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Minimal Impairment: An Unreasonable Measure of the Justifiable Limits of Rights

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ABSTRACT

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Marcus Moore

Under both the Oakes and Doré frameworks of proportionality analysis in Canada, critical in assessing the justifiability of rights limitations under section 1 of the Charter has been the "Minimal Impairment" question. Conceptually, Minimal Impairment asks whether a right has been impaired as little as possible in pursuit of the statutory objective. Applied strictly it is a virtually-impossible standard of justification. Thus, sometimes more relaxed standards are applied in practice. This double standard has caused inconsistency in which standard is applied from case-to-case (or even opinion-to-opinion in the same case). New emphasis within the tests on the Proportionality of Effects inquiry should reduce the role played by Minimal Impairment, but in fact amplifies it by adding inconsistency in when Minimal Impairment with its double standard is or is not glossed over. Further, the Doré test's confusing formulation of Proportionality of Effects is often mistaken as just repeating the Minimal Impairment condition so that in many Doré cases effects are not weighed at all, and the test reduces to merely a question of Minimal Impairment. In short, Minimal Impairment is the root of much of the arbitrariness seen as afflicting justification assessments — crucial decisions of whether to limit a Charter right or invalidate an act of democratic government. I argue that Minimal Impairment should be replaced with a functionally-equivalent inquiry free of these defects. As well, the text and legislative history of section 1 provide no basis for a Minimal Impairment condition; rather, they are clear that Reasonable Limitations are justified. I provide a two-pronged test for assessing these. This corresponds with the standard often currently applied in practice (i.e., putting aside the case-to-case arbitrariness) so that it would not alter the substantive threshold for right-limitations. Being a standard that is possible to consistently adhere to — as required in a system ruled by law — I argue that paradoxically this offers more protection to rights than the hollow rhetoric of Minimal Impairment. It is time that proportionality analysis in Canada reflect this, recognized long ago in the text and legislative history of section 1.

Minimal Impairment: An Unreasonable Measure of the Justifiable Limits of Rights

Dr. Marcus Moore*

I. Introduction

This paper deals with proportionality analysis under section 1 of the *Canadian Charter of Rights of Freedoms*. Proportionality analysis is used in this context to assess the justifiability of state-imposed limitations of Charter rights. Presently, this is done through two frameworks: the *Oakes* framework for limitations imposed by laws, and the *Doré* framework for limitations imposed by administrative decisions enabled by legislation. It is now clear that both call for a proportionality test in which the key questions are whether the right has been impaired as little as possible in pursuit of the statutory objective (Minimal Impairment) and whether the overall benefits of the measure exceed its detrimental effects, notably including the limitation of the right (Proportionality of Effects). Whether the *Oakes* and *Doré* tests as typically applied in practice actually give meaningful effect to both questions may be wondered, as will be discussed later in the paper.[1] As between the Minimal Impairment and Proportionality of Effects components of the tests, historically, the Minimal Impairment inquiry was decisive. But in recent years, a shift in emphasis placed new weight on the Proportionality of Effects inquiry. This shift in emphasis did not, however, eliminate Minimal Impairment as an important element of the overall proportionality analysis. And in some cases, especially under the *Doré* test, Minimal Impairment indeed still dominates proportionality analysis.

The enduring significance of Minimal Impairment calls for serious reflection, as almost immediately from its inception nearly four decades ago, the Minimal Impairment condition has been problematic. Conceptually, it imposes an unrealistically exacting standard on the state. Thus, in practice, it has often been departed from, with a more relaxed test actually applied. A variety of formulations have sought to capture the standard as applied, further muddling the picture of what the standard is. Meanwhile, not infrequently Minimal Impairment is applied according

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[1] Parts IV-VI.

to its strict terms in order to make a clear case that a given limit of a Charter right is unjustified. Needless to say, it is not applied according to those strict terms where there is a converse wish to chill dispute that the limitation of a right *is* justified; in those cases, the relaxed standard is applied. The variation in how the Minimal Impairment condition is applied in one case versus another creates arbitrariness in assessments of whether limitations of Charter rights are justified.

Where the ordained shift in emphasis to Proportionality of Effects is followed, it somewhat helps mitigate this arbitrariness by reducing the relative influence of the troublesome Minimal Impairment step. At the same time, however, it also produces a new layer of arbitrariness in whether and when the Minimal Impairment step is substantially swept over *en route* to more meaningful consideration of the acceptability of the rights limitation at the Proportionality of Effects step of the justification inquiry.

Meanwhile, in other cases the shift to Proportionality of Effects is not followed, and justification analysis still revolves around Minimal Impairment. This is especially evident in the *Doré* jurisprudence. Its prescription of the Proportionality of Effects query is not straightforward, and seems to be ignored in some judgments, on the assumption that it is simply repeating the need to address Minimal Impairment. In these cases, the issue of Proportionality of Effects is omitted, and *Doré* "proportionality" analysis is reduced to the question of Minimal Impairment. This yields yet another layer of arbitrariness in assessing the justifiability of rights limitations under section 1: There is no discernible pattern to which *Doré* cases will be reduced in this way to Minimal Impairment. With the singular assessment being of Minimal Impairment, the latter's "internal" arbitrariness, stemming from the different versions of it applied in practice in lieu of the strict conception (as mentioned above) has an increased impact.

Arbitrariness in the assessment of the justifiability of rights limitations under section 1 is a serious concern. Arbitrariness is the antithesis of the rule of law, which the Charter describes as inherent in the founding principles of Canada. In the context here, where what is at stake in justification assessments is either limiting Charter-guaranteed rights or else invalidating action taken by a democratic government, arbitrariness is especially worrisome. Arbitrariness is sometimes colloquially used as a synonym for randomness. But arbitrariness is not limited to randomness — it means that factors like ideological bias, subconscious prejudices, and social pressures can determine the outcomes of these controversies in lieu of the law. We can do better than to let some of the most important decisions affecting society be tainted by arbitrariness flowing from a defective aspect of the proportionality tests relied on to give effect to section 1.

To eliminate all of the above sources of arbitrariness in the Minimal Impairment test that plays an important and sometimes decisive role in assessing the acceptability of rights limitations, I argue that Minimal Impairment must be replaced with a conceptually similar inquiry that does not suffer from the problems above. In fact, the text and legislative history of section 1 reveal that there never was a proper basis

for the proportionality tests to include a Minimal Impairment condition in the first place. Section 1's reference rather to "reasonable" limits directs us to how we ought to reconceive the inquiry that should replace the Minimal Impairment element of the *Oakes* and *Doré* proportionality tests — without needing to otherwise alter those. The question to replace Minimal Impairment should ask: Does the chosen means of pursuing the statutory objective avoid unreasonable limitation of the right? This would be answered by whether (i) the limitation of the right is proportionate to the statutory objective, or if not, whether (ii) the disproportionate limitation is unavoidable in pursuing the statutory objective.

This revised inquiry into whether the challenged measure is a "Reasonable Limitation" can be applied consistently with its articulated terms, thus alleviating the current problem of arbitrariness in how the Minimal Impairment inquiry will be applied in practice in one case versus another. This would in turn reduce the incentive to sweep over that step of the inquiry because it is problematic or because choosing to apply the strict or relaxed version within its double standard will inevitably be criticized as arbitrary. By thus dissuading the analysis from sweeping over Minimal Impairment, the arbitrariness in when this does or does not happen can also be eliminated. Further, while clarifying the formulation of the Proportionality of Effects inquiry under *Doré* is necessary to avoid instances in which it is taken to be redundant with Minimal Impairment, replacing Minimal Impairment with the Reasonable Limitation test set out above will eliminate the arbitrariness stemming from Minimal Impairment's double standard in all remaining cases where the analysis does not follow the shift in emphasis to Proportionality of Effects.

The above-recommended replacement of Minimal Impairment with a similar but more realistic inquiry into Reasonable Limitation is supported by Canadian jurisprudence's existing focus on reasonable limits in many of the various attempts to capture the more flexible test a court is actually applying at this stage of the analysis in lieu of a strict test of minimal impairment. This also means that the proposed reconception will not alter the substantive threshold for the justifiability of limits as most frequently applied in practice, but only alleviate the arbitrariness problem of stricter or more relaxed tests being used in different cases. Further, the change will enable the test's formulation to correspond to how it is applied, as well as to the text and legislative intent of section 1 in providing for "reasonable", rather than only strictly necessary limits.

I hasten to add that on the surface, reasonableness seems like a lamentably lower standard of protection of rights than necessity or Minimal Impairment. However, as mentioned, Minimal Impairment is unrealistic, and cannot truly be implemented, meaning that it is some different test that is actually applied. The double standard this creates leads to arbitrariness as to which of the double standards will be applied in any given case. Subject to the major influence of this arbitrariness in the process for assessing outcomes, it could be argued that rights enjoy no legal protection at all. Thus, I suggest that reasonableness, as the standard that is possible to implement under a system ruled by law, paradoxically offers more protection than the hollow

rhetoric of Minimal Impairment. The text and legislative intent of section 1 wisely recognize this.

The paper's discussion of the issues above, and related matters, will proceed in six parts: Part II provides an overview of the proportionality analyses used in Canada to give effect to section 1 of the Charter. Part III recaps the recently ordained shift in emphasis within the proportionality tests from Minimal Impairment to the subsequent step of Proportionality of Effects. Part IV examines the problem of the arbitrariness resulting from the inevitable double standard created by Minimal Impairment, due to the concept and/or strict application of it requiring the impossible. Part V explains how the shift to Proportionality of Effects partly mitigates this by reducing but not eliminating the influence of Minimal Impairment on the overall justification assessment, but on the other hand also leads to cases where, as part of the shift, Minimal Impairment is superficially swept over *en route* to Proportionality of Effects, creating a new layer of arbitrariness in when this does or does not happen. Meanwhile, where the shift is not followed, Part VI shows how in some cases under the *Doré* framework, the analysis only investigates Minimal Impairment, omitting to investigate Proportionality of Effects — producing further arbitrariness in when that does or does not occur. Lastly, Part VII offers a solution to the arbitrariness problem in justification assessments: replace the Minimal Impairment inquiry with a conceptually similar but realistic question of whether the chosen means avoids unreasonably limiting the right. I further show that this suggestion actually reflects the text and legislative intent of section 1, unlike Minimal Impairment. And I explain how it does not alter the substantive threshold of justification sought by Canadian jurisprudence in practice.

II. PROPORTIONALITY ANALYSIS UNDER SECTION 1 OF THE CANADIAN CHARTER

The justifiability of limits of rights in Canada is governed by section 1 of the Charter:[2]

> 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.

Presently, justification of a rights limitations under section 1 is assessed through one of two different frameworks, depending on whether the limitation is imposed by a law or by an administrative decision. Where the limit is imposed by a law, the framework to be applied is the *Oakes*[3] test. On the other hand, where the limit is imposed by an administrative decision, the *Doré*[4] framework is to be used.

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[2] *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"].

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

[4] *Doré v. Barreau du Québec*, [2012] S.C.J No. 12 (S.C.C.) [hereinafter "*Doré*"].

