
Proportionality: Comparative Law Lessons

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Introduction

1. Despite the central importance of the doctrine of proportionality in modern public law, the English courts have not yet given much attention to the structure of the proportionality test, and certainly not by comparison with the courts in some other jurisdictions. This article examines in detail the case law of two such jurisdictions: Canada and Israel. The Supreme Courts in these countries have established a far more developed jurisprudence on proportionality, from which important lessons can and should be drawn.
2. This article therefore has three objectives. First, it makes a case for the consideration of comparative case law on proportionality. Secondly, it seeks to set out and explain the jurisprudence of proportionality applied by the Canadian and Israeli Supreme Courts. In part the reason for so doing is that no such discussion exists in readily accessible form for academics and practitioners in this country. Thirdly, this article draws general conclusions from the Canadian and Israeli jurisprudence for the development of the proportionality doctrine in domestic law.

Significance of the Canadian and Israeli jurisprudence

3. Lord Bingham has stated that there is a need for “[s]ome caution” in relying on comparative case law in the domestic context. He gave two reasons for this. He observed that such authorities are the product of differently worded enactments and he indicated that domestic courts should take their lead from Strasbourg.¹ With respect, there is always a need for some caution in considering comparative jurisprudence. However, it is suggested that the foreign case law on proportionality is especially relevant and important for a number of reasons. First, it will be seen that the doctrine of proportionality is a judicial creation which is largely independent of the particular words of the constitutional provisions that justify its application. Lord Bingham’s first reason for special caution is not applicable. Secondly, the doctrine of proportionality refers to the process of analysis which, unlike the meaning of substantive rights, is not greatly influenced by local moral or political beliefs. There is only need for particular caution where a particular proportionality analysis is closely tied to features of the right under consideration. Thirdly, the doctrine of proportionality has the character of an international doctrine that owes its origin and development to cross-fertilisation between the jurisprudence of different judicial bodies across the world, both civilian and common law. It is therefore peculiarly appropriate to consider comparative approaches to proportionality. Fourthly, this is not an area in which the Strasbourg Court provides much helpful guidance, as we shall see. Lord Bingham’s second reason for caution is also therefore not apposite. Fifthly, it is suggested that this is an area in which domestic law is sadly under-developed and its growth calls for comparative sustenance.

¹ *Sheldrake v DPP* [2004] UKHL 43 [2005] 1 AC 264 at [33].

4. If, then, this is an area appropriate for comparative lessons, why the focus on Canada and Israel? As a general matter, the Canadian Charter of Rights and Freedoms 1982 (“the Charter”) is without doubt the most influential of all modern bills of rights. It provides the model for bills of rights which do not give the final say to the courts, as the constitutions of Germany and the United States do. Such bills of rights have structural features that allow for an exchange between courts, government and Parliament and also provide for an explicit balance between individual and public interests.² For instance, the Human Rights Act 1998 (“HRA”) has sought to reconcile the protection of rights with maintaining Parliamentary sovereignty by allowing Parliament to legislate inconsistently with the courts’ interpretation of the European Convention on Human Rights (“the Convention”). Moreover, the bills of rights in New Zealand, Israel and South Africa have all drawn heavily on the Charter’s general limitation on rights contained in s. 1 of the Charter. Although the HRA contains no equivalent to s. 1, most Convention rights contain their own in-built limitation clauses of a similar nature (e.g. Art. 10(2) of the Convention).
5. The Canadian Supreme Court’s case law is, then, particularly influential. However, just as significantly, the Supreme Court of Canada has developed a rich and informative jurisprudence on the doctrine of proportionality, which seeks to marry both the European and US jurisprudence on proportionality. This outstrips the case law on proportionality under any other modern bill of rights, as well as that of the Strasbourg Court, in volume and significance.
6. Israel’s claim for consideration is different. The Supreme Court’s proportionality jurisprudence is much less extensive than that of the Canadian Supreme Court. It has, however, been particularly influenced by the Canadian case law and, in recent cases, has sought to build upon it by rationalising afresh the various aspects of the proportionality test. This not only complements a consideration of the Canadian case law, but these cases shed new light on the analytical structure of the proportionality test.

Proportionality in English law (and why we need lessons from abroad)

7. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 the principle of proportionality was accepted by the House of Lords as a principle applicable in English law. It is important to recognise that the principle was accepted as a part of English law in two respects. First, their Lordships applied a proportionality test (in all but name) in holding that the infringement of a claimant’s *common law right* to the confidentiality of his privileged legal correspondence was unlawful. Lord Bingham stated (at para. [21]):

“the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners.”

Secondly, the House of Lords also held that it may be appropriate to apply a proportionality standard when judging compatibility with the Convention under the HRA. Lord Steyn stated (at para. [24]) that “proportionality [is] applicable in respect of review where *Convention rights* are at stake” (emphasis added).³ It is worth observing that domestic courts are not bound to apply the same proportionality analysis as the Strasbourg Court. Indeed, by contrast with the EC Treaty, the concept of proportionality is not contained anywhere in the written text of the Convention itself. Moreover,

² The limitation clause in s. 1 of the Charter is the subject of discussion in this article. But also consider s. 33 of the Charter which allows legislation to be enacted “notwithstanding” that it violates Charter rights.

³ Lord Bingham’s speech was unanimously approved; Lord Steyn’s speech was approved by all bar Lord Scott.

domestic courts are not bound by decisions of the Strasbourg Court under s. 2 of the HRA.

8. In *Daly* Lord Steyn adopted the articulation of the proportionality principle by the Privy Council in *de Freitas v Ministry of Agriculture* [1991] 1 AC 69 at 80. Drawing on the Canadian case law, the Privy Council accepted and adopted a “threefold analysis of the relevant criteria”.⁴ This was:
 - (a) the legislative objective must be sufficiently important to justify limiting a fundamental right;
 - (b) the measures must be designed to meet the objective and must be rationally connected to it;
 - (c) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
9. Despite Lord Steyn observing in *Daly* that the proportionality principle is more “precise and sophisticated” than the ordinary *Wednesbury* analysis, the English courts have not given any sustained consideration to the principle or attempted to structure it in a more detailed manner. There is no equivalent to the Canadian cases of *R v Oakes* [1986] 1 SCR 103 or *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199 or the Israeli case of HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* considered below. The three-fold criteria do not in themselves offer either a precise or sophisticated test, and call for further elaboration.
10. Furthermore, the English courts’ application of the proportionality test frequently fails to reflect even the *de Freitas* criteria. This is most obvious with respect to the third limb: the minimal impairment test. Consider, for instance, *R v Shayler* [2002] UKHL 11 [2003] 1 AC 247 in which the House of Lords held that the criminal prohibition under the Official Secrets Act 1989 on publication of information obtained by members of the Security Services in the course of their employment was proportionate under Art. 10(2). This finding was made despite the fact that there were a number of ways in which the restriction on disclosure could easily have been made much less severe, such as allowing a public interest defence where disclosure caused no damage or detriment to the public interest. There are numerous other examples.⁵
11. It is fair to say that the proportionality principle has been applied by the English courts in a relatively ad hoc way. In appropriate cases foreign case law, including Canadian, has been considered.⁶ But it has now been over five years since *Daly* was decided and the principle of proportionality still remains unelaborated, uncertain and its application unstructured.⁷

Proportionality in Strasbourg and Luxembourg

12. Before turning to examine the Canadian law it is important briefly to mention two more directly relevant sources of guidance: Strasbourg and Luxembourg. If we consider Strasbourg first, it must be acknowledged that the European Court of Human Rights has developed some of the most important and seminal principles on proportionality.

⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27].

⁵ For example *R (Williamson) v Secretary of State for Education* [2005] UKHL 15 [2005] 2 AC 246; *Attorney General v Punch Ltd* [2002] UKHL 50 [2003] 1 AC 1046; *R (British American Tobacco Co. Ltd) v Secretary of State for Health* [2004] EWHC 2493 (Admin) [2005] ACD 27.

⁶ See in particular the consideration of *RJR-MacDonald v Attorney General of Canada* [1995] 3 SCR 199 in *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at [39], [130], [178], [214].

⁷ The five-year anniversary was 23 May 2006.

In addition to the need to pursue a “legitimate aim”, the general proportionality test applied by the Strasbourg Court has two limbs: (1) an interference must “correspond to a pressing social need”; and (2) the interference must be “proportionate to the aim pursued”.⁸ A number of cases have added that the reasons advanced must be “relevant and sufficient”.⁹ Nonetheless, the assistance provided by the Court is limited. An important problem arises from the fact that the Court is an international Court and therefore its application of the principle of proportionality is holistic, looking at all the events together,¹⁰ and it is also affected by the fact that the Strasbourg Court affords a “margin of appreciation” to domestic authorities. Since domestic courts will not apply a “margin of appreciation”, the Strasbourg Court’s approach to proportionality is frequently of questionable relevance. More importantly, the Strasbourg Court has not clearly structured what it means by “proportionate”. It states that the Member State must strike a “fair balance” between the general interests of the community and the interest of individuals;¹¹ but this provides little guidance, since it also states that the need to strike a “fair balance” is “inherent in the whole of the Convention”.¹² The principle of proportionality, if it is to do anything, should provide a means to determine *how* that balance should be struck.

