test mirrored the analysis of the OCA, and the SCC was explicit in saying that the "sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case."[61] Notwithstanding the difference in name between the two tests, are they in substance identical? Will any state action that increases the risk of non-trivial harm meet the causation requirements for a section 7 claim? After all, many government schemes make activities more risky.[62]

Related to this question of threshold is the question of flexibility and context. While the SCC reiterates the importance of a having a flexible and

57 *Ibid* at para 90.
58 *Ibid* at para 78.
59 *Ibid* at para 86.
60 *Ibid* at paras 75, 76.
61 *Ibid* at para 76.
62 E.g. the prohibition of marijuana: Ethan A Nadelmann, "Drug Prohibition in the United States: Costs, Consequences, and Alternatives" (1989) 245:4921 Science 939.

contextual causation test, it is not apparent how this contextual analysis is applied. The SCC's analysis only relies on the bare finding that the impugned laws make an activity more risky. A contextual analysis would presumably also inquire into the situational context (such as the role of third parties) surrounding the activity and perhaps also the objectives the state was trying to achieve in enacting the impugned laws. The SCC expressly rejected such contextual facts to be relevant to the causation question.

Thus, the question remains — in what way is this sufficient causal connection test flexible and contextual? Given how the test was applied and the emphasis on factors such as the marginalization of the claimants in society, I believe what the SCC was attempting to pursue was a multi-factored, sliding-scale approach. Courts should enquire into factors such as whether the claimant is disadvantaged in society, how much harm is imposed on the claimant due to the impugned action,[63] and whether the activity the claimant is engaging in is legal,[64] to determine the level of connection that must be present to satisfy the causation test. In essence, the threshold is one that changes depending on the factors at play. Where there is a legal activity, a high degree of harm, and a particularly marginalized group, the threshold drops to *de minimis* levels, as in *Bedford*. But where one of the factors is changed — as in *Carter*, in which the activity in question is illegal, the threshold may be higher. The "but for" test Finch CJ used in *Carter*,[65] akin to the low threshold general impact test used by the OCA in *Bedford*, may therefore not be sufficient to meet this causation test. This sliding-scale approach would both resolve the issue of accessibility and still be a "fair and workable threshold" that does not

63 This factor would be similar application to the arbitrariness test advanced by McLachlin CJC and Major J in *Chaoulli*, *supra* note 5 ("The more serious the impingement on the person's liberty and security, the more clear must be the connection" at para 131). This was picked-up by Finch CJ in *Carter v Canada (Attorney General)*, 2013 BCCA 435 at para 135, 365 DLR (4th) 351 [*Carter BCCA*], as a factor that may increase the level of deference in applying overbreadth and gross disproportionality analysis. In addition, a precautionary approach would suggest that even where there is a possibility of very serious or irreparable harm (e.g. certain environmental harms like oil spills, or medical harms like severe adverse reactions to vaccinations), the threshold of causation should be low. Another method that may be better suited for anticipated serious harms is to create a reverse onus on the causation question, such that the burden is on the government to show its actions did not in fact cause harm: see David W.L. Wu, "Embedding Environmental Rights in Section 7 of the Canadian *Charter*: Resolving the Tension Between the Need for Precaution and the Need for Harm" (2014) 33:2 *NJCL* 191 at 212-18.

64 The SCC in *PHS*, *supra* 7 at para 102, suggests that the legality of the activity should not be a factor considered in section 7, but given the wording throughout the *Bedford* decision, it is seemed clear that the Court gave heavy consideration to the fact that prostitution is legal. Perhaps the legality of the activity can only work in one direction — to lower the threshold of causation but not increase it.

65 *Carter BCCA*, *supra* note 63 at para 121.

set the threshold too low. However, it remains to be seen whether this is the approach the SCC meant.