1. The *Oakes* Proportionality Test

Under the *Oakes* test, if a court finds that a measure prescribed by law limits a Charter right, it is to ask the following series of questions to determine its justifiability under section 1 of the Charter:

(1) "Pressing and Substantial Objective": Does the government measure have a pressing and substantial objective?[5]

(2) "Rational Connection": Does the government measure bear a rational connection to its objective?[6]

(3) "Minimal Impairment": Does the government measure minimize the impairment of the right in pursuing the objective?[7]

(4) "Proportionality of Effects": Is there proportionality between the salutary and deleterious effects of the government measure?[8]

Stepping through the foregoing sequence of queries one-by-one, if the answer at any stage is negative, the limitation is unjustified. If the measure satisfies all four conditions, then the limitation is justified as proportionate, and thus compliant with the Charter.[9]

2. The *Doré* Proportionality Test

The framework for reviewing the justification of limits imposed by the decisions of public administrators hails from *Doré v. Barreau du Québec*.[10] The reviewing court must assess whether the challenged decision was reasonable, including in particular that "in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play."[11]

The *Doré* test has been the subject of considerable questioning.[12] However, some

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[5] *Oakes*, at para. 69.

[6] *Oakes*, at para. 70.

[7] *Oakes*, at para 70.

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

[9] *Oakes*.

[10] *Doré*, at paras. 55-57.

[11] *Doré*, at para. 57.

[12] *T. (E.) v. Hamilton-Wentworth District School Board*, [2017] O.J. No 6142 at paras. 108-125 (Ont. C.A.); Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in Colleen M. Flood & Lorne Sossin, eds., *Adminstrative Law in Context*, 2d ed. (Toronto: Edmond Montgomery, 2013) 407; Hoi Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 501; Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms"

points of key relevance to the discussion in this paper have been clarified in subsequent restatements or evolutions of the test since the case for which it is named.[13]

Hence, it is now clear first, that *Doré*, like *Oakes*, calls for the conduct of proportionality analysis.[14] Although framed inside reasonableness review, under *Doré*, "reasonableness requires proportionality".[15] Indeed, referring to the cases subject to *Doré*, it is now said that "when a decision engages the *Charter*, reasonableness and proportionality become synonymous."[16]

Second, as urged by McLachlin C.J.C.,[17] a *Doré* analysis should now proceed by asking initially whether the challenged decision limits a Charter protection, before turning, in the event it does, to whether the limitation is proportionate.[18] Thus, if the initial determination is that a Charter right has been limited, the issue of whether that limitation is proportionate can be addressed without this constitutional requirement being dissolved amidst broader consideration of the reasonableness of the challenged decision.

Third, it is now clear that proportionality analysis under *Doré* calls courts to focus on the same queries — Minimal Impairment and Proportionality of Effects — that are seen as normally most critical in proportionality assessments under *Oakes*:

> A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework . . .: minimal impairment and balancing [of effects] . . . . As

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(2014) 65 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference (2) 249; Christopher Bredt & Ewa Krajewska, "Doré: All That Glitters is Not Gold" (2014) 67 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 339; Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 561; Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66:1 U.T.L.J. 121; Mary Liston, "Administering the Charter, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017) 30:2 Canadian Journal of Administrative Law & Practice 211 at 242-46; Edward J. Cottrill, "Novel Uses of the Charter Following Doré and Loyola" (2018) Alta. L. Rev. 73; Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2 Journal of Commonwealth Law 1; Mark Mancini, "The Conceptual Gap Between Doré and Vavilov" (2020) 43:2 Dal. L.J. 793.

[13] See, *e.g.*, *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12 (S.C.C.) [hereinafter "*Loyola*"]; *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 (S.C.C.) [hereinafter "*LSBC v. TWU*"].

[14] *Loyola*, at para. 3; *LSBC v. TWU*, at para. 79.

[15] *Loyola*, at para. 38; *LSBC v. TWU*, at para. 80.

[16] *LSBC v. TWU*, at para. 80.

[17] *Loyola*, at para. 114; *LSBC v. TWU*, at para. 112. Chief Justice McLachlin recommends addressing more explicitly *Charter rights*.

[18] *Loyola*, at para. 39; *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33 at para. 31 (S.C.C.).

> such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test . . .[19]

As in the penultimate Minimal Impairment stage of the *Oakes* test, the *Doré* framework requires that "the *Charter* protection must be 'affected as little as reasonably possible' in light of the applicable statutory objectives", and "the reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives."[20]

As well, corresponding to the final Proportionality of Effects stage of *Oakes*, the *Doré* framework calls for the "reviewing court [to] also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context".[21]

As mentioned in the Introduction, whether both of these questions are actually meaningfully addressed in practice under *Doré* (or *Oakes*) may be wondered, as will be explored later in the paper.

3. Minimal Impairment's Inclusion in Both Tests

As is apparent from the above summaries of the *Oakes* and *Doré* tests, Minimal Impairment is one of the key inquiries under both of these frameworks of proportionality analysis in Canada. The problems of arbitrariness in assessing the justifiability of Charter rights limitations that are discussed in Parts IV and V of this paper pertain to both the *Oakes* and *Doré* tests. The one from Part VI occurs mainly under *Doré*.

I should note that there has been extensive discussion of discrepancies between the *Oakes* and *Doré* tests, including in the analysis each calls for, and perhaps especially the question of whether they apply substantively differing thresholds for justification of rights limitations.[22] In spite of the importance of these discrepancies

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[19] *Loyola*, at para. 40.

[20] *LSBC v. TWU*, at paras. 80-81.

[21] *LSBC v. TWU,* at para. 82.

[22] *T. (E.) v. Hamilton-Wentworth District School Board*, [2017] O.J. No 6142 at paras. 108-125 (Ont. C.A.); Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in Colleen M Flood & Lorne Sossin, eds., *Adminstrative Law in Context*, 2d ed. (Toronto: Edmond Montgomery, 2013) 407; Hoi Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 501; Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms" (2014) 65 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference (2) 249; Christopher Bredt & Ewa Krajewska, "Doré: All That Glitters is Not Gold" (2014) 67 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 339; Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 S.C.L.R.: Osgoode's Annual Constitutional Cases Conference 561; Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66:1 U.T.L.J. 121; Mary Liston, "Administering the

— and of their continued study — they do not alter the central points argued in *this* paper. The solution recommended in Part VII applies in both proportionality frameworks, and the clarification to *Doré* suggested in Part VI is not among the issues that have been extensively discussed with respect to differences between the two frameworks.

4. Uncertain Future of the *Doré* Test

It might be added that following the Supreme Court of Canada's landmark decision in *Vavilov*,[23] the *Doré* framework faces a potentially uncertain future. Notably, the Supreme Court's hand-picked *amici curiae* in *Vavilov* recommended revisiting it.[24] The judgment did say that "although the amici questioned the approach to the standard of review set out in *Doré* . . . a reconsideration of that approach is not germane to the issues in this appeal."[25] However, that does nothing to exclude the possibility that the Court *would* find it germane in a case raising different issues. Further, the *Vavilov* majority held that "an administrative decision maker's interpretation of [whether its enabling statute violates the Charter] should be reviewed for correctness."[26] I note that in many if not all cases, instead of a claimant directing its Charter challenge at the administrative decision itself, it could direct it at the decision-maker's interpretation of the statute as being Charter-compliant in authorizing this decision. Further, the majority which boasted seven justices underlined that:

> The Constitution . . . dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.[27]

Charter, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017) 30:2 Canadian Journal of Administrative Law & Practice 211 at 242-46; Edward J. Cottrill, "Novel Uses of the Charter Following Doré and Loyola" (2018) Alta. L. Rev. 73; Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2 Journal of Commonwealth Law 1; Mark Mancini, "The Conceptual Gap Between Doré and Vavilov" (2020) 43:2 Dal. L.J. 793. See also the chapters in this volume by Carmelle Dieleman and Mark Mancini.

[23] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 (S.C.C.) [hereinafter "*Vavilov*"].

[24] *Vavilov*, at para. 57.

[25] *Vavilov*, at para. 57.

[26] *Vavilov*, at para. 57.

[27] *Vavilov*, at para. 56.

The need for "determinate, defined and consistent limits" on state action puts in question the sustainability of divergences between *Doré* and *Oakes*. Following the retirement of Abella J., the author and leading proponent of *Doré*, only one of the two dissenting justices in *Vavilov* now remains on the Court.[28] Meanwhile, two justices still on the Court have already openly expressed a desire to depart from *Doré*.[29] In short, *Doré* faces an uncertain future. *Vavilov* signals a possible future reconvergence on the long-pedigreed *Oakes* test for assessing the justifiability of Charter rights limitations, whether effectuated by a law or an administrative decision. In that case, discussions below that refer to *Doré* would instead fall under *Oakes*.[30]

III. THE RECENT SHIFT IN EMPHASIS FROM MINIMAL IMPAIRMENT TO PROPORTIONALITY OF EFFECTS

I now summarize the recent shift in emphasis within proportionality analysis in Canada from the Minimal Impairment query to the Proportionality of Effects inquiry, discussed in greater detail in my prior article reviewing that development.[31] This summary will show the dominant role Minimal Impairment has played within the larger framework of proportionality analysis in Canada since the inception of Charter jurisprudence, underscoring the significance of that component of assessments of the justifiability of rights limitations, and of the arbitrariness problems arising from it. The summary will also help explain the more recent shift in emphasis to the Proportionality of Effects step of analysis, as necessary background to the discussion of new sources of arbitrariness surrounding Minimal Impairment in Parts V and VI below.

As Kent Roach and Robert Sharpe J.A. explain, Minimal Impairment has traditionally operated as the "central element" of proportionality analysis in Canada.[32] Peter Hogg and Wade Wright have described it as the "heart and soul of s. 1 justification" in the courts.[33] Among the four steps of the *Oakes* test (the latter two of which are included also in the *Doré* test), they make the following observation:

> 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

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[28] Karakatsanis J.

[29] *LSBC v. TWU*, at paras. 302-314, *per* Brown and Côté JJ.

[30] With the exception of Part VI, which would be moot if unaddressed by the time *Doré* might be discontinued.

[31] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143.

[32] Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed. (Toronto: Irwin Law, 2021) at 86.

[33] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:20.

> 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 . . . (fourth step). In short, for the great majority of cases, the arena of debate is the third step, the requirement of [minimal impairment].[34]

However, as I explained in my "Proportionality of Effects" article, there has been a recent shift in emphasis intended to place more weight on the fourth and final step of Proportionality of Effects.[35] A preliminary foray in this direction was made by the Supreme Court of Canada in *Hutterian Brethren*.[36] A more definitive shift was prescribed by the Court's 2016 judgment in *R. v. K.R.J.*; as this article was in press, this was reaffirmed in the Court's new decision in *R. v. Ndhlovu*.[37] The jurisprudence shows that assessments of the justifiability of rights limitations now generally come down to this step.[38]

This change is best understood as a shift *in emphasis* among the components of proportionality analysis in applying section 1 of the Charter.[39] For a rights limitation to be justified, it must still be a Minimal Impairment besides being Proportionate in its Effects. While both of these inquiries involve balancing, they differ in what is on the scales at the respective steps. 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".[40]

The shift in emphasis from Minimal Impairment to Proportionality of Effects helped alleviate a problem of conceptual incoherence that subsisted until then. In

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[34] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:20.

