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R. v. K.R.J.: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects

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R. v. K.R.J.: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects

Marcus Moore*

I. INTRODUCTION

1. *K.R.J.* and the Potential Shift from Minimal Impairment to Proportionality of Effects

The judgment of the Supreme Court in *R. v. K.R.J.*[1] reflects an important potential change in the way proportionality analysis is conducted in the review of constitutional rights limitations under Canada's *Oakes*[2] test. Until *K.R.J.*, most cases came down to the "Minimal Impairment" stage of *Oakes*.[3] Minimal Impairment's customary role as the centrepiece of the analysis was challenged in *Alberta v. Hutterian Brethren*, where both the majority and the primary dissent placed new weight on the "Proportionality of Effects" stage.[4] Nevertheless, the traditional pattern resumed thereafter.[5] However, the shift in emphasis heralded by *Hutterian Brethren* was reprised in *K.R.J.*,

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1 *R. v. K.R.J.*, [2016] S.C.J. No. 31, [2016] 1 S.C.R. 906 (S.C.C.) [hereinafter "*K.R.J.*"].

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

3 See *e.g.*, Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2013) at 38-36 [hereinafter "Hogg"].

4 *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"].

5 Hogg, *supra*, note 3.

which endorsed and carried further the Court's earlier reasoning.[6] *K.R.J.* demonstrated this effort to more fully consider the Proportionality of Effects question,[7] raising the possibility of it inaugurating a permanent change in how the proportionality doctrine will be applied in Charter[8] review cases in Canada — a change in which we see Proportionality of Effects displace Minimal Impairment centre stage.

This potential shift does not implement a change to the overall substantive threshold for justifying rights limitations.[9] Rather, it appears driven by conceptual rationales, and entails a switching of sides in a related ongoing debate on the appropriate style of judicial reasoning in Charter adjudication.[10] The shift should indeed accomplish its specific conceptual goals, enhancing the rationality and conceptual coherence of Canadian proportionality jurisprudence.[11] These advances, and their implications, are significant gains. However, the change seems unlikely to put an end to the judicial style debate, in which there is merit on both sides, within a dynamic which it does not alter.[12] Overcoming that impasse would require further changes in proportionality analysis to address the effects of deeper issues embedded in the conceptual substructure underlying the debate. Presently, there is little to suggest that such an endeavour is under consideration.[13] In the meantime, while the style debate may not yet be fully resolved, it takes nothing away from the gains made on key conceptual issues.

Beyond an assessment of the change in relation to its rationales, the potential shift in the practice of proportionality portended by *K.R.J.* raises other important questions. Three of these are addressed in this paper. The first concerns what to make of different formulations that have been put forth of the newly-emphasized Proportionality of Effects inquiry. The second seeks to anticipate the post-shift relationship between Minimal Impairment and Proportionality of Effects, and what this will mean for various classes of cases. The third question tracks disagreements among the three judicial opinions in *K.R.J.* regarding the evidential requirements for justifying an infringement, and the implications of an unavailability of proof.

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6 *K.R.J.*, *supra*, note 1, at paras. 77-79.

7 *Id.*, at paras. 80-114 (Karakatsanis J.), paras. 124-129 (Abella J.), paras. 134-161 (Brown J.).

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

9 See Part III, *infra*.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

2. Structure of this Article

The discussion below proceeds in four parts. Part I briefly surveys necessary background to the changes in proportionality analysis at issue from *K.R.J.* The changes themselves are detailed in Part II. Part III explains and appraises the changes in relation to the motivations driving them. In Part IV a few additionally important questions are examined arising from *K.R.J.*'s prospective shift in emphasis from Minimal Impairment to Proportionality of Effects. A short concluding section wraps up the discussion.

PART I. THE BACKGROUND: SECTION 1, PROPORTIONALITY, AND *OAKES*

It is surely the case that the most important provision of Canada's *Charter of Rights and Freedoms* is the first one:

> 1. 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.[14]

By these terms, section 1 guarantees the rights and freedoms which follow it, yet also limits them.[15] In seeking to "balance the interests of society with those of individuals and groups", section 1 ordains for the courts a task frequently delicate and complex.[16] The tool of choice for this difficult task is the doctrine of "proportionality".[17] The doctrine of proportionality offers a fixed, authoritative, analytical structure designed to systematize the general exercise of considering the key factors relevant to justifying rights restrictions, and thereby guide case-by-case judicial decisions as to whether a given restriction is acceptable.[18] Canada's version of the doctrine, elaborated by Dickson C.J.C. in *R. v. Oakes*,[19] and since having come to be commonly referred to as the

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[14] Charter, *supra*, note 8, at s. 1.

[15] *Oakes*, *supra*, note 2, at para. 63.

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

[17] *Id.* For more on the doctrine of proportionality transnationally, see *e.g.*, Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l L. 72 [hereinafter "Stone Sweet"].

[18] See *e.g.*, Charles-Maxime Panaccio, "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2011) 24 C.J.L.J. 109 at, 111-114.

[19] *Oakes*, *supra*, note 2.

"*Oakes* test", has become known throughout the world.[20] Pursuant to it, if a court finds a *prima facie* infringement of a right by government action prescribed by law, the infringement may be allowed as justified if the conditions comprising the test, which have crystallized in the jurisprudence as summarized below, are satisfied:[21]

(1) "Pressing and Substantial Objective": Does the government measure have a pressing and substantial objective?[22]

(2) "Rational Connection": Does the government measure bear a rational connection to its objective?[23]

(3) "Minimal Impairment": Does the government measure minimize the impairment of the right in pursuing the objective?[24]

(4) "Proportionality of Effects": Is there a proportionality between the salutary and deleterious effects of the government measure?[25]

Applying the test, by stepping through the foregoing sequence of inquiries one-by-one, if the answer at any stage is negative, the infringement is unjustified, and the government measure unconstitutional.[26] If the government measure satisfies all four conditions, then the infringement is found to be proportionate, and hence pursuant to the doctrine, is justified, with the government measure accordingly determined to be Charter-compliant.[27]

PART II. THE SHIFT: FROM MINIMAL IMPAIRMENT TO PROPORTIONALITY OF EFFECTS

The Supreme Court's judgment in *K.R.J.* is significant in signalling a potential shift in emphasis among the constituent stages of Canada's *Oakes* test of proportionality.

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[20] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. (2d) 501 at, 502 [hereinafter "Choudhry"].

[21] See *e.g.*, Hogg, *supra*, note 3.

[22] *Oakes*, *supra*, note 2, at para. 69.

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

[24] *Id.*

[25] *Dagenais v. Canadian Broadcasting Corp*., [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at para. 95 (S.C.C.) [hereinafter "*Dagenais*"].

[26] See *e.g.*, Hogg, *supra*, note 3.

[27] *Id.*

1. Minimal Impairment's Traditional Pre-Eminence in Proportionality Analysis in Canada

Throughout the era of Charter adjudication, the proportionality doctrine's third step of "Minimal Impairment" has figured as the "central element"[28] of the test, the "heart and soul of s. 1 justification" in the courts.[29] It is this stage of the *Oakes* test that has been pivotal in most cases dealing with the justifiability of a rights infringement.[30] As Peter Hogg wrote:

> We have noticed that courts have usually readily accepted that a legislative purpose is sufficiently important to justify overriding a *Charter* right (first step). We have also noticed that courts have usually readily accepted that a law is rationally connected to its objective (second step). We shall shortly notice that courts have usually readily accepted that a law does not have a disproportionately severe impact on the persons to whom it applies (fourth step). In short, for the great majority of cases, the arena of debate is the third step, the requirement of [minimal impairment].[31]

Meanwhile, as the passage from Hogg alludes to, during the period where the Minimal Impairment step was dominant, little work was done by the fourth stage of "Proportionality of Effects".[32]

2. An Increased Importance of Proportionality of Effects?

(a) Hutterian Brethren

A notable exception was *Hutterian Brethren*, where the Supreme Court explicitly embraced Proportionality of Effects as the "decisive analysis" in the case.[33] There, the majority devoted 32 paragraphs of its judgment to consideration of Proportionality of Effects,[34] while the principal dissent similarly spent 27 paragraphs on it.[35] Commenting on the issue in the

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[28] Kent Roach & Robert Sharpe, *The Charter of Rights and Freedoms*, 5th ed. (Toronto: Irwin Law, 2013), at 78 [hereinafter "Roach"].

[29] Hogg, *supra*, note 3.

[30] See *e.g.* Roach, *supra*, note 28, at 78.

[31] Hogg, *supra*, note 3.

[32] *Id.* See also *Hutterian Brethren*, *supra*, note 4, at para. 75: "this stage of the justification analysis, it has not often been used".

[33] *Hutterian Brethren*, *supra*, note 4, at para. 78.