13. The ECJ has developed a standard formula, similar but not identical to that found in the Strasbourg cases. However, it suffers from the same shortcomings of compression and generality. First, there is a test of appropriateness or suitability: are the means employed appropriate and suitable to achieve the objective? Secondly, it must be asked whether the means employed are necessary for the attainment of the objective. At this stage competing interests are weighed, whether there is a less restrictive way of achieving the objective and whether the measure in issue imposes an excessive burden on the individual.¹³ Like English decisions, the sometimes stated need for the interference to be the minimal possible is honoured as much in the breach as in the observance. It is notable that there is no requirement of a pressing social need, or explicit rational connection test (although this is reflected in the test of appropriateness and suitability). Since the principle of proportionality was first developed in EC law as a control on administrative and executive discretion,¹⁴ it has required significant modification in the context of Community legislation. The ECJ will not usually strike down a legislative measure unless it is found to be “manifestly inappropriate” to achieve its objectives.¹⁵ Although this general approach is well settled, the ECJ’s application lacks any further consistent structure. This represents a significant limitation on the utility of this jurisprudence in developing a domestic conception of proportionality.

⁸ For example *Silver v United Kingdom* (1983) 5 EHRR 347 at [97].

⁹ For example *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [62].

¹⁰ For example *Silver v United Kingdom* (1983) 5 EHRR 347 at [102].

¹¹ For example *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35 at [69]; *Hatton v United Kingdom* (2003) 37 EHRR 611.

¹² *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35 at [69].

¹³ For example Case 66/82 *Fromançais v Forma* [1983] ECR 395 at [8]; Case C-331/88 *Fedesa* [1990] ECR I-4023. There is some support for a three-stage test in which “necessity” is considered separately from “excessive burden” (the strict sense of proportionality): Case C-331/88 *Fedesa* [1990] ECR I-4023 at 405, per Advocate-General Mischo; Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, per Advocate-General van Gerven; but in practice the ECJ does not separate these tests.

¹⁴ Case 18/63 *Woollast v EEC* [1964] ECR 97; Case 8/55 *Fédéchar v High Authority* [1954–56] ECR 292; its early application to EC regulations suggested that this strict approach would be carried over to legislation: Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125.

¹⁵ Case C-331/88 *Fedesa* [1990] ECR I-4023 at [13]–[14].

Proportionality in Canada

Foundations of proportionality in Canada

14. The notion of proportionality is not found in the text of the Charter itself. The rights and freedoms that it enshrines are subject to the limitation clause contained in s. 1, which reads:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

15. The first and still the most important exposition of the requirements of s. 1 of the Charter is found in the judgment of Dickson CJ in *R v Oakes* (above) (the Supreme Court in that case was unanimous on this point). When the case was decided s. 1 had barely been considered by the courts. Recent analysis of records of the judicial deliberations in *Oakes* has shown that Dickson CJ’s s. 1 analysis was the product of a study (aided by his two law clerks) of European jurisprudence and the extensive case law under the Constitution of the United States.¹⁶ Dickson CJ did not, however, attempt to follow either the US or European approaches and did not refer to them in his judgment. He sought to marry the jurisprudence in a modern articulation of the principles of justification and proportionality. It has been described as “five of the most important pages ever written in Canadian constitutional law”.¹⁷
16. Dickson CJ divided the test of demonstrable justification into two parts. The first part requires that the objective that the limit on the Charter right is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Once a sufficiently significant objective is shown, the second part requires that the government goes on to show that the means chosen to meet that object are reasonable and demonstrably justifiable. In Dickson CJ’s view this second part required a “form of proportionality test”.
17. The form of proportionality test that Dickson CJ articulated (at paras [69]–[71]) has three components:
- “First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.”
18. Dickson CJ recognised (at para. [70]) that the nature of the proportionality test will vary depending on the circumstances. Even so, the *Oakes* test significantly embellishes the words of s. 1 and imposes stringent requirements of justification on government. On two occasions, the most recent being October 2004, the Supreme Court has declined invitations to abandon or depart from the *Oakes* test, and has affirmed that it properly reflects the requirements of s. 1.¹⁸ The reality, however, is that the *Oakes* test has been significantly adjusted by the Supreme Court. In particular, the rational connection

¹⁶ RJ Sharpe and K Roach, *Brian Dickson – A Judge’s Journey* (University Toronto Press, 2003), p. 334.

¹⁷ *Ibid.*

¹⁸ *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199; *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381.

requirement has been narrowed to exclude considerations of arbitrariness, fairness and irrational considerations, and the second component of the test – which has become known as the “minimal impairment test” – has been considerably relaxed. This has meant that almost all cases turn on the second component, and the third component has become practically redundant. Despite this, the Canadian courts still apply the *Oakes* test as the touchstone of proportionality under the Charter.

Proportionality in administrative law

19. The foundation of proportionality in s. 1 of the Charter has meant that, until very recently, it was treated solely as a *constitutional* standard and applied only to review of legislation. The review of administrative decisions, absent legal error, continued to be tested by reference to a standard of reasonableness. The Canadian courts applied two such standards: (1) reasonableness *simpliciter*, and (2) patent unreasonableness, the latter derived from the *Wednesbury* case.¹⁹ The fact that a decision had “a human rights dimension” was a reason – albeit not a conclusive one – for the application of a simple reasonableness test, but not a proportionality analysis.²⁰ Absent an administrative decision overtly misinterpreting a provision of the Charter the constitutional standards applicable to legislation were simply not applied.²¹
20. The Canadian administrative law cases are in fact far more deferential than their English counterparts. In the leading case of *Suresh v Canada* [2002] 1 SCR 3 the Supreme Court applied a patent unreasonableness test to a decision that a refugee from Sri Lanka posed a danger to Canadian security, despite the pressing human rights dimension (which was that his deportation might result in his torture), having regard to the political nature of the decision. The traditional Canadian approach is the reverse of that in England, where proportionality was first applied at common law to administrative decisions, and only *then* applied by extension to legislation under the Human Rights Act 1998. It is also the opposite of the approach taken in EU law, where a proportionality analysis is adopted in relation to administrative law and a more relaxed review is conducted in relation to legislation.
21. The Canadian approach has always been difficult to square with two particular aspects of the Charter scheme: first, the fact that the Charter expressly applies to the Government of Canada and of each province;²² furthermore, constitutional logic dictates that since no Canadian legislation can permit public officials to act incompatibly with the Charter, statutory powers should always have to be exercised according to Charter standards. However, this logic has not been reflected in the Canadian cases.
22. The Supreme Court has, by a majority, recently radically altered the court’s approach. In *Singh Multani v Commissionnaire scolaire Marguerite-Bourgeois* 2006 SCC 6 Charron J, giving judgment for the majority of the court, held that the Court of Appeal had erred in applying a reasonableness standard to judge the legality of a decision of a school board banning the wearing of a kirpan (a dagger worn under the clothes by orthodox Sikhs). In the face of a strong dissent from Deschamps and Abella JJ, Charron J stated:

¹⁹ *Baker v Canada* [1999] 2 SCR 817. As in English law, in the case of a jurisdictional error the standard is correctness.

²⁰ *Chamberlain v The Board of School District No. 36 (Surrey)* [2002] 4 SCR 710 (decision of school board not to approve book showing same-sex couples as a teaching aid on family life curriculum held to be an unreasonable accommodation of religious opinions); see also *Slaight Communications Inc v Davidson* [1989] 1 SCR 1308 (Dickson CJ left open in that case the application of the Charter in administrative law; Lamer J would have applied s. 1 of the Charter); *Ross v New Brunswick School District No. 15* [1996] 1 SCR 825.

²¹ *Nova Scotia (Workers’ Compensation Board) v Martin* [2003] 2 SCR 504.

²² Section 32.

“16. With respect for the opinion of Deschamps and Abella JJ., I am of the view that this approach could well reduce the fundamental rights and freedoms guaranteed by the Canadian Charter to mere administrative law principles or, at the very least, cause confusion between the two. It is not surprising that the values underlying the rights and freedoms guaranteed by the Canadian Charter form part – and sometimes even an integral part – of the laws to which we are subject. However, the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the Canadian Charter establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian Charter. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the Canadian Charter.”