[35] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143.

[36] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37 at paras. 72-103 (S.C.C.), *per* McLachlin C.J.C., at paras. 149-176 *per* Abella J. [hereinafter "*Hutterian Brethren*"].

[37] *R. v. K.R.J.*, [2016] S.C.J. No. 31 at paras. 77-116 (S.C.C.), *per* Karakatsanis J., at paras. 124-129 *per* Abella J., at paras. 134-161, *per* Brown J. [hereinafter "*J. (K.R.)*"]; *R. v. Ndhlovu,* [2022] S.C.J. No. 38 at para. 129, 2022 SCC 38 (S.C.C.) [hereinafter "*Ndhlovu*"], confirming that the inquiry now seen as "At the heart of the s. 1 analysis is the determination of whether the salutary effects outweigh the negative impacts of the challenged measures. This is the final [Proportionality of Effects] stage."

[38] Peter Lauwers, "What Could Go Wrong With Charter Values?" (2019) 91 S.C.L.R. (2d) at 48; *LSBC v. TWU*, at para. 114 *per* McLachlin C.J.C.

[39] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 149.

[40] *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] S.C.J. No. 44 at para. 125 (S.C.C.). *Ndhlovu*, at para. 130.

practice, factors besides the statutory objective were imported into the Minimal Impairment inquiry, sometimes without acknowledgment, as it operated *de facto* as an all-in-one assessment of the justification of rights limitations. This undermined the purpose of proportionality frameworks, in endeavouring to break down such assessments into a series of analyses, to ensure each dimension is considered, and that no salient factor is overlooked or counted twice, etc.[41]

The shift also enabled more rational discussion of cases where the least drastic means of pursuing the statutory objective still drastically limits a Charter right. Such measures should pass Minimal Impairment, and have their justifiability determined by whether their beneficial effects justify such drastic means. Before the shift, when

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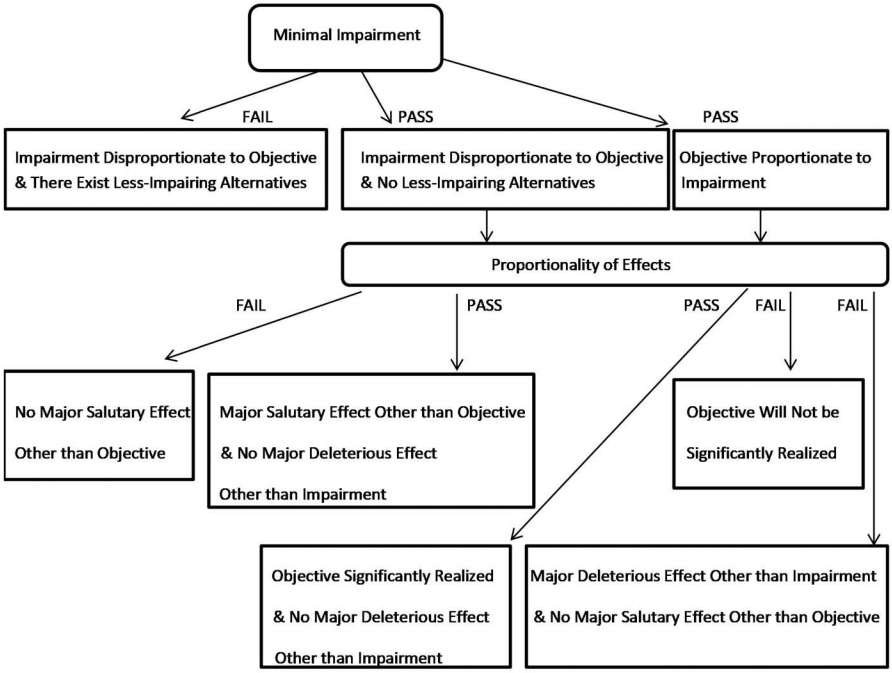
[41] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 150-53; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 U.T.L.J. 383 at 395.

Minimal Impairment decided virtually every case, judges had to effectively "read down" the statutory objective as less than what it really was, in such cases, in order to reach the outcome at that stage that the limitation was not proportionate.[42]

The shift raised the question of how the proportionality tests would work moving forward, factoring in roles for the two key inquiries of Minimal Impairment and Proportionality of Effects. Minimal Impairment would continue to be relevant, and sometimes decisive. But many more cases would reach and be decided at the final Proportionality of Effects stage.[43] The chart below (hereafter "Chart 1"), taken from my article detailing the shift, shows the possible interrelation of these two key steps of proportionality analysis in different cases:



The chart assumes Minimal Impairment's application according to flexible standards often used in practice in place of the conception itself or a strict

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[42] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 153-58; Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369 at 373-74; *Hutterian Brethren*, at para. 76; *J. (K.R.)*, at para. 79.

[43] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 169-72; *J. (K.R.)*, at n. 5.

application of it, as will be discussed in the next Section.[44] These seem to require that the rights limitation not be disproportionate to the statutory objective, or in the event that it is, that the objective could not be achieved except by such drastic means.[45] However, in any given case, Minimal Impairment is subject to radical inconsistency in the standard the court will apply. I examine this problem next.

IV. ARBITRARINESS IN THE APPLICATION OF THE MINIMAL IMPAIRMENT INQUIRY

The Minimal Impairment inquiry — sometimes rendered Minimum Impairment — consists in whether the state used what Hogg and Wright dub the "least drastic means" of pursuing the statutory objective, in terms of its limitation of the affected Charter right.[46] Its authoritative formulation in *Oakes,* still routinely quoted in cases today, queries whether the means adopted to achieve the end "impair 'as little as possible' the right or freedom in question".[47] Put another way, "the test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective."[48] If the means chosen to pursue the objective does not impair the right as little as possible, the limitation is unjustified under section 1.

The root of the problems with Minimal Impairment is that it embodies an unrealistic standard. As La Forest J. noted early on in Charter jurisprudence, it leaves the government no "room to manoeuvre".[49] Hogg and Wright compare it to "the camel passing through the eye of the needle",[50] and note "the ease with which a less drastic alternative to virtually any law could be imagined".[51] Conceptually, the Minimal Impairment condition is nearly or actually an example of what legal philosopher Lon Fuller, in his timeless articulation of elements of the rule of law, saw as failing to live up to that foundational ideal by virtue of "requiring the impossible".[52] Realistically, the limitation of a right can only be justified by

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[44] *LSBC v. TWU*, at para. 81; *Hutterian Brethren*, at paras. 37, 54, 62, 144; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 160 (S.C.C.).

[45] *Cf.* the revised test I recommend in Part VII to replace Minimal Impairment.

[46] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:20.

[47] *Oakes*, at para. 70 quoting; *R. v. Big M Drug Mart Ltd*, [1985] S.C.J. No. 17 at para. 139 (S.C.C.).

[48] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:20; *Hutterian Brethren*, at para. 55; *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 at para. 102 (S.C.C.); *J. (K.R.)*, at para. 70.

[49] *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70 at para. 183 (S.C.C.).

[50] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:21 (referencing Matthew 19:24; Mark 10:25).

[51] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:21.

[52] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven, CT: Yale University Press, 1969)

loosening a requirement of Minimal Impairment to something less demanding. Thus, one could argue that in most cases where a limitation was found justified, the Minimal Impairment test was not truly applied.

To be workable, applications of Minimal Impairment have *had to* depart from this unrealistic standard. In Canada, this departure was evident "almost immediately" after *Oakes*, in the *Edwards Books* case.[53] As Hogg and Wright summarize, "certainly, the cases after *Edwards Books* have applied the requirement in a flexible fashion".[54] Lorraine Weinrib suggests that it goes beyond flexibility; such applications of the test represent "a competing vision . . . a different paradigm"[55] than Minimal Impairment. Justice Bertha Wilson, who had been a champion of the literal or "strict" Minimal Impairment condition, agreed:

> Do the above quoted passages evidence a willingness on the part of the Court to adopt a more flexible approach to this aspect of the s. 1 test? I think it clear that they do.[56]

Another element of Fuller's classic elaboration of the rule of law is "congruence between official action and declared rule".[57] In the context here, the declared rule is Minimal Impairment, and the action by legal officials consists in whatever test a judge substitutes in practice for Minimal Impairment, due to it requiring the impossible. Because of the necessary incongruence between these, Minimal Impairment is clearly problematic from the perspective of this aspect of the rule of law as well.

In some cases, this has been somewhat mitigated through qualifiers. For example, more "flexible" tests applied in practice have sometimes been acknowledged by saying that, despite what the test may suggest, what is actually required is that the state action "falls within a range of reasonable outcomes" in how much it limits the right in pursuit of the statutory objective.[58] Or, after quoting the Minimal

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at 70. For some additional reflections on requirements of the rule of law, see, *e.g.*, John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) at 270; Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 Law Q. Rev. 195 at 216; Jeremy Waldron, "The Rule of Law" in *Stanford Encyclopedia of Philosophy* (2016).

[53] Lorraine Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 S.C.L.R. 469 at 509; *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70 at para. 183 (S.C.C.).

[54] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:21.

[55] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 157.

[56] *McKinney v. University of Guelph*, [1990] S.C.J. No. 122 (S.C.C.).

[57] Lon Fuller, *The Morality of Law*, 2d ed. (New Haven, CT: Yale University Press, 1969) at 81.

[58] *LSBC v. TWU*, at para. 81; *Hutterian Brethen*, at paras. 37, 54, 62, 144; *RJR-*

Impairment test, qualifications may be added to the effect that nonetheless, "the court will not interfere simply because it can think of a better, less intrusive way to manage the problem."[59] In one instance, the Supreme Court of Canada even flatly counseled "courts [to] keep in mind that the minimal impairment test must not be applied too literally".[60]

But the simultaneous presence of one concept or standard "in books" and another "in action",[61] and the sometime addition of qualifying words acknowledging and reconceptualizing (indeed in a variety of ways) the "in action" concept or standard, invites inconsistency. Hogg and Wright confirm that "the results make for an unpredictable jurisprudence."[62] This problem of inconsistency has been a common theme in scholarly commentary.[63]

With Minimal Impairment subsisting as the official rule, the opportunity exists to apply the strict test, and at times this opportunity is seized — and indeed defended as more faithful to what the test requires, or offering laudably more rigorous protection of rights, or both. In such cases, Minimal Impairment is applied literally: embodying, as noted, a significantly different conception and standard. In the opposite direction, abetted by the jurisprudence's (necessarily) habitual departure from the strict conception or standard of the official rule, and by the variety of articulated attempts to capture more flexible standards or concepts actually applied in its place, the converse opportunity exists and is sometimes taken: namely, applying a test that is remarkably lax. While this inconsistency has played out case by case throughout the whole history of justification assessments under section 1, a few examples may be helpful in order to illustrate this inconsistency.

