

Proportionality, Justification, Evidence and Deference: Perspectives from Canada

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Introduction

Proportionality – the notion that means should be commensurate to ends – is an idea with a noble pedigree in law that dates back to ancient and classical conceptions of justice.² Today, its presence is felt in all areas of the law.

At international law, proportionality has long been tied to the use of force in armed conflicts. The pursuit of legitimate military goals requires proportionality in the means chosen to wage war and the execution of those means.³ Proportionality is also a general principle of law in European Community law, and it has been applied by the European Court of Justice to review actions by Community and Member States in cases alleging fundamental rights infringements, to review policies and regulations which impose burdens in the form of penalties or levies, and to review discretionary decisions.

Proportionality also lies at the core of the criminal law. Some see the Magna Carta as embodying a proportionality principle that the punishment fit the crime,⁴ and indeed, as a sentencing principle, proportionality can be understood as a limit on the state power to punish.⁵ It features prominently in American jurisprudence under the Eight Amendment, to prevent cruel and unusual punishment.

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² Thomas Poole, “Proportionality in Perspective”, [2010] N.Z. L. Rev. 369 (tracing it to Plato and Cicero); Mark Antaki, “The Rationalism of Proportionality’s Culture”, in Grant Huscroft, Bradley W. Miller and Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge Univ. Press 2014) 284, at 305 (tracing it to the Aristotle’s conception of justice in the *Nicomachean Ethics*).

³ Judith Gardam, “Proportionality and Force in International Law” (1993), 87 *American Journal of International Law* 391.

⁴ Anthony F. Granucci, “‘Nor Cruel and Unusual Punishment Inflicted’: The Original Meaning” (1969), 57 *Calif. L. Rev.* 839; *contra*: Craig S. Lerner, “Does the Magna Carta Embody a Proportionality Principle?” (2014-2015), 25 *Geo. Mason U. C.R. L.J.* 271.

⁵ Alice Ristroph, “Proportionality as a Principle of Limited Government” (2005-2006), 55 *Duke L.J.* 263.

The importance of proportionality has also been recognized in the civil law. With the requirement that parties conduct litigation in a proportionate manner,⁶ proportionality has become a key feature of civil litigation and is central to improving access to justice. This is fundamental to the rule of law, since a society with a healthy rule of law must provide courts as a means “for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”.⁷ Without access to justice, as the Supreme Court of Canada recently held, “the rule of law is threatened”.⁸

Proportionality’s most visible presence, however, is in the sphere of public law. The idea of proportionality is central to the adjudication of rights in liberal democracies worldwide.⁹ It is both a principle of constitutional adjudication and a procedure for managing such disputes.¹⁰ As Moshe Cohen-Eliya and Iddo Porat explain:

Proportionality is a German-bred doctrine that structures the way judges decide conflicts between rights and other rights or interests, basically requiring that any interference with rights be justified by not being disproportionate. It consists of four (or three, depending on your perspective) stages: whenever the government infringes upon a constitutionally protected right, the proportionality principle requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective (suitability); third, that no less drastic means were

⁶ The preamble of the Quebec *Code of Civil Procedure* is especially enlightening in this respect: "This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role. It is also designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice." (*Code of Civil Procedure*, CQLR c. C-25.01, preliminary provision)

⁷ Tom Bingham, *The Rule of Law* (London: Penguin, 2011), at 83. See, in the American context, Jordan M. Singer, "Proportionality's Cultural Foundation" 2012, 52 Santa Clara L. Rev. 145.

⁸ *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, para. 26; see also *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31.

⁹ See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012); Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism* (2008), 47 Colum. J. Transnat'l L. 73; David Beatty, *The Ultimate Rule of Law* (2004). Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (1999); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005).

¹⁰ Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009), 47 Colum. J. Transnat'l L. 72, at 73.

available (necessity); and fourth, that the benefit from realizing the objective exceeds the harm to the right (proportionality in the strict sense). In addition to its simplicity, two important features of proportionality also stand out: it is standard-based rather than categorical, and it is results-oriented rather than being a formal and conceptual doctrine.¹¹

In public law, proportionality stands as the “archetypal universal doctrine”¹² of human rights adjudication, and some even claim that there is a logical, necessary connexion between proportionality and constitutional rights.¹³ To be sure, the reach of proportionality is global,¹⁴ and in the common law world, judicial review of administrative decisions can be said to represent the next frontier of proportionality.

This paper’s focus will be on proportionality in the context of public law, and more specifically of constitutional rights adjudication. It assumes that proportionality is a situated concept, in the sense that it works more in the concrete than in the abstract, and that in every legal system, proportionality analysis is shaped by the approaches judges take case after case, from one context to the next.¹⁵ In this light, while proportionality discourse forms the basis of a common constitutional language, its full import is embedded in each country’s legal and political culture. There, it “infus[es] coherence into the entire constitutional system”.¹⁶ Comparative study has its invaluable uses, but also presents limits. Understanding proportionality requires looking at it from within.

After tracing the history of proportionality, with an emphasis on the features of the Canadian doctrine (Part I), I will examine how the discourse of proportionality – and its underlying doctrine – flow from a legal culture that values justification as a means of resolving disputes (Part

¹¹ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) at 2.

¹² Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, (Cambridge University Press, 2013) at 4.

¹³ Robert Alexy, “Constitutional Rights and Proportionality” (2014), 22 *Revus* 51.

¹⁴ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 *Colum. J. Transnat’l L.* 72.

¹⁵ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 *Colum. J. Transnat’l L.* 72, at 162.

¹⁶ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, (Cambridge University Press, 2013) at 3.

II). In the final part of the paper, I will consider some of the challenges faced by judges tasked with assessing the arguments and evidence advanced by governments to justify the limitations to fundamental rights on the basis of proportionality (Part III).

Part 1 – Proportionality as an idea/ideal

1. Origins of proportionality

The emergence of proportionality in public law is generally traced to nineteenth-century Prussian – and then German – administrative law.¹⁷ After the Second World War, in the 1950s and early 1960s, proportionality gradually became a central aspect of German constitutional law.¹⁸ During the 1970s, the European Court of Justice and the European Court of Human Rights adopted the doctrine,¹⁹ which then led to very rapid developments. Indeed, it has been observed that proportionality went “viral”.²⁰ Not only did it spread to every continental Western European jurisdiction during the 1980s, it spilled over into Eastern Europe,²¹ Asia (Hong Kong, India, South Korea) and Latin America (Brazil, Colombia, Mexico, Peru).²² After initial resistance,²³ the U.K. paved the way for the absorption of proportionality into its jurisdiction with the enactment of the *Human Rights Act* in 1998.²⁴

¹⁷ Alec Stone Sweet and Jud Mathews, “Proportionality, balancing and global constitutionalism” (2008) 19 Colum. J. Transnat’l L. 72, 102; Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007), 57 Univ. Toronto L. J. 383.

¹⁸ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 2nd edn. 1997) at 33.

¹⁹ Internationale Handelsgesellschaft 11/70 [1970] ECR 1125; *Handyside v. The United Kingdom* (1976) 24 Eur. Ct. HR (Ser. A) 23 at para. 49.

