**Carter v. Canada: “Societal Interests” Under Sections 7 and 1**

*Mark Carter*

I. INTRODUCTION

In *Carter v. Canada (Attorney General)*, after finding that in certain circumstances the *Criminal Code* offence of aiding or abetting suicide infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court went on to find that the infringement is not a reasonable limit under s. 1. This was the Court’s most significant consideration of the relationship between ss. 7 and 1 since its extended review of the issue in *Bedford v. Canada (Attorney General)*. In the *Bedford* decision, which declared the *Criminal Code*’s prostitution-related offences invalid, the Court consolidated its jurisprudence concerning the three principles of fundamental justice that were also engaged in *Carter*: the rules against arbitrariness, overbreadth, and gross disproportionality (“AOG”). These rules seem to uniquely prefigure considerations that would otherwise arise in the context of the *Oakes* test for assessing reasonable limits on *Charter* guarantees under s. 1. Therefore, when these rules are invoked they suggest that a s. 1 analysis

---

* College of Law, University of Saskatchewan.

1. 2015 SCC 5, 384 DLR (4th) 14 [*Carter*].
2. RSC 1985, c C-46, s 241(b).
4. Section 1 of the *Charter* reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
5. 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].
6. The offences are the bawdy-house house provision, ss 210(1), (2) (keeping, being an inmate of, being found in, allowing premises to be used for a bawdy-house), s 212(1)(j) (living off the avails of prostitution), and s 213(1)(c) (communicating for the purposes of engaging in prostitution).
8. Arguably, s 7 is not unique in this regard. Robert Alexy argues, for example, that a full understanding of the structure of any rights guarantee will include the characteristics of proportionality that the *Oakes* test enshrines. See Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002) at 66.
may be redundant. When combined with admonitions from the Supreme Court to the effect that s. 7 infringements will be upheld under s. 1 only in “exceptional conditions, such as natural disasters, ... wars, epidemics, and the like,” this state of affairs has contributed to the view that s. 1 has been “read...out” of s. 7. This, in turn, has led to the phenomenon, remarked upon by Chief Justice McLachlin in *Bedford*, where the Attorney General did “not seriously argue” that s. 7 infringements may constitute reasonable limits under s. 1. In response to this climate of opinion, the Chief Justice, writing for the unanimous court in *Bedford*, reaffirmed the “crucial differences between the two sections.” The Court insisted that, when properly understood, AOG analysis does not, in fact, obviate s. 1 inquiry or undermine its significance for s. 7 infringements.

In this comment I focus on one way that the Court in *Carter* attempts to support the distinction between the nature of the analyses that courts are to undertake under ss. 7 and 1 respectively. In *Carter* the Court returns to a theme that characterized the dissenting opinion of McLachlin J. (as she then was) in *Rodriguez v. British Columbia*. This theme is the insistence that “societal interests” and related values should not be part of the s. 7 analysis and, instead, “are to be dealt with under s. 1 of the *Charter*."

I argue that the broadest interpretation of the Court’s position in this respect cannot be sustained because societal interests are inextricable from the objectives or purposes of laws. These objectives or purposes are, in turn, essential to AOG analysis. I then consider the possibility that the Court’s simultaneous acceptance and rejection of societal interests may be reconciled by the Court’s insistence in *Carter* and *Bedford* that it will take the objectives or purposes of laws “at face value” in the AOG context. I conclude that this can only mean that