Following the strict test in *Oakes* and flexible test in *Edwards Books* already mentioned, an example of a strict application was *Vaillancourt* (1987) where the Supreme Court of Canada found the centuries-old felony-murder rule unconstitutional. In arriving at this conclusion, Lamer J. followed the strict version of Minimal Impairment: "It is not *necessary* to convict of murder persons who did not intend or foresee the death . . . in order to deter others from using or carrying weapons. . . . Stigmatizing the crime as murder [as opposed to the less drastic means of manslaughter] *unnecessarily* impairs the *Charter* right."[64] Meanwhile, near the other extreme, in *McKinney* (1990) the Court used a notably lax test in upholding

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MacDonald Inc. v. Canada (Attorney General), [1995] S.C.J. No. 68 at para. 160 (S.C.C.).

[59] *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63 at para. 94 (S.C.C.).

[60] *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68 at para. 267 (S.C.C.).

[61] Roscoe Pound, "Law in Books and Law in Action" (1910) 44 Am. L. Rev. 12.

[62] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:21.

[63] 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 508.

[64] *R v. Vaillancourt*, [1987] S.C.J. No. 83 at para. 41 (S.C.C.) (emphasis added).

the mandatory retirement policy of a public university. Justice La Forest's analysis came down in practice to "whether the government had a reasonable basis" for its action.[65] As Sharpe and Roach observe, "this is plainly a much more relaxed standard of review."[66]

Turning to more recent examples, a prominent instance of strict application was *Carter v. Canada (Attorney General)* (2015). After acknowledging that the Minimal Impairment "question lies at the heart of this case", the Court found the prohibition on assisted dying to fail Minimal Impairment because assisted dying with safeguards would impair the section 7 rights less. The Court accepted assisted dying with safeguards as an alternative means of pursuing the statutory objective of protecting the vulnerable from being induced to take their life in times of weakness on the basis that the trial judge found that safeguards provide "adequate" protection.[67] However, what constitutes adequate protection is not a fact-finding, but a policy judgment that defines the statutory objective. This was an example, then, of cases where the statutory objective is "read down" so that alternative measures would achieve it.[68]

As far as relaxed applications of Minimal Impairment, a recent notable example was *Beaudoin v. British Columbia* (2021) in which COVID-19 orders restricting religious gatherings and events were upheld as a justified limit on freedom of religion.[69] A relaxed standard was applied that the limitation need only fall within

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[65] *McKinney v. University of Guelph*, [1990] S.C.J. No. 122 (S.C.C.).

[66] Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed. (Toronto: Irwin Law, 2021) at 89.

[67] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 (S.C.C.).

[68] Text to note 42. For a critique of the Court's treatment of the statutory objective in *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 (S.C.C.), see John Sikkema, "The 'Basic Bedford Rule' and Substantive Review of Criminal Law Prohibitions Under Section 7 of the Charter" in D.B.M. Ross, ed., *Assisted Death: Legal, Social and Ethical Issues after Carter* (Toronto: LexisNexis Canada. 2018), 49. However, it seems to me that this critique is misdirected in focusing so much on *Carter*, as the statutory objective in that case was a precedent taken from *Rodriguez v. British Columbia (Attorney General),* [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.). Sikkema points out discrepancies (at 66*ff.*). But in my view, they are *obiter*, and his overall critique is respectfully strongest if read as a concern with the construction *process* used in *Rodriguez*. On the approach that courts should follow to construing statutory purpose since the unanimous judgment of the Supreme Court of Canada in *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14 (S.C.C.), see Marcus Moore, "*R. v. Safarzadeh-Markhali*: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223. For an exemplary recent case of the correct approach being followed, see *Ndhlovu* at paras. 59*ff*. *per* Karakatsanis and Martin JJ.

[69] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 244 (B.C.S.C).

a range of reasonable outcomes to be considered a Minimal Impairment.[70] Further, the court said that "this is the type of situation that calls for a considerable level of deference" to the government.[71]

The problem of different conceptions/standards of Minimal Impairment being applied not only occurs from one case to another, but perhaps more strikingly, also among appellate judges in the same case. An example notorious among scholars is *RJR-MacDonald* (1995), where a ban on tobacco advertising was struck down.[72] Contrasting applications of Minimal Impairment underlay the deeply-divided judgment. Justice Iacobucci took a literal approach, stating that the measure "is only constitutionally acceptable if . . . such a total prohibition is necessary . . . . When . . . a partial prohibition is as effective . . . the *Charter* requires that the legislature enact [it]. The least rights-impairing option is to be preferred."[73] Justice La Forest (dissenting) took a relaxed approach, concluding that the measure was "a reasonable one".[74] Chief Justice McLachlin took an intermediate position, referenced above as one commonly invoked in jurisprudence since.[75]

Another such example was the controversial decision in *Chaoulli* (2005) where a Quebec law banning private medical insurance was invalidated, again with split-opinions resting on radically diverging versions of Minimal Impairment.[76] As Roach and Sharpe describe, "a majority of four judges took a strict approach" in a "dramatic break from the Supreme Court's previous deferential approach".[77] They focused on whether the limitation was "necessary".[78] The dissent, meanwhile, took a very deferential approach, according the government a "substantial margin of appreciation".[79]

A notable later example of very different standards applied in the same case was

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[70] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 246 (B.C.S.C.).

[71] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 244 (B.C.S.C).

[72] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 (S.C.C.).

[73] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 188 (S.C.C.).

[74] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 102 (S.C.C.).

[75] *LSBC v. TWU*, at para. 81; *Hutterian Brethen*, at paras. 37, 54, 62, 144; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 160 (S.C.C.).

[76] *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 (S.C.C.) [hereinafter "*Chaoulli*"].

[77] Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed. (Toronto: Irwin Law, 2021) at 89.

[78] 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 534.

[79] *Chaoulli*, at para. 276.

Hutterian Brethren where a photograph requirement on driver licences was upheld despite limiting the claimants' religious freedom. The majority stated that "Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be 'reasonable' and 'demonstrably justified'." Justice Abella (dissenting) disagreed, noting the existence of less impairing alternatives, and took exception to the statutory objective. Justice LeBel (dissenting) observed this effectively "read down" the statutory objective.[80] Of note, this was also the case in which the Court first suggested that it may be best to reduce the work being done by Minimal Impairment and give more scope to the later Proportionality of Effects inquiry.[81] Also reflecting growing recognition of the inconsistency problem with Minimal Impairment, Abella J. acknowledged that "this aspect of the s. 1 analysis has attracted judicial approaches of some elasticity".[82]

In response to scholarly concern about an unacceptable level of inconsistency in applications of the test, the Supreme Court developed various devices to try to explain and discipline the differing standards.[83] These prominently included a set of "contextual factors" to determine the degree of "deference" owed the government:

1) Whether the law sought to protect a vulnerable group;

2) Whether the law sought to mediate between competing interests;

3) Whether the law is related to allocation of scarce resources; or

4) Whether surrounding the law there was complex or conflicting social-science evidence.[84]

However, this only compounded the inconsistency, in that the supposed contextual factors from *Irwin Toy* set out above were themselves inconsistently applied. As Sujit Choudhry summarizes:

> The argument is that *Oakes* set out a uniform approach for assessing justifiable limitations on *Charter* rights irrespective of differences in context, but that in the decade following *Oakes,* the Court searched for criteria of deference, to reliably and predictably categorize cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories

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[80] *Hutterian Brethren*, at paras. 37, 146-147, 198.

[81] Text to note 36.

[82] *Hutterian Brethren*, at para. 143.

[83] 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 508-515.

[84] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36 (S.C.C.).

. . . The narrative captures much of *Oakes*' legacy.[85]

Doré does not escape from this unrationalized inconsistent application, as it includes the same troubled Minimal Impairment inquiry.

The failure of devices such as the contextual factors from *Irwin Toy* to rationalize and offer predictability to the variable applications of Minimal Impairment in different judicial opinions reveals that inconsistency as arbitrary. And that arbitrariness constitutes a more global concern for the rule of law than the deficits previously mentioned.[86]

V. ARBITRARINESS IN WHETHER MINIMAL IMPAIRMENT INQUIRY SWEPT OVER

Within the frameworks for proportionality analysis, the shift in emphasis to Proportionality of Effects described in Part III helps to somewhat mitigate the arbitrariness problem examined in Part VI, by reducing the relative influence of the Minimal Impairment inquiry on the outcome of the overall analysis. However, it does not eliminate the problem discussed in the last section. Minimal Impairment remains a key component of proportionality analysis under both *Oakes* and *Doré*, and sometimes dominates analyses under *Doré*, as we will see later in Part VI of this paper. Its continued importance brings with it the problem of the arbitrary inconsistency in the standard/conception used in practice at that stage, noted earlier.

What I discuss in this section is how the shift in emphasis to Proportionality of Effects in a different way actually *compounds* the arbitrariness under section 1 through new unrationalized inconsistency regarding *when* Minimal Impairment is superficially swept over *en route* to more genuine consideration of the justifiability of the rights limitation in the Proportionality of Effects inquiry. When this happens, the assessment is lacking a major element — the analysis fails to duly investigate whether the limitation was appropriately tailored, in how it pursues the statutory objective. Because this omission happens in some cases and not others, without justification, it adds another layer of arbitrariness to the role Minimal Impairment plays in proportionality analysis in practice.

It might be argued that glossing over Minimal Impairment only puts it in the same boat as the earlier steps of Pressing and Substantial Objective and of Rational Connection in the *Oakes* version of proportionality, as these are also swept over. However, as noted earlier, these steps are almost always glossed over, so this does

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[85] 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 503.

[86] Text to notes 52, 57. For some additional reflections on requirements of the rule of law, see, *e.g.*, John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) at 270; Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195 at 216; Jeremy Waldron, "The Rule of Law" in *Stanford Encyclopedia of Philosophy* (2016).

not result in significant inconsistency in the overall test.[87] Moreover, that the government's objective is worthy, and that the actual measure at issue is not unconnected to it, are not seen as onerous conditions; arguably they are the preliminary inquiries they are treated as in practice.[88] On the other hand, Minimal Impairment is one of the key conditions of justification in both proportionality frameworks.[89]

A high profile case where Minimal Impairment was swept over in a problematic way was *LSBC v. TWU*. Here, Minimal Impairment was glossed over on the basis that the law only allowed the decision-maker the option to accredit or not accredit; and accrediting was ruled out as not supporting the statutory objective (of equal access to the legal profession, given that TWU's covenant was held to exclude LGBTQ persons).[90] But after moving on to the Proportionality of Effects stage, the discussion regressed at that step to consideration of less-impairing options: The LSBC had asked whether TWU would consider diluting or removing its mandatory covenant, which TWU conveyed disinterest in doing. The Court majority seized on this to hold TWU responsible for the consequence of not receiving accreditation, thus discounting this major deleterious effect of the LSBC's decision from its weighting of the Proportionality of the Effects of that decision. In doing this, the judgment effectively treated the LSBC as having issued an approval on conditions (pertaining to the covenant), which made the deleterious effect of the decision merely for TWU to have a law school that did not meet its "optimal" religious environment (the harsher consequence of non-accreditation being TWU's own fault for rejecting this conditional approval). Clearly, this is inconsistent with the judgment's prior acknowledgment under Minimal Impairment that the LSBC decision was to deny accreditation.