²⁰ The term is by Alec Stone Sweet and Jud Mathews, “Proportionality, balancing and global constitutionalism” (2008), 19 Colum. J. Transat’l L. 72.

²¹ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) 181-208; Alec Stone Sweet and Jud Mathews, “Proportionality, balancing and global constitutionalism” (2008) 19 Colum. J. Transat’l L. 72, at 75; Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in The Post-Communist States of Central and Eastern Europe* (Dordrecht: Springer, 2005) at 263.

²² Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), at 199-202.

²³ *R. v. Secretary of State for the Home Department: ex parte Brind*, [1991] 1 A.C. 696.

²⁴ Aaron Baker, *Proportionality under the UK Human Rights Act*, (Oxford: Hart Publishing 2016), pre-released abstract. See also *R. v. Ministry of Defense, ex parte Smith*, [1996] Q.B. 517; and *Smith and Grady v. United Kingdom*, [2000] 29 E.H.R.R. 493.

While the U.S. does not recognize proportionality as a constitutional doctrine, judges, including Justice Breyer of the U.S. Supreme Court, in dissent, have referred to it in constitutional cases, and the topic is alive and well in academia.²⁵

In international law, proportionality is now seen as a general principle,²⁶ and is central to humanitarian law.²⁷ It has been used to interpret and apply the *International Covenant on Civil and Political Rights*, and international commerce institutions such as the World Trade Organization and the International Center for the Settlement of Investment Disputes are basing their jurisprudence on this principle.²⁸

2. Canada's version of proportionality

In those countries that possess a written constitution with a compendium of rights, clauses limiting rights are, implicitly or explicitly, the gateway for the judicial review of the constitutionality of government action. In Canada, s. 1 of the *Canadian Charter of Rights and Freedoms* is the basis for the expression of the proportionality principle in that domain. It states:

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

Some see s. 1 of the *Charter* as “the most important section of the Charter and [...] a key factor in determining the type of liberal democracy we have in Canada”.²⁹

In 1986, four years after the enactment of the *Charter*, the Supreme Court of Canada introduced proportionality analysis to Canada in the landmark case *R. v. Oakes*,³⁰ described as the “holy

²⁵ e.g. *District of Columbia v. Heller*, 554 US 690.

²⁶ Thomas M. Franck, “Proportionality in international law” (2010), 4 L. & Ethics Hum. Rts. 229.

²⁷ Georg Nolte, “Thick or thin: the principle of proportionality in international humanitarian law” (2010) 4 L. & Ethics Hum. Rts. 243.

²⁸ Axel Desmedt, “Proportionality in WTO law” (2001), 4(3) J. Int. Eco. L. 441; Alec Stone Sweet, “Investor-state arbitration: proportionality’s new frontier” (2010), 4(1) L. & Ethics Hum. Rts. 46.

²⁹ Errol P. Mendes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?” (2013), 61 S.C.L.R. (2d) 293, at 295.

writ”.³¹ Under *Oakes* and subsequent refinements, proportionality analysis is conducted in two steps. In order to justify the infringement of a claimant’s rights under s. 1 of the *Charter*, the government must first show that the law (or limit “prescribed by law”) has a pressing and substantial objective, and second, that the means chosen are proportional to that objective. The second inquiry entails three steps. A law is proportionate if (1) the means adopted are rationally connected to that objective (rational connection); (2) the law minimally impairs the right in question (minimal impairment); and (3) there is proportionality between the deleterious and salutary effects of the law (proportionality in the strict sense).

Two terms are critical to the first step: “prescribed by law” and “pressing and substantial objective”. The term “prescribed by law” has been given a broad interpretation. It is not confined to formally enacted legislative provisions. Any measure that contains an “intelligible standard”³² or gives “sufficient guidance for legal debate”³³ is “prescribed by law”.³⁴ The government’s objective, to be “pressing and substantial objective”, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”.³⁵

At the second step, the need for a rational connection between the measure and the objective usually poses little difficulty. It suffices that the governmental measure is causally capable of achieving the objective, “on the basis of reason or logic”.³⁶ The government failed to meet the

³⁰ [1986] 1 S.C.R. 103.

³¹ Errol P. Mendes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?”, in E. Mendes and S. Beaulac eds., *Canadian Charter of Rights and Freedoms*, 5th ed. LexisNexis 2013, at pp. 295-296

³² *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at paras. 53-54.

³³ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at para. 71.

³⁴ e.g. *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 S.C.R. 296, at paras. 64 and 65 (a transit authority’s advertising policy); *Canadian Broadcasting Corp v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, at paras. 59, 60 and 63 (a ministerial directive limiting filming at certain locations in courthouses).

³⁵ *R. v. Big M Drug Mart Ltd.*, at p. 352; see also *R. v. Whyte*, [1988] 2 S.C.R. 3 (a “valid” objective); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (a “sufficiently important” objective).

³⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. In *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, the Court was faced with a challenge to a provision of the *Canada Elections Act*, RSC 1985, c E-2, under which prisoners serving a sentence of two or more years were not entitled to vote in federal elections. A majority of the Court found that there was no rational connection between the law and the government’s stated goals of educating inmates to respect the law and rehabilitating them: “[t]he ‘educative message’ that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory” and “[d]epriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity” (paras. 32 and 38). In short, it was

“rational connection” part of the test in *Oakes*, the first case to apply the proportionality analysis. However, it is rare that governments fail to satisfy this requirement.³⁷

To date, most s. 1 cases turn on the “minimal impairment” step of the proportionality analysis.³⁸ The challenged measure must impair the protected rights “as little as is reasonably possible”. Typically, the court asks “whether there is some reasonable alternative scheme”.³⁹ The question is whether the measure constitutes a “reasonable impairment” or falls within a “range of possible alternatives”⁴⁰ available to the government. The minimal impairment test is applied flexibly and takes into account context.⁴¹ Cases where a full prohibition is enacted are difficult to justify; the government is required to show that “only a full prohibition will enable [Parliament] to achieve its objective”.⁴²

The last stage of the proportionality test “weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good”.⁴³ In broad terms, “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality

illogical for the government to seek to attain its objectives by denying the right to vote to an entire class of citizens. Recently, in *R. v. Nur*, 2015 SCC 15, which involved a challenge to mandatory minimum sentences provisions of the *Criminal Code*, the Court noted that while empirical evidence suggests that such sentences do not deter crimes, the provisions nevertheless had a rational connection with the other sentencing goals of denunciation and retribution (at paras. 112-115).

³⁷ Carissima Mathen, “Rational Connections: *Oakes*, Section 1 and the Charter’s Legal Rights”, (2011-2013) 43:3 *Ottawa L Rev.* 491, at 495 ff.

³⁸ By contrast, courts in Germany and Israel have tended to find fault with legislation on the basis of a lack of an absence of general proportionality: see Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 *Colum. J. Transnat’l L.* 72, at 163; Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007), 57 *U.T.L.J.* 383 at 389, 393.

³⁹ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at 772.

⁴⁰ *R. v. Bryan*, [2007] 1 S.C.R. 527.

⁴¹ In *Newfoundland v. NAPE*, [2004] 3 S.C.R. 381, for example, which involved the retroactive annulment of pay equity payments to women employees on the basis of an impending financial crisis, Binnie J. explained that “the requirement that the measure impair as little as possible the infringed *Charter* right cannot be applied in a way that is blind to the consequences for other social, educational and economic programs” (at paras. 94-95).

