

***Bedford*, Substantive Rationality, and Participatory Democracy**

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Presented by:
Prof. Wayne Renke
University of Alberta
Edmonton, Alberta

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BEDFORD, SUBSTANTIVE RATIONALITY, AND PARTICIPATORY DEMOCRACY

Notwithstanding their number and variety, the principles are united by certain general goals. These include, above all, the effort to promote deliberation in government, to furnish surrogates for it when it is absent, to limit factionalism and self-interested representation, and to help bring about political equality.¹

The Supreme Court's *Bedford* decision² has life-altering significance for sex trade workers and it is crucial to the prospects of Parliamentary regulation of the sex trade through the *Criminal Code*.³ In *Bedford*, written for a unanimous Court by Chief Justice McLachlin, the Supreme Court struck down three sets of offence provisions relating to the sex trade under the *Charter*,⁴ and it established the framework for determining the constitutionality of the new sex trade provisions in Bill C-36.⁵ The case engaged numerous issues, including exceptions to *stare decisis*,⁶ social fact evidence in *Charter* cases,⁷ the "shifting objective" doctrine,⁸ and the division of judicial labour between trial and appellate courts.⁹ The issue of public interest standing was raised at trial,¹⁰ but not addressed on appeal¹¹ or in the Supreme Court's decision. Despite the importance of these issues, I will focus instead on the constitutional doctrine at work in *Bedford*.

¹ Cass R. Sunstein, *After the Rights Revolution* (Cambridge, Massachusetts: Harvard University Press, 1990) at 171 [Sunstein, *After the Rights Revolution*].

² *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, McLachlin CJ [*Bedford*].

³ RSC 1985, c C-46.

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

⁵ *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 Session, 41st Parliament, 2014, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=6635303>>.

⁶ "The issue of when, if ever, such precedents may be departed from takes two forms. The first 'vertical' question is when, if ever, a lower court may depart from a precedent established by a higher court. The second 'horizontal' question is when a court such as the Supreme Court of Canada may depart from its own precedents." *Bedford*, *supra* note 2 at para 32. "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate." *ibid* at para 42.

⁷ "[T]his Court has expressed a preference for social science evidence to be presented through an expert witness ... The assessment of expert evidence relies heavily on the trial judge This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence The distinction between adjudicative and legislative facts can no longer justify gradations of deference:" *ibid* at para 53.

⁸ *ibid* at para 132.

⁹ "When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case:" *ibid* at para 49.

¹⁰ *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, Himel J at paras 60 – 62 [*Bedford (Trial)*]; on the issue of private interest standing, see *ibid* at paras 44 – 59.

¹¹ *Bedford v Canada (Attorney General)*, 2012 ONCA 186 at para 50 [*Bedford (Appeal)*].

Following an overview of the *Bedford* decision and a brief discussion of the threshold issues of “security of the person” and “legislative causation,” I will offer a theory (or the beginnings of a theory) of fundamental justice, before providing an account of the constitutional principles against arbitrariness, overbreadth, and gross disproportionality. I shall characterize these principles as exemplifying a more general constitutional requirement of “substantive rationality,” and I shall contend that these principles open a space for corrective participatory democracy in the judicial review of the constitutionality of legislation. I will close with some reflections on the possible revitalization of s. 1 of the *Charter* in s. 7 cases.

A. **BEDFORD BEFORE THE SUPREME COURT**

Bedford did not concern the legality of selling or purchasing sexual services by adults, since these transactions are not prohibited in Canada. Neither did *Bedford* concern all *Criminal Code* provisions relating to prostitution. At issue were ss. 210 [the “common bawdy-house provisions”], 212(1)(j) [the “living on the avails provisions”], and 213(1)(c) [the “communication for the purposes provisions”] of the *Criminal Code* (as well as the definition of “common bawdy-house in s. 197(1) insofar as it referred to “prostitution”). These provisions criminalize certain conduct relating to or incidental to prostitution:

210(1) Every one who keeps a common bawdy-house¹² is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is an inmate of a common bawdy-house,
- (b) is found, without lawful excuse, in a common bawdy-house, or
- (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was

¹² A “common bawdy-house” is a place that is “(a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency:” *Criminal Code*, supra note 3, s 197(1).