23. This imports the *Oakes* test into administrative law for the first time. It does not however, as such, modify the reasonableness test. Rather, it *rejects* that test in favour of the application of a constitutional standard in administrative law where a Charter right is engaged.²³ The importance of this to English lawyers is that it means that the Canadian decisions on proportionality are now directly relevant to Canadian, and by extension English, administrative law. It is however still necessary to examine with some care whether a constitutional standard or administrative law standard is being applied in Canadian decisions, as well as the reason for this.

Sufficiently important objective

24. Unlike the Convention, the Charter does not specify which objectives may legitimately be relied upon to justify an interference with a protected right. Dickson CJ in *Oakes* (at para. [64]) spoke of “principles essential to a free and democratic society”. In almost all cases this requirement has been satisfied. However the Supreme Court has stressed that the Government must do more than point out the obvious: it must do more than explain why it chose to interfere with a right: it must explain the objective it sought to pursue.²⁴ Moreover, there have been occasions where the Supreme Court has been prepared to hold that an objective is not legitimate. Thus, the court has struck down legislation where the aims pursued are incompatible with the observance of rights enshrined in the Charter.²⁵ In *R v Big M Drug Mart* [1985] 1 SCR 295 the Supreme Court held that the Lord’s Day Act, imposing Sunday closing on traders, was intended to compel the observance of the Christian Sabbath, and this was illegitimate as contrary to the protection of freedom of religion enshrined in s. 2(a) of the Charter.
25. *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 offers an instructive contrast to *Big M*, and shows the limited nature of the Supreme Court’s scrutiny of claimed objectives. In this case provincial legislation restricting Sunday-trading and trading on other Christian holidays was accepted as pursuing the secular objective of securing common holidays for retail workers.²⁶ The need to provide for greater opportunities for communal and family activities was sufficiently important.²⁷

²³ 2006 SCC 6 at [23] (Deschamps and Abella JJ dissenting).

²⁴ *Vriend v Alberta* [1998] 1 SCR 493 at [114], per Sopinka J.

²⁵ *Ibid.* (objective behind omitting protection of sexual orientation from discrimination legislation incompatible with s. 15); *Attorney General for Quebec v Quebec Association of Protestant School Boards* [1984] 2 SCR 66 (restrictions on English language education in Quebec incompatible with protection of minority language rights in s. 2).

²⁶ “[L]egislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion”: per Dickson CJ at para. [101].

²⁷ The need was not “unimportant or trivial”: per Dickson CJ at para. [126]. In *RJR-MacDonald v Attorney General of Canada* [1995] 3 SCR 199, concerning a ban on tobacco advertising, the Court held (at para. [146]) that: “While the limited objective of reducing tobacco-associated health risks by reducing advertising-related consumption

26. In *Big M* the court also rejected the contention that the Government could invoke a secular objective of the Lord's Day Act on the ground that it was not permissible to invoke a different purpose from that justifying the legislation's enactment.²⁸ This is known as the "shifting purpose doctrine". However, in many cases the Government is able to escape the strictures of the shifting purpose doctrine by relying on a more general objective behind the measure. For instance, the Supreme Court was prepared to accept that the Government did not fall foul of the shifting purpose doctrine in justifying a criminal prohibition on selling pornographic material enacted in 1959 on the ground that a "permissible shift in emphasis was built into the legislation".²⁹ The court held that it was reasonable to presume from the legislation that its objective was to prevent harm to society, which was considered to be a sufficiently important objective.
27. The Canadian cases reveal that the breadth with which the objective of the legislation is stated will also have an important effect on later stages of the proportionality analysis. Whereas framing the objective broadly may assist in making out a sufficiently important objective and in overcoming the rational connection requirement, it will make it more difficult for the Government to show that the measure chosen was necessary and that other less-restrictive measures could not have been taken.

Rational connection

28. In *Oakes* the rational connection test was formulated in broad terms: Dickson CJ referred (at para. [70]) to legislation that is "arbitrary, unfair or based on irrational considerations". Such a formulation undoubtedly trespasses on the other limbs of the *Oakes* test. Notably, it is expressly formulated so as to capture both under- and over-inclusive legislation. It was probably intended to relate to the scope of legislation rather than the means used, that is, the *who* rather than the *how*: the *breadth* rather than the *depth* of a measure. But although this distinction emerges from the case law, it was not explicitly recognised. In *Oakes* itself, a statute that applied a presumption, to all persons found in possession of illegal drugs, that they possessed them for the purpose of trafficking was held to be irrational. The court reasoned (at para. [78]) that it does not follow that a person possessing a small amount of drugs is likely to be involved in drug trafficking. There was therefore no rational connection between mere possession of drugs and the inference that a person intended to traffic them. It is important to appreciate that there was found to be no rational connection although the measure clearly went some way toward achieving its objective of protecting society from drug trafficking. The statute under consideration in *Oakes* was irrational because it was overbroad.³⁰ *Benner v Canada* [1997] 1 SCR 358 is an example of an *under-inclusive* measure being held to lack rational connection. The Supreme Court held that a statute which set out stringent requirements for citizenship on individuals born to Canadian mothers but not to Canadian fathers was irrational, despite the fact that the court was prepared to assume that the requirements advanced the objective of screening out dangerous persons.

and providing warnings of dangers is less significant than the broad objective of protecting Canadians generally from the risks associated with tobacco use, it nevertheless constitutes an objective of sufficient importance to justify overriding the right of free expression guaranteed by the Charter. Even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression".

²⁸ See also *R v Zundel* [1992] 2 SCR 731 (the Government cannot advance a new objective to justify a measure from that originally behind it. In this case the law in question was ancient and the original justification was lost. It could not therefore be applied for new purposes).

²⁹ *R v Butler* [1992] 1 SCR 452.

³⁰ [1986] 1 SCR 103 at [76]. However, the result was not reached solely on grounds of over-breadth. In particular, Dickson CJ (at para. [78]) took into account the seriousness of the offence in question, which carried with it the possibility of imprisonment for life.

29. *RJR-MacDonald v Attorney General of Canada* (above) is now the leading authority on the rational connection test. The case concerned the legality of a ban on tobacco advertising and promotion, absent health warnings, which was alleged to breach freedom of expression. The Supreme Court held (at para. [153]) that the Government had to show that the restriction “serves the intended purpose”.³¹ However, the trial judge had rejected the evidence of the Government’s witnesses in support of its claim that advertising bans decrease tobacco consumption. This case did not concern breadth, but depth: it was the nature of the restriction that was challenged, not the fact that it applied to all persons seeking to advertise or promote tobacco products. The Supreme Court held that in relation to such a measure the rational connection could be established on the basis of reason or logic even in the absence of empirical evidence showing cause and effect, particularly where the question was the effect of the law on patterns of human behavior. McLachlin J (as she then was³²) stated (at para. [153]) that the Government:

“must show a causal connection between the infringement and the benefit sought on the basis of reason and logic. To put it another way, the government must show that the restriction on rights serves its intended purpose. This must be demonstrated on balance of probabilities.”

30. Ultimately, the question posed in *RJR-MacDonald* was whether the asserted connection between means and ends is reasonable, in relation to which empirical evidence will be of probative value but not necessary.³³ This is well-illustrated by the decision in the case itself. It was held that as a matter of common sense, prohibiting lifestyle tobacco advertising and requiring warnings to be displayed on packages would reduce smoking; but equally there was no rational connection between the prohibition of displaying trade marks on tobacco-related products and reducing tobacco use.³⁴ The case shows that the rational connection test can be relatively easily satisfied; but it does remain a genuine hurdle requiring proper consideration of the reasons for all aspects of a legislative scheme.

31. The approach in *RJR-MacDonald*, was not, however, limited to cases concerning the depth rather than breadth of legislation. In practice, therefore, the effect of *RJR-MacDonald* has been significantly to dilute the rational connection test from the position as originally conceived in *Oakes*. A good example is *R v Laba* [1994] 3 SCR 965 in which the Supreme Court held that a reverse onus clause requiring persons in possession of ore to prove that they were the owner was held to be rationally connected to the objective of preventing theft, although there was no “internal rationality” between possession of ore and the assumption that it was stolen. Sopinka J (for the court) stated (at paras [27] and [28]):

“Where there is good reason to believe that it would be difficult for the Crown to prove that goods have been stolen it is rational to place some kind of burden of proving that they have not been stolen upon the accused. . . . The only relevant consideration at this stage of the analysis is whether the presumption is a logical method of accomplishing the legislative objective.”

The court went on to hold that Parliament went further than it needed to have gone to achieve the objective.

³¹ In relation to administrative law, in *Singh Multani v Commissionnaire scolaire Marguerite-Bourgeois* 2006 SCC 6 at [49] the majority asked whether a “decision was rendered in furtherance of the objective”.

³² Beverley McLachlin is currently Chief Justice of Canada.

³³ [1995] 3 SCR 199 at [154], per La Forrester J; and at [183], per Iacobucci J.

³⁴ *Ibid.* at [158]–[159].