⁴² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 163. See also *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; and *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

⁴³ *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, at para. 122; see also *R. v. Nur*, 2015 SCC 15, at para. 118.

between the deleterious and the salutary effects of the measures”.⁴⁴ The impacts of the law are measured “both qualitatively and quantitatively”.⁴⁵

While this final step was once thought redundant in Canada,⁴⁶ its relevance has been recently reaffirmed in *Alberta v. Hutterian Brethren of Wilson Colony*.⁴⁷ Drawing on the experience of the Supreme Court of Israel,⁴⁸ the Court noted that minimal impairment and strict proportionality focus on different kinds of balancing: “[w]here no alternative means are reasonably capable of satisfying the government’s objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government’s objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*”.⁴⁹

In *Oakes*, the Supreme Court did not advert to the jurisprudence of the European Court of Human Rights, and the influence of the European jurisprudence on the introduction of proportionality into Canadian constitutional law remains unclear.⁵⁰ However, the Canadian experience is credited for having furthered similar developments in New Zealand,⁵¹ South Africa⁵² and Australia.⁵³

Part II – Proportionality as a feature of a legal culture of justification

⁴⁴ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889

⁴⁵ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 126.

⁴⁶ e.g. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., (Scarborough, Ont., Thomson/Carswell, 2007), vol. 2, at section 38.12.

⁴⁷ [2009] 2 S.C.R. 567; see also Sara Weinrib, “The Emergence of the Third Step of the *Oakes* Test in *Alberta v. Hutterian Brethren of Wilson Colony*” (2010), 68 U. Toronto Fac. L. Rev. 77.

⁴⁸ Aharon Barak, “Proportional Effect: The Israeli Experience” (2007), 57 Univ. Toronto L. J. 369.

⁴⁹ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 76.

⁵⁰ Robert J. Sharpe and Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003) 334.

⁵¹ *Ministry of Transp. v. Noort*, [1992] 3 NZLR 260, 282-5. There, the judges adopted the test developed in *Oakes*. See also *Hansen v. R.*, [2007] 3 NZLR 1 at 104; Philip A. Joseph, “The New Zealand Bill of Rights Experience”, in Philip Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford Univ. Press 1999) 283, at 305.

⁵² *S. v. Zuma & Others*, 1995 (2) SA 642 (CC).

⁵³ The Hon. Susan Kiefel, “Proportionality: A rule of reason” (2012), 23 PLR 85; see also *Kartinyeri v. Commonwealth* (1998) 152 ALR 540.

1. Normative effects of proportionality

Proportionality is not without its critics. Some claim that its effect is to weaken rights protection, on the basis that allowing for a balancing of rights “reduce[s] claims of basic liberties or rights of individuals to mere claims of interest” or “elevate[s] mere claims of interests of government into claims of rights”.⁵⁴ They fear that proportionality may lead to the watering down of constitutional rights. Others say that allowing judges to review the reasonableness of legislative policies grants them too much power over policy-making, usurping the role of elected representatives.⁵⁵ Still others take issue with the application of the doctrine from case to case, both in terms of a perceived lack of analytical rigour in the application of each step of the proportionality doctrine⁵⁶ and of an apparent lack of consistency in the weighing of relevant considerations at each step.⁵⁷ Despite these criticisms of proportionality in constitutional decision-making, the bald fact is that proportionality has become the dominant discourse of constitutional rights adjudication, not only in Canada, but in many liberal democratic societies.

Rights are not absolute, and broader public interests require that they be limited in certain contexts. Constitutional rights can be limited in two ways. The first is definitional; *prima facie* absolute rights are “read down” by judicially created exceptions. This is the approach in the United States. The second is by requiring that limitations be proportionate to ends – proportionality.

⁵⁴ James Fleming, “Securing Deliberative Democracy” (2004), 72 *Fordham L. Rev.* 1435, at 1446. See also Grégoire Webber, “Proportionality, Balancing and the Cult of Constitutional Rights Scholarship” (2010), 23 *Can. J. L. & Jur.* 179

⁵⁵ In the U.S. context, see T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987), 96 *Yale L.J.* 943.

⁵⁶ For an example concerning the last step of the proportionality test applied in Canada, see Sara Weinrib, “The Emergence of the Third Step of the Oakes Test in *Alberta v. Hutterian Brethren of Wilson Colony*” (2010), 68 *U. Toronto Fac. L. Rev.* 77.

⁵⁷ Errol P. Medes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?” (2013), 61 *S.C.L.R.* (2d) 293, at 303. See also 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; Danielle Pinard, “La promesse brisée de *Oakes*”, in Luc B. Tremblay and Grégoire C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes*, (Les Éditions Thémis Inc. 2009), at 131.

Some have suggested that the variance in approaches is largely a result of differences in constitutional culture and history.⁵⁸ This makes evaluating the respective approaches an exercise fraught with complexity.

It can be argued that the definitional approach tends to eclipse an important dimension of constitutional adjudication. At bottom, the courts are asked to do more than define rights and interests. They are called upon to resolve conflicts between rights and interests on the one hand, and broader public interests or rights on the other hand. Proportionality offers a structured heuristic device for political-moral reasoning;⁵⁹ it separates the requirements of justification in a number of steps to streamline argumentation and decision-making. Proportionality provides a framework that is communicable to those involved in judicial review, be they litigants or decision makers.⁶⁰ It structures and constrains the decision-making process, leaving the judge to evaluate the claims – to judge – and requiring her to articulate the reasons for her choices. And because it applies to all (or at least most) rights, I would argue that it provides intellectual coherence to the constitutional scheme in a way that a right-by-right definition does not.

Proponents of a definitional approach to limiting rights have argued that it offers more certainty and provides less scope for judicial law-making than proportionality.⁶¹ However, these advantages may be more apparent than real. Whether by re-defining the contours of a right, or by applying the principle of proportionality, the reality is that in both cases, judges must resolve the conflict on the basis of value judgments that are incapable of scientific measurement.

⁵⁸ Moshe Cohen-Iliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013).

⁵⁹ Charles-Maxime Panaccio, “In Defence of Two-Step Balancing and Proportionality in Rights Adjudication” (2011), 24 *Can. J.L. & Juris.* 109; Kai Möller, “Blancing and the structure of constitutional rights” (2007), 5 *Int.’l J. Const. L.* 453.

⁶⁰ Charles-Maxime Panaccio, “In Defence of Two-Step Balancing and Proportionality in Rights Adjudication” (2011), 24 *Can. J.L. & Juris.* 109. See also Mendelson, “On the Meaning of the First Amendment: Absolutes in the Balance” (1962), 50 *Calif. L. Rev.* 821, at 825: “Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them – more particularized and more rational at least than the familiar parade of hallowed abstraction, elastic absolutes, and selective history”.

⁶¹ For a historical view of this line of reasoning, see T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1986-1987), 96 *Yale L.J.* 943.