[34] *Id.*, at paras. 72-103.

[35] *Id.*, at paras. 150-176.

majority judgment, McLachlin C.J.C. rejected the hypothesis that the Proportionality of Effects stage might be redundant, noting that "the minimal impairment and proportionality of effects analyses involve different kinds of balancing".[36] Justice Abella, in her dissenting opinion, went so far as to say: "In my view, most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality [of effects]. Proportionality is, after all, what s. 1 is about."[37]

However, notwithstanding *Hutterian Brethren*'s strong endorsement of a more significant role for Proportionality of Effects,[38] the pattern of adjudication thereafter continued to be one in which Minimal Impairment was "the focus of most litigation under the *Charter*," while Proportionality of Effects bore little influence.[39]

(b) K.R.J.

Recently, the Supreme Court's judgment in *K.R.J.* seems to have taken to heart that which was said in *Hutterian Brethren*, and indeed gone further in the direction there contemplated.[40] Writing for the majority in *K.R.J.*, Karakatsanis J. stated that "[w]hile the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final [Proportionality of Effects] step permits courts to address the essence of the proportionality enquiry at the heart of s. 1."[41] Putting this revised approach into practice, the majority quickly passed through the Minimal Impairment stage and then inquired into Proportionality of Effects in-depth over the course of 38 paragraphs.[42] Its analysis at this final stage led it to arrive at the conclusion that one of the challenged legislative provisions was justified, while the other failed and thus violated the Charter.[43] With the latter ruling, the theory that the Proportionality of Effects step is purely redundant has been overtaken by events.[44]

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[36] *Id.*, at paras. 75-76.

[37] *Id.*, at para. 149.

[38] Sara Weinrib, "The Emergence of the Third Step of the *Oakes* Test in *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 68 U.T. Fac. L.R. 77 [hereinafter "Weinrib"].

[39] Roach, *supra*, note 28, at 78. On the influence of Proportionality of Effects, Hogg wrote "it has never had any influence on the outcome of any case": *supra*, note 3.

[40] *K.R.J.*, *supra*, note 1, at paras. 78-79.

[41] *Id.*, at para. 79.

[42] *Id.*, at paras. 77-114.

[43] *Id.*, at paras. 115-116.

[44] See *e.g.*, Hogg, *supra*, note 3; *Hutterian Brethren*, *supra*, note 4, at para. 75.

The Proportionality of Effects stage of the *Oakes* test was also the locus of disagreement with the Court's majority by both of the other opinions in the case, each dissenting in part: Abella J. would have found that both provisions at issue fail Proportionality of Effects,[45] while Brown J. would have upheld both as satisfying it.[46]

3. Conclusion

The Supreme Court's judgment in *K.R.J.* is significant in rekindling the prospect, which had dimmed since being lit years earlier by *Hutterian Brethren*, that the long-marginalized final "Proportionality of Effects" step of *Oakes* will harbour new importance in the future.

Indeed, *K.R.J.* signals a potential shift in the balance of "balancing" power within the conduct of proportionality analysis in Canada from the balancing implicit in the Minimal Impairment inquiry to that prescribed by the Proportionality of Effects stage.

PART III. UNDERSTANDING AND APPRAISING THE SHIFT

The potential change in the practice of proportionality by Canadian courts which arises from *K.R.J.* seems not to stem from an intent to alter the substantive threshold for justifying rights limitations. No such motive is mentioned, and no such effect is apparent.[47]

Rather, what is manifest in *K.R.J.* is a shift *in emphasis,* among the component stages of the *Oakes* test, from Minimal Impairment to Proportionality of Effects.[48] In order for the infringement of a right to be justified, it must still satisfy both of these queries (as well as the two preceding elements of the test). This change, as opposed to being aimed at a change in the substantive threshold for justification, seems to have taken place in order to accommodate corrections contemplated to address conceptual concerns related to the test, along with responsiveness to a long-standing critique of the style of judicial reasoning used in Charter adjudication.

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45 *K.R.J.*, *supra*, note 1, at para. 130.
46 *Id.*, at para. 162.
47 *Id.*
48 *Id.*, at paras. 77-79.

I turn next to surveying the specifics of these evident rationales, and to appraising the likelihood of *K.R.J.*'s shift realizing these objectives behind it.

1. Conflation of the Final Two Inquiries of the Test: Minimal Impairment and Proportionality of Effects

(a) The Rationale

One of the conceptual concerns fuelling the change in *K.R.J.* pertains to a disjunction between the conceptual structure of the proportionality doctrine and its customary application in Canada.[49] This concern is focused in particular on the final two steps of the *Oakes* test.[50] Minimal Impairment is meant to inquire into the magnitude of the restriction of the right in consideration of the challenged law's *purpose*; Proportionality of Effects exists to compare the legislation's salutary and deleterious actual *effects*.[51] Thus, "minimal impairment and proportionality of effects analyses involve different kinds of balancing", as McLachlin C.J.C. summarized in *Hutterian Brethren*.[52] The concern, as she acknowledged, is that "the distinction … has not always been strictly followed by Canadian courts".[53] Instead, in practice, a law's effects were often imported into the Minimal Impairment analysis, so as to allow for a full balancing of factors at that pivotal stage where the constitutionality of the provision was bound to be decided. The need to distinguish between the final two steps of the test was also underlined by Abella J., dissenting.[54] While attention had thus been drawn to the issue by the Supreme Court in *Hutterian Brethren*, the pattern of the two steps conflation nevertheless continued to be prevalent afterward — until *K.R.J.*[55]

In *K.R.J.*, the Court, in a majority opinion written by Karakatsanis J., emphasized the "fundamentally distinct role" played by the final stage Proportionality of Effects analysis.[56] The judgment in the case, quoting

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[49] *Id.*, at paras. 77, 79. See also *Hutterian Brethren*, *supra*, note 4, at para. 76; Grimm, *infra*, note 61, at 393.

[50] *Id.*, at paras. 76-79. See also *Hutterian Brethren*, *supra*, note 4, at paras. 75-77.

[51] See notes 24-25. See also *K.R.J.*, *supra*, note 1, at para. 77; *Hutterian Brethren*, *supra*, note 4, at para. 77.

[52] *Hutterian Brethren*, *supra*, note 4, at para. 76.

[53] *Id.*

[54] *Id.*, at paras. 150-153.

[55] See notes 38-39.

[56] *K.R.J.*, *supra*, note 1, at para. 77.

Thomson Newspapers v. Canada,[57] noted how Minimal Impairment balances "the ends of the legislation and the means employed", whereas Proportionality of Effects scrutinizes "whether the benefits which accrue from the limitation are proportional to its deleterious effects".[58] The judgment went on to explain that, while the final stage was initially conceived in *R. v. Oakes* as a comparison between the deleterious effects and the legislative *objective*, this was too narrow a characterization of the final step, and it was reformulated in *Dagenais v. Canadian Broadcasting Corp.*[59] to compare the legislation's deleterious and salutary *effects*.[60]

The conflation of Minimal Impairment and Proportionality of Effects that occurred prior to *K.R.J.* was not just a matter of distinguishing conceptually separate inquiries, it was also an issue of the appropriate division of labour between these steps, based on their respective roles within the overall conceptual structure of proportionality doctrine. This was highlighted by former German constitutional judge Dieter Grimm, who argued that the conceptual "inaccuracy" of the conflation resulted in a situation where the Canadian practice "does more than it promises in the [Minimal Impairment] step, and has little use for the [Proportionality of Effects] step", which effectively offered only "repetition" if the effects were considered a second time there.[61] When the steps are properly analytically separated, Grimm added, fewer cases are decided at the Minimal Impairment step.[62] Canada's habit of making Minimal Impairment the focus, he wrote, was a "premature anticipation of the final balance"[63] typically to be considered under Proportionality of Effects.

This corollary of the initial proposition that conceptually separate steps had been conflated and needed to be distinguished was endorsed by the Supreme Court in *K.R.J.*, as the majority adopted Abella J.'s statement from *Hutterian Brethren* that "most of the heavy conceptual lifting and balancing ought to be done at the final step" of Proportionality of Effects: "Proportionality is, after all, what s. 1 is about."[64] Citing Grimm and concordant views from other scholarly works, Karakatsanis J.

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[57] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter "*Thomson*"].

[58] *Id.*, at para. 125.

[59] *Dagenais, supra*, note 25.

[60] *K.R.J.*, *supra*, note 1, at endnote 6.

[61] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 U.T.L.J. 383, at 396 [hereinafter "Grimm"].

[62] *Id.*, at 387.

[63] *Id.*, at 388.