IV. Principles of Fundamental Justice

The last and perhaps most important clarification provided by the SCC in *Bedford* is a clear framework for the substantive principles of fundamental justice analysis. In the last two decades, the doctrines of arbitrariness, overbreadth, and gross disproportionality have rapidly developed. The OCA noted three outstanding questions with the framework. First, there is "significant overlap" among all three principles, leading to "confusion as to what level of deference the court should accord to legislative choice and what considerations govern at each step of the analysis."[66] Second, it was unclear what the appropriate standard for arbitrariness was, as the court in *Chaoulli* split 3-3 as to "whether a more deferential standard of inconsistency, or a more exacting standard of necessity, should drive the arbitrariness inquiry."[67] Third, there was some support that gross disproportionality had subsumed overbreadth analysis,[68] though more recent SCC jurisprudence had held them to be distinct principles.[69]

The SCC provided important clarifications to all three questions. First, while the principles are distinct, they all target "'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.'"[70] A law is arbitrary when there is no connection between its objective and its impact on the claimant's section 7 interests.[71] A law is overbroad if there is no connection between its objective and "*some*, but not all, of its impacts."[72] Thus, an overbroad law is "arbitrary *in part*."[73] Both arbitrariness and overbreadth address the lack of

66 *Bedford ONCA*, supra note 23 at para 143.

67 *Ibid* at para 146. This split was also mentioned in *PHS* but not settled: *PHS*, *supra* note 7 at para 132.

68 *Bedford ONCA*, *supra* note 23 at 150-51, citing *Clay*, *supra* note 4 at paras 37-38; *R v Dyck*, 2008 ONCA 309, 90 OR (3d) 409; *Cochrane v Ontario (Attorney General)*, 2008 ONCA 718, 92 OR (3d) 321; *R v Lindsay*, 2009 ONCA 532, 97 OR (3d) 567; *United States of America v Nadarajah*, 2010 ONCA 859, 109 OR (3d) 662.

69 *Bedford ONCA*, supra note 23 at para 154-55, citing *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489; *PHS*, *supra* note 7.

70 *Bedford SCC*, *supra* note 8 at para 107, citing Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 151 [Stewart].

71 *Bedford SCC*, *supra* note 8 at para 111.

72 *Ibid* at para 112 [emphasis in original].

73 *Ibid* [emphasis in original].

connection between the objective of the law and its effects.[74] Gross disproportionality, on the other hand, targets a different evil — when the law's effects on the claimants' section 7 interests are "totally out of sync" with the objective of the measure so that it cannot be rationally supported.[75] Clearly, gross disproportionality does not subsume overbreadth as the two target distinct concerns.

On the issue of the correct standard for arbitrariness, the Court concluded that arbitrariness or overbreadth could be triggered when the effect of the law is "inconsistent" (as in the case where the effect undermines the objective) or when it is "unnecessary" (as in the case where there is no connection between the effects and the objective).[76] The main question is whether there is "no connection" between the law's effects and its purpose.[77] Whether a law is "inconsistent" or "unnecessary" is simply descriptive of the lack of connection.[78]

After clarifying the content of each of these three principles, the SCC tries to distinguish the principles of fundamental justice analysis from the section 1 analysis.[79] Section 1 analysis requires the government to bear the burden of showing that state action that infringes on an individual's *Charter* rights can be justified given the government's goals and the broader public interest. Importantly, the impacts of the law are judged both qualitatively and quantitatively, as the government is "well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole."[80] Under section 7, the claimant bears the burden to establish that the state action is not in accordance with the principles of fundamental justice. The focus is on "the nature of the object, not on its efficacy."[81] Unlike section 1, the focus is on qualitative rather than quantitative evidence. There is no need to measure the law's impact on society as a whole; rather, "an arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7."[82]

74 *Ibid* at para 119.
75 *Ibid* at para 120.
76 *Ibid* at para 119.
77 *Ibid* at para 117.
78 *Ibid* at para 119.
79 *Ibid* at paras 124-29.
80 *Ibid* at para 126.
81 *Ibid* at para 127.
82 *Ibid.*

Commentary

Bedford provides welcome clarification to what has been a contradictory and confusing area of jurisprudence.[83] The conclusion that arbitrariness, overbreadth, and gross disproportionality are distinct tests is perhaps not surprising, given the previous application of the tests in *PHS* and commentary by scholars. It is also helpful that the SCC resolved the debate between the "inconsistent" and "unnecessary" thresholds when assessing arbitrariness — a debate that the SCC left open in *PHS*.[84]

