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Taking Proportionality Seriously in Charter Adjudication: R v KRJ

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Case Commented On: *R v KRJ*, 2016 SCC 31 (CanLII)

Introduction

The rights and freedoms enshrined in the *Charter* are not absolute. They are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Canadian Charter of Rights and Freedoms*, section 1). In *R v Oakes*, 1986 CanLII 46 (SCC), Chief Justice Brian Dickson established the legal standard by which an infringement of a *Charter* protected right may be justified, which has come to be known as the "*Oakes* test." An infringing law must (1) pursue a pressing and substantial objective, (2) be rationally connected to that objective, (3) minimally impair the right or freedom in question, and (4) there must be a proportionality of effects between the deleterious and salutary effects of the law (*Oakes* at paras 69-70). It is possible to find each of these elements described in somewhat different language throughout the case law, but these four components are the essence of the *Oakes* test.

In *R v KRJ*, 2016 SCC 31 (CanLII), the Supreme Court of Canada was tasked with delicately balancing the *Charter* right of an offender not to be punished by the retrospective application of a punitive law, against Parliament's objective of protecting children from sexual violence perpetrated by recidivists (*KRJ* at para 64). I will elaborate on the substance of the decision below, but what is of interest to me in this case is the lengthy and substantial "proportionality of effects" analyses engaged in by Justices Andromache Karakatsanis (writing for the majority), Rosalie Abella (dissenting in part), and Russell Brown (dissenting in part). The most substantial point of disagreement between the three judgements occurred at the final stage of the *Oakes* test.

By so deeply engaging in the balancing inquiry, the Court has indicated that it may be open to relying more heavily on the proportionality of effects stage in the future. This is a development which should be welcomed and will hopefully lead to greater transparency in the Court's decision making in s. 1 cases.

Background

In 2013, KRJ pleaded guilty to incest and the creation of child pornography (*KRJ* at para 8). The offences were committed between 2008 and 2011 (*KRJ* at para 8).

When a person is found guilty of incest or the creation of child pornography, s. 161 of the *Criminal Code* obliges the sentencing judge to consider making an order prohibiting the offender, upon release, from engaging in certain enumerated activities that might lead to the offender coming into contact with children (*Criminal Code of Canada*, RSC 1985, c C-46, s. 161).

At the time KRJ committed the offences to which he plead guilty, s. 161(1) read as follows:

> **161.** (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
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> *(a)* attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;
>
> *(b)* seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or
>
> *(c)* using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years." (*KRJ* at para 9)

In 2012, the *Safe Streets and Communities Act*, SC 2012, c. 1, s. 16(1) amended s. 161 by broadening the scope of the activities which may be the subject of a sentencing judge's prohibitory order. When KRJ pleaded guilty and was sentenced in 2013, paragraphs (c) and (d) of s. 161(1) read as follows:

> **(c)** having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or
>
> **(d)** using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

The *Charter* right engaged in this case was s. 11(i), which guarantees the right of any person charged with an offence:

> if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Issues on Appeal to the Supreme Court of Canada

At the Supreme Court, none of parties disputed that Parliament intended the amendments to s. 161(1) to operate retrospectively (*KRJ* at para 18). It was accepted by Justice Karakatsanis that Parliament intended the amendments to apply retrospectively (*KRJ* at para 18).
There were two main questions to be decided by the Court, summarized succinctly by Justice Karakatsanis at paragraph 17 of her judgment:

(1) Does the retrospective operation of s. 161(1)(c) and (d) of the Criminal Code limit s. 11(i) of the *Charter*?

(2) If so, is the limitation a reasonable one prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Decision

As mentioned above, the Supreme Court divided three ways:

(1) The majority judgment authored by Justice Karakatsanis, and concurred in by Chief Justice McLachlin and Justices Cromwell, Moldaver, Wagner, Gascon and Côté, answered question 1 in the affirmative and found that a retrospective application of s. 161(1)(c) was not justified, but that a retrospective application of s. 161(1)(d) was justified (the "Majority").