32. It is possible to distinguish *Oakes* from *R v Laba* on the basis that (unlike the correlation between possessing large quantities of drugs and trafficking) there is no greater correlation between possessing a large amount of ore and it having been stolen, than with possessing a small amount: the issue is therefore difficult to describe as one of over-breadth. Certainly, the case was treated as concerning *how* (i.e. the reverse onus established) rather than *who* (i.e. its application to all persons in possession). However, the same analysis adopted in *R v Laba* could have been applied in *Oakes* and the result would have been different. Therefore, if the interpretation of the rational connection test in *Oakes* remains good law, it can only be in relation to cases where legislation applies in the same way to persons in relevantly different situations (or differently to persons in the same situation). *R v Laba* also shows that, although it can be illuminating and helpful, the distinction between depth and breadth of legislation has its limitations.
33. Following *RJR-MacDonald* and *R v Laba*, examples of legislation failing the rational connection test are now rare.³⁵ The weight of analysis has been thrown on to the second two limbs of the *Oakes* proportionality test.

Minimal impairment or least injurious means

34. The minimal impairment limb of the *Oakes* test has given rise to more difficulty. On its face it is the most stringent requirement because laws can only pass the test if they can be shown to represent the minimal interference with rights possible. Taken at face value, this requirement would be capable of extinguishing any scope for the exercise of legislative judgment or discretion when formulating rights-infringing laws: there would only be one way the objective could lawfully be achieved.³⁶ It was in this context that the first serious challenge to the *Oakes* test arose, in the *Edwards Books* case (above). The case concerned the lawfulness of charges issued against four retailers for trading on Sundays. Having found that the Ontario legislation in question had a secular purpose (see the discussion above), the case turned on the *effects* of the measure on religious freedom. The legislation established an exemption for small retailers who closed on Saturdays. The central argument was that the exemption should not have been limited to small retailers. This caused a four-way split in the Supreme Court³⁷ which continues to provide the best illustration of the substance of the principle of proportionality in the Canadian case law.
35. Beetz and McIntyre JJ appreciated the potential effect of the *Oakes* test in limiting legislative freedom. For this reason, they held there was no interference with religious freedom at all. They reasoned (at paras [167]–[168]) that if Jewish traders closed on Saturdays as well as Sundays this was properly attributable to their religion and not to the Sunday closing laws. Had it been generally accepted, this analysis would have limited the right to religious freedom to a protection only from those laws that directly prevent religious observance; there would have been no protection in those cases where an interference with religious observance was merely the effect of a particular

³⁵ See, e.g. *R v Butler* [1992] 1 SCR 452 (there is a rational connection between violence to women and children and pornography, despite there being no clear evidence in support of this view); *Corbiere v Canada* [1999] 2 SCR 202 (there is a rational connection between the aim of maintaining the control of reserves with their residents and banning non-resident band members from voting); but cf. *Vriend v Alberta* [1998] 1 SCR 493 (there is no rational connection between omission of sexual orientation from equality legislation and the aim of ensuring equal treatment).

³⁶ In rare cases it may be possible to choose between options that impair protected rights to an equal extent.

³⁷ For an insight into this split, including a discussion of internal memorandum between the justices, see Sharpe and Roach, n. 16 above, pp. 353–357.

law. Such an analysis of Charter rights, had it been accepted, would seriously have restricted the scope and effectiveness of the Charter as a whole.

36. La Forest J also appreciated the potential difficulties of adhering to the *Oakes* test. However, he was not prepared to limit the scope of the Charter as a consequence. Instead, he embarked on what became a powerful dissenting tradition calling for a significant departure from *Oakes*. He stated that “[g]iven that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective”. He claimed (at paras [180]–[183]) that the courts were not able to make social policy choices; therefore legislation should stand unless the legislative choice was shown to be unreasonable. La Forest J concluded that the Sunday closing law was not only valid, but would have been valid without any concession or exception made for small businesses.
37. In stark contrast, Wilson J, also dissenting, held that the *Oakes* test should be applied with its full rigour: least injurious meant just that. The legislation had struck a compromise between upholding the religious freedom of individuals and the desire to provide a common rest day on the basis of the size of retailer. This was not a compromise based on a distinction of principle: it was discriminatory against larger employers and arbitrary in not applying equally to them. Moreover, it had not been shown that allowing all retailers who opened on Saturdays to open on Sundays would cause substantial disruption in the provision of a common rest day.³⁸ Accordingly, Wilson J held that the legislation was unlawful, even having regard to the exception that it established.
38. Dickson CJ, writing for the majority, steered a pragmatic middle course that has come to characterise the Canadian approach to proportionality. It reveals that the proportionality test under s. 1 of the Charter is neither the hard-edged check on Canadian legislatures that it is often made out to be, extinguishing room for legislative choice, nor mere window-dressing for judicial deference. Dickson CJ appreciated the need for some relaxation of the *Oakes* test in order to accommodate the extension of Charter rights to cover legislation, such as that in issue, which only indirectly affected the enjoyment of Charter rights. He therefore held that legislative measures could be justified, although less-intrusive alternatives existed,³⁹ and went on to explain (at paras [147]–[148]) what the flexible *Oakes* test required in the circumstances:
- “A ‘reasonable limit’ is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place where to draw the line. . . . In my view, the principles articulated in *Oakes* make it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers. The exemption in . . . the Act under review in these appeals represents a satisfactory effort on the part of the Legislature of Ontario to that end and is, accordingly, permissible.”
39. Applying this test, Dickson CJ held that it was necessary to consider possible alternative legislative schemes when assessing whether the measure satisfied the “minimal impairment” test. Reasonable efforts had to have been made to accommodate Sunday observers. The exception provided in the legislation was held to satisfy this requirement. Dickson CJ rejected the view of a five-judge panel of the Ontario Court of Appeal

³⁸ [1986] 2 SCR 713 at [207]–[210].

³⁹ *Ibid.* at [95]–[101], [138]–[139]. In other words, the court recognised that if the Charter rights could be infringed by indirect interference it would be necessary to widen the scope for legislative choice of means.

that the exception could and therefore should have been extended to cover those who could demonstrate a sincere belief that they should observe a different Sabbath: “there was no constitutional duty on the Ontario Legislature to do so” (at para. [149]). Importantly, Dickson CJ reached this conclusion despite the fact that the only evidence available to justify the laws was a report on Sunday observance which was over 15 years old. However, the most important point, which shows that the proportionality test has real teeth and is set apart from a mere reasonableness test, is that it was held that the law in question would *not* have satisfied the proportionality test if no exemption had been provided for Saturday observers.⁴⁰ Although such an accommodation had to be “reasonable” the need for such an accommodation would not have arisen if the applicable test had been a test of reasonableness because (as per La Forest J) it would have been reasonable not to have made any accommodation.

40. The majority approach in *Edwards Books* was further developed in *RJR-MacDonald*, in which the court was once again divided.⁴¹ In comments that have subsequently been unanimously approved by the Supreme Court,⁴² McLachlin J (as she then was) stated:

“160. [T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be ‘minimal’, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.”

41. The majority held that the complete prohibition on tobacco advertising without health warnings breached the minimal impairment test because the Canadian Government had not shown why less-restrictive alternatives to a total ban could not have been adopted. Even so, the minimal impairment test articulated by McLachlin J clearly built upon the flexibility in the *Oakes* test recognised in *Edwards Books*, expressly providing for a “range” of permissible policy options, and therefore departing from the strict interpretation of *Oakes*: that the least intrusive or best possible option *must* be chosen. Nor did the Supreme Court lay down a requirement that the Government show in every case why less-restrictive means have not been used, still less that such measures would have been less effective.
42. The circumstances of the case itself illuminate the narrowness of the circumstances in which laws will be held unconstitutional because less-restrictive means exist. In the first place, there was considerable evidence that “significantly less intrusive”⁴³ alternatives to a total ban on tobacco advertising existed.⁴⁴ Moreover, it was also accepted that the Government had undertaken a study of these alternative policy options, but it had not only refused to disclose the study but had not even made submissions on the

⁴⁰ The opposite result was reached in *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016: the “categorical exclusion” of agricultural workers from labour relations legislation did not minimally impair the right to freedom of association.

⁴¹ La Forest J again set out a more deferential approach to s. 1. Iacobucci J, in particular, expressed concerns that this would have the effect of “unduly diluting the s. 1 principles from their original form cast in *R v. Oakes*”: [1995] 3 SCR 199 at [182].

⁴² *Libman v Quebec (Attorney General)* [1997] 3 SCR 569 at [58].

⁴³ [1995] 3 SCR 199 at [160].