However, this clarification of the principles of fundamental justice analysis also engages one unanticipated and problematic idea. In its effort to distinguish principles of fundamental justice analysis from section 1, the SCC repeatedly emphasizes that the test is "qualitative" not "quantitative." The choice of wording is curious, given that gross disproportionality, as a weighing test, is inherently quantitative. Like any weighing test, it involves valuing interests on either ends of a scale and determining to what degree one side outweighs the other. Perhaps what the SCC is attempting to emphasize by using the qualitative/quantitative language is that the scope of what is weighed is significantly narrowed to the interests of the individual claimant in principles of fundamental justice analysis, whereas in section 1 what is to be weighed is the interests of the broader community.

Indeed, the emphasis on an "individual" approach to the section 7 tests is repeatedly mentioned. For example, arbitrariness is defined as testing "whether there is a direct connection between the purpose of the law and the impugned effect on the *individual*."[85] When describing the overbreadth analysis, the Court states that "the focus remains on the *individual* and whether the effect on the *individual* is rationally connected to the law's purpose."[86] Similarly, the gross disproportionality analysis "balances the negative effect on the *individual* against the purpose of the law."[87] More explicitly, the Court states:

> The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative.

83 For a good summary of the incoherent case law involving arbitrariness, overbreadth, and gross disproportionality, see *Carter BCCA*, *supra* note 63 at paras 289-313.

84 *PHS*, *supra* note 7 at para 132.

85 *Bedford SCC*, *supra* note 8 at para 111 [emphasis added].

86 *Ibid* at para 113 [emphasis added].

87 *Ibid* at para 121 [emphasis added].

> An arbitrary, overbroad, or grossly disproportionate *impact on one person* suffices to establish a breach of s. 7.[88]

The emphasis on an individual test as opposed to a societal one perhaps becomes clearer if one replaces the phrase "is not quantitative" with "is not engaged with the interests of the community" and the word "qualitative" with "is engaged with the interests of the individual" in this passage.

Notwithstanding the confusing use of "qualitative," an individualized substantive principle of fundamental justice analysis raises additional problems. First, it appears to be inconsistent with the internal logic of the case — that is, other sections of the case appear to point to a broader contextual approach to section 7. As one may recall, the second branch of the *stare decisis* test asks if "there is a significant change in the circumstances or evidence."[89] The logic underlying the adoption of this branch is that "in Charter cases, and especially under section 1 ... judicial reasoning is deeply intertwined with the social and legislative facts 'that establish the purpose and background of legislation, including its social, economic and cultural context.'"[90] However, with section 1 playing such a limited role in section 7 cases, it seems that if "attitudes and perspectives" should remain a viable route into revisiting section 7 precedent, it would most logically be assessed at the principles of fundamental justice stage.

In addition to the inconsistency with the *stare decisis* test, one may also recall that the SCC shunted the question of deference from the causation analysis to the principles of fundamental justice analysis.[91] The deference analysis is one that inherently requires an assessment of broad contextual factors.[92] Deference arises when there are presumptively equally reasonable means to achieve the same legislative objective.[93] Yet in the principles of fundamental justice discussion, not only is it clear that the focus of the analysis is individual as opposed to societal, but also that the efficacy of the law should not be considered: "The inquiry into the purpose of the law focuses on the nature of the object, not on

88 *Ibid* at para 127 [emphasis added].

89 *Ibid* at para 44.

90 Arvay, Tucker & Latimer, *supra* note 28 at 77, citing *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, 73 DLR (4th) 686 at para 27.

91 *Bedford SCC*, *supra* note 8 at para 90.

92 See e.g. *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 90, 38 OR (3d) 735 [*Thomson Newspapers*].

93 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 ("If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives." at para 37).

its efficacy."[94] Without assessing efficacy, how can one determine whether the government's choice fits into a reasonable range of alternatives? Indeed, one has to ask how deference fits into such a narrow analysis at all.