The fact remains that proportionality as a constitutional principle is ascendant in many parts of the world.⁶² It is increasingly understood as a “constitutional doctrine”, in the sense developed by, notably, Richard Fallon and Mitchell Berman.⁶³ It is seen as an “argumentation framework”⁶⁴ designed to give effect to and implement constitutional norms. It acts as “a discursive frame for norm-based argumentation that enables the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict”,⁶⁵ dividing the work involved between contesting parties, organizing how they present their arguments and engage their opponents’ arguments, and dictating how courts will frame their decisions. By providing “a checklist of sorts”,⁶⁶ proportionality serves an epistemic purpose. It provides an “analytical structure”⁶⁷ to deal with tensions between asserted rights and their limitations, between the constitutional values and interests at stake. Scholars assert that, as a constitutional doctrine, proportionality analysis, helps judges “manage potentially explosive environments, given the politically sensitive nature of rights review” and serves to “establish, then reinforce, the salience of constitutional deliberation and adjudication within the greater political system”.⁶⁸

Proportionality can also be understood as an institutionalized and professional ethic. It requires governments to be “to the point, clear, precise and necessary and, in the context of constitutional guarantees, respectful of those guarantees”.⁶⁹ And it imposes on courts the duty to preserve the balance between the rights protected by the constitution and the limits that can reasonably be imposed on them.

⁶² Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), chap. 7.

⁶³ Richard Fallon, “Forward: Implementing the Constitution” (1997), 111 Harv. L. Rev. 56; Mitchell Berman, “Constitutional Decision Rules” (2004), 90 Va L. Rev. 1.

⁶⁴ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 Colum. J. Transnat’l L. 72, at 86.

⁶⁵ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 Colum. J. Transnat’l L. 72, at 87.

⁶⁶ Dimitrios Kyritsis, “Whatever Works: Proportionality as a Constitutional Doctrine” (2014), 34 Oxford Journal of Legal Studies 395, at 413.

⁶⁷ Mattias Kumm, “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice” (2004), 2 Int’l J. Const. L. 574, at 579.

⁶⁸ Alec Stone and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 Colum. J. Transnat’l L. 72, at 87.

⁶⁹ Brian F. Fitzgerald, “Proportionality and Australian Constitutionalism” (1993), 12 U. Taz. L. Rev. 263, at 268; see also Paul Loftus, “Proportionality, Australian Constitutionalism and Governmental Theory – Changing the Grundnorm” (1999), 3 S. Cross U. L. Rev. 30, at 34.

Finally, proportionality serves a legitimizing function. As Mattias Kumm puts it, under proportionality, “the law’s claim to legitimate authority is plausible only if the law is demonstrably justifiable to those burdened by its terms that free and equals can accept”⁷⁰ It serves as a significant constraint on the decision-making process, while allowing for a degree of flexibility that must exist if the courts are to discharge their duty to uphold the rule of law. Applying proportionality shows “(a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, *a priori*, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts”.⁷¹

2. Proportionality in a culture of justification

The link that exists between proportionality and an emerging global legal “culture of justification” has recently garnered interest.⁷² The term “culture of justification” was coined by the late South African scholar Étienne Mureinik and subsequently adopted by Moshe Cohen-Eliya and Iddo Porat, and by David Dyzenhaus. Justification has become what David Beatty has called the “leitmotiv of constitutional review”.⁷³

In a culture of justification, a government is required to “provide substantive justification for all of its actions, in that it must show the rationality and reasonableness of those actions and the tradeoffs they necessarily entail”.⁷⁴ Justification, or reason-giving, has a certain “pull”,⁷⁵ in that

⁷⁰ Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review” (2010), 4:2 *Law & Ethics of Human Rights* 141 at 143.

⁷¹ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008-2009), 47 *Colum. J. Transnat’l L.* 72, at 88.

⁷² The term is by Étienne Mureinik, “A bridge to where? Introducing the Interim Bill of Rights” (1994), 10 *S. Afr. J. on Hum. Rts.* 31.

⁷³ David Beatty, *Constitutional Law in Theory and Practice* (Univ. of Toronto Press, 1995), at 17.

⁷⁴ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge Univ. Press 2013), at 7.

⁷⁵ The term is by David Dyzenhaus and Michael Taggart, “Reasoned Decisions and Legal Theory”, in Douglas E. Edlin, ed., *Common Law Theory* (2007), at 134; see also David Dyzenhaus, “Proportionality and Deference in a

the authority of decisions that affect legal interests in part depends on the reasons offered in support.

As Moshe Cohen-Eliya and Iddo Porat remark,⁷⁶ constitutional systems that foster a culture of justification are typically characterized by a broad conception of rights, a constitutional approach to interpretation that emphasizes fundamental principles rather than text, an absence of significant barriers to substantive review, a subjection of all areas of government to review, and a two-step justification process: identification of a rights infringement; assessment of the government's justification. The constitutional doctrine of proportionality, which "institutionalizes a right to justification",⁷⁷ finds a home in such a culture.

Justification offers interrelated beneficial effects that parallel those associated with proportionality analysis.

First, the requirement of justification exerts a disciplining influence on public authorities. Governments are in a position to anticipate the need to justify their actions, and thus have a strong incentive to take matters of proportionality into account when they first develop policy and enact legislation.⁷⁸ In Canada, for example, the *Charter* influences all stages of the policy-making process. Legislation proposed by the government is pre-screened for *Charter* compliance, and the Minister of Justice is required by law to "examine [...] any proposed legislation introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter" and must then report any inconsistency to the House of

Culture of Justification", in Grant Huscroft, Bradley W. Miller and Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge Univ. Press 2014) 234, at 242.

⁷⁶ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge Univ. Press 2013), at 7-8.

⁷⁷ Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010), 4:2 *Law & Ethics of Human Rights* 141, at 143.

⁷⁸ Richard Ekins, "Legislating Proportionately", in Grant Huscroft, Bradley W. Miller and Grégoire Webber, eds. (Cambridge University Press: 2014) 343. See also: Janet L. Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006), 69 *Mod. L. Rev.* 7, at 12-13; James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (2005); M. Dawson, "The Impact of the Charter on the public policy process and the Department of Justice" (1992), 30 *Osgoode L.J.* 596.

Commons.⁷⁹ When constitutional challenges are anticipated, Parliament has tools at its disposal to show that the dictates of proportionality were respected. It can add preambles to legislation that state how the legislation is tailored to the objective.⁸⁰ The government may also seek the Supreme Court of Canada's advisory opinion on proposed legislation.⁸¹ If a serious challenge is anticipated, or if Parliament is responding to a judgment striking down legislation, Parliament is likely to build an extensive record to ensure that it can meet its evidentiary burden later on.⁸²

Second, justification fosters transparency, accountability and trust. Requiring reasons “invites a process of deliberation, discourse, and the active participation of the citizen in the democratic process. Without reasons and justification, there is no basis for discourse and exchange”.⁸³ More generally, the analytical structure of proportionality favours a culture of justification, because it “forces judges to give an open and reasoned justification for intervention”.⁸⁴ The proportionality test provides a framework through which courts can assign particular weights to particular considerations. It provides clear criteria that judges must answer before they can quash a decision.

⁷⁹ *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1.

⁸⁰ Peter W. Hogg, Alison A. Bushell Tornton & Wade K. Wright, “Charter Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007), 45 *Osgoode Hall L.J.* 1, at 48.