⁴⁴ For instance, by banning only lifestyle advertising (and not informational or brand preference advertising) or by banning only advertising aimed at children or adolescents.

point.⁴⁵ The court was not impressed by this.⁴⁶ McLachlin J described it as a “glaring” omission.⁴⁷

43. The flexibility now recognised as built in to the minimal impairment limb of the *Oakes* test is perhaps most starkly revealed by the recent case of *Newfoundland (Treasury Board) v NAPE* (2002) 221 DLR (4th) 513. The province of Newfoundland and Labrador enacted legislation delaying the implementation of a pay increase for female public employees which was required to bring public sector pay into line with the requirements of s. 15 of the Charter on equality. The legislation was prompted by an unprecedented financial crisis affecting the province. Marshall JA in the Newfoundland Court of Appeal (at para. [351]) called for the Supreme Court to “revisit” *Oakes* and expressed the need for it to be, “harmonized with the Separation of Powers Doctrine by foreclosing the potential for the judiciary to assume the role of final arbitrator of the correctness of policy initiatives within the purview of the political branches of government”.
44. The Supreme Court rejected Marshall JA’s plea. It rejected his suggestion that the onus should be on the applicants to show that the exercise of their rights was reasonable in the specific circumstances obtaining in each individual case.⁴⁸ The Supreme Court also rejected the contention that the court should refrain from interfering with or considering “policy initiatives” on separation of powers grounds. Binnie J, giving the judgment of the court, stated:
- “111. The ‘political branches’ of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called ‘policy initiatives’. If the ‘political branches’ are to be the ‘final arbitrator’ of compliance with the Charter of their ‘policy initiatives’, it would seem the enactment of the Charter affords no real protection at all to the rightsholders the Charter, according to its text, was intended to benefit. Charter rights and freedoms, on this reading, would offer rights without a remedy.
112. Marshall J.A. would preclude the courts from looking at alternative measures the ‘political branches’ might have adopted to achieve their legitimate objectives with minimal impairment to Charter rights and freedoms. . . .
113. With respect, it is difficult to understand how a court could satisfy itself that a particular legislative limit is ‘reasonable’ if it is blinkered from considering whether other less limiting measures were available.”
45. On the other hand, the Supreme Court also held that the Newfoundland authorities had to be given a broad “margin of appreciation” in making budgetary choices and the court had to recognise the consequences that their decisions could have on allocation

⁴⁵ *RJR-MacDonald v Attorney General of Canada* [1995] 3 SCR 199 at [165]–[168], per McLachlin J.

⁴⁶ “Instead, the Attorney General contented himself with the bland statement that a complete ban is justified because Parliament ‘had to balance competing interests’ somehow. Its response to the minimal impairment argument is not evidence, but a simple assertion that Parliament has the right to set such limits as it chooses: ‘Parliament was certainly entitled to conclude that nothing short of the means it designed would meet the public health objectives set out in s. 3 of the [Act]. The Act is a justified preventative health measure. *Parliament has the ability to set the exact limits of this measure*’” (emphasis added); per McLachlin J, at para. [167]. See also paras [186]–[188], per Iacobucci J.

⁴⁷ *RJR-MacDonald v Attorney General of Canada* [1995] 3 SCR 199 at [166]. There was even a suggestion in McLachlin J’s judgment that the law may nonetheless be upheld even where the minimal impairment requirement is not satisfied (para. [160]). In *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211 at 296 Wilson J described the Supreme Court’s approach as permitting measures unless there are alternatives which are “clearly superior to the measures currently in use”.

⁴⁸ “Nowhere in the Charter is it suggested that the exercise of fundamental rights and freedoms should be presumed unreasonable unless and until a claimant proves the contrary ‘in the specific circumstances’”: [2004] 3 SCR 381 at [109].

of finite resources, notwithstanding that the legislation was expressly discriminatory. Upholding the law, Binnie J observed:

“95. In this context, 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. The provincial government in this case could have thrown other claims and priorities to the winds and simply paid the \$24 million but in its view, the cuts it would have had to make elsewhere to permit this to happen would have created even greater grief and social disruption. The budget is simply a forum for juggling spending priorities of all types. It is not convincing simply to declare that an expenditure to achieve a s. 15 objective must necessarily rank ahead of hospital beds or school rooms.

As in most cases, resourceful counsel, with the benefit of hindsight, can multiply the alternatives. It was suggested, for example, that the government could have frozen the step progressions (0.5 percent of the payroll) rather than postponing pay equity and extinguishing the accumulated 1988–91 benefits. This, too, might have been a justifiable approach, but there is no compelling rule that says step progression should have been denied all employees, including women, in order to keep to the original schedule of the pay equity program.”

46. *Newfoundland Treasury Board v NAPE* displays with particular clarity the considerable wiggle-room contained in the *Oakes* formulation of the minimal impairment test as it is understood by the Canadian Supreme Court. Nonetheless, it was undoubtedly an exceptional case and it is important to appreciate that the application of the *Oakes* test in *Newfoundland* did not go as far as Marshall JA called for. It was only the acute financial crisis that justified the very considerable deference afforded by the court and the acceptance of the province’s plea that the interference with protected rights had to be offset by the need to apply finite resources to other projects. Of course, the arguments that succeeded in *Newfoundland* do play a lesser part in cases where the difficulties faced by public bodies are less acute. However, had Marshall JA’s approach been accepted, the courts’ scrutiny of social and economic initiatives would have been very considerably restricted in all cases.

47. The Supreme Court has been careful to circumscribe the circumstances in which it will confer any significant deference to legislative decisions. McLachlin J in *RJR-MacDonald* cautioned against extending deference too far:

“136. As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.”

48. The court’s approach has been summarised in the following terms:⁴⁹

“political complexity is not the deciding factor in establishing a margin of deference under s. 1. Rather, the margin will vary according to whether legislature has (1) sought a balance between the interests of competing groups, (2) defended a vulnerable group with a subjective apprehension of harm, (3) chosen a remedy whose effectiveness cannot be measured scientifically, and (4) suppressed an activity whose social or moral value is relatively low.”

⁴⁹ *Dunmore v Ontario (Attorney-General)* [2001] 3 SCR 1016 at [57].

49. The Supreme Court has therefore afforded considerable deference where the legislature has balanced social or economic interests of different groups against each other. However, where the interests of society are directly pitted against the individual the court is not prepared to offer significant deference to the legislature. It describes such circumstances as those where the state is the “singular antagonist of the individual”. Moreover, where the court has particular expertise, most notably in criminal justice matters, the court has also held that deference is not appropriate.⁵⁰
50. The case law therefore shows that there is room for political manoeuvre within the confines of the minimal impairment test both within the test itself (most notably, the requirement of reasonable accommodation) and, to a lesser degree, through the doctrine of deference. It must be emphasised that there are a number of cases which show that the minimal impairment test does continue to have real teeth. In *Ford v Attorney General for Quebec* [1988] 2 SCR 712, for instance, Quebec legislation prohibiting commercial signs in English was struck down because the objective of preserving and enhancing the French language could have been achieved by dual-language signs. In *Corbiere v Canada* [1999] 2 SCR 202 a prohibition on First Nations Band Members residing outside their band’s reserve from voting in their band’s elections was unjustified because the Government had not shown why other measures could not have been taken to ensure that reserves remained in the control of their inhabitants.⁵¹ In *Thompson Newspapers v Canada* [1998] 1 SCR 877 federal legislation banning the publication of opinion polls in the three days prior to an election was over-inclusive in banning accurate polls and under-inclusive in preventing the correcting of previously published inaccurate polls; it also had not been shown why the obvious – although not quite as effective – alternative of publishing methodological data could not have been taken. It was therefore unlawful (para. [129]). These cases show that where there are apparently genuine and effective alternatives the Government will be required to show, at least, that they were considered and why they were not chosen.
51. Nonetheless it is far from easy to predict the degree of scrutiny that will be given by the Canadian courts, and how close to “minimal” impairment a measure must in fact be. Moreover, the Supreme Court’s attempt at reconciling the notion of “reasonable alternatives” with the notion of “minimal impairment” cannot disguise the obvious tension between them. In a recent decision, Charron J, for the majority of the Supreme Court, stated that, “[t]he limit, which must minimally impair the right or freedom that has been infringed, need not be the least intrusive solution”.⁵² With respect, this makes little sense. As little as possible interference was what *Oakes* expressly required, but it is not what is now required by the Supreme Court.

Overall balance

52. The final limb of the *Oakes* test relates to the overall balance of the benefits of the measure against its deleterious effects on rights and freedoms. In other words, even if

⁵⁰ *Libman v Quebec (Attorney General)* [1997] 3 SCR 569 at [59]; *RJR-MacDonald v Attorney General of Canada* [1995] 3 SCR 199; *Irwin Toy Ltd v Attorney General of Quebec* [1989] 1 SCR 927.

⁵¹ It was of significance in this case that: (i) there was an infringement of equality rights under s. 15; (ii) a number of options involving creative design of the electoral systems and governance of reserves, which would not be expensive or difficult to administer, were open to the Government; (iii) the Government had not been shown why any interference with equality rights was necessary at all or why the alternatives were unsuitable (paras [101]–[104]).