(2) Justice Abella's dissent in part also answered the first question in the affirmative, but found that a retrospective application of both s. 161(1)(c) *and* (d) was not justified under s. 1.

(3) Justice Brown's dissent in part also answered the first question in the affirmative, but found that a retrospective application of s. 161(1)(c) *and* (d) was justified under s. 1.

The Majority accordingly allowed KRJ's appeal in part, ordering that s. 161(1)(c) could not be applied retrospectively, but that a retrospective application of s. 161(1)(d) was justified (*KRJ* at paras 115-116).

In their respective s. 1 analyses, the dissenters and the Majority agreed that the infringing measure pursued a pressing and substantial objective, and satisfied the rational connection and minimal impairment stages of the *Oakes* test. Where they disagreed was at the "proportionality of effects" stage, which led to their three separate conclusions under s. 1.

Reasons of the Majority (Question #1): Was KRJ's s. 11(i) Right Infringed?

The legal test to determine whether a prohibition or sanction is a punishment under section 11(i) was established in *R v Rodgers* 2006 SCC 15 (CanLII) ("*Rodgers*"). It is a two part test:

(1) The measure must be a consequence of a conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and

(2) The measure must be imposed in furtherance of the purpose and principles of sentencing. (*KRJ* at para 28)

The majority at the BC Court of Appeal concluded that the sanctions under s. 161(1) were not imposed in the furtherance of the purpose and principles of sentencing because they were aimed at public safety (*KRJ* at para 14). This position was adopted by the Crown at the Supreme Court (*KRJ* at para 31).

The position taken by the BC Court of Appeal and the Crown raised two sub-issues the Majority needed to answer:

(1) Does a public safety objective *necessarily* exempt a law from the second branch of the *Rodgers* test? (*KRJ* at para 30)

(2) What role does the impact of a measure on an offender have in determining if the measure is a punishment under s. 11(i)? (*KRJ* at para 30)

Justice Karakatsanis quickly dispatched with the first sub-issue, answering in the negative. She found that it was "clear from the plain language of s. 718 [of the *Criminal Code*] that public protection is part of the very essence of the purpose and principles governing the sentencing process" (*KRJ* at para 33).

To address the second sub-issue, Justice Karakatsanis reformulated the *Rodgers* test:

(1) The measure must be a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and

(2) The measure must be imposed in furtherance of the purpose and principles of sentencing, or

(3) The measure must have a significant impact on an offender's liberty or security interests (*KRJ* at para 41)

Applying the reformulated s. 11(i) test to s. 161(1), Justice Karakatsanis found that the 161(1)(c) and (d) prohibitions were consequences of conviction that form part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence (*KRJ* at para 50). The first part of the test was satisfied.

Justice Karakatsanis then went on to find that both the second and third parts of the test were satisfied, although only one or the other were required (*KRJ* at para 51).

The objective of 161(1) was to shield children from sexual violence by separating offenders from society, rehabilitate offenders, and deter future violence (*KRJ* at para 52). This objective aligned with the purposes and principles of sentencing (*KRJ* at para 52).

The 161(1)(c) and (d) prohibitions also had the potential for a non-trivial impact on the liberty and security interests of offenders because of the stigma attached, restrictions on employment, restrictions on the ability of an offender to interact in public and private spaces, and a possible significant deprivation of internet access (*KRJ* at para 54).

All three elements of the reformulated *Rodgers* test being satisfied, Justice Karakatsanis concluded that the newer version of s. 161 was "clearly" a more severe punishment than the previous version because of the expanded scope of activities covered in s. 161(1)(c) and (d) (*KRJ* at para 57). Therefore, a retrospective application of the new version of s. 161 infringed KRJ's s. 11(i) right to the benefit of the lesser punishment and had to be justified under s. 1 of the *Charter* (*KRJ* at para 57).

Reasons of the Majority (Question #2): Justification under s. 1 of the *Charter*

As noted in the introduction, in order to justify the limitation of a Charter right or freedom the law must satisfy each component of the *Oakes* test. There must be a pressing and substantial objective, a rational connection between the measure and objective, minimal impairment of the right in question, and a proportionality of deleterious and salutary effects caused by the measure (*KRJ* at para 58).