[64] *K.R.J.*, *supra*, note 1, at para. 78; *Hutterian Brethren*, *supra*, note 4, at para. 149.

stated for the Court majority in *K.R.J.* that: "While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final [proportionality of effects] step permits courts to address the essence of the proportionality enquiry at the heart of s. 1."[65]

It is therefore evident that one of the motives behind the change in the way the *Oakes* test was applied in *K.R.J.* was to better separate in practice the conceptually distinct inquiries at the Minimal Impairment and Proportionality of Effects steps; associated with that was an intent to shift the emphasis within the *Oakes* test from the former stage towards the latter, which was perceived as conceptually closer-related to the overall question of proportionality which *Oakes* is meant to embody.

(b) Appraisal

This first rationale for the potential change manifest in *K.R.J.* as to how proportionality may be conducted in the future in Canada would seem a worthy objective. Maintaining the conceptual separation of the steps of the doctrine of proportionality is more than a matter of accurate record-keeping; as Justice Grimm. explains, it "has legal value":[66]

> The disciplining and rationalizing effect, which is a significant advantage of the proportionality test over a mere test of reasonableness or a more or less free balancing, as in many US cases, is reduced when the four stages are not clearly separated. Each step requires a certain assessment. The next step can be taken only if the law that is challenged has not failed on the previous step. A confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.[67]

The corollary objective of relying less on Minimal Impairment and more on Proportionality of Effects in the way the test is applied also seems appropriate — particularly once these two steps are no longer conflated but separated. Conceptually, Proportionality of Effects encompasses the fullest range of factors that might merit a place on the scales of balance, within the overall question of the impugned legislation's proportionality. I would also submit that ultimately what matters most in terms of assessing proportionality is how the legislation operates in the real world. In that case,

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65 *K.R.J.*, *supra*, note 1, at para. 79, endnote 7.
66 Grimm, *supra*, note 61, at 395.
67 *Id.*, at 397.

the final step is most *à propos*, as that is where it turns the test's gaze — measuring Proportionality of *Effects*.

If the rationale is worthy, the question then to be asked is whether the change evident in *K.R.J.* can be expected to achieve it. Here, the change made is crafted precisely to correct this conceptual problem. This is demonstrated in the judgment itself, where the two steps are clearly separated,[68] and the test's gravitational centre is in a weighty Proportionality of Effects discussion.[69] In adhering to the analytical distinction between the steps, and leaving the preponderance of factors (being the effects) to be weighed under Proportionality of Effects, rather than imported into the Minimal Impairment evaluation, the Court in *K.R.J.* looks to have successfully addressed the conceptual concern described in this section.

The change should therefore result in better correspondence between the conceptual design of the proportionality doctrine and its application in Canada, and in conjunction, enhanced analytical clarity at each step of the test's application.

In addition, the Supreme Court of Canada has long been committed to applying the proportionality doctrine in a highly *contextual* manner: that is, sensitive to the facts of how a challenged measure operates in the real world.[70] It has rejected the alternative, *viz*. the intellectually hollow exercise of balancing abstract principles without account of how those principles are actually implicated in the case at hand, or remote from sensing the actual human impact both individually and in the shared life of community.[71] *K.R.J.*'s shift in emphasis to Proportionality of Effects should assist with this, by putting centre stage the balance of these practical impacts.

2. The Conceptual Inaptness of Minimal Impairment for Deciding Cases Where Only Drastic Rights Restrictions Would Attain the Government Objective

(a) The Rationale

The second evident rationale for *K.R.J.*'s change in the way proportionality is applied under the *Oakes* test is a concern that only the

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[68] *K.R.J.*, *supra*, note 1, at paras. 70-76 (Minimal Impairment), 77-114 (Proportionality of Effects).

[69] *Id.*, at paras. 77-114 (Karakatsanis J.), 124-129 (Abella J.), 134-161 (Brown J.).

[70] See *e.g.*, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 63 (S.C.C.).

[71] *Id.*

Proportionality of Effects inquiry is conceptually apt to address the justifiability of drastic rights infringements in situations where these are necessary to pursuing the government goal.[72] Conceptually, the least drastic means of attaining a valid legislative purpose, regardless of how drastic it may be, should inherently satisfy the Minimal Impairment test.[73] In theory, at the Proportionality of Effects stage is where such a measure might be found to be disproportionate, depending on whether the law's salutary effects — including attainment of the law's purpose — are not in proportion to its deleterious effects, notably the drastic curtailment of the right.[74] A justification analysis fixated on Minimal Impairment complicates the ability to deal with cases of this type.

This was a concern forcefully expressed by former President of the Supreme Court of Israel, Aharon Barak, who noted that Minimal Impairment is bound by "the need to realize" the legislative objective, whereas Proportionality of Effects can examine "whether the realization of this proper objective is commensurate with the deleterious effect upon the human right".[75] Reflecting on the Israeli experience in relation to that of Canada, Barak even suggested that with Minimal Impairment as the fulcrum of the test, rights are insufficiently protected.[76] That such may be the case in other countries is certainly possible; however, if such account were submitted of the history of rights protection in Canada under the Charter, in my view it would not be sustainable because of the issue addressed in Part A: the conflation of Minimal Impairment and Proportionality of Effects saw Minimal Impairment in practice operate as a more holistic determination of the proportionality of the challenged legislation, with considerations which conceptually might belong to Proportionality of Effects absorbed explicitly or implicitly into the central Minimal Impairment decision, as discussed.

However, this did come at a cost of compounding the conceptual concerns in the cases at issue in this section, where the least drastic means is indeed drastic. In these "drastic least drastic limit" cases, what was required in order to avoid the substantive deficit in rights protection apprehended by

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[72] *K.R.J.*, *supra*, note 1, at paras. 76, 79. See also *Hutterian Brethren*, *supra*, note 4, at paras. 76, 78.

[73] *Hutterian Brethren, supra*, note 4. See also Weinrib, *supra*, note 38.

[74] *Id.*

[75] Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369, at 374 [hereinafter "Barak"].

[76] *Id.*, at 373.

Barak resulted in a conceptual Catch-22. As McLachlin C.J.C. explained in *Hutterian Brethren*, the only way courts could avoid the deficit was by "reading down the government's objective within the minimal impairment analysis" as something less than what it really was.[77] On the surface, such a practice might again raise concern of whether the substantive standard for proportionality was altered — this time in the other direction of improperly finding valid laws to be unconstitutional. The riposte is the same: as a general matter, one must assume that usually the reading down of goals was only a pragmatic way of justifying in the conceptual terms of Minimal Impairment what was really a more holistic determination that the legislation was disproportionate, arrived at as part of the discussed conflation of the two final steps of the test.

Thus, with Minimal Impairment as the focus of analysis, drastic least drastic limit cases resulted in one or the other of the following undesirable consequences: where the legislation was upheld, the appearance was given that the conceptually necessary Proportionality of Effects inquiry was short-circuited; conversely, where the legislation was found to violate the Charter, the appearance was given that the legislative object that is supposed to be accepted at the Minimal Impairment stage, as part of the conceptual question posed, was instead challenged.

Hutterian Brethren, citing President Barak, recommended a shift to Proportionality of Effects in order to deal with this class of cases: "Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law."[78] However, as noted, the pattern of reliance on Minimal Impairment nevertheless continued thereafter, until *K.R.J.*[79]

K.R.J. was a case of this type. The amendments contained in section 161(1)(c) and (d) of the *Criminal Code* allowed for the retrospective application, at the sentencing stage, of broadened restrictions on persons convicted of certain sexual offences against youth under 16.[80] This drastically impaired the section 11(i) Charter right, "if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment".[81] Although drastic, it was accepted that the

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77 *Hutterian Brethren*, *supra*, note 4, at para. 76.

78 *Hutterian Brethren*, *supra*, note 4, at para. 76.

79 See note 55.

80 *Criminal Code*, R.S.C. 1985, c. C-46, s. 161(1)(c)-(d).

81 Charter, *supra*, note 8, s. 11(i).

measures were the least drastic means, within the meaning of the Minimal Impairment test.[82]

Whereas in prior cases this might have been conclusive of the matter, or the objective might have been read down such that the measures were not minimally impairing, in *K.R.J.*, the Court held that the central issue was still ahead. Justice Karakatsanis expressed that in these circumstances, "[t]he more difficult issue is whether the benefits achieved … outweigh the deleterious effects".[83] Responding to the risk of the legislative objective being "read down" if Minimal Impairment had been relied upon as decisive — she further noted that "proceeding to this final [Proportionality of Effects] stage permits appropriate deference to Parliament's … full legislative objective".[84]

Thus, while it was acknowledged that "the minimal impairment test has come to dominate much of the s. 1 discourse in Canada", the Proportionality of Effects analysis was the essential question for the drastic least drastic limit scenario at issue in *K.R.J*. Accordingly, we see all three opinions in the case follow the mold of a test focused not on Minimal Impairment but on Proportionality of Effects.