⁵² *Singh Multani v Commissionnaire scolaire Marguerite-Bourgeois* 2006 SCC 6 at [49] (striking down a school board’s decision to ban wearing of kirpan); *Attorney General of Canada v Harper* [2004] 1 SCR 827 at [29] (upholding limits on election spending by private individuals).

a measure is carefully tailored to attain a sufficiently important objective it may nonetheless be the case that the measure remains such a significant interference with a protected right that it cannot be justified.⁵³ Consider *Thompson Newspapers* again. In that case it was held that even if the legislation on opinion polls had been better tailored and the alternative measures would not have been effective, the Supreme Court held that in any event a ban on opinion polls was not justified. The court considered that although the ban pursued the important objective of preventing inaccurate opinion polls from influencing an election, the benefits of the ban were “marginal” and the postulated fears of inaccurate polls influencing elections would seldom occur. By contrast, the court held (at para. [127]):

“This is a complete ban on political information at a crucial time in the electoral process. The ban interferes with the rights of voters who want access to the most timely polling information available, and with the rights of the media and pollsters who want to provide it. It is an interference with the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them.”

Accordingly, there was no overall proportionality between the disadvantages and the benefits of the measure.

53. Bastarache J, delivering the majority judgment explained the third stage of the *Oakes* test in the following terms (at para. [125]):

“The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the Charter right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a Charter value is infringed, the ultimate standard is whether the Charter right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.”

54. Despite this attempt to provide a separate function for the third limb of the *Oakes* test, it is not entirely successful. It is not clear what Bastarache J means the distinction to be in the passage quoted above. In particular, unless the competing alternative means all interfere with a right to the same degree (which is extremely unlikely), any analysis of such alternatives will have to compare not only the relative costs of the measures, in terms of the degree of interference with protected rights, but also their respective benefits, in terms of how well the measure furthers the legitimate aim (and potentially other savings, such as allowing resources to be distributed elsewhere). But analytically, it is possible to identify two separate questions. First, as just explained, the proportionality test can require a comparison of the marginal cost/benefits gains of measure A against measure B (and C and D, etc.). Secondly, the “overall” question of proportionality is resolved by asking whether the benefits of measure A, taken apart from any alternatives, are proportionate to the costs. Legislation therefore could, at least theoretically, pass the minimal impairment test but fail the test of overall balance. Note, however, that the distinction between these two questions dissolves if one treats not doing the measure in question at all as a hypothetical “alternative means”.

⁵³ “The final proportionality assessment takes all the elements identified and measured under the heads of Parliament’s objective, rational connection and minimal impairment, and balances them to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental Charter right is demonstrably justifiable in a free and democratic society”: *R v Sharpe* [2001] 1 SCR 45 at [101].

55. More importantly, in practice the distinction can rarely be usefully maintained. Testament to this is that no Canadian case has turned solely on the overall balance test. This is probably because it is artificial in practice to divorce the question of overall proportionality from the potential availability of less-intrusive means. It is difficult to envisage a court saying that a law is proportionate overall but fails the proportionality test on the ground that it should have been more restrictively framed. *Singh Multani v Commissionnaire scolaire Marguerite-Bourgeoys* (considered above) provides an illustration. The Supreme Court held that allowing the wearing of kirpans did not raise a significant safety risk, so there was therefore little if anything weighing in favour of the decision to ban it from the school. Furthermore, a total ban had very significant effects on religious freedom:

“A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating [the appellant] and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.”⁵⁴

56. The Supreme Court therefore held that there was no reasonable accommodation of the claimant’s rights. It also held that the effects of a total ban were so significant and not offset by benefits that the decision lacked overall balance. The court’s focus on the deleterious effect of a *total* ban (as opposed to reasonable restrictions on wearing a kirpan) meant that the second and third parts of the *Oakes* test were essentially doing the same work.⁵⁵ We can conclude that it will often be an artificial exercise to seek hermetically to seal the two questions: both are aspects of the question of overall proportionality.

Proportionality in Israel

Foundation of proportionality in Israel

57. The doctrine of reasonableness is a long-established component of Israeli administrative law, imported directly from English law. The Israeli courts have permitted decisions within a “zone of reasonableness” but have struck down decisions which substantially depart from anything that can be considered reasonable. However, the Israeli courts have also taken the English cases further, and developed an approach that explicitly assesses whether the weight attributed to relevant factors by the decision-maker was reasonable (which is, of course, impermissible under the *Wednesbury* approach).⁵⁶
58. This has meant that by English standards, many of the Supreme Court’s decisions have been considerably interventionist.⁵⁷ Furthermore, the Supreme Court recognised in the

⁵⁴ 2006 SCC 6 at [79].

⁵⁵ See also *R v Sharpe* [2001] SCR 45 at [101]–[110]: the criminalisation of possession of child pornography could be justified, but extending the prohibition to material created by the accused for private use as well as material including the accused performing legal acts went too far and, moreover, this also meant that the deleterious effects outweighed the benefits of the measure. Similarly, see *Thompson Newspapers v Canada* [1998] 1 SCR 877, especially paras [110]–[118] (Iacobucci, Bastarache, Arbour, LeBeld, Deschamps and Fish JJ); paras [32]–[34] (McLachlin CJ, Major and Binnie JJ (dissenting)): a ban on publication of opinion polls in the three days prior to an election was both too onerous, having regard to its limited effects, and its deleterious effects outweighed its benefits. In these cases there is apparently little if any difference between the analysis under the minimal impairment head and the overall balance head of the *Oakes* test.

⁵⁶ HC 910/86 *Ressler v Minister of Defence* (1988) IsrSC 42(2) 441.

⁵⁷ In HC 935/89 *Ganor v Attorney General* (1990) 44(2) PD 485 the Supreme Court overturned the decision of the Attorney General not to prosecute officers of Israel’s major banks for manipulating share prices holding that, although only relevant considerations had been considered, he had given excessive weight to some and

mid-1980s that human rights should be given special weight by the executive. It therefore developed a “balance of interests” approach as an element of the reasonableness analysis.⁵⁸ In HC 5510/92 *Turkman v Minister of Defence* (1994) 48(1) PD 217 the Supreme Court of Israel took the further step of declaring proportionality to be a separate and distinct ground of judicial review. The court held that the demolition of a house in which a terrorist convicted of murder resided would inflict disproportionate harm on a family that also resided there. It was only appropriate for the military commander to board up part of the house.⁵⁹

59. The Supreme Court has not limited proportionality to the human rights context and has also applied it, for example, in licensing cases.⁶⁰ It is applied alongside and not in substitution for the principle of reasonableness. Although its origins in Israeli law are in administrative law, the principle of proportionality has been extended into the constitutional context. The Supreme Court has held that it is also enshrined in Art. 8 of the Basic Law on Human Dignity and Liberty, which states:

“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”

60. Today, the Supreme Court describes proportionality as one of the basic principles recognised by Israeli public law, along with reasonableness and good faith.⁶¹

61. The most important analysis and articulation of the principle of proportionality in the law of Israel has been given in two recent cases relating to the legality of the security “fence” constructed in the occupied territories: HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* and HCJ 7957/04 *Mara’abe v Prime Minister of Israel*. These are the two most important of a number of petitions by Palestinian communities and landowners against orders for the seizure of land in the occupied territories made to enable Israel to build the fence. In *Beit Sourik Village Council* the Supreme Court expounded the proportionality test in the following way (at para. [40]):

“According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it . . .”

The principle of proportionality is therefore applied where the challenge relates not to a decision as such, but to the means used by the state in achieving its objectives.

62. The Supreme Court has articulated three sub-tests of the proportionality test, in addition to the need to show a legitimate aim, influenced by the German and particularly the Canadian approach to proportionality, and drawing on the jurisprudence of international tribunals:

insufficient weight to others (such as the severity of the alleged offences and the need to deter future market manipulation). In HCJ 6163/92 *Eisenberg v Minister of Building and Housing* [1992–94] IsrLR 19 the Supreme Court held that a former Major General of the Security Service should not have been appointed Director General of the Ministry of Building and Housing because the decision had failed properly to balance his expertise against his incrimination in two major public scandals.

⁵⁸ HC 153/83 *Levi v Commissioner of the Southern District of the Police* (1984) 38(2) PD 393 (freedom of demonstration); HC 14/86 *Laor v Board of Censorship for Films and Plays* (1987) 41(1) PD 421 (freedom of speech).

⁵⁹ See also HC 2994/90 *Knesset Member Poraz v Government of Israel* (1990) 44(3) PD 317 (disproportionate for Minister of Housing to invoke emergency rather than ordinary legislation); and HCJ 5016/96 *Horev v Minister of Transportation* [1997] IsrLR 152 (in closing Bar-Ilan Street on the Sabbath during hours of prayer the Minister did not adequately weigh the views of secular residents).