The evidence presented by the Crown to justify the *Charter* infringement in this case was unique because neither the BC Provincial Court nor the BC Court of Appeal heard evidence on s. 1. The Supreme Court was therefore the court of first instance on the matter and none of the evidence was tried in the usual way it might have been in a trial setting (*KRJ* at paras 59-60).

The Pressing and Substantial Objective

An infringing law must pursue an objective of sufficient importance in the context of a free and democratic society to justify overriding constitutionally protected rights (*KRJ* at para 61). The relevant objective is not necessarily the objective of the law as a whole, but the objective of the infringing measure (*KRJ* at para 62, citing *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 (CanLII) at para 20). Justice Karakatsansis identified the infringing measure as being the retrospective application of the amended version of s. 161 (*KRJ* at para 62).

Upon review of the legislative history, judicial interpretation, and design of s. 161, Justice Karakatsanis found the overarching purpose behind the amendments as a whole to be the enhancement of the protection s. 161 provides children against the risk of sexual violence (*KRJ* at paras 64-65). Naturally then, the objective behind retrospectively applying these amendments was to, "better protect children from the risks posed by offenders like the appellant who committed their offences before, but were sentenced after, the amendments came into force" (*KRJ* at para 65). This objective was found to "obviously" be pressing and substantial in a free and democratic society (*KRJ* at para 66).

Rational Connection

The means employed by the infringing law must be rationally connected to the pressing and substantial objective on the basis of reason or logic (*KRJ* at para 68). KRJ conceded that a retrospective application of s. 161 was rationally connected to the objective and Justice Karakatsanis did not take long to conclude on the basis of reason and logic that there was "clearly" a rational connection (*KRJ* at para 69).

Minimal Impairment

When there is an alternative means available which both achieves the government's objective in a real and substantial manner and is less harmful to the right infringed, then the impugned law is not minimally impairing (*KRJ* at para 70).

It is worth noting at this point that Justice Karakatsanis earlier acknowledged and adopted a line of cases from lower courts which have imposed some constraints on when a s. 161 prohibitory order can be used and what form it must take (*KRJ* at para 48). The sentencing judge must be satisfied that:

> (1) There is an evidentiary basis upon which to conclude the offender poses a risk to children,

(2) The specific terms of the order are a reasonable attempt to minimize the risk, and

(3) The content of the order carefully responds to an offender's specific circumstances.

This framework affords a high degree of latitude to sentencing judges to allow them to tailor the order to the special circumstances of an individual offender and there will be no order imposed where there is no evidentiary footing for one. The discretionary nature of the orders ensures they will impair an offender's right no more than is necessary to protect children and the requirement of an evidentiary basis ensures the orders will not be applied in an overly broad fashion (*KRJ* at paras 72-73).

Justice Karakatsanis also noted that a purely prospective application of the amended s. 161 would undermine the government's objective because the recidivism rate for sex offenders is significant (*KRJ* at para 75). Additionally, striking down the retrospective application of the amendments at this stage would fail to grant sufficient deference to Parliament's legislative choice of means (*KRJ* at para 75).

Accordingly, it was found that the retrospective application of the amendments was minimally impairing of s. 11(i) (*KRJ* at para 76).

Proportionality of Effects

Before embarking on her extensive 33 paragraph proportionality of effects analysis, Justice Karakatsanis made a critical observation on the final stage of the *Oakes* test. The proportionality of effects stage is important because it is the only part of the *Oakes* test that allows judges to *transparently* engage in a normative, value-laden discussion about whether the infringement of an individual's *Charter* rights is justifiable (*KRJ* at para 79). This stage is, as Justice Karakatsanis noted, the very "essence of the proportionality enquiry at the heart of s. 1" (*KRJ* at para 79).

