Zoltán Pozsár-Szentmiklósy*

The Canadian Approach to Fundamental Rights Disputes

Methodological Exceptionalism in Constitutional Interpretation and Proportionality Reasoning

I The Purpose and Structure of the Paper

This paper aims at giving an overview of the unique methods of constitutional interpretation used by Canadian courts and their special relevance in fundamental rights disputes, especially those examined based on the principle of proportionality. As the Canadian literature and the practice of the Supreme Court of Canada demonstrates, the well-founded, consistently and transparently used methods of legal interpretation and legal argumentation can strengthen each other and lead to justified and acceptable decisions. In the long run, methodological clarity and certainty supports the more effective protection of fundamental rights.

The approach of this paper is descriptive. First I will present the origins and particularities of the most influential methods of constitutional interpretation used by Canadian courts, the *progressive*, the *purposive*, and the *generous interpretation*. In the second step, I will present the *Canadian form of* the *proportionality analysis,* which, despite its relatively short history, has a significant impact on Comparative Constitutional Law. The hypothesis of this paper is that constitutional interpretation and proportionality reasoning are intertwined. Accordingly, the appropriate and transparent use of these methods in a common framework enhances the convincing nature and justification of judicial decisions. To test this assumption, I will include a *case study analysis* in this paper by presenting a classic decision, the *Alberta v Hutterian Brethren* case.[1] No doubt many more cases could be examined; however, the author hopes that this model-analysis convinces the reader that the 'Canadian approach' to fundamental rights disputes is worth following.

* Zoltán Pozsár-Szentmiklósy is assistant professor (PhD) at Eötvös Loránd University.

[1] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 S.C.R. 567

II Constitutional Interpretation in Canada

Constitutional interpretation is inevitable when courts decide on fundamental rights disputes. The fundamental right affected in the particular legal dispute is codified in the constitution, as well as the limitation clause[2] which prescribes the possible purpose and extent of the limitation of fundamental rights. The constitution therefore needs to be interpreted in order to identify whether a particular fundamental right has been infringed and to examine whether the limitation in question is acceptable or not. Proportionality analysis offers a framework for this examination, as well as for the reasoning of the court, while constitutional interpretation is the starting point and context of this operation. In the case of Canada, this assessment refers in particular to the interpretation of the Canadian Charter of Fundamental Rights and Freedoms (Charter)[3], 'a nation-building instrument'[4]. However, the origin of the most influential methods of constitutional interpretation used by Canadian courts dates back to times when constitutional adjudication – in the absence of a codified charter of fundamental rights – was based on other parts of the constitution.

The challenges related to constitutional interpretation are well-known. According to the summary of Jeffrey Goldsworthy, 'the provisions of national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that judges must decide'. Moreover, in the case of constitutions (compared to other laws) 'the stakes are much higher'[5], when it comes to the responsibility of the interpreter. Due to the fact that there are many justifications and classifications of the methods of constitutional interpretation, both in Constitutional Law scholarship and in the practice of courts, it is useless to search for 'the right method' of interpretation. The benefit of the debates between the proponents of the different methods[6] is not the possible hegemonic position of a particular approach, but rather a better understanding of the particularities of the concurring methods – therefore offering a set of more sophisticated methodological tools for judges.

Particular methods of interpretation in most of the cases are favoured by individual judges, based on the legal culture from which they come and their social experiences or

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2 This is not the case of implicit limitation clauses. However, the meaning of implicit limitation clauses can be also derived from their context, the text of the constitution. Aharon Barak uses the term of 'implied limitation clauses'. See: Aharon Barak, *Proportionality. Constitutional rights and their limitations* (Cambridge University Press 2013, New York) 134–141.

3 Included in Constitution Act, 1982, effective from April 17 1982.

4 Joanna Harrington, 'Interpreting the Charter' in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2015, Oxford) 23, 2.

5 Jeffrey Goldsworthy, 'Introduction' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions. A Comparative Study* (Oxford University Press 2007, Oxford) 1.

6 The debates were particularly intensive in the American literature. See e.g. William H. Rehnquist, 'The Notion of a Living Constitution' (1977) 54 Texas Law Review; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977, Cambridge, MA); Antonin Scalia, *A Matter of Interpretation. Federal Courts and the Law* (Princeton University Press 1998, Princeton, NJ); Richard Posner, *How Judges Think* (Harvard University Press 2008, Cambridge, MA).

personal professional beliefs. It is rare when particular interpretive methods can be associated at the general level, explicitly with the activity of certain judicial organs or jurisdictions – the Canadian legal tradition is exceptional in this regard as well.