(b) Appraisal

This second basis for *K.R.J.*'s shift in emphasis among the stages of the *Oakes* test is also well-founded. It allows for drastic least drastic limit cases to be rationally dealt with, accepting the necessity of the harsh measure from the perspective of the legislative goal, without necessarily accepting its proportionality in the broader sense, and without diluting what the objective is such that the measure might go beyond what is necessary. It is not considered that the substantive threshold for the justification of rights infringements in Canada has been a problem, as a general matter, whether because of Minimal Impairment's inability to challenge drastic least drastic limits, or because of the workaround of "reading down" legislative goals.[85] The opposing substantive distortions these would respectively tend to produce were avoided, as discussed, because, prior to *K.R.J.*, Minimal Impairment often operated *de facto* as a

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82 *K.R.J.*, *supra*, note 1, at para. 76.

83 *Id.*

84 *Id.*, at para. 79.

85 I mean overall or consistent under-protection of rights or over-interference with the legislative prerogative. I do not suggest that there have been no exceptions or errors. But instances of such are not typical of the justification jurisprudence.

holistic assessment of proportionality. However, while there might have been no actual substantive problem, the appearances created thereof constitute a different kind of problem, since justice must not only be done, but must be seen to be done.[86] The change in *K.R.J.* could rightfully aim to resolve that issue.

Can the shift in emphasis apparent in *K.R.J.* achieve these intended benefits? *K.R.J.* gives reason to think so. None of the opinions in the case disputed that the measures, though drastic, were minimally impairing. Yet each went on to consider in-depth whether they might run afoul of Proportionality of Effects, and thereby be unjustified. The majority's 38 paragraph discussion of the final stage testifies to this, as does its conclusion that one of the two measures violated the Charter despite having been the least drastic means of pursuing its objective.[87] In-depth consideration of Proportionality of Effects was also the basis of Abella J.'s opinion that both measures violated the Charter,[88] and of Brown J.'s disagreement that either should fail justification.[89] With the shift, there was also no pressure to read down the legislative objective, and no sign that it was. For example, the majority rejected as too narrow the claimant's proposed construction,[90] and accepted that the goal, to "better protect children from the risks posed by offenders", was "vital" in confronting a "serious societal problem, a statement that needs no elaboration".[91] With a division of labour between Minimal Impairment and Proportionality of Effects consonant with their conceptual roles, the appearance of a substantive problem of one type or another, as might have occurred if the analysis confined itself to Minimal Impairment, was never created. Thus, it would seem that the change manifest in *K.R.J.* can realize the rationales at issue in this section.

Additionally, to the extent that the handling of drastic least drastic limit cases previously under Minimal Impairment might have created a risk of a substantive *error* in individual cases, that risk is diminished by the change seen in *K.R.J.* Because Minimal Impairment was commonly used in practice as a holistic assessment, that risk may have been small. But if an error occurs, the stakes are high, as it will mean, as mentioned; either underprotecting rights by short-circuiting any challenge to the goal

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86 *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, [1923] All E.R. 233.

87 See *supra*, notes 42-43.

88 *K.R.J.*, *supra*, note 1, at para. 130.

89 *Id.*, at para. 162.

90 *Id.*, at para. 63.

91 *Id.*, at paras. 65-66.

in relation to its deleterious side-effects, or unduly impairing the legislature by reading down pressing and substantial legislative goals that can only be attained by drastic means. The benefit of reducing those risks is also creditable to the change in *K.R.J.*

3. The Long-standing Critique of "Lack of Transparency"

(a) The Rationale

The third reason given by *K.R.J.* for its shift from Minimal Impairment to Proportionality of Effects is responsive to a long-standing critique of the style of reasoning of Charter adjudication during the time that Minimal Impairment was the decisive question.[92] This critique revolves around a lack of transparency in how the outcome of the analysis was arrived at. According to this view, the subjective value-judgments that were being made (and which had to be made) as part of deciding the issue of justification, were being concealed by the objective-seeming terms used.[93]

A strong voice of this critique has been that of Danielle Pinard.[94] In "La promesse brisée de *Oakes*", she laments "l'illusion de la possibilité de décisions scientifiquement objectives quant au caractère raisonnable de limites apportées aux droits et libertés".[95] Rather, she maintains that "des considérations de l'ordre des valeurs sont au coeur de la justification".[96] Indeed, she says, behind the illusion of objectivity, subjective value-judgments have always driven the assessment of rights limitations: "au-delà de toutes les étapes de tous les tests et au-delà de toutes les données factuelles disponibles, c'est en réalité cette simple « pondération de valeurs » qui fonde le jugement sur la justification des limites apportées aux droits".[97]

Among the various aspects of the *Oakes* test that project this illusion of objectivity are the terms of Minimal Impairment, whose inquiry

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[92] *Id.*, at para. 79.

[93] *Id.*; Pinard, *infra,* note 95. See more generally Luc Tremblay et Grégoire Webber, eds., *La limitation des droits de la Charte: essais critiques sur l'arrêt R. c. Oakes* (Montréal: Éditions Thémis, 2009) [hereinafter "Webber"].

[94] For a list of publications, see online: <http://droit.umontreal.ca/fileadmin/droit/documents/PDF/Publications/Pinard_publications_mai2016.pdf>.

[95] Danielle Pinard, "La promesse brisée de *Oakes*", in Webber, *supra*, note 93, at 149 [hereinafter "Pinard"].

[96] *Id.*

[97] *Id.*, at 150.

constitutes: "whether the means adopted to achieve the end sought do so by impairing as little as possible the right". Put another way, "[t]he test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."[98] As Peter Hogg summarizes, it is a test of the least drastic means.[99] Framed merely in terms of a measurement of the scope of the restriction relative to alternatives, it suggests a certain objectivity and value-neutrality:

> [I]n practice, the Court's dealing with [Minimal Impairment] looks much more value laden… If indeed the attempt to avoid policy considerations and value judgements is responsible for the reluctance to enter the [Proportionality of Effects] step, the Court risks self-deception when all the value-oriented considerations have been made under the guise of a seemingly value-neutral category.[100]

In contrast, Proportionality of Effects is seen as engaging more openly and overtly in the subjective weighing of values said to inevitably underlie justification decisions. Jamie Cameron, cited by *K.R.J.* on this point, argued that the Proportionality of Effects step:

> should not be so easily discounted… [T]his branch of the section 1 analysis asks an important question. By assessing the proportionality of its deleterious effects and salutary benefits it considers, in direct and explicit terms, whether the consequences of the violation are too great when measured against the benefits that may be achieved.[101]

Thus, as a solution to Minimal Impairment's problem of intransparency, re-orienting the focus of *Oakes* instead towards the Proportionality of Effects inquiry would make the subjective value-judgments that are central to the balancing of interests, that in turn is inevitably determinative of the justifiability of rights limitations, more open and accessible.[102] In Cameron's words, the "underlying values [balanced in Proportionality of Effects] should be at the forefront of the analysis and not an afterthought which only enters the equation after the justifiability of the limit has been established" at the Minimal Impairment stage.[103]

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[98] *Oakes*, *supra*, note 2, at para. 70; *Hutterian Brethren*, *supra*, note 4, at para. 55, referred to by *K.R.J.*, *supra*, note 1, at para. 70.

[99] Hogg, *supra*, note 3, at 38-36.

[100] Grimm, *supra*, note 61, at 394.

[101] Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35:1 Osgoode Hall L.J., at 66 [hereinafter "Cameron"].

[102] Grimm, *supra*, note 61.

[103] Cameron, *supra*, note 101, at 32-33.

Hutterian Brethren had also noted the openness-enhancing feature of Proportionality of Effects, quoting President Barak who approved of how it "requires placing colliding values and interests side by side and balancing them according to their weight".[104]

The influence of the rationale described in this section is clearly evident in *K.R.J.*, where the majority remarked how:

> [Proportionality of Effects] allows courts to stand back to determine on a normative basis whether a rights infringement is justified … Although this examination entails difficult value-judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision."[105]

(b) Appraisal

Considering this third rationale for *K.R.J.*'s change in the conduct of the *Oakes* test, the concern with lack of transparency is legitimate. The justifiability of a rights limitation is not an objective determination, as some aspects of the *Oakes* test might suggest. Subjective value-judgments inevitably need to be made, and are made, as part of balancing incommensurable factors. That includes at the Minimal Impairment step, despite terms which connote a neutral measurement. And that disconnect was all the greater when the Minimal Impairment step, in practice, comprised a holistic but not always explicit weighing of a more diverse set of factors, prior to *K.R.J.* The disconnect was grounds for some to worry about why subjective value-judgments that were being made and needed to be made, were in these senses concealed rather than open.