⁸¹ *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53. See, for example, *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, where the Court stated the following in response to the question whether, in light of the proposed legislation recognizing the legality of same-sex marriage, freedom of religion guaranteed by s. 2(a) of the *Charter* protected religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs: “The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(a). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.” [at paras. 52-53; emphasis in original]

⁸² e.g. In reviewing legislation on tobacco advertising enacted in response to a successful court challenge, the Court noted that the government had “presented detailed and copious evidence in support of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s. 1 of the *Charter*”: *Canada (Attorney General) v. RJR-Macdonald*, [2007] 2 S.C.R. 610, at para. 8. The Court upheld the constitutionality of the new legislation.

⁸³ Moshe Cohen-Eliya and Iddo Porat, “Proportionality and justification” (2014), 64 *U of T L.J.* 458, at 468.

⁸⁴ Guy Régimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005-2006), 31 *Manitoba L.J.* 239, at p. 268. See also G. Wong, “Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality”, (2000) *P.L.* 92.

Third, requiring a decision-maker to articulate reasons leads to better decision-making. As the Supreme Court of Canada recognized when discussing justification in the context of judicial review of discretionary administrative decisions, reasons “foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for a decision by itself may be a guarantee of a better decision”.⁸⁵

Fourth, justification has positive effects on the separation of powers. In the context of administrative decision-making, “[b]y requiring the executive to justify the exercise of its power, and by requiring the judiciary to defer to reasonable justification, the roles each branch plays are made clearer”.⁸⁶ In a culture of justification, “administrative bodies participate as partners with other institutions in the process of determining how fundamental rights commitments are to be interpreted and implemented”.⁸⁷ As Janina Boughey says, in a culture of justification, “[t]he executive is obliged to give justifications for its decisions, and the judiciary is required to defer to those justifications where they are reasonable”.⁸⁸

Finally, imposing on the government the duty to justify its actions fosters an attitude of respect towards citizens,⁸⁹ which, in turn, increases compliance by citizens while reducing monitoring and compliance costs.⁹⁰

3. The spread of the culture of justification

⁸⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39.

⁸⁶ David Dyzenhaus, “Proportionality and Deference in a Culture of Justification”, in Grant Huscroft, Bardley W. Miller and Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge Univ. Press 2014) 234, at 255.

⁸⁷ David Dyzenhaus, “Proportionality and Deference in a Culture of Justification”, in Grant Huscroft, Bardley W. Miller and Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge Univ. Press 2014) 234, at 256.

⁸⁸ Janina Boughey, “The Reasonableness of Proportionality in the Australian Administrative Law Context” (2015), 43 Fed. L. Rev. 59, at 84.

⁸⁹ Moshe Cohen-Eliya and Iddo Porat, “Proportionality and justification” (2014), 64 U of T L.J. 458, at 466, referring to Kai Möller, “Proportionality, Rights Inflation and the Right to Murder” [unpublished].

⁹⁰ Mathilde Cohen, “Reasons for Reasons” in Dov M Gavvay et al, eds, *Approaches to Legal Rationality* (New York: Springer, 2010) 119. Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401707.

The culture of justification, once installed, tends to spread to diverse areas of the law. Consider the introduction of the proportionality principle in the field of administrative law, a matter that has garnered much interest recently in the common law world. This is bringing proportionality analysis into new areas of the law. Some assert that proportionality should be a general principle of judicial review that can be used in all cases, whether those involve rights claims or not, albeit with varying intensity of review.⁹¹ Others take the view that its role, if any, should be more limited,⁹² for fear that a less deferential standard may be used to review government acts where fundamental rights are not at stake, thus inappropriately upsetting the balance between courts and the executive.⁹³

A number of factors may explain the appeal of proportionality in administrative law.

Proportionality and judicial review share similar methodology. At their core lies the idea that the legality of decisions made by public authorities depends on the justification offered by the decision-maker.⁹⁴ In the parlance of administrative law, the *quality* of the reasons matters.

Proportionality and judicial review also allow for varying intensity of oversight. Different margins of appreciation apply in different circumstances, and courts must, in certain circumstances, defer to the decision maker. Judicial deference in both administrative and constitutional law is justified by the fact that there are many situations where there is no single right answer to the question under review. It is not always a judicial court's role to seek out whether a given question could be answered in a better way. Some decision makers must be afforded more leeway than others.

That is why Canadian administrative law recognizes two different "standards of review": correctness and reasonableness. On the correctness standard, the administrative decision maker is

⁹¹ e.g. Paul Craig, "Proportionality, Rationality and Review" (2010), 2010 N.Z. L. Rev. 265; Murray Hunt, "Against Bifurcation" in David Dyzenhaus, Murray Hunt and Grant Huscroft, eds. *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, Oxford, 2009) 99.

⁹² Michael Taggart, "Proportionality, Deference, *Wednesbury*" (2008), 2008 N.Z. L. Rev. 423; Jeff King, "Proportionality: A Halfway House" (2010), (2010) N.Z. L. Rev. 327; Tom Hickman, "Problems for Proportionality" (2010), 2010 N.Z. L. Rev. 3030.

⁹³ Michael Taggart, "Proportionality, Deference, *Wednesbury*", [2008] N.Z. L. Rev. 423.

⁹⁴ Michael Taggart, "Proportionality, Deference, *Wednesbury*", [2008] N.Z. L. Rev. 423, at 457.

not permitted to err, and the reviewing court may substitute its opinion to that of the decision maker. On the reasonableness standard, the question is whether the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.⁹⁵ In those situations, courts accept that more than one decision is possible, and that the specific choice of outcome was delegated to an administrative body by Parliament. If the reasons or the evidence justify the decision, then deference is due regardless of whether the court would have come to a different conclusion. In a sense, the deference shown by the reviewing court amounts to “a respectful attention to the reasons offered or which could be offered in support of a decision”.⁹⁶ It also respects the fact that there may be more than one reasonable interpretation of a statute,⁹⁷

In Canada, there have been calls for integrating the proportionality principle in judicial review of administrative action.⁹⁸ The Supreme Court has recognized that discretion in the administrative law context “must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*”.⁹⁹ In the recent case *Dor é v. Barreau du Québec*¹⁰⁰ – a case involving a lawyer disciplined by a professional disciplinary board for having sent an intemperate letter to a judge following a court hearing – the Court recognized the parallels between proportionality in constitutional adjudication and in administrative review.¹⁰¹

⁹⁵ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 47. Incidentally, the language of “range of acceptable outcomes” used in the administrative law context is the same as that used in *Edwards Books* in the *Charter* context.

⁹⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65. See also David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in M. Taggart, ed., *The Province of Administrative Law* (1997) 279, at 286.

⁹⁷ Evan Fox-Decent, “The Internal Morality of Administration: The Form and Structure of Reasonableness” in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 143 at 155.

⁹⁸ Evan Fox-Decent, “The Internal Morality of Administration: The Form and Structure of Reasonableness”, in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 143, at 157-163; see also Guy Régimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005-2006), 31 *Manitoba L.J.* 239.

⁹⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56.

¹⁰⁰ [2012] 1 S.C.R. 395.