⁶⁰ HC 344/89 *Ch SH International Trade Ltd v Minister of Industry and Commerce* (1990) (1) PD 456.

⁶¹ HCJ 7957/04 *Mara’abe v Prime Minister of Israel* at [30].

“The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the ‘appropriate means’ or ‘rational means’ test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the ‘least injurious means’ test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the ‘proportionate means’ test (or proportionality ‘in the narrow sense’).”⁶²

Legitimate aim

63. The security fence cases contain extended consideration of the question of whether the construction of the fence pursued a legitimate aim, which is unusual in the international jurisprudence on proportionality. In the *Beit Sourik Village Council* case it was submitted that the seizure orders were motivated by political objectives – namely to “annex” Palestinian territories to the state of Israel – rather than to prevent terrorist infiltration of the Israeli state.
64. The Supreme Court gave sustained consideration to this argument but ultimately rejected it. It considered that the Israeli Government had repeatedly emphasised that the fence did not express a political border, or any kind of border. It held that the route of the fence was determined by security considerations par excellence. It also rejected the invitation to infer a contrary objective from the fact that the route of the fence departed from the armistice line between Israel and Jordan after the War of Independence (the “Green Line”). The court held (at paras [28], [30] and [45]) that there were good security reasons to justify such a departure. Subsequently, the International Court of Justice (ICJ) reached the opposite conclusion in an Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Territory*. It held that the construction of the “wall” was motivated by political considerations and the desire to annex Palestinian territory.⁶³ The argument was then made in the Israeli case of *Mara’abe v Prime Minister of Israel* before the Supreme Court of Israel that the court should find that every segment of the wall failed the proportionality test because it did not pursue a legitimate aim. This argument was rejected by Supreme Court of Israel.
65. The Supreme Court held that the ICJ’s Opinion was not *res judicata* because it had been decided on a different factual and evidential basis from the decision that it had to make. The security and military necessity for the fence had been mentioned only briefly in the sources relied upon by the ICJ. No oral representations were made by Israel before the ICJ and no witnesses were heard (although Israel did make written submissions to the court). Furthermore, the ICJ had not had specific evidence from local inhabitants and had only considered the fence as a whole (paras [63]–[74]). The Supreme Court of Israel has therefore continued to hold that the construction of the security fence pursues a legitimate aim.

Rational connection test

66. The Israeli Supreme Court has stated that the means used must “rationally lead to the realization of the objective”. In *Mara’abe v Prime Minister of Israel* the Supreme Court

⁶² HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* at [41].

⁶³ *Legal Consequences of the Construction of a Wall in the Occupied Territory, Advisory Opinion* (9 July 2004) 43 ILM 1009 (2004).

suggested (at para. [30]) that the first subtest “calls for a fit between the goal and means”. This indicates that in addition to the need for a measure to be likely to promote attainment of the objective, significantly over-inclusive and under-inclusive measures could well be struck down as lacking rational connection to the objective sought to be achieved, in the same way as the Canadian Supreme Court struck down the criminal law in issue in *Oakes*.

67. In the *Beit Sourik Village Council* case the Supreme Court stated (at para. [45]) that “[i]f the chosen route is not well-founded from the military standpoint, then there is no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest)”. The reference to the need to show that the route was “well founded” may be taken to suggest that something more must be shown than that the route of the fence advanced the security interests of Israel. This however is not the case. In the *Beit Sourik Village Council* case the court was faced with a conflict of evidence as to whether the route of the fence actually advanced the security of Israel. The Council for Peace and Security made expert submissions on the military necessity (or, rather, lack of it) for the fence. However, the Supreme Court felt unable to reject the opinion of the military commander who determined the route. It essentially applied a *Wednesbury* or *Bolam* test to his evidence: the court would not reject his evidence unless it was not an opinion a reasonable Commander could hold.⁶⁴ The court stated (at paras [56] and [57]):

“We cannot – as those who are not expert in military affairs – determine whether military considerations justify laying the separation fence north of Jebel Muktam (as per the stance of the military commander) or whether there is no need for the separation fence to include it (as per the stance of the petitioners and the Council for Peace and Security). . . . By our very ruling that the route of the fence passes the test of military rationality, we have also held that it realizes the military objective of the separation fence.”

68. The novel facts of the case expose clearly the way in which deference can operate at all stages of the proportionality test. In this case, extreme deference was afforded to the assessment of the military commander that the fence advanced Israel’s security. Such an approach may be appropriate in other “expert” areas, such as in relation to the decisions of child psychologists, social workers and the police.
69. In *Mara’abe v Prime Minister of Israel* the petitioners argued that there was no rational connection between the building of a certain section of the fence and the separation between Palestinians and Israelis, since many Palestinians found themselves on the Israeli side of the fence. The Supreme Court easily side-stepped this argument by stating that the true aim of the fence was to separate Israelis from terrorists.⁶⁵

Least-restrictive means

70. In order to understand the way in which the Supreme Court of Israel has elaborated the minimal impairment or least injurious means test it is necessary to jump ahead briefly to consider its understanding of proportionality “in the narrow sense” (the third sub-test). According to the court, proportionality in the narrow sense can be applied in two ways. First, the court can engage in a direct comparison between the advantages of the administrative act and the damage that results from it. The measure must bear a

⁶⁴ *Bolam v Friern HMC* [1957] 1 WLR 582; *Bolitho v City and Hackney Heath Authority* [1998] AC 232: the court will only depart from expert opinion where it is not capable of withstanding logical analysis. For an analysis of the relationship between *Wednesbury* and *Bolam*, see Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” (2004) 63 CLJ 166.

⁶⁵ HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* at [111].

“proper proportion” to the benefits gained from the interference. Secondly, the test can be applied in a “relative manner” whereby the administrative act is compared to an alternate act or acts. The original administrative act may be disproportionate if employing alternative means ensures a substantial reduction in the injury caused.⁶⁶ The Supreme Court has also made clear that the proportionality test will usually leave open a range of policy options for the Government to choose between:⁶⁷

“Not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a ‘zone of proportionality’ must be recognized (similar to a ‘zone of reasonableness’).”

71. The application of the proportionality test in the narrow sense can therefore plainly result in measures being upheld, although there were other “less injurious” means that could also have been taken. These two ways in which the narrow proportionality test are applied mirror the Canadian Supreme Court’s approach to proportionality in the following way: the first equates to the third limb of the *Oakes* proportionality test in requiring an “overall balance”; the second reflects the approach to the second limb of the *Oakes* test (the minimal impairment/least injurious means test), as modified by subsequent cases.
72. This begs the question: what role does the “least injurious means” test in Israeli law fulfill? The Supreme Court of Israel has not modified the “least injurious means” test in the same way as the Canadian Supreme Court. Unlike the Canadian Supreme Court, the Israeli Supreme Court has said that the requirement of “least injurious means” means what it says: the means used by the administrative body must injure the individual to the “least possible extent”. But this leads to the further question: how is it that the least injurious means test does not render the narrow proportionality test otiose?⁶⁸ The answer is that instead of relaxing the least injurious means test (as the Canadian Supreme Court has done) the Supreme Court of Israel has restricted its application. In the *Beit Sourik Village Council* case it held that the second sub-test only applies where there are alternative means available that *better advance* the objective of the law or decision in question, or where it will achieve the objectives *equally as well*.⁶⁹ In *Mara’abe v Prime Minister of Israel*, finding against one of the petitioners’ arguments the court held (at para. [112]) that establishing the fence on the Green Line would reduce security and therefore the second sub-test was not breached.
73. It is suggested that there are three main problems with this approach. First, it means that the second sub-test in practice has *no effective sphere of application*. In almost all cases alternative means will impair at least to some degree the achievement of the aim in question. The proportionality test is, after all, principally concerned with the question of when governments should be required to accept a trade-off between the pursuit of their projects and the rights of individuals. In Israeli law, the least injurious means test has been converted into a very narrow exception to the general proportionality

⁶⁶ Ibid. at [41].

⁶⁷ Ibid. at [42].

⁶⁸ The discussion at text to footnote 55 above makes clear that the second way in which the narrow proportionality test is applied would be analytically redundant, whereas the first way would be at least redundant for practical purposes.