---

11 *Bedford*, supra note 5 at para 161. Also see Canada (AG) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]. After finding that the federal Minister of Health’s failure to grant to a safe injection site an exemption from prosecution under the *Controlled Drugs and Substances Act* (SC 1996, c 19) constituted an arbitrary infringement of s 7, the Chief Justice, writing for the Court, stated (at para 137): “if a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed.”
12 *Bedford*, ibid at para 124.
13 Ibid.
14 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 [*Rodriguez*].
15 *Carter*, supra note 1 at para 80.
16 For example “public goods,” ibid at para 95; “public benefits,” ibid at para 79.
18 *Carter*, ibid at para 89; *Bedford*, supra note 5 at para 125.
these objectives will be subject to more substantive analysis under s. 1 than under s. 7. This prospect is of limited significance except insofar as it leaves room under s. 1 for courts to consider societal interests that do not directly inform the purposes of the laws that may be under consideration under both sections. These would include the kind of “practical reasons”\textsuperscript{19} that the Court alludes to in \textit{Carter} as the hypothetical basis for future findings that some overbroad laws represent minimal impairments, perhaps in situations that are not as “exceptional” as the Court has heretofore suggested. Accordingly, rather than relegating all societal interests to s. 1, the Court is more clearly reserving only the most utilitarian of them for consideration in this context.

\textbf{II. BEDFORD AND THE RELATIONSHIP BETWEEN SECTION 7 AND SECTION 1 OF THE CHARTER}

In \textit{Bedford}, McLachlin C.J.C. recognized the “parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate \textit{Charter} rights.”\textsuperscript{20} In rough terms, the rule against arbitrariness, which is offended by a law that “imposes limits on [life, liberty, and security of the person]...that bears no connection to its objective,”\textsuperscript{21} suggests the “rational connection” consideration which is the first step of the proportionality stage of the \textit{Oakes} test. A law that offends the principle against overbreadth will be “arbitrary in part,”\textsuperscript{22} proscribing “some conduct that bears no relation to its purpose.”\textsuperscript{23} Estimations of overbreadth are suggestive of those demanded by the second step of the proportionality stage of the \textit{Oakes} test which requires determining whether laws “impair ‘as little as possible’"\textsuperscript{24} the rights or freedoms that they infringe. Finally, gross disproportionality is the characteristic of a law that has “effects on life, liberty or security of the person [that] are so grossly disproportionate to its purposes that they cannot rationally be supported.”\textsuperscript{25} Gross disproportionality resonates with the final step in the proportionality stage of the \textit{Oakes} test where it is determined whether the “deleterious

\begin{thebibliography}{9}
\bibitem{19} \textit{Carter}, \textit{ibid} at para 82.
\bibitem{20} \textit{Bedford, supra} note 5 at para 124.
\bibitem{21} \textit{Ibid} at para 111 [emphasis added]. In this regard, the Court appears to have reconciled the debate over whether, in order to avoid arbitrariness, infringements of s 7 rights need to be “necessary” to, or merely connected to, the purpose of the law. The lower rational connection standard is applied in \textit{Bedford} and \textit{Carter}.
\bibitem{22} \textit{Ibid} at para 112.
\bibitem{23} \textit{Ibid}.
\bibitem{24} \textit{Oakes, supra} note 7 at 139.
\bibitem{25} \textit{Bedford, supra} note 5 at para 120. McLachlin CJC also uses the descriptors “totally out of sync” and “draconian impact.”
\end{thebibliography}
effects” of infringing laws are balanced against or “justified by the purposes [that they are] intended to serve.”

III. CARTER AND THE ROLE OF “SOCIETAL INTERESTS” IN SECTION 7 ANALYSIS

Notwithstanding the parallels outlined above, the Bedford decision distinguished s. 7 analysis from s. 1 in a number of respects. From among these distinctions, the Court in Carter reiterated the idea that in the s. 7 context, “courts are not concerned with competing social interests or public benefits conferred by...impugned law[s]. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the Charter.” As indicated above, however, the structure of AOG analysis necessarily involves a consideration of the purposes or objectives of laws which have been found to infringe s. 7 interests. In general terms, these purposes or objectives will include or be directed at societal interests that “compete” with s. 7 rights. Indeed, such competition is precisely why laws—and the objectives that they serve—will be under s. 7 scrutiny.