¹⁰¹ The precise methodology for engaging in administrative review is still evolving. See, e.g., *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12; see also Lorne Sossin and Mark Friedman, “Charter Values and Administrative Justice” (2014), 67 *Supreme Court L. Rev.* 391.

In Australia, the dominant view is that proportionality is not a ground of review for discretionary administrative decisions at common law, and that administrative decisions must be reviewed under the strict *Wednesbury* unreasonableness standard. Some have argued that the winds are changing, and that some of the methods of proportionality can be applied within Australia's judicial review framework, albeit with some significant adaptations.¹⁰² Courts in New Zealand may be headed in the same direction on this issue.¹⁰³

Part III – Assessing proportionality and the need for deference – evidentiary considerations

1. The need for evidence

Courts reviewing legislation and government action for compliance with the constitution find themselves in a difficult position. They must ascertain government objectives, weigh values and interests, and draw conclusions on the impacts of government measures both qualitatively and quantitatively. Yet they lack the resources that law-makers enjoy. As a constitutional doctrine, proportionality assists courts by providing an analytical path. But it does not tell them how to judge. The rules of evidence further constrain judicial decision-making.

As the Supreme Court of Canada explained in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361:

...the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinions as to the future impact of the impugned legislation and the result of the possible decision pertaining to it may be of great assistance to the courts.

¹⁰² Janina Boughey, "The Reasonableness of Proportionality in the Australian Administrative Law Context" (2015), 43 Fed. L. Rev. 59.

¹⁰³ Michael Taggart, "Proportionality, Deference, *Wednesbury*" (2008), N.Z. L. Rev. 423, at pp. 441 ff.

In constitutional adjudication, evidence is used 1) to establish that a right has been breached and 2) to justify the breach. In general, the normal rules regarding the proof of facts in litigation apply in the context of constitutional review. A distinction is made between “adjudicative” or “historical” facts – i.e. the facts of the case – and “legislative” or “social” facts – i.e. facts about society at large.¹⁰⁴ Legislative facts are typically proven by the presentation of social science evidence presented through expert testimony.¹⁰⁵ Allowing the filing of “social science” evidence in constitutional adjudication is an acknowledgment that the “facts” to be proved in such cases are not simply “adjudicative facts”,¹⁰⁶ but extend to social phenomena.

While the rights claimants are required to establish the breach, the government bears the burden of justifying it, since “[u]nlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law’s impact in terms of society as a whole”.¹⁰⁷ The standard of proof is the civil standard of proof by a preponderance of probability.¹⁰⁸

On the basis of the words used in s. 1 of the *Charter*, proportionality analysis in Canada imposes on the government the burden of demonstrating that the limit it imposes on rights is “reasonable” and “demonstrably justified in a free and democratic society”. This is a burden of “argumentation”,¹⁰⁹ or demonstration. As the Supreme Court stated in *RJR MacDonald Inc. v. Canada (Attorney General)*:

The choice of the word “demonstrably” [in s. 1 of the *Charter*] is critical. The process is not one of mere intuition, nor is it one of deference to Parliament’s choice. It is a process

¹⁰⁴ K.C. Davis, “Facts in Lawmaking” (1980), 80 *Columbia L. Rev.* 931; *R. v. Spence*, [2005] 3 S.C.R. 863, at paras. 56-60.

¹⁰⁵ *R. v. Malmø-Levine*, [2003] 3 S.C.R. 571, at paras. 26-28; *R. v. Spence*, [2005] 3 S.C.R. 863, at para. 68; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 53.

¹⁰⁶ K.C. Davis, “An Approach to Problems of Evidence in the Administrative Process” (1942), 55 *Harv. L. Rev.* 364.

¹⁰⁷ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 126.

¹⁰⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103, at 137.

¹⁰⁹ Charles-Maxime Panaccio, “In Defence of Two-Step Balancing and Proportionality in Rights Adjudication” (2011), 24 *Can. J.L. & Juris.* 109, at 121.

of demonstration. This reinforces the notion inherent in the word “reasonable” of rational inference from evidence or established truths.¹¹⁰

To justify a *Charter* violation, the government must present sound evidence, and cannot simply rely on common sense or “intuition”. Similarly, the government cannot simply “assert” that a violation is inevitable, and cannot rely on “vague and symbolic objectives”.¹¹¹ Thus in *Oakes*, the Court insisted that evidence required to prove the constituent elements of a s. 1 inquiry must be “cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit”.¹¹² The question is whether, on the evidence, the government has a “reasonable basis” for concluding that a particular problem exists, that the means chosen would address it and that those means infringe rights as little as possible.¹¹³ Scientific demonstration is not required: “the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view”.¹¹⁴ However, courts must evaluate the issue “in the light, not just of common sense or theory, but of the evidence”.¹¹⁵

Where empirical evidence is non-existent, however, both “experience and common sense”¹¹⁶ and “reason or logic”¹¹⁷ may help bridge the gap.¹¹⁸ Judicial notice can be taken of facts that are “either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily

¹¹⁰ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 128-129.

¹¹¹ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at paras. 21-22.

¹¹² *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138; see also *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Jones*, [1986] 2 S.C.R. 284; *PSAC v. Canada*, [1987] 1 S.C.R. 424.

¹¹³ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 994.

¹¹⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at 333.

¹¹⁵ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, at para. 150.

¹¹⁶ *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 94.

¹¹⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 154.

¹¹⁸ There have been disagreements, of course, on the kinds of inferences governments are entitled to draw from inconclusive evidence, and on the circumstances in which it is appropriate for courts to apply logic or common sense to surmount an absence of evidence. On this point, see 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 p. 527 ff.

accessible sources of indisputable accuracy”.¹¹⁹ However, the doctrine of judicial notice is not used lightly, and its permissible scope varies according to the issue under consideration – i.e. whether the facts in question, be they adjudicative or social or legislative, are central to the dispute or whether they are more in the nature of background facts.¹²⁰ The doctrine is available to both first instance decision-makers¹²¹ and appellate level courts.¹²²

2. How much evidence?

The diversity and breadth of questions courts must consider on proportionality review means that many kinds of evidence may be relevant, and that it may be voluminous. Critics in Canada have pointed to inconsistencies in the evidentiary requirements imposed on the parties to constitutional litigation, both to establish a breach and to justify it. They see the Court’s approach as oscillating between a permissive one, where the burden of persuasion is low, and a strict one, where the quantity and quality of evidence must be higher.¹²³ The problem is one of too much or too little deference. The implications critics point to are twofold. First, because of this uncertainty, “those seeking to have courts uphold their rights are unable to properly structure their pleadings in the first stage of Charter judicial review and prepare the Court for any contest over the evidence provided by the government”.¹²⁴ Second, “in the realm of public policy, cogent

¹¹⁹ *R. v. Find*, [2001] 1 S.C.R. 863, at para. 48 (e.g. *R. v. Lavallee*, [1990] 1 S.C.R. 852 (taking judicial notice of the “battered wife syndrome” to explain the wife’s conduct); *Moge v. Moge*, [1992] 3 S.C.R. 813 at 853 (taking judicial notice of the effect of the “feminization of poverty”); *R. v. Wells*, [2000] 1 S.C.R. 207, at para. 53; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 83 (taking judicial notice of the systemic background factors that have contributed to the difficulties faced by aboriginal people in the criminal justice system and in society)).