It is also true, as expressed in *K.R.J.*, that Proportionality of Effects is designed to weigh competing values in much more "direct and explicit terms" than Minimal Impairment: identifying the benefits and drawbacks, and placing them side by side on the scale of balance.[106]

For these reasons, a shift to Proportionality of Effects could rationally be expected to make justification determinations more open and transparent.

Does *K.R.J.* bear out the realization of this aspiration? At the Proportionality of Effects stage of analysis, the three opinions in the case are undoubtedly open about their reasons for judgment. The majority's view seemed to be that the retrospective application of the amendments

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104 *Hutterian Brethren*, *supra*, note 4, at para. 76.

105 *K.R.J.*, *supra*, note 1, at para. 79.

106 See notes 101, 104.

at issue could not be justified merely by reference to bases that could apply generally to almost any criminal law; there had to be a special temporal basis — either in the social conditions the amendments address, or via the amendment itself constituting an important legal innovation. Hence, for example, regarding section 161(1)(c) of the *Criminal Code*, the majority stated:

> In particular, the Crown has provided no temporal justification for the retrospective limitation, nor much evidence to establish the degree of enhanced protection s. 161(1)(*c*) provides. Temporal considerations are relevant in this content because, at its root, s. 11(*i*) is about the timing of changes to penal laws. … When it comes to s. 11(*i*), timing can be everything.[107]

With respect to section 161(1)(d), by contrast, it noted the presence of such a basis in the form of:

> emerging harms precipitated by a rapidly evolving social and technological context. This evolving context has changed both the degree and nature of the risk of sexual violence facing young persons. As a result, the previous iteration of s. 161 became insufficient to respond to the modern risks children face. By closing this legislative gap and mitigating these new risks, the benefits of the retrospective operation of s. 161(1)(d) are significant and fairly concrete.[108]

As far as the other opinions, Abella J.'s dissent was similarly transparent about its reasons, particularly its dissatisfaction with the government evidence. She stated that "s. 11 imposes a singularly onerous evidentiary burden on the Crown to justify a violation under s. 1", and saw "no reason to bridge the significant empirical gaps in the evidence with inferences".[109] Meanwhile, the dissent of Brown J. clearly evinced, throughout, a view that deference was required. He noted that the amendments targeted "grave, persistent" harms, saw a legislative gap in the prior provisions, and emphasized that there are limits to the evidence possible to empirically validate yet-untried measures.[110]

While there is perhaps no way to reliably measure the transparency of a judgment, certainly the opinions in *K.R.J.* openly and intelligibly disclose, at the Proportionality of Effects stage, the judges' reasons for arriving at their conclusions on the outcome of the test.

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[107] *K.R.J.*, *supra*, note 1, at paras. 92-93.
[108] *Id.*, at para. 101.
[109] *Id.*, at paras. 126, 129.
[110] *Id.*, at paras. 161, 154, 159.

But in assessing the rationale presently at issue, the fact that the change promises and delivers greater transparency is only a partial picture. The transparency rationale for the change in *K.R.J.* cannot be appraised in isolation, for it is not an independent consideration, but is part of a larger question of the style of judicial reasoning appropriate in rights adjudication.

Throughout the period of proportionality's use in applying section 1 of the Charter, Canadian courts' reliance on the Minimal Impairment inquiry reflected a different perspective on that question. Within that view, the concern is rather with excess subjectivity in rights adjudication.[111] Excess subjectivity creates the risk of decisions being of an arbitrary character, rather than legal determinations. The stakes are particularly high for such concerns in Charter review, where at issue are human rights on one hand, or the constitutionality of government action, on the other.

Against this background, Proportionality of Effects is both more subjective — and as the transparency critique noted — more open and explicit about its subjectivity than Minimal Impairment. It prescribes neither the factors, nor a consistent means of identifying the factors, to be balanced, other than that they fall under the broad umbrella of "effects". A functional distinction between direct and indirect effects would be difficult to draw, and if indirect effects are fair game, there is no end to the chain of them, and no limit to the effects that might be considered. A subjective choice of factors therefore colours the inquiry even before the weighing begins.[112] At that point, as President Barak said, Proportionality of Effects' transparent style "requires placing colliding values and interests side by side and balancing them according to their weight".[113] This presentation magnifies attention on the weighing, highlighting its contestability, and thus emphasizing its subjectivity. For instance, Weinrib quotes Professor Naáma Carmi of the University of Haifa as lamenting how the use of that style in Israel "gives the impression that there are no clear principles or standards guiding the decision", only "subjective estimation and assessment".[114] In Canada, a discomfort with the extent of Proportionality of Effects' subjectivity has

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[111] See *e.g.*, Grimm, *supra*, note 61, at 393.

[112] Grimm seems to overlook the subjectivity inherent in this determination, in suggesting that: "the danger of political decisions can be avoided by a careful determination of what is put into each side of the scales": *id.*, at 395.

[113] Barak, *supra*, note 75, at 374.

[114] Weinrib, *supra*, note 38, at 96, quoting "The Nationality and Entry into Israel Case before the Supreme Court of Israel" (2007) 22 *Israel Studies Forum* 26 at 33.

perhaps been evident in the inquiry's articulation using the obscure legalistic terms "deleterious" and "salutary" effects rather than terms synonymous but more consistent with the stated rationale of transparency and lay-intelligibility, such as "costs" and "benefits".[115]

A language of costs and benefits *had* been used in the United States; and more broadly, the "free balancing" approach often used in the U.S. was viewed as undesirable from the perspective of concern with excess subjectivity.[116] Use of the whole doctrine of proportionality, as an instrument for assessing rights limitation under section 1, is underpinned by a belief that the "disciplining and rationalizing effect" produced by the legal confines of its analytical structure "is a significant advantage" by comparison with a more subjectively wide-open weighing.[117] But the advantage becomes largely illusory if all it means is going through the first three steps of the doctrine as little more than a formality before reaching as a decisive analysis Proportionality of Effects where one engages in essentially the same free balancing exercise.

From that perspective, more promising was the option, which had also been followed by the European Court of Human Rights, of relying as the crucial step on Minimal Impairment.[118] The inquiry it poses limits and prescribes the factors to be weighed. Moreover, due to its framing as measuring the scope of a rights infringement, it comes across as more technistic and less subjective than Proportionality of Effects.[119] This might help "manage potentially explosive environments, given the politically sensitive nature of rights review", and accordingly shelter courts from a hostile atmosphere of more frequent and heated charges of activism than what reliance on Proportionality of Effects might encourage.[120] On that point, Justice Grimm describes the "fear that a court might make policy decisions at this [Proportionality of Effects] stage rather than legal decisions".[121] In *K.R.J.*, Karakatsanis J. seems to acknowledge the basis of these concerns, confirming that:

> [T]his final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and

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115 Stone Sweet, *supra*, note 17, at 75-76.

116 Grimm, *supra*, note 61, at 397.

117 *Id.*

118 Berend Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter" (1985) 17 Ottawa L.R. 213.

119 See note 100.

120 Stone Sweet, *supra*, note 17, at 87.

121 Grimm, *supra*, note 61, at 393.

> democratic society. Although this examination entails difficult value-judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision.[122]

But while seeming to recognize the countervailing concern of increased subjectivity, the passage leaves unclear precisely why the course of action of enhancing transparency at that cost is preferable. Throughout the judgment more broadly, *K.R.J.* witnesses the Court switch sides in the long-standing debate about the appropriate form of judicial reasoning in Charter review. As an inherent *consequence* of the shift to Proportionality of Effects, this needs no explanation. But put forth as a *rationale* for that shift, more fulsome reasoning might be hoped for, given the context of an opposition of interests in which the views on both sides have merit: formal and informal styles of judicial reasoning are both legitimate and widely used throughout the law in Canada and the world. Nothing in section 1 of the Charter obviously provides for one or the other style of ascertaining them. Both positions are also underpinned by important legal and constitutional virtues. Transparency is tied to values such as intelligibility, justification, and democracy. Meanwhile, constraint of the subjective aspect of decision-making is associated with core commitments such as consistency, certainty, equal justice, and the rule of law. Although a subjective element is inevitable regardless of which stage of proportionality is emphasized, a manifest effort to constrain it is integral to law's legitimacy, and to public confidence in it as an institution.[123] In the face of these conflicting interests, *K.R.J.*'s shift only results in switching sides in the debate, without resolving the underlying dilemma or fully disclosing the preference it expresses for the transparency interest.

Additionally, *K.R.J.*'s wholesale endorsement of the transparency interest combined with the absence of any evident weight given to the countervailing interest in the constraint of subjectivity in crucial legal determinations, feels surprising, and possibly ironic in this context of a larger frame in which proportionality rather than a hierarchical approach is being endorsed and applied as the proper means to deal with conflicts among fundamental interests.