The assisted suicide offence itself provides the best example of the necessary engagement with societal interests in the context of AOG analysis. In Rodriguez, Sopinka J. argued for the majority, and in direct opposition to the dissenting opinion of McLachlin J. (as she then was) on this point, that “[o]ne cannot conclude that a particular limit is arbitrary...without considering the state interest and the societal concerns which it reflects.” Earlier in his reasons Sopinka J. held that s. 241(b) “fulfils the government’s objectives [i.e. societal interests] of preserving life and protecting the vulnerable.” Relying on the authority of Rodriguez, the Court in Carter identified a narrower version of this statement as the purpose of s. 241(b): “protection of the vulnerable.” Notwithstanding this process of narrowing, the purpose of the law that the court incorporated for its arbitrariness and overbreadth analysis in Carter was recognized as a societal interest in Rodriguez, and rejected on that account for s. 7 use by McLachlin J. Accordingly, while the Court’s unanimous decision in Carter enshrines the theme of McLachlin J.’s dissent in Rodriguez that societal interests have “no place in s. 7 analysis,” one of those interests that she

26 Oakes, supra note 7 at 140.
27 Carter, supra note 1 at para 79.
28 Rodriguez, supra note 14 at 594-95.
29 Ibid at 590.
30 Carter, supra note 1 at para 76. The Court states: “[Sopinka J’s] remarks about the ‘preservation of life’ in Rodriguez are best understood as a reference to an animating social value rather than as a description of the specific object of the prohibition.”
31 Rodriguez, supra note 14 at para 621.
rejected in the earlier case was embraced by the Court for the purposes of its arbitrariness and overbreadth analysis in *Carter*.

**IV. TAKING THE PURPOSES/OBJECTIVES OF LAWS “AT FACE VALUE” UNDER SECTION 7**

In attempting to reconcile the Court’s simultaneous rejection and engagement with societal interests under s. 7, it must be concluded that although these values do have a role to play in the courts’ AOG analysis, that role is so significantly different from the way that the courts will treat them under s. 1 that it amounts to the same thing as saying that the “courts are not concerned with them” in the former context. Supporting this interpretation is the Court’s indication in *Bedford* 32 and *Carter* 33 that the purposes of laws—and therefore the societal interests that they serve—are to be taken “at face value” under s. 7. The implication, therefore, is that these purposes or objectives will be subject to a sort of analysis in the s. 1 context that contrasts with the face value kind under s. 7.

Whatever “face value” means, it cannot be related to any differences between the objectives of laws that will be under consideration in the context of either section. It may seem unremarkable that laws will be presumed to have single “true” objectives or purposes that transcend analytical contexts, and this is certainly the most advantageous presumption for parties challenging legislation under s. 7. Nonetheless, in its determination to distinguish the sections, the Court might have allowed the framing of the objectives of laws under s. 7 to be somewhat less restricted than it is under s. 1. For example, some considerable historicism characterizes the identification of the purpose of legislation under the *Oakes* test, captured by the doctrine that prevents the government from relying on “shifting objectives.” 34

By contrast, the “face value” concept might have been understood to allow the Crown some more leeway under s. 7 to take advantage of new, evolving understandings of the objectives that those laws serve. The *Carter* decision, however, makes clear that the process of framing the purposes of laws for AOG analysis under s. 7 and the first step of the *Oakes* test under s. 1 are essentially identical. In *Carter* the Court states:

> [T]his Court warned [in *RJR-MacDonald Inc. v. Canada (Attorney General)*] against stating the object of a law “too broadly” in the s. 1 analysis, lest the resulting

32 Supra note 5 at para 125.
33 Supra note 1 at para 89.
34 See infra note 36.
35 *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald*].
objective immunize the law from challenge under the Charter....The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as “the preservation of life,” it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.36

Following from the fact that the same objectives will be used for AOG and Oakes analyses, we can exclude from the meaning of “face value” any suggestion that the courts will automatically accept the position of governments in this regard. In Bedford, the Chief Justice rejected all of the purposes of the prostitution-related provisions that were proffered by the Crown in favour of alternatives that were better supported by the legislative record or previous case law. Similarly, in Carter, as indicated above, the Court accepted an objective for the assisting suicide offence—“to protect vulnerable persons from being induced to commit suicide at a time of weakness”—which, although accepted by most parties to the action,37 was narrower than the Attorney General of Canada’s preferred candidate: “the preservation of life.”38 Canada’s position was rejected by the Court as an incorrect interpretation of Sopinka J.’s ruling in Rodriguez.39