¹²⁰ *R. v. Spence*, [2005] 3 S.C.R. 458, at para. 60, referring to Kenneth Culp Davis, *Administrative Law Treatise*, 2nd ed., vol. 3 (San Diego, 1980).

¹²¹ e.g. for sentencing purposes: *R. v. Gladue*, [1999] 1 S.C.R. 688.

¹²² e.g. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, at para. 56 (for the purposes of proportionality analysis under s. 1 of the *Charter*, taking judicial notice of public accounts of the Province that are filed with the legislative assembly, and public comments by the Minister of Finance and the President of Treasury Board as to what they thought the accounts disclosed and what they planned to do about it).

¹²³ e.g. Errol P. Mendes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart” (2013), 61 S.C.L.R. (2d) 293, at 297; Danielle Pinard, “La promesse brisée de Oakes”, in Luc B. Tremblay and Grégoire C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montréal: Thémis (2009)) 131; 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.

¹²⁴ Errol P. Mendes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart” (2013), 61 S.C.L.R. (2d) 293, at 299.

social-science evidence often does not exist for a perceived harm, although legislators may have a ‘reasoned apprehension of harm’¹²⁵.

These criticisms do not negate the fact that courts are obliged to evaluate all *Charter* claims through the lens of proportionality, a complex “method for implementing constitutional rights”.¹²⁶ That said, courts must be sensitive to the challenges of determining whether a particular intrusion on a right is proportionate. First, they must recognize that the context of those claims varies from case to case and can have important effects on the evidentiary burden imposed on the government. Second, they must remember that the *Oakes* test affords Parliament a “margin of appreciation”¹²⁷ in adopting legislative measures that infringe rights. It is undisputed that Parliament must sometimes act with limited knowledge, especially when attempting to address complex social problems, and there may be many possible solutions to a given social problem.

The Supreme Court of Canada has recognized that the analysis under s. 1 of the *Charter* must pay close attention to context: “context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right”.¹²⁸ In an early case, Wilson J. explained how a contextual approach could be useful in weighing the different values sought to be protected by rights:

The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by

¹²⁵ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Suppl.) (Toronto: Carswell, 2007 (loose-leaf)), at p. 38-9 (references omitted).

¹²⁶ Dimitrios Kyritsis, “Whatever Works: Proportionality as a Constitutional Doctrine” (2014), 34 *Oxford Journal of Legal Studies* 395, at 411.

¹²⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 999.

¹²⁸ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 87.

the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.¹²⁹

Later, in *Thomson Newspapers Co. v. Canada (Attorney General)*,¹³⁰ the Court held that in assessing whether a limit to a protected right has been demonstrably justified under s. 1, courts should consider the following contextual elements: the group which the government seeks to protect is vulnerable;¹³¹ the subjective fears and apprehensions of harm of the group;¹³² the fact that a particular harm or the efficaciousness of a remedy cannot be measured scientifically;¹³³ and the nature of the activity which is infringed (e.g. the type of expression at issue, including political expression¹³⁴). Thus, by examining the conflicting values in their factual and social contexts, courts are able to take into account special features of the protected right under scrutiny.¹³⁵

Attention to context and appropriate deference to the legislator may palliate the criticism that proportionality adjudication introduces subjectivity in the s. 1 analysis with little predictability.¹³⁶ And as the Court said in *RJR MacDonald*:

The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line

¹²⁹ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56.

¹³⁰ [1998] 1 S.C.R. 877.

¹³¹ *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 995 (publicity directed at children); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 88.

¹³² *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 857

¹³³ *R. v. Butler*, at p. 502.

¹³⁴ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 91. See also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at 246-47; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 760 (hate speech); *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 71-73 and 132; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 60 (expression related to political campaigning).

¹³⁵ *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232, at pp. 246-47.

¹³⁶ Christopher D. Brecht and Adam M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001), 14 S.C.L.R. (2d) 175, at p. 184.

if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perform fail.¹³⁷

Attention to context and appropriate deference result in considerable flexibility in how evidence is weighed by decision makers. By applying the standard of proof flexibly, while insisting on the need for a demonstration, the Court is acknowledging the reality that in matters of constitutional adjudication, "not all relevant considerations can be 'proved'; some questions of political morality are to be asserted and justified without being evidence-based",¹³⁸ hence the need for argument and justification, and not necessarily precise measurement. Ultimately, judging requires choosing,¹³⁹ and requiring evidence in the context of a proportionality framework brings some amount of constraint and accountability to bear on those choices.

3. Who weighs the evidence?

As a rule, the task of weighing evidence falls to the primary decision-maker, and reviewing or appellate judges are to exercise some measure of deference in respect of those findings.

In the recent case on the criminal prohibition against bawdy-houses, living on the avails of prostitution and communicating in public for purposes of prostitution, for example, the Supreme Court of Canada recognized the importance of the fact-finding role of the judge of first instance:

When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of

¹³⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 128-129.

¹³⁸ Grégoire C. N. Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010), 23 *Can. J. L. & Jurisprudence* 179, at 192.

¹³⁹ *Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957) (Frankfurter J., concurring in the result) ("[i]n the end, judgment cannot be escaped....").

establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.¹⁴⁰

Some have suggested that the need for evidence combined with the deference shown to a trial judge's conclusions may give undue power to trial judges on complex social issues,¹⁴¹ who depend on the quality of the evidence presented to them by the parties and, because of the rules of the adversarial process, cannot go out and seek evidence on their own. This may have consequences on how the case is framed once it reaches the Supreme Court of Canada. Peter W. Hogg, a leading Canadian constitutional scholar, remarks that "the validity or invalidity of a law will often turn on the state of the evidentiary record at trial",¹⁴² and suggests that courts place less reliance on evidence for *Charter* review than has sometimes been the case.¹⁴³

In *Canada (Attorney General) v. Bedford*, the Court gave two reasons for exercising some measure of deference towards trial judges. First, relaxing the standard of review on legislative and social facts would duplicate the work done before the trial judge, thereby leading to concerns about efficiency, costs and delay.¹⁴⁴ Second, given that social and legislative facts are intertwined with adjudicative facts and with questions of credibility, "[t]o posit a different standard of review... is to ask the impossible for courts of appeal".¹⁴⁵

¹⁴⁰ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 49.

¹⁴¹ Sean Fine, "Medicare challenge highlights power of trial judges", *The Globe and Mail*, July 29, 2015, referring to concerns expressed by Professor Joel Bakan.

¹⁴² Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., (Scarborough, Ont., Thomson/Carswell, 2007), vol. 2, at section 38.4, pp. 38-8 and 38-9.

¹⁴³ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., (Scarborough, Ont., Thomson/Carswell, 2007), vol. 2, at section 38.4, p. 38-8.

¹⁴⁴ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 51.

¹⁴⁵ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 52.

This said, appellate courts reviewing trial judges' proportionality analysis should carefully assess those findings of fact to ensure that they are grounded in the evidence and that the trial judge's inferences and conclusions are fair and balanced.