Had the Minimal Impairment step not been glossed over, this internal contradiction would almost certainly have been avoided, for it is at the Minimal Impairment stage that less-impairing measures should have been considered. In that case, the justices would have remained clear, as they were at that stage, that since the only options under the legislation were to accredit or not accredit, an approval on conditions as later conjured under Proportionality of Effects was not an option available to the decision-maker.

Thus, as a result of the glossing over, the Proportionality of Effects analysis was incorrectly applied based on a government decision neither taken nor available under the legislation. Or, if the majority felt that an approval on conditions *was* an

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[87] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:20.

[88] See, *e.g.*, Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:11.

[89] Part II.3, "Minimal Impairment's Inclusion in Both Tests".

[90] *LSBC v. TWU*, at paras. 84, 95.

available option (perhaps only informally, but to be taken into account, as treated in its Proportionality of Effects analysis), then had Minimal Impairment not been glossed over, the majority would have recognized that it is the government's obligation to *make* this less-impairing decision if it is to satisfy the Minimal Impairment test, not just to make inquiries about an applicant's interest in altering its position to avoid its application being rejected. An applicant cannot be obliged to alter its application to one that will incur a more favourable government response in order to avoid courts discounting in Proportionality of Effects analysis the effect of the government's decision on the application actually submitted. Either way, factored into Proportionality of Effects was a less-impairing option not taken and which under the Minimal Impairment inquiry had been said not available. In short, because of initially glossing over Minimal Impairment, the majority in *LBSC v. TWU* conflated Minimal Impairment and Proportionality of Effects, thus generating an unsound analysis.[91]

Where the court is sympathetic to the government measure or unsympathetic to the claimant, the temptation to let the prescribed shift in emphasis to Proportionality of Effects provide a pretext for glossing over Minimal Impairment may be hard to resist. This is especially so if even a relaxed application of Minimal Impairment would potentially find that the measure went too far in limiting the affected right. In *Zuk v. Alberta Dental Association and College* (2018), the Court of Appeal did not really consider whether the sanction applied by the Association for the claimant's public statements criticizing the profession was a Minimal Impairment under any conception/standard.[92] The court found that the decision to sanction was "reasonable" given the statutory objective of preserving the dignity and integrity of the profession, without addressing *how drastic* a sanction the decision imposed, and in particular, whether with suspensions for other misconduct having been in the range of two months, Zuk's year-long suspension may have unduly limited his right to freedom of speech.[93]

Meanwhile, in other cases Minimal Impairment is not swept over. A judge may be especially inclined to give it its due (or more) where the judge is unsympathetic to the challenged measure or rights claim. Given the judge's burden to justify decisions, and the possibility of dissenting opinions or critical commentary, the judge will be tempted to make a more "emphatic" case for the measure's constitutional illegitimacy by finding it not only to lack Proportionality of Effects, but also to not be a Minimal Impairment. As discussed above, virtually any measure could be shown to fail the strict version of Minimal Impairment.

One example of this was the Supreme Court of Canada decision in *Ontario*

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[91] *LSBC v. TWU*, at paras. 84*ff*.

[92] *Zuk v. Alberta Dental Assn. and College*, [2018] A.J. No. 1000 (Alta. C.A.).

[93] *Zuk v. Alberta Dental Assn. and College*, [2018] A.J. No. 1000 at paras. 107, 111, 187 (Alta. C.A.).

(Attorney General) v. G. (2020), where the claimant challenged as violating the Charter right to equality a law that allowed persons convicted of sexual offences to be exempted in certain situations from being placed on a sexual offender registry, but not to be exempted in the same circumstances if they had been found not criminally responsible by reason of mental disorder ("NCRMD"). The majority found the unavailability of an exemption for persons NCRMD to fail Minimal Impairment: Karakatsanis J. applied a strict version of Minimal Impairment, noting that this was more drastic than hypothetically allowing in at least some circumstances for a person NCRMD to be exempted. This was another example of where the statutory objective was effectively read-down in finding the law to fail Minimal Impairment: The parties agreed that the objective was "to assist in the investigation and prevention of sexual offences". But assistance can range from slight to tremendous; clearly, the amount of assistance is indissociable from the objective. Here, Karakatsanis J. held that the extent to which the authorities could investigate and prevent sexual offences without including such persons on the registry was sufficient protection for the community against the risk of subsequent reoffences. As noted earlier, it is not for the Court to decide how much protection against risk is sufficient, as this is a policy decision, and helps define the statutory objective.[94] If the law will not achieve the objective, or would be unjustified even if it did, it will still fail constitutional review — but at the stage of Proportionality of Effects.

Another example was *Frank v. Canada (Attorney General)* (2019): The plaintiffs attacked the constitutionality of legislation that made citizens who upon an election had been residing abroad for five or more years ineligible to vote. This aspect of the law was said to fail Minimal Impairment. In this case, the standard applied at that stage was not overtly strict. However, the majority essentially disagreed with the relevant statutory objectives, as defined by the government, in arguing that the law failed the Minimal Impairment test. This is probably a case where, under the prescribed shift in emphasis to Proportionality of Effects, the law's unjustifiability is more apparent at that subsequent stage — which the law indeed went on to fail as well. By finding the law to also fail Minimal Impairment at the prior step, the majority evidently felt its opinion that the provision was unconstitutional was strengthened by reaching that result "early and often", contesting blow-by-blow the sharp dissent in the case.[95]

In short, the shift to Proportionality of Effects has occasioned a second layer of arbitrariness arising from the Minimal Impairment inquiry, namely in when that inquiry is superficially swept over *en route* to more genuine consideration of the

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[94] *Ontario (Attorney General) v. G.*, [2020] S.C.J. No. 38 at paras. 73-76 (S.C.C.). See text to note 69. On the process courts should follow to construe a statutory objective in a reliable way and with the proper degree of precision, see Marcus Moore, "*R. v. Safarzadeh-Markhali*: Elements and Implications of the Supreme Court's New Rigorous Approach to Construction of Statutory Purpose" (2017) 77 S.C.L.R. (2d) 223.

[95] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 66 (S.C.C.).

justifiability of the rights limitation at the Proportionality of Effects stage. For the reasons described in this section, the conflicting existence of strict and lax conceptions/standards of Minimal Impairment both encourages arbitrariness in whether the Minimal Impairment step as a whole is glossed over, and exacerbates the influence of this arbitrary fact on the outcome of the section 1 assessment.

I now turn to a scenario in some ways opposite to that just discussed: cases where the shift in emphasis to Proportionality of Effects is disregarded and proportionality analysis boils down to Minimal Impairment.

VI. ARBITRARINESS WHEN *DORÉ* PROPORTIONALITY IS REDUCED TO MINIMAL IMPAIRMENT

In some cases, the shift to Proportionality of Effects described in Part III is not followed. In these cases, analysis of a rights limitation's justifiability under section 1 still turns on Minimal Impairment. This is evident especially in the *Doré* jurisprudence. As I will elaborate in this section of the paper, the *Doré* jurisprudence's prescription of the Proportionality of Effects test is not straightforward. In some cases, it seems to be mistaken as a repetition of the Minimal Impairment question. The Proportionality of Effects inquiry is ignored, and the *Doré* proportionality test collapses into merely the Minimal Impairment query. Whether a limitation of a right is acceptable then becomes a function of whether it was the least possible limitation of the right in pursuing the statutory objective — or in the relaxed versions of Minimal Impairment often applied in practice — whether the administrative decision-maker made a reasonable effort to restrict the limitation.

With assessment of the Proportionality of Effects thus omitted, the flawed analysis excludes the possibility that the limitation might not be proportionate to the statutory objective, even if it is the least drastic option of pursuing the objective — the Minimal Impairment.[96] It also excludes investigation of the extent to which the impugned decision can actually be expected to achieve the objective, which is taken for granted in the Minimal Impairment inquiry.[97] It excludes, further: consideration of other deleterious effects of the decision which might include limits to other Charter rights or values; ways in which the decision might detract from the statutory objective that should be netted against the ways the decision might further it; and its effects on other recognized matters of public interest.[98] Arguably, Minimal

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[96] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 153-58; Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369 at 373-74; *Hutterian Brethren*, at para. 76; *J. (K.R.)*, at para. 79; see also Chart 1.

[97] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 166.

[98] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 165-72. See also Chart 1.

Impairment on its own is not a proportionality test at all.[99] Certainly, a test of Minimal Impairment, omitting assessment of Proportionality of Effects, is not what the proportionality frameworks prescribed to implement section 1 call for. In leaving out an essential requirement of the tests implementing section 1, the threshold for justification is lowered, and measures could be upheld that should properly fail in scenarios like those just mentioned.

Beyond the fact that this reduction/distortion of proportionality analysis to Minimal Impairment is most evident in cases under the *Doré* framework, no pattern is discernible regarding in what specific contexts it occurs. This therefore creates yet another layer of arbitrariness regarding in what cases this happens, versus in what cases no such confusion occurs and the court does also analyze Proportionality of Effects. Of course, where the confusion does occur, the Minimal Impairment test applied is also subject to the same internal arbitrariness concerning what version of it is used, explained in Part IV. But in this context, where it constitutes the whole "proportionality" analysis, the impact is obviously magnified.

Why might this be occurring in the *Doré* framework? Within that framework, the Proportionality of Effects inquiry is formulated as calling for the "reviewing court [to] consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context".[100] As can be seen, this formulation weighs the severity of the rights limitation against the benefits of advancing the statutory objectives. Accordingly, it falls among a certain number of formulations of the Proportionality of Effects requirement, to be found in different cases in the history of section 1 jurisprudence, which are distinguished by their framing of the balancing as between the rights limitation on one hand and the benefits of the state action on the other.[101] In my previous article on Proportionality of Effects I explained that these formulations may be useful for purposes of reminding the court that a Charter protection is being violated and of retaining in view the overarching issue under section 1 of whether the state action is proportionate to the rights limitation.[102] However, I added: "But when it comes to turning Proportionality of Effects from a notion into a test — an analysis to be carried out — the [other] formulation [prominently found in the section 1

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[99] In practice, it often is. However, this can be misleading as there are cases where a disproportionate limit is the least drastic limit that would allow pursuit of the statutory objective. Such a situation satisfies Minimal Impairment and if the end cannot justify such means, that would emerge in the Proportionality of Effects inquiry: Part III above.

[100] *LSBC v. TWU*, at para. 82.

[101] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 166-67.

[102] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 167. Perhaps I should have added that these are things a reviewing court is presumably not very likely to lose sight of.

jurisprudence: balancing] salutary versus deleterious effects seems to have the upper hand."[103] One reason for this was that it "allows for the balancing process to be carried out (and explained) in a more straightforward way", as an instance of familiar cost-benefit assessments, which people often use in weighing decisions.[104] Conversely, I explained that a formulation which "isolates the rights infringement on one side of the scale" and places "net benefits [of the government action] on the opposite side of the scale . . . add[s] unnecessary complexity as well as risk of confusion to the application of Proportionality of Effects."[105] Under *Doré*, one of these risks of confusion is that the framework's formulation of Proportionality of Effects, quoted above, is framed using the same opposing considerations as Minimal Impairment: the rights limitation versus the statutory objective. What is in fact the prescription of a separate subsequent step of analysis is thus mistaken in these cases as simply repeating in seemingly only a slightly different way, the prior call for a Minimal Impairment assessment, which is then set out as the test for proportionality under *Doré*, and exclusively carried out. The cases below provide a few examples of where this has happened, resulting in courts analyzing only Minimal Impairment, with little or no investigation and weighing of effects.