Taking the foregoing into account, a remaining possibility for what it may mean to take the objectives of laws at face value in the s. 7 context in a manner that would be distinguished from their treatment under s. 1, is connected to the Chief Justice’s insistence in Bedford on the exclusively “qualitative” character of AOG analysis.40 Once the “true” (i.e. non-shifted, etc.) purposes of laws and the societal interests that they serve have been determined, the “qualities” of the laws that are at issue at this stage will be restricted to their rights-limiting effects and the connections between those effects and the laws’ purposes, whatever those purposes may be. The suggestion of indifference as to the nature of those purposes might, then, explain the “face value” character of this approach. It is for the next stage of analysis, s. 1, to engage in a review of the substantive merits of those

36 Carter, supra note 1 at para 77. Similarly, in Bedford, supra note 5 at para 132, McLachlin CJC asserted that R v Zundel, [1992] 2 SCR 731 [Zundel], supports the assertion that “[t]he doctrine against shifting objectives does not permit a new object to be introduced at this point” although “this point” in Zundel involved s 1 analysis after a finding of an infringement of s 2(b), freedom of expression, a fact that the Chief Justice does not mention.
37 Carter, ibid at para 74.
38 Ibid at para 75.
39 Ibid at para 76.
40 Bedford, supra note 5 at para 123.
purposes and, perhaps, to bring in to the analysis some additional societal interests that were not identified as part of those purposes.

Pursuant to the first step of s. 1’s *Oakes* test, rather than being taken at face value, the purposes of laws that have been found to infringe s. 7 have to be “pressing and substantial in a free and democratic society.” It is notorious, however, that this stage of analysis has rarely presented much of an obstacle to parties attempting to justify *Charter* infringements. Accordingly, it would seem that the weight of the Court’s point regarding how taking purposes at “face value” under s. 7 contrasts with their treatment under s. 1 must rest beyond the first step of the *Oakes* test. Important statements by the Court suggest, however, that any laws that arrive at the rational connection stage of the *Oakes* analysis after findings of arbitrariness under s. 7 stand little chance of surviving this part of the test. That being the case, the fact that the purposes of laws are being treated otherwise than at face value would seem to be irrelevant. However, while alluding to the rareness of the possibility, but without containing it to “exceptional circumstances,” both the *Bedford* and *Carter* decisions imply that the Court may, in the future, consider upholding some overbroad laws as minimal impairments under the *Oakes* test, in the (societal) interests of “[e]nforcement practicality” or other “practical reasons.” In that event, it may be the case that, in presuming to deny societal interests a role under s. 7, the Court is really only excluding the most utilitarian of them, which may then weigh into the proportionality stage of s. 1 analysis, and minimal impairment in particular.

V. CONCLUSION
The *Carter* decision endeavors to support the Supreme Court of Canada’s recent insistence on a clear distinction between the forms of inquiry that are to be undertaken under ss. 7 and 1 by insisting that societal interests have no place in in the former context and are a matter of concern only under the latter. The Court’s attempt is undermined, however, by the necessary connection between societal

---

42 In *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791, Chief Justice McLachlin and Major J with Bastarache J concurring, questioned “whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R v Oakes*” (para 155).
43 *Bedford*, supra note 5 at para 113.
44 *Carter*, supra note 1 at para 82.
interests and the purposes or objects of laws. These purposes/objectives are essential to determinations of the potential arbitrariness, overbreadth, and gross disproportionality of laws under s. 7. Accordingly, if societal interests somehow help to distinguish the constitutional review of legislation under ss. 7 and 1 respectively, then the answer as to how they do this does not lie in an absence of a role for them under s. 7 analysis. It may be safe to say, however, that the most utilitarian of such interests can only enter into the analysis under s. 1.