4. What if the evidence is inadequate?

A lack of a proper evidentiary record at trial may substantially complicate the work of appellate-level courts, which, by their very nature, are ill-equipped to try evidence.¹⁴⁶ The Supreme Court of Canada can deal with such situations. For example, faced with a deficient record, the Court may decide to refuse leave to appeal and wait for a better case.¹⁴⁷ It may also limit the scope of the appeal.¹⁴⁸

The *Supreme Court Act*¹⁴⁹ also allows the Court to receive further evidence by oral examination in court,¹⁵⁰ by affidavit or deposition (s. 62(3)). Permission to file such evidence may be sought by parties and interveners in important public law or *Charter* cases to provide the social, economic or contextual contexts of legislation.¹⁵¹ However, the Court allows for affidavit evidence to be cross-examined.¹⁵² An order may also be made receiving extrinsic materials to supplement the record. The materials are in the nature of background or legislative facts. Finally, as discussed above, judicial notice of facts – adjudicative or social – can be taken in limited circumstances.¹⁵³

5. Foreign jurisdiction evidence – challenges of comparative law

¹⁴⁶ Errol P. Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart? (2013), 61 S.C.L.R. (2d) 293, at 301.

¹⁴⁷ In a well-known speech to the legal profession, the late Justice Sopinka discussed the criteria that the Court usually applies in deciding to hear a case. He explained that "[i]f a *Charter* challenge is involved, it is important to consider whether there exists an appropriate record to determine, for instance, a s. 1 analysis" (quoted in Henry Brown, *Supreme Court of Canada Practice, 2015* (Toronto: Carswell, 2015), at p. 21).

¹⁴⁸ Henry Brown, *Supreme Court of Canada Practice, 2015* (Toronto: Carswell, 2015), at p. 80.

¹⁴⁹ R.S.C. 1985, s. S-26.

¹⁵⁰ This is an extremely rare occurrence (e.g. *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866.

¹⁵¹ e.g. *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 (expert evidence on recent developments in a foreign jurisdiction on the issue of physician-assisted death).

¹⁵² *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 90.

¹⁵³ *R. v. Find*, [2001] 1 S.C.R. 863; *R. v. Spence*, [2005] 3 S.C.R. 458.

Charter review on issues involving fundamental rights invites the use of international human rights material. This is so both by virtue of the rule that the *Charter* should, as far as possible, be interpreted to conform to international law,¹⁵⁴ and by virtue of the types of questions that *Charter* litigation brings before the courts. The problem this raises is how to weigh the relevance of material from international bodies and foreign courts. Expert evidence may help to contextualize that material.

The history of the case *Rodriguez v. British Columbia (Attorney General)*¹⁵⁵ illustrates the point. There the issue was whether the criminal prohibition against providing assistance in dying infringed the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter*, in a way that could not be justified under the proportionality analysis prescribed by s. 1. In ruling that the prohibition was justified, the majority of the Supreme Court reviewed the legislative situation in other Western democracies and concluded that the approach with respect to assisted suicide was very similar to that which existed in Canada at the time.¹⁵⁶

Twenty years later, however, the matter was revisited by the British Columbia Supreme Court, in *Carter v. Canada (Attorney General)*.¹⁵⁷ There, the trial judge heard extensive evidence from all the jurisdictions where physician-assisted death had since become legal or regulated, and concluded that proper safeguards would minimize the risk associated with assisted dying, such that the total prohibition enacted by the *Criminal Code* was not minimally impairing of the right to life, liberty and security of the person protected by s. 7 of the *Charter*.

On appeal before the Supreme Court, the matter of whether less infringing alternatives were available to the government took on increased importance. The experience of foreign jurisdictions with legalized assisted death became central to the case, and the government sought to adduce fresh evidence in the form of an affidavit by an expert on bioethics and euthanasia in Belgium. The government claimed that the evidence demonstrated that issues with compliance and with the expansion of the criteria granting access to assisted suicide inevitably arose, even in

¹⁵⁴ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 69; *Divito v. Canada*, [2013] 3 S.C.R. 157, at paras. 22-27.

¹⁵⁵ [1993] 3 R.C.S. 519.

¹⁵⁶ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at 601-606 and 613.

¹⁵⁷ 2012 BCSC 886; 287 C.C.C. (3d) 1.

a system with safeguards (such as Belgium). The Supreme Court allowed the government to file the evidence, but held that the findings of fact of the trial judge were entitled to a measure of deference, and that in any event, the evidence did not undermine those findings. The Court underlined that the foreign regime was the product of a different medico-legal culture, and that in the absence of a comparable history in Canada, it was problematic to draw inferences “both in assessing the degree of physician compliance and in considering evidence with regard to the potential for a slippery slope”.¹⁵⁸

6. Revisiting previous factual findings on different evidence

A final point concerns the interaction between the need for evidence in constitutional adjudication and the doctrine of *stare decisis*. *Stare decisis*, the rule of adherence to precedent,¹⁵⁹ treats like cases alike, and thus “promotes predictability, reduces arbitrariness, and enhances fairness”.¹⁶⁰ When precedent has become unworkable, or when its validity has been undermined by subsequent jurisprudence, the Court has recognized that it may depart from its past rulings, but this is done exceptionally.¹⁶¹ Because they involve political and value judgments on matters of interest to society as a whole, constitutional matters present a special case. Society evolves, and so must the law. As the Court recently held: “*stare decisis* is not a straightjacket that condemns the law to stasis”.¹⁶² However, where the effect of reversing a past decision would diminish *Charter* protection, the Court has held that courts should be “particularly careful in their intervention”.¹⁶³

The requirement of evidence in constitutional adjudication grants reviewing courts a measure of flexibility in judging the proportionality of government action. In *Canada (Attorney General) v. Bedford*, for example, the Court revisited a past decision¹⁶⁴ that had upheld the constitutionality of prohibitions on keeping or being in a bawdy-house and communicating in public for purposes

¹⁵⁸ *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, at para. 112.

¹⁵⁹ W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1770), Book I, at p. 69.

¹⁶⁰ *Sriskandarajah v. United States of America*, [2012] 3 S.C.R. 609, at para. 18.

¹⁶¹ *R. v. Henry*, [2005] 3 S.C.R. 609, at para. 44.

¹⁶² *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331.

¹⁶³ *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 58.

¹⁶⁴ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

of prostitution. The Court recognized that a matter that has been decided in the past “may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate”.¹⁶⁵ This power is not reserved for the Supreme Court, but can also be exercised by lower courts. The threshold is high and “balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role”.¹⁶⁶

Conclusion

Proportionality is a seminal and seductive concept. It aligns with our conceptions of and metaphors for justice, fairness and reasonableness. Scales are what Justice uses to “weigh” the positions presented to her. While she is blind, she hears each party equally, and renders her decisions in a fashion that makes the result acceptable to all reasonable people. The notion of proportionality is firmly rooted in rationalist thought, provides a measure of predictability in how courts will engage in the review that the constitution commands them to perform, and generally operates within a legal culture whose features allow it grow and bear fruit. For a country like Canada, that imagines its constitution as a “living tree”,¹⁶⁷ all this is perhaps unsurprising.

¹⁶⁵ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 42; see also *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331.

¹⁶⁶ *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 44.

¹⁶⁷ *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136 (“The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits”).