One recent example of this was *Beaudoin*.[106] In stating the test for justification under the *Doré* framework, the Minimal Impairment element was quoted at length from *TWU v. LSUC* (cited as the most recent authority on *Doré*), while the Proportionality of Effects element, which was contained in the very same paragraph of *TWU v. LSUC*, was omitted completely.[107] The conduct of the test followed this account of it. The court cited ways that Provincial Health Officer Dr. Bonnie Henry sought to "minimize impacts on the rights" in crafting the COVID-19 orders restricting gatherings and events that had been challenged as violating freedom of religion.[108] And using the terms of a common account of the Minimal Impairment test as applied in practice,[109] Hinkson C.J.B.C. concluded:

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[103] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 168.

[104] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 168.

[105] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 167.

[106] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 244 (B.C.S.C).

[107] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 219 (B.C.S.C) quoting; *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33 at para. 36 (S.C.C.). See also *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para 223 (B.C.S.C).

[108] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 244 (B.C.S.C).

[109] See text to notes 44, 58. *LSBC v. TWU*, at para. 81; *Hutterian Brethren*, at paras. 37, 54, 62, 144; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 160 (S.C.C.).

> I find that Dr. Henry's decision fell within a range of reasonable outcomes. There . . . were no other reasonable possibilities that would give effect to the s. 2 *Charter* protections more fully, in light of the objectives of protecting health, and in light of the uncertainty presented by the Virus.[110]

Thus, as a result of the confusion described above, the constitutionality of the COVID-19 public health restrictions on freedom of religion, at issue in *Beaudoin*, was treated as a function of Minimal Impairment. Not only was the shift in *emphasis* to Proportionality of Effects not adhered to, but the subsequent analysis of the Proportionality of Effects requirement for justification of a rights limitation under *Doré* (and *Oakes*) was *omitted altogether*. This was potentially significant. Given that it was uncertain whether the restrictions on religious gatherings would significantly reduce viral transmission, and that the restriction of religious freedom was severe, it is possible that had the effects been investigated, the restriction would have been found to not be proportionate. The risk that its arbitrary omission as a result of its confusing formulation in the *Doré* test may have affected the outcome in this case is enhanced by the lax test applied at the Minimal Impairment stage, described earlier.[111]

Another prominent example of where, confounded by the formulation of Proportionality of Effects under the *Doré* framework, that element was treated as redundant of Minimal Impairment, was the Supreme Court of Canada's ruling in *Ktunaxa Nation v. British Columbia*.[112] The Ktunaxa First Nation had challenged government approval of a ski resort as violating their freedom of religion, with the development to take place in the Qat'muk area of their traditional territory, home to Grizzly Bear Spirit, a principal spirit within their religious beliefs. The majority found no infringement of the freedom. However, the concurring opinion did, and proceeded to assessment of its justifiability under section 1 of the Charter.[113] Here too, the analysis revolved around Minimal Impairment. In stating the requirements of the *Doré* test (citing *Loyola*, as more recent authority on it), the Minimal Impairment element was quoted,[114] whereas the Proportionality of Effects element was not mentioned at all.[115] This was then mirrored in the analysis conducted. It was

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[110] *Beaudoin v. British Columbia*, [2021] B.C.J. No. 551 at para. 245 (B.C.S.C).

[111] Text to notes 70, 71.

[112] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 (S.C.C.).

[113] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 at paras. 135*ff*. (S.C.C.).

[114] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 at para. 136 (S.C.C.). quoting *Loyola*, at para. 40: One "must ensure that the *Charter* protections are 'affected as little as reasonably possible' in light of the state's particular objectives".

[115] Neglecting *Loyola*, at para. 68: whether there is sufficient "benefit to the furtherance of the state's objectives" in comparison with the rights limitation. (Cited in the statements of

noted that the Minister "tried to limit the impact of the proposed development on the substance of the Ktunaxa's section 2(a) right as much as reasonably possible given [the] statutory objectives" of administering Crown land and disposing of it in the public interest.[116] The further minimization of the impairment of the right sought by the Ktunaxa was rejected on the basis that it would not allow achievement of the statutory objective.[117] Again quoting the Minimal Impairment element of *Doré*, Moldaver J. then completed his analysis stating that the Minister's decision "limited the Ktunaxa's right 'as little as reasonably possible' given the statutory objectives".[118]

A further example of cases in which the shift to Proportionality of Effects was disregarded and the court reduced the justifiability of a rights limitation to a function of Minimal Impairment was *Right to Life Assn. of Toronto v. Canada*.[119] The Ministry refused to consider an application for a summer jobs subsidy from the Right to Life Association after it declined to make an attestation that included "reproductive rights" in conflict with its religious beliefs and those of its prospective job-holders.[120] As in the cases above, the court's statement of the *Doré* proportionality test (taken from *Loyola*) included only Minimal Impairment, leaving out the Proportionality of Effects requirement.[121] And as in the cases above, the analysis conducted consisted merely of Minimal Impairment.[122] The omission of the Proportionality of Effects condition was exacerbated by the "elasticity" of the standard applied for Minimal Impairment: the court found that the Right to Life Association's exclusion from the funding minimally impaired its freedom of religion because it was only for that year's subsidy and because the application might have failed anyway. And the court added:

> The Applicants submit that while the Attestation may have sought to protect the rights of others, it did not protect their rights. However, this is the nature of a

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the *Doré* test in *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33 at para. 36 (S.C.C.); *LSBC v. TWU*, at para. 82.)

[116] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 at paras. 145-146 (S.C.C.).

[117] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 at paras. 150-154 (S.C.C.).

[118] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54 at para. 155 (S.C.C.) again quoting *Loyola*, at para. 40 (see note 114).

[119] *Right to Life Assn. of Toronto v. Canada (Minister of Employment, Workforce, and Labour)*, [2021] F.C.J. No. 1724 (F.C.).

[120] *Right to Life Assn. of Toronto v. Canada (Minister of Employment, Workforce, and Labour)*, [2021] F.C.J. No. 1724 at para. 14 (F.C.).

[121] *Right to Life Assn. of Toronto v. Canada (Minister of Employment, Workforce, and Labour)*, [2021] F.C.J. No. 1724 at para. 178 (F.C.).

[122] *Right to Life Assn. of Toronto v. Canada (Minister of Employment, Workforce, and Labour)*, [2021] F.C.J. No. 1724 at paras. 179-188 (F.C.).

> balancing exercise. The *Doré* analysis recognizes that . . . the rights of some may inevitably yield to some extent to the rights of others.[123]

The court did not consider, for instance, whether the Ministry could have accepted a modified attestation from the Right to Life Association that was consistent with the religious beliefs of itself and its members, or created a different stream for religious organizations. This might especially have been appropriate given that the distinctiveness of these organizations from secular organizations was recognized by the Supreme Court of Canada in the concurring opinion of McLachlin C.J.C. and Moldaver J. in *Loyola*.[124]

Discussed above were several notable examples of cases treating section 1 as a question of Minimal Impairment, with the Proportionality of Effects requirement overlooked, due to its unclear formulation within the *Doré* proportionality framework. Meanwhile, in many cases under *Doré*, courts have overcome this confusion and conducted a full analysis of Proportionality of Effects, subsequent to analyzing Minimal Impairment. Indeed, in some of these cases, the Proportionality of Effects inquiry was emphasized within the overall proportionality test, consistent with the prescribed shift in emphasis to that stage, discussed earlier.[125]

Courts would certainly be aided in doing so more consistently if, like the *Oakes* framework, *Doré* used the more straightforward and clear formulation of Proportionality of Effects, which balances the impugned decision's salutary and deleterious effects.[126] This formulation draws authority from *Dagenais v. CBC,*[127] a Supreme Court of Canada case concerning decisions by judges of whether to order trial-related publication bans — which is now part of the stream of section 1 jurisprudence that addresses decision-making under legislation, headlined by *Doré*. In setting out this more accurate and straightforward formulation in *Dagenais*, Lamer C.J.C. pointed out that formulations of the balancing test, which are expressed in terms of the impairment of the right on one side of the scale, and the statutory objective on the other, risk confusion and the omission of other factors critical in evaluating the effects of the decision, such as those mentioned earlier in

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[123] *Right to Life Assn. of Toronto v. Canada (Minister of Employment, Workforce, and Labour)*, [2021] F.C.J. No. 1724 at paras. 186-187 (F.C.).

[124] *Loyola*, at paras. 89-102.

[125] See, *e.g.*, *LSBC v. TWU*, at paras. 81-105; *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33 at paras. 35-42 (S.C.C.); *Strom v. Saskatchewan Registered Nurses Assn.*, [2020] S.J. No 370 at paras. 146-169 (Sask. C.A.); *Redeemed Christian Church of God v. New Westminster (City)*, [2021] B.C.J. No. 1575 at paras. 110-117 (B.C.S.C.).

[126] Marcus Moore, "R v. KRJ: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 168.

[127] *Dagenais*.

this Part.[128] Recently, in *J. (K.R.)*, the Supreme Court discussed with approval how, in *Dagenais*, Lamer C.J.C. had "reformulated the test to account for the 'proportionality between the deleterious and the salutary effects of the measur[e]'", a move which I commended and further explained the logic of in my "Proportionality of Effects" article.[129] It would immensely help in avoiding unnecessary confusion and putting reviewing courts in the best position to consistently apply the *Doré* proportionality test correctly, if its next authoritative restatement uses the *Dagenais* formulation of the Proportionality of Effects requirement, which asks the court to weigh the challenged decision's salutary and deleterious effects.

In the meantime, the discussion in this section showed how confusion caused by the current formulation of the Proportionality of Effects inquiry within the *Doré* framework leads reviewing courts in some cases to assess the justification under section 1 of a rights limitation as a matter of Minimal Impairment, with the added requirement of Proportionality of Effects overlooked. This departs from the correct analysis conducted in other cases, and lowers the standard for justification from its proper level. Because there is no rationale for in which *Doré* cases this does or does not happen, it adds another layer of arbitrariness to assessing the justifiability of rights limitations under section 1. In an arbitrary set of cases, Minimal Impairment alone governs the justification analysis; and this is magnified by the internal arbitrariness of how Minimal Impairment is actually applied in practice, as discussed earlier.

VII. RESOLVING THE ARBITRARINESS: REASONABLE LIMITS

1. Deciding Rights Limitations According to Law vs Arbitrarily

The arbitrariness discussed in the preceding three sections of this paper is a serious concern. Colloquially, arbitrariness is often equated with randomness. However, arbitrariness goes beyond just randomness: arbitrary decision-making allows factors like ideological bias, subconscious prejudices and social pressures to determine outcomes. Arguably, because the problematic Minimal Impairment query makes this arbitrariness *inevitable* in assessments of the justification of rights limitations, it encourages more sweeping "result-selective reasoning": an undesirable performance of the judicial function in which judges decide results *before* turning to legal reasoning merely to justify the predetermined results.[130] Whether or not Minimal Impairment does invite this in rights limitation decisions, what is certain at least is that the arbitrariness it creates is the antithesis of the rule of law.[131] The rule of law, for its part, is "a fundamental postulate of our constitutional

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[128] *Dagenais,* at para 95.