⁶⁹ For example “The second subtest examines whether it is possible to attain the security objectives of the separation fence in a way that causes less injury to the local inhabitants. There is no doubt – and the issue is not even disputed – that the route suggested by the members of the Council for Peace and Security causes less injury to the local inhabitants than the injury caused by the route determined by the military commander. The question is whether the former route satisfies the security objective of the security fence to the same extent as the route set out by the military commander”: HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* at [58].

principle, applying not where there has to be a trade-off between rights, on the one hand, and the wider public interest, on the other, but where no such trade-off is actually required. The second problem follows from the first. This is that the approach taken by the Supreme Court of Israel *conflicts* with the general principle of proportionality embodied in the third sub-test. For instance, it means that where there is a measure which is equally effective or slightly more effective at achieving the Government's objective (say, two per cent more effective), then this measure *must* be taken, even where it would represent only a marginal or relatively small improvement in the position of the individual. But in such cases there would be no necessary disproportion between the improvement in the position for the individual (i.e. representing the burdensomeness of the measure actually taken) and the costs of alternative measure (being actually a two per cent improvement). Where this limited exception applies, there is no "zone of proportionality".

74. Moreover, by requiring an analysis of the potential effectiveness of different measures, and by requiring that the most effective measures for achieving the Government's objective must be taken for projects to be lawful, the approach of the Supreme Court of Israel threatens to draw the courts deep into the comparative merits of policy choices. Indeed, the Supreme Court of Israel recognised this latter concern⁷⁰ and in seeking to overcome it the court has created the third problem: it has established a threshold requirement that essentially *dissolves* the least injurious means test into a test of rationality.
75. Thus, in the *Beit Sourik Village Council* case the petitioners alleged that other routes for the security fence were available which would be less intrusive and which would not diminish the attainment of the security objective. They presented expert military evidence to this effect which conflicted with the view of the military commander of IDF Forces in the West Bank. Understandably, the court considered that it could not resolve this difference of opinion. It would only "guard the borders" and "maintain the boundaries" of the discretion of the commander, and the petitioners had the burden, which they had not discharged, of showing that his decision fell outside a "zone of reasonableness" (paras [46], [56] and [58]).⁷¹ This is classic *Wednesbury* language, not permitting the judge to stray within the four corners of the statute. It also bears a strong resemblance to the *Bolam* test, by which a professional's expert opinion will not be questioned by a court unless it can be shown to be unreasonable or illogical.⁷²
76. Even so, in *Mara'abe v Prime Minister of Israel* the Supreme Court appeared to shift the burden of proof on this issue back to the Government. In relation to the creation of Alfei Menashe enclave, created by the route of the fence, the Supreme Court declared that it was "by no means persuaded" of the military necessity for the route. It stated (at paras [113]–[114]) that "the required effort has not been made, and the details of an alternative route have not been examined". This approach is more satisfactory, but a close analysis of the various sub-tests makes clear that the second sub-test can only serve a useful and principled purpose by trespassing into the territory of the other aspects of the proportionality test.

⁷⁰ HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* at [48].

⁷¹ Given the very special expertise of the military commander the court held that his evidence would be given "special weight".

⁷² *Bolam v Friern HMC* [1957] 1 WLR 582; *Bolitho v City and Hackney Health Authority* [1998] AC 232. For an analysis of the relationship between *Wednesbury* and *Bolam*, see Hickman, n. 64 above.

Proportionality in the narrow sense

77. The most persuasive and helpful aspect of the Supreme Court of Israel's approach to proportionality relates to its application of the third sub-test. It is recalled that few Canadian cases reach the final stage of the proportionality analysis. By contrast, both the security fence cases turned on this question. The Supreme Court held that, unlike the question of whether the most effective means had been employed, the narrow question of proportionality was a legal one.⁷³ The Supreme Court formulated the question that it had to answer in the following way:

"The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves 'family honour and rights' (Regulation 46 of the Hague Regulations). All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. The question before us is: does the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand in reasonable (proper) proportion to the security benefit from the construction of the fence along that route?"⁷⁴

78. This helpfully structures the balancing of interests that must take place. The court must take into account the "severity of the injury" to local inhabitants, but this is not intended to mean only actual physical and economic harm and inconvenience. It must take account of the place of rights and freedoms, which are given recognition in the general normative structure of the legal system. It also makes clear that the question is not simply a question of trying to identify whether the benefits outweigh the harm. This is an arid exercise when rights are on one side of the scales. The way it is helpfully put by the Supreme Court is whether the infringement of rights stands in "proper proportion" to the security benefits.

79. The Supreme Court conducted a detailed analysis of each segment of the security fence under consideration. In a number of cases it held that the route of the fence was disproportionate because it severely affected the lives of local inhabitants. The court accepted that altering the route of the fence would also reduce the level of security that it provided; this was held to be out of all proportion to the very significant improvement in the lives of Palestinians that would be achieved.⁷⁵ An example of its conclusion on one part of the fence is set out at length below:⁷⁶

"60. Our answer is that the relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falahin) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with

⁷³ H CJ 2056/04 *Beit Sourik Village Council v Government of Israel* at [48].

⁷⁴ *Ibid.* at [59].

⁷⁵ *Ibid.* at [50]–[81].

⁷⁶ *Ibid.* at [60]–[61].

substitute land, despite our oft repeated proposals on that matter. The separation is not hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.

61. These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination.”

80. Interestingly, the court also considered the compound effect of the 40 kilometres of fence under consideration in the case. It considered the total number of people whose lives were injured (35,000), the total land taken up (4,000 dunams), the thousands of dunams of cultivated land and olive groves uprooted, the effect on the “fabric of life of the entire population”, and the absence of compensation. It concluded that “the balance determined by the military commander is not proportionate”, and required complete reconsideration:⁷⁷

“The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabbala and Ramallah).”

81. It is worth also considering the court’s comments in *Mara’abe v Prime Minister of Israel* in relation to the Alfei Menashe enclave. The court decided to leave open its finding on the third sub-test, given its finding in favour of the petitioners on the second sub-test (above). The reason for this was that it perceived that the Alfei Menashe enclave raised a special problem. It asked, what if the consideration of an alternative route leads to the conclusion that the only route which provides the minimum required security is the existing route? Without it, the court said, there would be “no security” for the Israelis. But with it, there is a “severe injury to the fabric of life of the residents of the villages” (at para. [116]):

“What will the case be in such a situation (‘Absolute implementation of narrow proportionality . . .’)? That is the most difficult of questions. . . . It seems to us that the time has not come to confront this difficulty, and the time may never come.”

82. Of course, this would be a difficult question. But it is principally so because the court’s hypothesis is that an alternative route would not provide the “minimum” security: there would be “no security”. The proportionality test still posits the question: is there a proper proportion between the interference and the security gain? It must be likely that if there really was no security at all then the interference would be justified. But in fact, in almost all ordinary cases, there is no “minimum”, and the question is a relative one between reductions in the effectiveness of measures and an improvement in the lives of individuals affected by them. In almost all cases, it is a question of trade off.

⁷⁷ Ibid. at [85].

Lessons and conclusions

83. The Supreme Courts of Israel and Canada have grappled with the structure of the proportionality test in a far more rigorous and reflective way than the English courts, the ECJ and the Strasbourg Court have yet done. This article is not meant to suggest that domestic courts should exactly follow either of their approaches. Domestic courts should establish their own approach. But in doing so, considerable lessons can be learnt from studying the Canadian and Israeli cases. Even the mistakes and wrong turnings that have been made prove illuminating.
84. Given the length of this article, it may be helpful to state the conclusions shortly and without any attempt to refer back to the preceding discussion. They relate only to what the case law shows to be a sensible and principled approach to the proportionality test.⁷⁸
85. In order for there to be a rational connection, a measure must be capable of advancing the legitimate aim. Rational connection should not need to be established by evidence, but can, in suitable cases, be treated as a matter of common sense.
86. There are various aspects of a measure which must also rationally relate to the pursuit of the legitimate aim: over- and under-inclusive measures may not disclose a rational connection to the aim.
87. It will often be helpful to distinguish between the breadth of a measure (generally, the *who*) and depth of a measure (generally, the *how*). Where the extension of a measure to certain persons, or its non-application to certain persons, does not serve to advance the legitimate aim, the measure may be said to lack a rational connection.
88. In assessing proportionality, a court should ask whether the impact of a measure on individual rights stands in proper proportion to the benefits gained in pursuit of the legitimate aim. Specifically, the court should consider: (1) the impacts and benefits of the measure compared with the impacts and benefits of any less-intrusive alternatives and (2) the overall proportionality of a measure.
89. In addressing (1), above, it should not be necessary for defendants in every case to produce evidence of alternatives, or to show that no less-intrusive alternatives were present and that the interference was the most minimal it could have been. A minimal impairment or least injurious means test is unhelpful and misleading. However, where alternatives are apparent to a defendant it should have to show that they were considered and explain why it did not adopt them. Defendants should also have to show that they have made an accommodation of the rights of those affected. However, the overriding question will be whether the failure to adopt an alternative route means that the effect of the measure on individual rights does not stand in proper proportion to the benefits gained. What is required by way of accommodation will vary depending on the circumstances.

⁷⁸ Of course, others may draw different conclusions from the cases, which is one reason why they have been set out at some length.