Overcoming the debate's impasse would require further changes in proportionality analysis to address the implications of deeper issues embedded in the conceptual substructure underlying the debate.

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122 *K.R.J.*, *supra*, note 1, at para. 79.

123 See *e.g.*, David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

Presently, there is little to suggest that such an endeavour is under consideration.

In the meantime, a "proportional" approach to Proportionality of Effects might recognize the value of the interests on the opposite side from transparency. And to the extent that the transparency rationale is necessary to *K.R.J.*'s prospective shift in emphasis in the conduct of the *Oakes* test, one might hope in a subsequent case for a more balanced view of any net benefit claimed on that side.

PART IV. SOME OTHER IMPORTANT QUESTIONS RAISED BY THE SHIFT TO PROPORTIONALITY OF EFFECTS

Beyond its rationales and capacity to achieve them, the potential change to the practice of proportionality in Canada brought by *K.R.J.* raises additional important questions. I address three of these below.

1. Sizing Up Different Formulations of Proportionality of Effects

A new emphasis on the Proportionality of Effects inquiry, and indeed the possibility that it may become the "heart" of the *Oakes* test in the future, put a spotlight on the question it poses. Multiple different formulations of it are referenced in *K.R.J.* What can be made of them?

The following passage from *K.R.J.* helps explain the relationship between two of those formulations:

> In *Oakes*, this final stage of the proportionality analysis was initially conceived as a comparison between the deleterious effects of the limiting measure and the law's objective. However, in *Dagenais v. Canadian Broadcasting Corp*., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, Lamer C.J. reformulated the test to account for the "proportionality between the deleterious and the salutary effects of the measur[e]" because characterizing the final step "as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality".[124]

Thus, the inquiry articulated in *Oakes* of whether there is "a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'" has been superseded by the

[124] *K.R.J.*, *supra*, note 1, at endnote 6.

formulation from *Dagenais*.[125] *Dagenais*'s explanation for its reformulation was that even if the first three elements of the *Oakes* test are satisfied, "and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society".[126] This could be, for example, because the measure, although having at least a rational connection to its objective, is not well-tailored to its achievement,[127] and will not significantly achieve it.[128] In such a case, achieving the objective might not be among the salutary effects.

K.R.J. also quotes a third distinct account of the Proportionality of Effects inquiry, taken from *Thomson* which casts the question as "whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*".[129] It may be wondered whether the words "as measured by the values underlying the *Charter*" make this a different conception than that from *Dagenais*. And it might also be queried whether the reference to benefits which accrue from *the limitation* make it a different conception from the *Dagenais* formulation which inquires into the benefits of the *measure*. *K.R.J.*'s use of both the *Thomson* and *Dagenais* descriptions in parallel, without any reckoning of discrepancies, suggests the Court's perception of none. This might additionally make sense as far as the latter question, in that the limitation itself often might have no direct benefits; but insofar as it is part and parcel of the measure which does, those benefits could fairly be said in that context to indirectly "accrue from the limitation".[130]

A fourth formulation of Proportionality of Effects referred to in *K.R.J.* specifies that at this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the

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[125] *Oakes*, *supra*, note 2, at para. 70.

[126] *Dagenais*, *supra*, note 25, at para. 95.

[127] See *e.g.*, *R. v. Appulonappa*, [2015] S.C.J. No. 59, [2015] 3 S.C.R. 754 at para. 80 (S.C.C.).

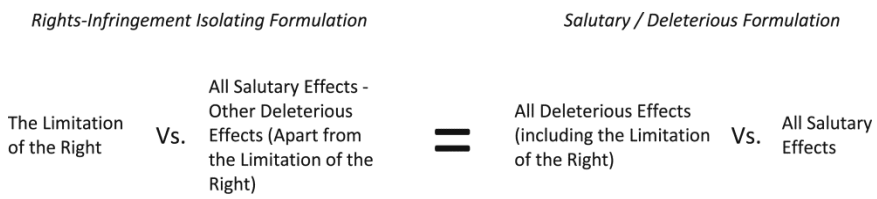
[128] *Dagenais*, *supra*, note 25, at 886-888. Lamer C.J.C.'s reformulation of the Proportionality of Effects inquiry at 889 follows discussion of his concern of how effective publication bans actually are at achieving their objective.

[129] *Thomson*, *supra*, note 57, at para. 125.

[130] This distinction between the limitation and the measure should not be confused with the distinction in *K.R.J.* between the *measure* (which the majority cast as the retrospective operation of the amendments: para. 62; Brown J. dissenting: para. 137) and the *provisions or enactment* (in this case the amendments as a whole). *K.R.J.* reinforces that it is the measure, not the provisions, which are the subject of the test.

beneficial effect of the law in terms of the greater public good".[131] Similar accounts can often be found in earlier cases; for instance: "the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law".[132] Does this formulation, which places the rights impairment on one side, and the effects on the other, conflict with the *Dagenais* formulation cited in *K.R.J.*?

Again, the fact that both formulations are referenced together in *K.R.J.*, without discussion of potential conflict between them, suggests no perception of one. However, it is not necessarily readily apparent why this is so. The answer may be that isolating only the rights limitation on the deleterious side, but discounting from the benefits side other costs apart from the rights limitation, is ultimately the same comparison as placing all the deleterious effects on one side and all the (undiscounted) salutary effects on the other. In other words:



Although these two formulations therefore may ultimately be consistent, a question remains as to which is preferable? As I see it, each has a frame for which it is better-suited.

Where the purpose of quoting a description of Proportionality of Effects is to relate it to the broader question of whether the limit of a right is justified, the version which singles out the rights infringement may be advantageous. This is because it more closely tracks the way proportionality is used as a conceptual vehicle for answering that overall question, namely by assessing whether the measure is proportionate to its impairment of the right. The Proportionality of Effects formulation that isolates the restriction on the right is framed in terms of a similar opposition, but focused on effects. Accordingly, one might say that it is more intuitive, in terms of its relationship to the overall question. And it better maintains focus on the overarching question before the court of whether a constitutional right has been violated.

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[131] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, at para. 122 (S.C.C.), quoted by *K.R.J.*, *supra*, note 1, at para. 77.

[132] *Hutterian Brethren*, *supra*, note 4, at para. 76.

But when it comes to turning Proportionality of Effects from a notion into a test — an analysis to be carried out — the *Dagenais* formulation of salutary versus deleterious effects seems to have the upper hand. The fact that the overall justification assessment includes a step whose focus is on effects reflects a conviction that that broader question cannot be answered without considering, beyond the legislation's objective and how it limits rights, the practical consequences of the legislation at issue. And if practical consequences are to be considered at all, they represent the kind of factor that normally only makes sense to consider the full range of. The infringement of the right is the most salient deleterious effect, given that it is the basis of the dispute. But at a stage which "stands back" from the conceptual details of the justification examination, in order to get a picture of the practical consequences of the measure, the relevance of other significant deleterious effects, regardless of type, should not be excluded.[133] Indeed, if one were to place on the scales the significant practical benefits of whatever kind (not limited to achievement of the objective) that accrue from the measure, but not apply the same standard to its drawbacks, it would distort the resulting sense obtained of the measure's practical consequences. That being the case, the *Dagenais* version's framing of the inquiry — and thereby of the analysis to be carried out pursuant to it — as balancing in general the salutary and deleterious effects of the measure, helps to ensure that other deleterious effects are not overlooked. By contrast, given that it is an infringement claim being adjudicated, and that the justification issue only arises as a result of the court having concluded that there is a *prima facie* violation of the right, there is little chance of a court losing sight of that as part of considering the effects of the measure, such as to require recourse to a formulation of the test which singles it out.

The *Dagenais* formulation of salutary versus deleterious effects also allows for the balancing process to be carried out (and explained) in a more straightforward way. The formulation which isolates the rights infringement on one side of the scale, conversely, requires the other deleterious effects to be discounted from the benefits, and then placing only the resulting net benefits on the opposite side of the scale from the infringement. This would add unnecessary complexity as well as risk of confusion to the application of Proportionality of Effects — undermining the rationale, in shifting emphasis to that stage, of enhancing justification

[133] *K.R.J.*, *supra*, note 1, at para. 79.

analysis's "transparency and intelligibility".[134] For these reasons, the *Dagenais* version seems better-suited to Proportionality of Effects' application. And indeed in *K.R.J.*, the opinions set up their balancing of the effects in these terms of salutary versus deleterious effects.[135]

2. Mapping the Relationship Between Minimal Impairment and Proportionality of Effects After the Shift

The potential changes in the conduct of the *Oakes* test heralded by *K.R.J.* also cause one to wonder what the division of labour between Minimal Impairment and Proportionality of Effects will be in the future, and what the change will therefore mean for different kinds of cases.