[129] *J. (K.R.)*, n. 6; Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 165*ff.*

[130] Peter Lauwers, "What Could Go Wrong With Charter Values?" (2019) 91 S.C.L.R. (2d) 1 at 3.

[131] For a view perceiving heightened concern about the impact on the rule of law under

structure".[132] It lies "at the root of our system of government".[133] In general, and together with the "supremacy of God", it is the expressed basis of the principles Canada is founded upon.[134] Within the Canadian legal terrain, arbitrariness has also been found to be situated in conflict with the principles of fundamental justice.[135]

Beyond the specific mischief they target, all of our laws, and our elaborate system of justice, are designed to avoid certain decisions from being made arbitrarily. Among those decisions, the ones at issue here often involve particularly important and controversial issues affecting our society. Questions of the justifiable limits of Charter rights arise in regard to many vital tensions between the fundamental rights of individuals and the broader objectives of the collective. Decisions about these determine, for instance, the enjoyment of freedom of religion, speech, and assembly; the protection of life, liberty, and security; the preservation of privacy; the assurance of equality; and more.[136] More than in any other context, perhaps, we expect — and have a right to expect — that the decision-making process manifest legal virtues such as consistency, rationality, conformity to law, and the pursuit of justice.

It is true that the permissible limits of rights are, per the terms of section 1, a matter of human judgment.[137] It is true, further, that in Canada and many other places around the world,[138] these judgments are to be made by weighing the proportionality of values which are incommensurable, uncertain and contested.[139] In assessing proportionality, subjective value judgments are inescapable.[140] Still, this

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the *Doré* test specifically, see Peter Lauwers, "What Could Go Wrong With Charter Values?" (2019) 91 S.C.L.R. (2d) 1.

[132] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1 at 142 (S.C.C.).

[133] *Reference re Secession of Quebec* , [1998] S.C.J. No. 61 at para. 70 (S.C.C.).

[134] Charter, preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . .".

[135] *Chaoulli*; *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72. (S.C.C.). The principles of fundamental justice are referenced in s. 7 of the Charter, and state conditions that must be complied with if a person is to be deprived of the benefit of one of the associated Charter rights.

[136] Charter, ss. 2, 7, 8, 15, *etc*.

[137] As to what is "reasonable", as well as what has been "prescribed by law" and is "demonstrably justified in a free and democratic society".

[138] David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Alec Stone Sweet & Jud Matthews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l L. 72.

[139] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 158-65.

[140] Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143 at 164; Beverley McLachlin, "Legislated Rights" (2019), online: *Judicial Power Project* http://judicialpowerproject.org.uk/legislated-rights-comment-by-beverley-mclachlin; Joel Bakan, *Just words: constitu-*

does not mean that it boils down merely to a matter of judges' "hunches".[141] Moreover, as Peter Lauwers J. underscores, even if judges' intuitions about justice play an important role in decisions, and even if these intuitions are affected by human cognitive biases, this in itself does not make proportionality assessments — or indeed all judicial decisions — arbitrary.[142] It is the job of the analytical framework prescribed for assessing the proportionality of the rights limitation (*i.e.*, *Oakes* or *Doré*, depending on the context) to *guide* this intuition by specifying the questions to ask, the sequence to ask them in, and the factors to consider in arriving at an ultimate conclusion. As Dieter Grimm J. explains, getting this right has an important "disciplining and rationalizing effect".[143] This is defeated, however, where one of the essential elements of inquiry is impossible to truly adhere to, so that there emerges in practice arbitrary resort to substitute inquiries whose terms are unstated and/or variable from case to case.[144] It is defeated also if an essential inquiry is arbitrarily swept over, or conflated with another distinct requirement.[145] And it is defeated if confusion leads to the analysis being reduced in an arbitrary set of cases to just one of these requirements (indeed the one already "internally" arbitrary), omitting the other (the one that is supposed to be emphasized).[146] All of this "creates the danger that elements" will be considered in "an uncontrolled manner" which will in turn "render the [final] result more arbitrary and less predictable".[147] This is the current predicament, with our justification of rights limitations jurisprudence in Canada. In this important area, we are presently falling short of our basic rule of law expectation that decisions be determined by law, as a result of an ongoing unwillingness or inability to rectify technical problems of legal doctrine. Many of these technical problems revolve around, and are epitomized by, the rhetorically reassuring but rationally unworkable doctrine of Minimal Impairment.

What should be done? Hogg and Wright conclude that "there is no practical way to avoid uncertainty in the application of the requirement of [minimal impair-

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tional rights and social wrongs (Toronto: University of Toronto Press, 1997) at 27-30.

[141] Peter Lauwers, "What Could Go Wrong With Charter Values?" (2019) 91 S.C.L.R. (2d) at 33-34.

[142] Peter Lauwers, "What Could Go Wrong With Charter Values?" (2019) 91 S.C.L.R. (2d) at 34-38.

[143] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 U.T.L.J. 383 at 395.

[144] Per Part III above.

[145] Per Part IV above; *J. (K.R.)*, at para. 77.

[146] Per Part V above.

[147] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 UTLJ 383 at 397.

ment]."[148] I agree. Every effort that has been made to mitigate its problems has instead compounded them.[149] Meanwhile, as I show below, there is in fact no foundation for a judicial requirement of Minimal Impairment in implementing section 1 of the Charter. Thus, after more than 40 years, we must ask ourselves: why do we continue to retain this fatally flawed jurisprudential invention at a cost of frustrating and undermining the ability of the Charter's most important provision to fulfil its twin promises of guaranteeing rights and of allowing their limitation to an extent justifiable in pursuing the broader interests of a free and democratic society? The time is long overdue to replace Minimal Impairment, within the overall proportionality analysis, with an inquiry that is functionally-equivalent but that accords with what is provided for by section 1 and that is better-suited to attain its promises. Where can we look for guidance as to how this replacement should take shape?

2. Text and Legislative History of Section 1 Call for a Standard of Reasonableness Not Necessity/Minimal Impairment

As alluded to in the last section, when we examine the text of section 1, in fact we find no foundation for a requirement of Minimal Impairment. Proportionality analysis, for its part, came to Canada from Europe.[150] As part of that, the Minimal Impairment test in Canadian jurisprudence has essentially been synonymous with the question in European proportionality analysis of whether a right has been limited only to the extent "necessary" in pursuing the statutory aim. Comparing the actual text of section 1 of the Charter with the relevant clauses of the *European Convention of Human Rights* that allow for limitations, in general we see very close conformity, but with one difference that is particularly striking: instead of the word "necessary" which is found in the *European Convention*, section 1 of the Canadian Charter uses the word "reasonable".[151] Berend Hovius, while commending the proportionality analysis used in Europe as a means for Canada to give effect to section 1 of the Charter in the lead-up to *Oakes*, noted this difference, explaining that the "absence of 'necessary' . . . suggests that section 1 imposes a less stringent test" than the *Convention*.[152] However, this point was ignored or disregarded as *Oakes* included the equivalent requirement of "Minimal Impairment".

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[148] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:21.

[149] As alluded to throughout this paper.

[150] The S.C.C. in *Big M* and *Oakes* made no mention of where it got it from, but Canadian constitutional scholars have linked it to European antecedents: see, *e.g.*, Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at §38:1.

[151] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 1950 (see, *e.g.*, art. 9 on freedom of thought, conscience and religion).

[152] 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. Rev. 213 at 241.

We should not mistakenly presume from this that the threshold for justifying the limitation of rights in Canada is lower than it is in Europe; for just as it is practically impossible to adhere to a condition of Minimal Impairment, in Europe the necessity threshold has not been applied (or been possible to apply) *in practice*. Hovius explains that there was an "obvious . . . need for flexibility in the application" of the necessity test.[153] In spite of language of necessity, European courts did not find measures to breach the *Convention* merely because some "equally effective but less restrictive means was available to reach the . . . goal pursued".[154] Just as often occurs with Minimal Impairment in Canada, the necessity test in Europe was applied in a manner that is "extremely flexible",[155] with necessity being effectively read down to reasonableness as European courts "consistently held that an interference can be considered necessary . . . if it is 'proportionate'".[156]

The use of "reasonable" in the text of section 1 of the Canadian Charter is therefore best understood as intending to effectuate a reconciliation of the threshold for rights limitations "in books" with the threshold arrived at "in action" from the accumulated practical experience of preceding decades in Europe.[157] As will be explained below in discussing the legislative history of the Charter, Canada took the opportunity of hindsight that came with being later to entrench human rights *to learn* from the European experience, and *correct* the defect of a standard of necessity "requiring the impossible", by instead capturing the reasonableness standard actually applied in practice within the text itself of section 1.

From that standpoint, the inclusion of a necessity condition in Canada's proportionality test, in the form of Minimal Impairment, not only stands illegitimately in conflict with the text of section 1, but unwisely *forgets* the lesson Canada had learned from the European experience that such a condition was unrealistic and incapable of truthful implementation. Thereby, it doomed Canada to repeat this mistake by reintroducing into justification assessments a problem that section 1 had been expressly drafted to eliminate.

These observations showing conflict between the Minimal Impairment element of

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[153] 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. Rev. 213 at 242.

[154] 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. Rev. 213 at 251.

[155] 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. Rev. 213 at 242.

[156] 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. Rev. 213 at 248.

[157] Text to note 61.

proportionality analysis in Canada and the text of section 1 reinforce this paper's larger argument of our need to discontinue use of Minimal Impairment: they reveal that this requirement is not only unhelpful on both sides of the Atlantic but is also illegitimate in Canada.

The same conclusion is reinforced by studying the legislative intent and political negotiations behind section 1: eight provincial premiers had held out altogether against the idea of constitutionalizing rights in a Charter.[158] An early draft of section 1 therefore would have given broad scope to their limitation, allowing for "reasonable limits as are generally accepted in a . . . society with a Parliamentary system of government".[159] Understandably, this encountered strong resistance from civil libertarians. Walter Tarnopolsky, who in the televised public hearings had prominently explained the European model,[160] fought for the European standard of necessity, proposing a redraft of section 1 providing for limits "*necessary* for the purposes of a free and democratic . . . society" as well as "demonstrably justifiable".[161] As is apparent, much of that language was adopted in the final text — but not the standard of the limit having to be "necessary". The standard of "reasonable" limits was retained instead, as an integral part of the difficult political and ideological compromise negotiated by then Justice Minister Jean Chrétien, in order to entrench rights with the text of section 1 that still exists today.[162] Further, at that time Chrétien faced and rebuffed complaints from civil libertarians over the choice of "reasonable" instead of "necessary", noting the other concessions he obtained from the premiers, and arguing that the prescription settled on as section 1 would ensure robust protection of rights.[163]

These events from the Charter's legislative history remind us how the language of section 1 was carefully chosen amidst intense negotiations and public deliberation, informed by experts, and embodies an ideological and political compromise. The very deliberate adoption of a standard of "reasonable" instead of only strictly "necessary" limits was a key part of that, making it especially inappropriate for the jurisprudence to override that and insert the necessity standard that had been expressly rejected, under a thinly-veiled pseudonym of "Minimal Impairment".