Proportionality of Effects: s. 161(1)(c)

There were three categories of effects that Justice Karakatsanis sought to balance:

(1) **Deleterious effects on individual offenders**: the expanded scope of s. 161(1)(c) constituted a substantial intrusion on the liberty and security interests of offenders because it would prevent them from freely participating in society (*KRJ* at para 81).

(2) **Deleterious effects on society**: retrospective application of punitive laws undermines the values protected by s. 11, namely fairness in criminal proceedings and respect for the rule of law (*KRJ* at para 82). Additionally, the Parliament's lack of compelling evidence justifying retrospective application enhanced the deleterious effect because it showed a lack of respect for the principles underlying s. 11 (*KRJ* at para 83).

(3) **Salutary effects for society**: Justice Karakatsanis accepted that recidivism rates for sexual offenders were significant and that potentially hundreds of offenders could be caught under the retrospective application of the amendment (*KRJ* at paras 85-88). She

therefore accepted that real risks to children were present and that retrospective application would mitigate these risks (*KRJ* at para 88).

In balancing these three sets of effects, Justice Karakatsanis noted that, while evidentiary issues are inherent when dealing with public policy, s. 1 requires that a limit be demonstrably justified according to, in the words of Chief Justice Dickson, a "stringent standard of justification" (*KRJ* at para 91, citing *Oakes* at para 65). The application of this "stringent standard" was the main bone of contention between the Majority and the dissenters.

In regards to the salutary effects of s. 161(1)(c), the Crown produced little, if any, direct evidence of the *marginal benefit* accrued by applying the new version of s. 161(1)(c) instead of the previous version (*KRJ* at para 89-90). Justice Karakatsanis also took issue with a lack of evidence as to why the new version had to be retrospective, finding general evidence of recidivism to be insufficient justification (*KRJ* at paras 93-94).

Justice Karakatsanis then characterized the deleterious effects of the measure as "significant and tangible", as against the "marginal and speculative" benefits society stands to gain (KRJ at paras 91-92) and concluded that a retrospective application of s. 161(1)(c) could not be justified under s. 1 (*KRJ* at paras 95-96).

Proportionality of Effects: s. 161(1)(d)

There were at least five categories of effects that Justice Karakatsanis sought to balance for this measure:

(1) **Deleterious effects on individual offenders**: A complete ban on internet use would be a "significant deprivation of liberty", erecting "massive barriers to an offender's full participation in society" resulting in serious social and economic consequences for that individual (*KRJ* at 98).

(2) **Deleterious effects on society**: same as considerations applied as with s. 161(1)(c) above.

(3) **Salutary effects for society**: rapid technological development has changed the degree and nature of the risk of sexual harm to children, creating a legislative gap filled by the introduction of s. 161(1)(d) (*KRJ* at para 101). The internet has created new and qualitatively different opportunities to harm young people (*KRJ* at para 107). Such opportunities were not covered under the older version of s. 161 (*KRJ* at para 107). Justice Karakatsanis described the evidence of salutary effects as "greater and more certain than those stemming from s. 161(1)(c)" (*KRJ* at 108).

(4) **Mitigation of deleterious effects to society**: the fact that the law responds to a legislative gap in a swiftly changing social context, according to Justice Karakatsanis, actually makes it less unfair and less intrusive on the rule of law (*KRJ* at paras 110-111).

(5) **Mitigation of deleterious effects on individuals**: the adverse effects of this provision will only be imposed when there is an evidentiary basis that it will mitigate the risk of harm to children (*KRJ* at para 112). It should be noted this consideration would also have applied to s. 161(1)(c) but Justice Karakatsanis did not reference it in that section.

Justice Karakatsanis ultimately concluded that the Crown had a "compelling case" that the deleterious effects of s. 161(1)(d) were outweighed by its salutary effects (*KRJ* at para 114). As the evidence of the salutary effects was regarded as more direct and credible, and the deleterious effects were somewhat mitigated, the balance was in favour of justification. She also noted that the harm of sexual violence against young people was particularly powerful, the scheme under s. 161(1)(d) was flexible and discretionary, and that an internet prohibition was not among the most onerous of punishments (*KRJ* at para 114).