As discussed in Part II.A, traditionally Minimal Impairment has been the determinative step of proportionality assessment in Canada. *K.R.J.* seems to contemplate a direct challenge to that long-standing state of affairs. As expressed in the judgment by Karakatsanis J.:

> While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this [Proportionality of Effects] step permits courts to address the essence of the proportionality enquiry at the heart of s. 1.[136]

She additionally endorsed the statement of Abella J., dissenting in *Hutterian Brethren*, that "most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality [of effects]. Proportionality is, after all, what s. 1 is about."[137] In *K.R.J.*, it was indeed the case that most of the normative heavy lifting and balancing was done at the Proportionality of Effects stage.[138]

However, the doctrine of proportionality comprises a rationally-ordered sequence of analysis, and one only reaches the Proportionality of Effects stage if the challenged measure has satisfied the preceding three steps — including Minimal Impairment.[139] As a result, unless the question of Minimal Impairment is swept over, or the test for it relaxed to the point that its satisfaction is "usually readily accepted by courts", as Peter Hogg described the pattern with the two prior steps, then Minimal Impairment will

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134 *Id.*

135 *Id.*, at paras. 80-114 (Karakatsanis J.), paras. 140-161 (Brown J.); Abella J.'s brief partial dissent is framed in terms of its departure from the majority reasons, and does not mention the majority's formulation of the test.

136 *Id.*, at para. 79.

137 *Id.*, at para. 78, quoting *Hutterian Brethren*, *supra*, note 4, at para. 149.

138 See note 7.

139 Hogg, *supra*, note 3.

continue to be relevant in many cases and sometimes decisive.[140] The *K.R.J.* majority seemed to confirm this, objecting to Brown J.'s suggestion that it was rendering Minimal Impairment obsolete, by stating that "the minimal impairment test remains an important part of assessing whether Parliament has discharged its burden under s. 1".[141]

At the same time, the shift modelled in *K.R.J.* will result in many other cases reaching and being decided at the Proportionality of Effects stage, where previously that prospect was effectively pre-empted by virtue of the final stage being subsumed into Minimal Impairment. Thus, a division of labour between Minimal Impairment and Proportionality of Effects may ultimately result. The structure of the doctrine of proportionality as comprising analytically discrete steps, dealing with different ways in which a measure might fail to be proportionate, suggests that such a division of labour is entirely appropriate.[142]

What might this division of labour between Minimal Impairment and Proportionality of Effects look like in the future?

Minimal Impairment, as noted, asks "whether the means adopted to achieve the end sought do so by impairing as little as possible the right". In practice, a more workable and realistic standard is often applied, querying whether the measure "falls within a range of reasonable alternatives"[143] that would achieve the objective "in a real and substantial manner".[144] Where alternatives exist, this comprises another balancing exercise besides Proportionality of Effects — this one balancing the impairment and the objective.[145] Where the impairment is disproportionate to the objective, and there are less-impairing alternatives, a measure will not survive Minimal Impairment, and that step will be decisive. Where there are either no less-impairing alternatives, or the objective is proportionate to the impairment, the measure will go on to have the proportionality of its effects assessed, which will be decisive in the sense that the measure's constitutionality will come down to it, whether the measure ultimately passes or fails there.

Beyond this, since both steps involve a balancing of related factors, might it be possible to conceive at a finer level how the change brought about by *K.R.J.* might play out for different kinds of cases? In *Hutterian*

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[140] See note 31.

[141] *K.R.J.*, *supra*, note 1, at endnote 5.

[142] See *e.g.*, Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), at 460-465.

[143] *Hutterian Brethren*, *supra*, note 4, at para. 54.

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

[145] *Id.*, at para. 76.

Brethren, LeBel J. counselled against a "sharp" approach to a division of labour, implying a need to consider how the two steps might operate harmoniously, as part of the overall assessment:

> I believe that the proportionality analysis depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance.[146]

Of the cases that should reach the Proportionality of Effects stage, let us first consider the class where the impairment is disproportionate to the objective, but there are no less-infringing measures. For these cases, it would seem that the only way the challenged measure might satisfy Proportionality of Effects is if it has significant salutary effects other than the objective, capable of overcoming the disproportion between the impairment and the objective, as well as any other deleterious effects. By contrast, cases in this class without a major salutary effect should, after the change in *K.R.J.*, fail to be justified at the Proportionality of Effects stage; in the past, these cases would have likely failed Minimal Impairment, but at the unwanted cost of "reading down" the legislative goal.[147]

Turning to the other class of cases that should reach Proportionality of Effects, those where the objective is proportionate to the impairment, there would seem to be a few streams within it where the cases should fail at the final stage. The first would be cases where there is a significant deleterious effect, other than the infringement, that flips the scales, and also outweighs any salutary effects beyond realizing the objective. The second stream would be cases where there exists at least a rational connection between the means and the goal, but the means will achieve the objective in something less than a real and substantial manner. In such cases, the weight of realizing the goal that was on the scale at the Minimal Impairment stage would need to be reduced on the subsequent Effects scale in proportion to the degree of its non-realization, which could alter the balance. And third would-be cases involving a combination of both of these features. By contrast, cases where the objective will be realized in a real and substantial manner, and where the infringement is the only major deleterious effect, should pass Proportionality of Effects and thus be justified.

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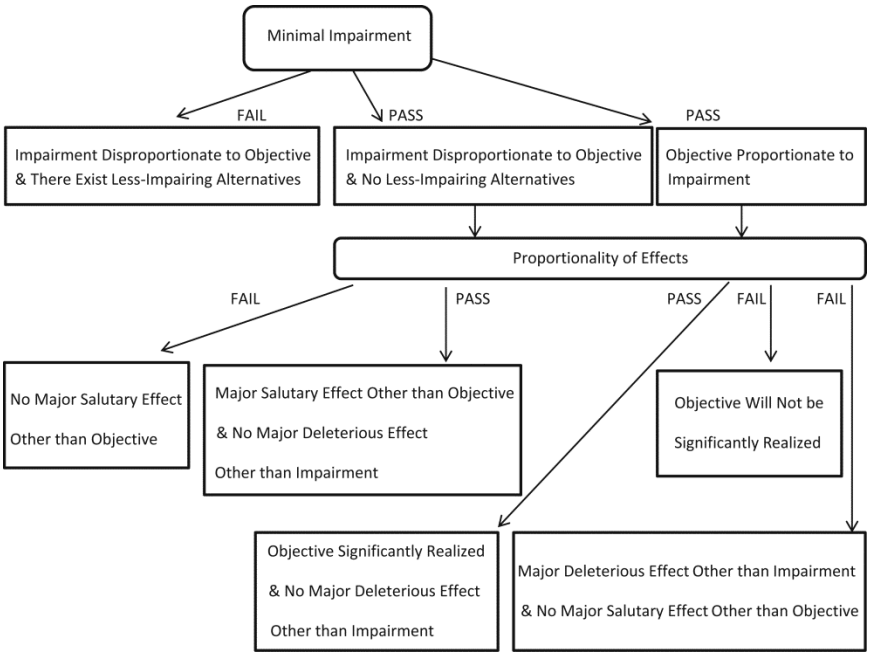
146 *Id*., at paras. 191-192.

147 *Id.*

The following chart summarizes these suppositions:



3. The Impact of Proportionality of Effects on Issues of Evidence

The potential change brought about by *K.R.J.* to the conduct of the *Oakes* test also raises questions relative to the evidential requirements for justification of rights infringements.

The issue of the test's evidence requirements is well-known. In the words of Sujit Choudhry, it has presented an "enormous institutional dilemma".[148] Choudhry described a foreground debate as to whether there should be a uniform threshold for all cases, a variable threshold based on a prescribed set of contextual factors, or a fully flexible threshold based on the unique context of each case.[149] And he highlighted a background problem of "a conflict between the demand for definitive proof to support each stage of the section 1 analysis, and the reality of policymaking under conditions of factual uncertainty".[150]

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148 Choudhry, *supra*, note 20, at 503.