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[158] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 136-137.

[159] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 137.

[160] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 142.

[161] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 147.

[162] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 130, 137, 144.

[163] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 144.

Scholars like Lorraine Weinrib who favour a strict test for justifiable limits of rights acknowledge that section 1 has "distinctive features" and is seen by "other countries . . . as a distinctive model".[164] Section 1's use of "reasonable" rather than "necessary" is a vital distinction.

3. A Suitable Replacement for Minimal Impairment: The Reasonable Limitation Test

As McLachlin J. agreed in *RJR-MacDonald*, "the appropriate 'test' to be applied in a s. 1 analysis is that found in s.1 itself."[165] In *Hutterian Brethren*, our former Chief Justice similarly noted that "Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be 'reasonable' and 'demonstrably justified'."[166]

To take Minimal Impairment's place within the *Oakes* and *Doré* proportionality frameworks for assessing the justifiability of limits of Charter rights under section 1, there should be a functionally-equivalent test, but using a standard of reasonableness rather than necessity, as called for by the text and legislative intent of section 1, and as reinforced by its constituting the measure that is possible to apply, as confirmed by decades of accumulated judicial practice. This "Reasonable Limitation" question should ask:

> Does the chosen means of pursuing the statutory objective avoid unreasonable limitation of the right?

The reasonability of the limit should in turn be answered by two sub-questions:

a) Is the limitation of the right proportionate to the statutory objective?

b) If not, is the disproportionate limitation unavoidable in pursuing the statutory objective?

If the answer to either sub-question is "yes", the state's action passes this "Reasonable Limitation" step. In both *Oakes* and *Doré*, the overall proportionality test would then move on, as it is does now, to the subsequent step which assesses the Proportionality of Effects of the government action.[167]

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[164] Lorraine Weinrib, "Canada's *Charter* of Rights: Paradigm Lost?" (2002) 6 Rev. Const. Stud. 119 at 133.

[165] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at 126 (S.C.C.).

[166] *Hutterian Brethren*, at para. 37.

[167] On the distinction between the Reasonable Limitation and Proportionality of Effects inquiries, see the last four paragraphs of Part III, the first paragraph of Part IV, paragraphs 2-4 of Part VI and Chart 1. See more generally Marcus Moore, "R v. KRJ: Shifting the Balance of the *Oakes* Test from Minimal Impairment to Proportionality of Effects" (2018) 82 S.C.L.R. (2d) 143. Under the *Oakes* test, these two steps would also continue to be preceded by the inquiries into whether the measure pursues a pressing and substantial objective, and whether the chosen means is rationally connected to that objective: see text to notes 5, 6.

Specifically, how would this resolve the arbitrariness problems associated with Minimal Impairment, discussed in this paper? The replacement query prescribed above does not "require the impossible" as the concept of Minimal Impairment does, as explained in Part IV. On the contrary, the Reasonable Limitation concept requires the *possible*: for the government to ensure the means it uses to pursue its objectives are reasonably tailored to ensure that any rights limitation is proportionate, unless there is truly no alternative (in which case its justifiability will come down to the Proportionality of its Effects, as it should).[168] By only requiring the possible, the new inquiry allows for "congruence between official action and declared rule", unlike Minimal Impairment, as noted in Part IV. In practice, courts can simply apply the test as formulated; they would not need to develop a different standard "in action" than the one "in books"—much less use various different tests in action, as happened with Minimal Impairment. In short, the replacement inquiry allows for a single test, that can be applied consistently from case to case, and that embodies the concept billed as defining the inquiry. This would excise Minimal Impairment's arbitrary core from crucial decisions on the justifiability of rights limitation under section 1 of the Charter.

Further, a practicable and consistent standard to adhere to on this aspect of proportionality analysis would remove the current incentives to sweep over it *en route* to addressing Proportionality of Effects, as explained in Part V: no longer caught between the strict vs lax double standard of Minimal Impairment, courts need not worry about inevitably being criticized for which of the double standards they use, nor have opportunity to exploit the double standard to support a determined outcome by dealing with the test superficially vs rigorously. In any case in which this step of inquiry is, for whatever reason, glossed over, the outcome will moreover be less impacted than presently where the step harbours a double standard.

Earlier, in Part VI, I suggested use under *Doré* of a more straightforward formulation of the Proportionality of Effects inquiry to reduce the frequency with which it is currently taken to be redundant of Minimal Impairment, with the result that proportionality analysis is reduced to a function of Minimal Impairment. But where this nonetheless occurs, the Reasonable Limitation test set forth here as a replacement for Minimal Impairment will vastly reduce the influence of such confusion on the outcome of limitation cases, by eliminating the arbitrariness of the differing standards of Minimal Impairment that are applied, as explained above. This would address the third layer of arbitrariness arising from Minimal Impairment, discussed in Part VI.

For all these reasons, the Reasonable Limitation test proposed here to replace Minimal Impairment is central to resolving the arbitrariness that currently afflicts decisions about the justifiable limits of rights under section 1 of the Charter.

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[168] Chart 1.

4. Practical Reinforcements: Reasonableness as the Standard that Is Possible and that Emerges from the Accumulated Weight of Judicial Experience

Some might worry that adopting a standard of reasonableness rather than necessity would establish a lamentably lower standard for the permissibility of limitations on fundamental rights. However, deeper reflection demonstrates that the opposite is in fact the case: This is because a standard of necessity, as discussed, is incapable of implementation by virtue of "requiring the impossible", and thus in practice produces a double standard. It is this existence of double standards that then results in arbitrary decisions of which standard to enforce and when. Where the limitation of rights is determined by arbitrary factors, they are not protected by any *legal* standard. That has been the ongoing problem in applying section 1. "Reasonable" is not a concession; it is the most that it is *possible* to require in a system governed by the rule of law. It is cliché to say that sometimes less is more, but there can be no doubt that assessing justifiable limits by a realistic standard offers far more protection to rights than a standard like Minimal Impairment, whose unenforceability results instead in decisions which are arbitrary.

Relatedly, we must not lose sight of the fact that most of the various attempts to capture the standard most typically applied in practice at this stage of the proportionality tests *do* use the word "reasonable". For example, sometimes it is said that the question amounts to whether the right was impaired "as little as *reasonably* possible".[169] Or it has been put as whether the limit was one "reasonable for the legislature to impose".[170] In other cases, courts have asked whether a measure is "reasonably tailored"[171] to avoid undue limitation of the right. Or it is asked whether the government action fell within a range of reasonable outcomes.[172] And so on. This provides strong evidence that, going back to *Edwards Books*, judges have often sought to apply a standard of reasonableness. In addition to being what the text of section 1 calls for, this suggests that the revised inquiry proposed above accords with judges' accumulated sense from more than four decades of practice. This also means that the revised inquiry recommended here to replace Minimal Impairment will not alter the threshold for justification, as most typically applied. Rather, what it does firstly is allow for common judicial practice to be accurately captured by the test as conceived and formulated; then, aided by this, it allows secondly the elimination of the problems of *arbitrary differences* in how the justifiability of rights limitations are decided in different cases or different opinions of one case.

To achieve this, it is necessary to wholly and officially "lay to rest" the Minimal Impairment construct.[173] And we must settle on a definitive alternate formulation —

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[169] *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70 at para. 131 (S.C.C.).

[170] *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70 at para. 147 (S.C.C.).

[171] *Hutterian Brethren*, at para. 53.

[172] *Hutterian Brethren*, at para. 53.

[173] *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.J. No. 23 at 462

that can be applied consistent with its terms, and consistent from case to case. The Reasonable Limitation inquiry recommended above does this. It accurately and unambiguously captures the concept meant to be inquired into at this stage of proportionality analysis. It appropriately implements the condition that section 1 itself provided for. And it sets a standard that is possible to apply in practice and apply consistently in different cases. This would surely be a major improvement over the situation that has long prevailed with respect to this element of decision-making on the justifiable limits of rights under the Charter.

VIII. CONCLUSION

Detracting from the foundational principle of the rule of law, decisions about the justifiable limits of rights under section 1 of the Charter have long been tainted by arbitrariness arising from the problematic Minimal Impairment element of proportionality analysis. In conception and in strict applications, Minimal Impairment imposes an unrealistic standard for justifying rights limitations. In more common applications, courts variously depart from that concept and standard significantly. The unrationalized inconsistency in which test will actually be applied in any given case is the source of worrisome arbitrariness in these important decisions seeking the proper balance between fundamental rights and broader societal needs. A recent shift in emphasis from Minimal Impairment towards the Proportionality of Effects element of the *Oakes* and *Doré* frameworks used to implement section 1 has partly mitigated this, but also occasioned another layer of arbitrariness in whether or not Minimal Impairment is then superficially swept over. Meanwhile, especially under *Doré*, the shift is not always followed. In such cases, proportionality analysis is often reduced to Minimal Impairment *only*. This too occurs arbitrarily, and exacerbates the "internal" arbitrariness of the Minimal Impairment condition for justification itself.

In addition to being the locus of most of the arbitrariness present in decisions about rights limitations, the requirement of Minimal Impairment has no basis in the text or legislative history of section 1 of the Charter. Rather, these call for a condition of "reasonable limits", reflecting accumulated judicial experience elsewhere where proportionality analysis is used, of what would avoid problems like those above.

It is long since time that the irremediable and illegitimate Minimal Impairment construct be laid to rest. Its place in the *Oakes* and *Doré* proportionality frameworks used in Canada should be replaced by a functionally-equivalent but realistic inquiry into whether the impugned measure is a Reasonable Limitation. This more suitable inquiry would ask: Does the chosen means of pursuing the statutory objective avoid unreasonable limitation of the right? That question would be answered by whether (i) the limitation is proportionate to the statutory objective, or if not, (ii) the disproportionate limitation was unavoidable in pursuing the statutory objective.

(S.C.C.) (referring to the since retired doctrine of fundamental breach).

This revised inquiry does not share the problems of Minimal Impairment that lead to arbitrariness. It can be applied according to its stated terms, obviating the emergence of "in action" double standards, and of arbitrariness when strict and lax tests are applied. This in turn would reduce current incentives to gloss over the inquiry, and dampen the impact of cases (especially under *Doré*) where conversely this inquiry is overemphasized at the expense of the question of Proportionality of Effects.

A reasonableness standard is already commonly invoked in practice. It therefore not only reflects the text and legislative intent of section 1, but also the weight of section 1 jurisprudence, looking beyond the problem of arbitrary discrepancies among individual cases.

The Charter enjoys pride of place not only in the Canadian legal system, but in Canadian society. A just balance between individual rights and their limitation in pursuit of collective aims under section 1 is essential. We need not let it continue to be undermined by a design flaw in Canadian proportionality analysis that was never supposed to be there anyway. At this point, both the problems with Minimal Impairment and the means to correct it are now clear. It is time to give section 1 of the Charter a chance to live up to its promises.