Justice Abella's Dissent in Part

Justice Abella's main point of departure with the Majority appears to be on the question of how strict the standard of justification should be for the Crown in this case (*KRJ* at para 124). Justice Abella would have held the Crown to the highest standard of justification (*KRJ* at para 124). She relied on the "absolutist language" of s. 11 of the *Charter* and on the Supreme Court's recent s. 11(h) case, *Canada (AG) v Whaling*, 2014 SCC 20 (CanLII) (at para 79), where the Court required "compelling evidence" to justify a retrospective change to parole review, which infringed the claimant's right not to be punished twice for the same offence (*KRJ* at para 124).

Justice Abella very clearly wanted direct evidence of the benefits to be gained by retrospectively applying the new law (*KRJ* at paras 128-129). Given the absence of such evidence, she would have found s. 161(1)(d) unjustified alongside s. 161(1)(c) (*KRJ* at para 130).

Justice Brown's Dissent in Part

Justice Brown, while agreeing with the Majority on the s. 11(i) question, would have dismissed the appeal entirely because he found a retrospective application of both measures to be justified under s. 1 (*KRJ* at para 133).

Justice Brown criticised the Majority's application of the *Oakes* test for:

(1) reading the purpose of the legislation too narrowly (*KRJ* at para 135),

(2) a rigid and acontextual application of *Oakes*, thereby avoiding the "unavoidable normative inquiry" at its heart (*KRJ* at paras 135-136)

(3) holding Parliament to an exacting standard of proof, denying Parliament its legislative policy-development role (*KRJ* at para 141),

(4) overstating the deleterious effects of s. 161(1)(c) while understating the salutary effects (*KRJ* at para 141), and

(5) finding a retrospective application of s. 161(1)(c) to be unjustified when their reasons for upholding the retrospective application of s. 161(1)(d) equally apply to s. 161(1)(c) (*KRJ* at para 141)

While Justice Brown raised several points of disagreement, in its essence his critique stems from a difference of opinion as to the proper amount of deference to grant to Parliament in this case, and accordingly, the proper standard of justification to apply. Justice Brown stressed that the analysis must be

> "sensitive to policy-makers' need for a measure of latitude to consider and try previously untried alternatives, particularly when confronting persistent and complex public policy concerns" (*KRJ* at para 144).

In my view, this departure from the Majority is the basis for his various points of criticism which ultimately led him to a different conclusion as to s. 161(1)(c).

Comparison to *Alberta v Hutterian Brethren of Wilson Colony*

In her general commentary on the proportionality of effects stage of the *Oakes* test, Justice Karakatsanis made a brief reference to Justice Abella's dissent in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII) at para 149, agreeing with Justice Abella that much of the heavy lifting and balancing should be done at this final stage of the *Oakes* test (*KRJ* at para 78). Indeed, much heavy lifting was carried out by the Court at this stage in both cases.

In *Hutterian Brethren*, the claimants - a colony of Hutterites - successfully argued that their s. 2(a) *Charter* right to freedom of religion was infringed by a law which mandated photo identification for driver's licences (*Hutterian Brethren* at paras 1-4). The claimants' religious beliefs precluded them from having their pictures taken (*Hutterian Brethren* at paras 1-4). Chief Justice McLachlin, writing for the majority, found the limit on freedom of religion to be justified under s. 1 (*Hutterian Brethren* at para 104). Along the way, the Chief Justice breathed new life into the proportionality of effects stage by insisting on its importance and by engaging in a rare in-depth balancing analysis (*Hutterian Brethren* at paras 72-103).

Where in *KRJ*, Justice Karakatsanis required more concrete and direct proof of the marginal benefit of applying the new version of s. 161(1)(c) over the old version, Chief Justice McLachlin, writing for the majority in *Hutterian Brethren*, took a different approach:

> Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear the international integrity of the system would be comprised (*Hutterian Brethren* at para 81)
>
> …a government enacting social legislation is not required to show that the law will in fact produce the forecast benefits. Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. (*Hutterian Brethren* at para 85)

This is a starkly different approach to the standard of evidence required for justification. What can explain this difference?