149 *Id.*

150 *Id.*

Both branches of the evidence issue figure prominently in the dissension that existed among the Supreme Court opinions in *K.R.J.*

Beginning with the first branch, on one side was the view of Abella J. that section 11 of the Charter imposed on the government "the highest possible evidentiary burden, namely, to demonstrate through 'compelling evidence'" the infringement's justification.[151] On the other side, Brown J., invoking the persistent nature of the mischief targeted by the legislation, saw considerable deference as warranted to avoid "hold[ing] Parliament to an exacting standard of proof, thereby denying Parliament the room necessary to perform its legislative policy-development role when addressing a chronic social problem".[152] Courts "must therefore be careful to avoid insisting upon too strict an evidentiary burden", Brown J. concluded.[153] The majority staked a middle ground. It acknowledged the potential shortfall of empirical evidence and accepted that "reason and logic are important complements to tangible evidence".[154] Provided those are factored in, it endorsed Dickson C.J.C.'s dictum in *Oakes* that the test imposes a "stringent standard of justification".[155] In spite of Brown J.'s plea that it "not lose the proportionality forest for the *Oakes* trees", the majority found that no justification for the retrospective operation of section 161(1)(c) of the *Criminal Code* had been provided, and hence it violated the Charter.[156] Meanwhile, also rebuffing Abella J.'s invitation to not "bridge the significant empirical gaps in the evidence with inferences", it accepted the justification of section 161(1)(d).[157]

It may be that the extensive debate in *K.R.J.* regarding what evidence was required and was satisfactory had nothing to do with *K.R.J.*'s change in the conduct of the *Oakes* test. Such debates, after all, have occurred often enough.[158] However, it may be that they are related. *K.R.J.*'s shift from Minimal Impairment to Proportionality of Effects places the spotlight on legislative effects. Effects typically encompass the future. Hence, the change may diminish the relative proportion of observation, and correspondingly increase the relative proportion of prognostication, that together constitute justification claims. In terms of types of evidence, this

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151 *K.R.J.*, *supra*, note 1, at para. 126.
152 *Id.*, at para. 135.
153 *Id.*, at para. 140.
154 *Id.*, at para. 90.
155 *Id.*, at para. 91.
156 *Id.*, at paras. 136, 96.
157 *Id.*, at paras. 129, 114.
158 See *e.g.*, Choudhry, *supra*, note 20.

may translate into a lesser proportion of empirical or otherwise established facts, and a greater proportion of inferences or otherwise projected facts. The latter are, by definition, more uncertain; and if that translates into their being viewed as more "speculative",[159] and thus less willingly accepted, the evidential standard at the Proportionality of Effects stage may need to be relaxed, in conjunction with the shift to greater emphasis on that stage, in order to avoid an unintended alteration in the substantive threshold of justification. Failing that, in the end, Brown J.'s apprehensions may prove true, that effects are not "amenable to demonstrative proof", in terms of how demonstrable proof at this stage would be interpreted and applied.[160]

This brings us to the second branch of the evidence issue: "policymaking under conditions of factual uncertainty". *K.R.J.* again demonstrates starkly divergent approaches on how to deal with this. For Abella J., the scenario of a right being seriously impaired with an uncertain social pay-off is unjustified. The burden of proof is on the government; the benefit of the doubt goes to the individual right.[161] Conversely, for Brown J., the prospect of indefinite perpetuation of a persistent social problem where that will result if the legislature cannot try new and unproven means of addressing it, justifies a limitation adjudged to be the least drastic means. Parliament, and by extension society, cannot be paralyzed by unavailable proof; deference is required.[162] Betwixt these two approaches, the majority again navigates a middle path. On one hand, it quotes Choudhry, who in turn quotes La Forest J. in recognizing uncertainty as a common phenomenon in policymaking:[163]

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in *McKinney* which rings true: "[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".[164]

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[159] *K.R.J.*, *supra*, note 1, at paras. 89-92, 95, 127-129, 135, 140-145, 152-153.

[160] *Id.*, at para. 140.

[161] *Id.*, at paras. 124-129.

[162] *Id.*, at paras. 134-161.

[163] *Id.*, at para. 90.

[164] Choudhry, *supra*, note 20, at 524 quoting *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at para. 104 (S.C.C.).

On the other hand, the majority affirms that "[n]onetheless, s. 1 mandates that the limitation on the right be demonstrably justified. As Dickson C.J. wrote in *Oakes*, this is a 'stringent standard of justification'."[165] In light of the majority's succeeding application of the test, these comments suggest a willingness to use logic and inferences to bridge gaps in the evidence, but not a willingness to defer to the legislature on the basis of uncertainty alone. Thus, the majority accepted the imperfect evidence on section 161(1)(d) of the *Criminal Code* as meeting the burden of proof on a balance of probabilities, but not the more seriously incomplete evidence on section 161(1)(c).[166]

As with the first branch of the evidence issue discussed in this section, the sharply divergent approaches in how to deal with uncertainty may merely coincide with the change in the conduct of the *Oakes* test implemented in *K.R.J.* However, given that that change took the form of a shift to Proportionality of Effects, it may conversely reflect the previously-noted fact that effects typically encompass the future, so that evidence is likely to be substantially predictive and seldom certain. The fact that this debate in *K.R.J.* was related to the change in the conduct of proportionality assessment that it undertook is supported by Brown J.'s comment that:

> [G]iven the complex social context in which Parliament often develops policy ... it will sometimes be difficult, if not impossible, for the state to provide reliable and direct evidence of the *benefit* its measures will achieve.[167]

Yet, given the frequency alluded to by Choudhry and La Forest J. with which the legislature confronts complex or persistent social problems, simply deferring to the legislature where such conditions are present risks granting it constitutional free rein. By the same token, due to the same frequency of those conditions, a stance on evidence requirements which precludes the justification of legislation whose benefits are uncertain risks paralyzing the legislature and society. The majority's more flexible approach, which falls back on general principles of civil proof, may be workable in some cases. However, if *K.R.J.* signals an increased reliance on Proportionality of Effects in the future, it may well wind up that Brown J.'s concern about cases where proof is impossible will, because of effects'

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165 *K.R.J.*, *supra*, note 1, at para. 91.
166 *Id.*, at paras. 114, 96.
167 *Id.*, at para. 144 (emphasis added).

difficulty to assess and their future-orientation, be more common than was the case until now when the test focused on Minimal Impairment.

As a result, consistent with the majority's reliance on general principles of civil proof, where there is an impossibility to prove the benefits of a measure, it may be that the Proportionality of Effects step should be judged inapplicable by a *showing* that it cannot be administered since the evidence is impossible to obtain. In these impossibility of proof cases, proof of the impossibility would displace the requirement of proof of Proportionality of Effects, and the test would then be effectively determined at the Minimal Impairment step, based on whether the government has proven that it is the least drastic means.[168] The burden should lie on the government to prove the impossibility in lieu of positive proof of the proportionality of the effects.

II. CONCLUSION

The shift in emphasis in *K.R.J.* from Minimal Impairment to Proportionality of Effects marks an important potential change to the future conduct of Canada's *Oakes* test — charged both to protect human rights and to delimit them where the democratic advancement of vital communal interests so warrants. By virtue of this shift, long-standing conceptual issues in the way proportionality doctrine has typically been applied in Canada appear to be successfully addressed. Hence, *K.R.J.* implements the doctrine's analytical separation of Minimal Impairment and Proportionality into functionally discrete steps. Simultaneously, it shifts the balance of "balancing power" from the former stage to the latter, which contemplates a set of factors overtly more complete and focused on the practical impact of the decision. And the change allows for the proportionality of legislation which is drastic but the only way of pursuing its goal to be assessed more openly with respect both to its effect on rights and to the plenitude of its objective. The transparency inherent in reasoning under the Proportionality of Effects question is also enhanced, as compared to under Minimal Impairment where subjective value-judgments are concealed behind that inquiry's more objective-seeming terms. However, the subjectivity of the reasoning called for by Proportionality of Effects is also more pronounced, which can make it seemingly more arbitrary, contestable, and controversial. Illustrative of

[168] Not in a literal sense, but as applied by the test at that step: see *supra*, text accompanying notes 143-145.

both of these dimensions of the change in the style of reasoning is *K.R.J.* with its clear reasons and clear dissension. The potential changes heralded by *K.R.J.* to the conduct of proportionality in Canada also raise other important questions. Multiple formulations of the Proportionality of Effects inquiry have been used, with the version which balances salutary and deleterious effects being the one seemingly best-suited to application of the test. The order of analysis inherent in the doctrine of proportionality should mean that Minimal Impairment will continue to be relevant and sometimes decisive, notwithstanding Brown J.'s reading of the majority's reasons as rendering that step "otiose".[169] However, *K.R.J.*'s contemplated shift in emphasis among the steps should see far more cases reaching and being decided under Proportionality of Effects than formerly was the case. This would particularly be expected in cases where drastic means are the only means, and cases where the legislative object is proportionate to the rights infringement. In the process, as demonstrated by *K.R.J.* itself, greater reliance on Proportionality of Effects is likely to exacerbate existing controversies over evidence requirements under the *Oakes* test — unless adjustments are made to compensate in general for the more complex matter of proving effects and in particular for the event of an impossibility of proof by the party on whom the burden rests.

All in all, while this and other matters remain to be worked out, what has been achieved by *K.R.J.*'s prospective change in the conduct of the *Oakes* test certainly suggests its shift in emphasis from Minimal Impairment to Proportionality of Effects constitutes a step in the right direction.

[169] *K.R.J.*, *supra*, note 1, at para. 138.