One may argue that deference to government should not be required at all in a section 7 claim, where the interests of life, liberty, and security of the person are of such fundamental importance that no leeway should be given to government. Despite the SCC's explicit words in the *Bedford* decision itself,[95] and in previous case law,[96] the concept of deference in the principles of fundamental justice analysis should perhaps be forgotten and only considered under section 1. Perhaps that is exactly what the Court was signaling when it spontaneously stated that "the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted."[97]

Even so, I would argue that an individualized approach to the principles of fundamental justice analysis may be fundamentally unworkable. All three tests involve assessing the means taken to achieve a legislative objective. The problem is that legislative objectives simply cannot be separated from the wider social context. It seems obvious to state, but every law is enacted for some wider societal goal, such as public health or safety.[98] In an oft-quoted passage, the SCC eloquently stated that "context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision."[99] To narrow the scope of the analysis would be to assess inadequately the true objective of the impugned provision. Historically, the characterization of the legislative objective has been key to determining the outcome of the principles of fundamental justice test. For example, in *Chaoulli*, the majority characterized the legislative objective as that of ensuring effective public health care.[100] On

94 *Bedford SCC*, *supra* note 8 at para 127.

95 *Ibid* at para 90.

96 *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348 ("In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator." at 793).

97 *Bedford SCC*, *supra* note 8 at para 129. It is noteworthy that the SCC in *Carter* engaged in a full section 1 analysis: *Carter SCC*, *supra* note 32 at paras 94-123.

98 This was the objective of the *Controlled Drugs and Substance Act*, SC 1997, c 19 at issue in *PHS*, *supra* note 7 at para 110. These were the same objectives of its predecessor, the *Narcotic Control Act*, RSC 1987, c N-1, at issue in *Malmo-Levine*, *supra* note 4.

99 *Thomson Newspapers*, supra note 92 at para 87.

100 *Chaoulli*, *supra* note 5 at paras 49-57, 135-37. I thank the anonymous reviewer for providing this example.

the other hand, the minority characterized the objective to be a health care system governed by need rather than wealth.[101] Both characterizations heavily considered the wider social, historical, and international contexts.[102] Whether the societal costs and benefits as distributed by the law were related to the legislative objective determined whether the impugned provisions were arbitrary or not. There was little focus on the relationship between the impugned provisions and the security of the person interest of the claimants.

In addition to context being required to properly characterize the legislative objective, context and efficacy are also required to assess how the means are related to the objective. Arbitrariness and overbreadth both assess whether there is any connection between the means and the objective of the impugned law. Does the assessment of connection not require one to see whether the law is effective at achieving its goals? Where it is not effective, does it not follow that there is no connection between the means and the objective? Despite the SCC's explicit warning that the tests "do not look at how well the law achieves its object,"[103] is that not what is exactly required for courts to scrutinize whether a law is "inadequately connected to its objective"[104] or "not a rational means to achieve [its] objective"?[105] Was it not the effectiveness of Insite at furthering public health and safety the fundamental analysis engaged by the SCC when determining arbitrariness?[106] Indeed, Hamish Stewart, in the work relied on by the SCC in *Bedford*, saw arbitrariness as whether the law "has *some effectiveness* in achieving its objective."[107]

Similarly unconvincing is the SCC's overly narrow gross disproportionality test, which "balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law."[108] How can one extricate the purpose of the law from the social benefit that flows from it? Do legislative objectives, such as public health and safety, not inherently have some positive social value? If the legislative objectives could

101 *Ibid* at paras 164, 236-41.

102 *Ibid* at paras 55-56, 171-76.

103 *Bedford SCC*, *supra* note 8 at para 123.

104 *Ibid* at para 107, citing Stewart, *supra* note 70 at 151.

105 *Bedford SCC*, *supra* note 8 at para 107, citing Hogg, *supra* note 2 at 209.