The issue of deference and the evaluation of social science evidence in s. 1 cases has plagued the Supreme Court since *Oakes* (See S. Choudhry, "So what is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006), 34 SCLR (2d) 501). *KRJ* is one of the hopelessly nebulous cases where the state-versus-the-individual dynamic would seem to necessitate a "stringent standard of justification" (*Oakes* at para 65), but also where the public policy and social science based aspects around judging how to deal with recidivism and protect the rights of children would seem to oblige a more lax standard (*Irwin Toy Ltd. v Quebec (AG)* 1989 CanLII 87 (SCC) at pp 993-994, *Canada (AG) v JTI-Macdonald Corp*. 2007 SCC 30 (CanLII) at para 43).

Thus, while Justice Karakatsanis did note that a degree of deference was warranted in her s. 1 analysis, it would appear she did not affect so deferential a posture as to make it determinative of the outcome (*KRJ* at para 67).

On the other hand, *Hutterian Brethren* was a case based on social policy and balancing rights outside of the criminal law context. Accordingly, the majority of the Court appears to have been more willing to defer to the legislature's judgment on how to effect the proper balance of societal interests versus those of a religious minority (See *Hutterian Brethren* at para 37).

Justice Abella's approach has been consistent in each case, insisting in a high standard of justification, even outside of the criminal law context as in the case of *Hutterian Brethren* (See *Hutterian Brethren* at paras 135, and 156-162). And in each case she appears to have been unable to persuade a majority of her fellow justices on the Supreme Court, although perhaps the Majority's conclusions on s. 161(1) were influenced by Justice Abella.

The Supreme Court's jurisprudence concerning the fourth component of the *Oakes* test has been the subject of considerable commentary by legal scholars. For example, Professor Hogg has described the proportionality of effects stage as "redundant" and observed that it "has never had any influence on the outcome of any case" (Peter W. Hogg, *Constitutional Law of Canada* (2015 Student Ed.), at section 38.12(b)). Dieter Grimm noted that the final stage of the *Oakes* test plays a "more residual function in Canada", which may be born of a "fear that a court might make policy decisions at this stage rather than legal decisions" (Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 *UTLJ* 383, at 393-394). The dominant narrative in the literature appears to be that, since the introduction of the *Oakes* test, our courts have been reluctant to meaningfully engage in the inherently value driven act of balancing deleterious and salutary effects of *Charter* infringing laws.

If the dominant narrative is true, then both *Hutterian Brethren* and *KRJ* would seem to buck the trend. One of Justice Brown's critiques noted above was that the Majority in *KRJ* shied away from the inherently value-driven nature of proportionality (*KRJ* at paras 135-136). Respectfully, I could not more strongly disagree. Justice Karakatsanis spent fully 33 paragraphs balancing the deleterious and beneficial effects of the measures and did not shy away from the inherently value-driven nature of proportionality at all.

Just because the Majority was not swayed by the evidence does not mean they have applied *Oakes* in an unprincipled and mechanical fashion. Indeed, in the absence of hard proof, it was principles and values which moved the Majority to its decision on s. 161(1)(c):

> It may be tempting to conclude that mitigating the risk of sexual violence to even one child is worth the costs….Such an approach ascribes almost no value to the right. Section 11(i) protects fundamental interests that can be overridden only in demonstrably compelling circumstances. (*KRJ* at para 95)

Far from shying away from the normative inquiry, the Majority embraced it. They have stated plainly that our rights and freedoms are not so cheaply held that they may be overridden merely at the say-so of Parliament.

In the final analysis, while the Supreme Court may have breathed new life into the proportionality of effects stage in *Hutterian Brethren*, the Court has confirmed that the final stage of *Oakes* does indeed have teeth by using it to overturn government policy in *KRJ*. If our Courts continue to show a greater willingness to engage in the balancing inquiry at the heart of the *Oakes* test, there will be greater transparency in judicial decision making in s. 1 cases, and we will be all the richer for it. Such a development should be welcomed.