106 *PHS*, *supra* note 7 at para 131. Insite's effectiveness in saving lives was also the key consideration in gross disproportionality analysis, at para 133. Because the case involved government inaction in extending the license for Insite to operate, the analysis was framed on the effectiveness of the activity rather than the impugned government action. But one can simply flip the framing, and say that government inaction to extend the license was ineffective at furthering the objectives of the legislation.

107 Stewart, *supra* note 70 at 152 [emphasis added].

108 *Bedford SCC*, *supra* note 8 at para 121 [emphasis in original].

be extricated from social benefits (i.e. be value neutral), then does gross disproportionality not become a test where the court only examines the negative impact on the claimant? In such a test, any negative impact on the claimant would be grossly disproportionate relative to a legislative objective that has little or no value. This surely is not the test the SCC had in mind. Even Hogg, in the article cited by the SCC in *Bedford*, saw gross disproportionality, "like overbreadth, [as] really an authority for the Court to undertake a review of the *efficacy* of the means enacted to achieve a legislative objective."[109]

A further problem with a non-contextual, individualized, principles of fundamental justice analysis is that, despite the intention of the Court, it may actually make it more difficult for marginalized claimants to access section 7. Clearly, the Court is attempting to reduce the burden on the plaintiff with this individual approach,[110] but it is unclear whether it would make any practical difference. There is already a large evidentiary burden placed on claimants before the principles of fundamental justice analysis is even engaged. The claimants in *Bedford* relied on "personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records" just to establish the impact of the impugned laws on their section 7 interests.[111] Thus, claimants may already be well-placed to use social and legislative evidence to properly challenge the rationality of the impugned laws.

The fear is that courts, seeing the SCC's explicit warning that "none of the principles measure the percentage of the population that is negatively impacted," will disregard social science evidence because it usually pertains to a class of people rather than an individual claimant. It may also make it harder for claimants to argue for gross disproportionality where the impugned law is on the margins of meeting the gross standard. That is, where the law may have a disproportionate impact on the claimant (falling just shy of the "gross" threshold), evidence that others in a similar position to the plaintiff are also suffering similarly (or, in some cases, more than the plaintiff) may push the courts to reach the gross threshold. However, where this social evidence is ignored, reliance is put solely on the claimant's personal evidence. This creates a

109 Hogg, *supra* note 2 at 204 [emphasis added].

110 *Bedford SCC*, *supra* note 8 at para 126 where the Court states: "Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole." And at para 127: "To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right."

111 *Ibid* at para 54. In total, there was over 25,000 pages of evidence in 88 volumes: *Bedford ONSC*, *supra* note 24 at para 83.

perverse situation — claimants best placed to win the principle of fundamental justice argument are people who suffers the most from the impugned state action, but the people suffering the most are often the most marginalized with the least resources.[112] Moreover, this problem raises a conceptual question: if a law disproportionately impinges on a large number of people without meeting the gross standard on any single individual, does that not make the law grossly disproportional? Surely, that law is as irrational, if not more so, than a law that has grossly disproportionate impacts on one person's section 7 rights but is beneficial to a vast number of others.[113]

It also remains to be seen how such a non-contextual principle of fundamental justice test will work with public interest litigants. One of the factors for the courts to consider in granting public interest standing is whether "the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action."[114] Because public interest standing inherently transcends the interests of individuals, it should follow that the principles of fundamental justice analysis (as well as the rest of the section 7 claim) should as well. Not to do so would be a bizarre contradiction of the underlying purpose of public interest standing. Yet even where the claimant is not bringing the claim through public interest standing, many section 7 cases are of public interest. The outcomes of cases like *Bedford* have much broader consequences than the interests of the litigating parties. This realization explains why such a narrow, individualized test seems so out-of-place with a *Charter* right used to challenge some of society's most contentious and policy-laden laws.

V. Conclusion

This case comment examined three notable developments to the section 7 framework advanced in *Bedford*. These developments appear motivated by a concern for accessibility of the *Charter* to marginalized groups. It is apparent that this concern continues to be at the forefront of the Court's attention. The

112 See e.g. Robert J Brulle & David N Pellow, "Environmental Justice: Human Health and Environmental Inequalities" (2006) 27 Annual Review of Public Health 103.

113 For example, government action may allow a factory to operate. In the first scenario, the factory pollution harms everyone in the community (but no one is hospitalized), but the operation of the factory has little to no benefit to society. In the second scenario, the factory pollution harms a select few people who already have respiratory issues, and the harm is serious enough that they have to be treated at the hospital, but there are measurable benefits to the society. To be clear, I am not suggesting this second scenario should not pass the gross disproportionality test — I am suggesting that the first scenario definitely should.

114 *SWUAV, supra* note 17 at para 51.

addition of a "circumstances or evidence" branch in the *stare decisis* test opens another avenue for claimants seeking to address fundamentally contentious issues that have been litigated in the past. The "sufficient causal connection" standard places a lower threshold where evidence of increased risk is sufficient to meet the test. The individualized, as opposed to contextual, principles of fundamental justice analysis seeks to alleviate the burden on the claimant to provide social and legislative evidence. In many ways the SCC has responded to critics suggesting that not enough emphasis was being placed on making the *Charter* more accessible to marginalized groups.[115] The Court should be praised for putting such a premium on accessibility in the development of section 7 jurisprudence in *Bedford*.

However, critical questions also emerge from the section 7 developments in *Bedford*. Is the "circumstances or evidence" branch of the *stare decisis* test actually defensible or useful in the section 7 context? What is the threshold needed in the "sufficient causal connection" test and what contextual factors are to be considered? Is an individualized principles of fundamental justice analysis that does not consider the efficacy of the impugned state action actually workable? If so, does it assist the marginalized claimant or actually make it more burdensome to find a section 7 infringement?

Upon a superficial examination of *Bedford*, one may be tempted to find the developments to section 7 as nothing but a "win" for marginalized groups in bringing *Charter* challenges. However, troubling concerns appear upon peeling back the layers. The SCC has focused so tightly on the issue of accessibility to the claimant that it has forgotten about other essential purposes that underlie the *Charter*. Nowhere is this more apparent than the Court's thin attempt to distinguish the substantive principles of fundamental justice analysis from section 1. An individualized analysis that excludes the broader contextual factors is inappropriate for the public interest cases that section 7 attracts — cases that address issues affecting many people in many different ways and often strike at Canadian society's most fundamental values. One only has to look at the number of interveners and the diversity of interests they represent to see the gravity of the issues the Court is dealing with.[116] As Arvay states, "It must not be forgotten that constitutional law affects people — the people of Canada, not merely the parties to the litigation — in a fundamental

115 See e.g. Ross, *supra* note 10; Jackman, *supra* note 13.

116 There were 22 interveners in the case representing a diverse range of interests including street-level sex workers, aboriginal sex workers, HIV/AIDS support groups and health care workers, religious groups, and provincial governments.

manner."[117] These are precisely the sorts of cases that have made the career of section 7 so brilliant.

The Court in *Bedford* appears to have forgotten about the broader policy issues frequently embedded in section 7 cases. It seems trite, but "*Charter* actions raise broad, systemic issues; they thereby demand a systemic approach."[118] While accessibility should be a significant factor in developing section 7 doctrine, it should not be the overriding factor. It is not apparent where the interests of government, let alone other members of society not parties of the litigation, can be examined in the doctrinal developments in *Bedford*. Ultimately, I believe such an individualized approach is unsustainable. There needs to be a radical re-conception of the substantive principles of fundamental justice framework and its relation to section 1.[119] At a minimum, there needs to be a clear, coherent, and workable analytical framework. The interests of all stakeholders (not just claimants) need to be considered. Arguably, the developments in *Bedford* have failed these requirements.

117 Arvay, Tucker & Latimer, *supra* note 28 at 81.

118 Phillips, *supra* note 18 at 24.

119 It is beyond the scope of this case comment to discuss what such a re-conception would look like. More play in section 1 may be needed, as *Bedford* and *Carter* seem to be signaling, or perhaps merging the two frameworks into one organic exercise may be more suitable for analyzing such complicated and far-reaching issues.