The reasons behind this *'methodological exceptionalism'*[7] can presumably be found in the particularities of the Canadian legal culture. (a) The structure of the constitution is special, which affects its interpretation as well. The constitution is not a single document;[8] the parts of it (Constitution Act 1867 and Constitution Act 1982) were enacted in very different times and social circumstances and none of these is comprehensive, regulating every relevant constitutional question.[9] However, the supreme judicial organs of the country had to support their decisions by referring to the text of the constitution; as such, there was a more pressing need to elaborate the 'unwritten' parts[10] of it by constitutional interpretation. (b) Another two particularities relate to the multicultural character of the country. At present, Quebec, as a French-speaking province, and 'French Canada' 'is an important part of Canadians' self-image'[11], while the rights of aboriginal people and their communities have enjoyed constitutional protection since the enactment of the Charter.[12] Due to the fact that Canadian society experienced significant political, legal and social conflicts in the past related to these aspects, which were later solved by social compromises, a forward-looking and consent-oriented approach dominates judicial (constitutional) interpretation as well.[13] (c) One can also mention that the Canadian legal system is a mixed jurisdiction, in which common law and civil law are concurrently present, therefore the traditions of both legal systems have an impact on the activity of the courts (eg. the special role of precedents) and pushes those to follow unique approaches or methods when interpreting legal texts. (d) The Supreme Court of Canada has reference power, according to which the federal government (or in the second step the governments of provinces) can address the Court for an advisory (preliminary) opinion related to proposals or policies which could be questionable from the point of view of constitutionality. The exercise of this competence promotes a living constitutional dialogue with the legislatures.[14]

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[7] The notion of exceptionalism is often associated with the jurisdiction related to the US Constitution. See: Lorainne E. Weinrib, 'Postwar Paradigm and American Exceptionalism' in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006, New York) 86–87.

[8] See: Peter W. Hogg: 'Canada: From Privy Council to Supreme Court' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions. A Comparative Study* (Oxford University Press 2007, Oxford) 55.

[9] E.g. the 1867 Constitution Act did not contain any provisions on the protection of fundamental rights, while the 1982 Constitution Act did not proclaim the judicial independence.

[10] Peter W. Hogg refers to 'democracy, responsible government, the rule of law, the independence of the judiciary, the protection of civil liberties and federalism' as unwritten principles. See: Hogg (n 8) 91.

[11] Hogg (n 8) 95.

[12] Hogg (n 8) 96.

[13] Hogg (n 8) 93–96. One can also add that the 'consensus model' of government, which 'includes rather than excludes' and 'tries to maximize the size of the ruling majority' can be associated in general with 'deeply divided' and even 'less divided' societies. See: Arendt Lijphart, *Patterns of democracy. Government Forms and Performance in Thirty-Six Countries* (Yale University Press 2012, New Haven, CT) 32.

[14] Hogg (n 8) 96–100.

Canadian scholars usually refer to three interpretive techniques as typical to Canadian courts:[15] the progressive, the purposive, and the generous interpretation. Two of these, the progressive and the purposive interpretation, can be considered as primary approaches, while the generous interpretation is used supplementarily. Needless to say, these typical methods of interpretation do not exclude the use of other techniques.

The *progressive interpretation* – the evolutive approach – derives from the famous historical *'living tree' doctrine*. According to this 'powerful metaphor'[16] created by the Judicial Committee of the United Kingdom's Privy Council, the constitution (at that time the British North America Act of 1867) 'planted in Canada a living tree capable of growth and development within its natural limits'.[17] The doctrine had a significant influence in Canada over the decades[18] and was explicitly reconfirmed by the Supreme Court after the enactment of the Charter[19] as well. Justice Dickson expressed that the interpretation of the Charter shall be 'capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers'.[20] According to another Canadian scholar, Peter W. Hogg, 'the principle of progressive (…) interpretation (…) has become the dominant theory of interpretation in Canada'. He also emphasises that, according to this theory, the Constitution is always applied to 'contemporary conditions'.[21]

One can note that the progressive (evolutive) interpretation is theoretically in conflict with the American-style, classic originalist approach[22] which looks for an interpretation which is in accordance with the original understanding of the framers. Peter W. Hogg calls to our attention that there are 'relatively scanty records of the legislative history of the Constitution Act 1867'[23] – possibly why 'originalism has never enjoyed any significant support in Canada'[24]. In addition, with regard to fundamental rights disputes, it is also relevant that the Charter (the legislative history of which is well-documented) was enacted decades after the formulation of the living tree doctrine, which was already applied by Canadian courts. One can also add that, in fundamental rights dispute cases, the progressive interpretation promotes the more precise identification of the conflict between fundamental rights by the relevant social circumstances taking into consideration.

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15 See: Hogg (n 8) 82–93; Harrington (n 4) 23, 5. There are also slight differences in the theoretical approaches: Peter W. Hogg highlights the *originalist approach* as well (at the same time stating that it has less significance) and the reference to *unwritten principles* (one can note that from the methodological point of view this is not a technique, rather a source of interpretation), while Joanna Harrington emphasises the significance of the *contextual interpretation* as well, which – with regard to fundamental rights disputes – is a more 'sensitive case-oriented' approach when determining the scope and content of Charter rights.

16 W. J. Waluchow, 'The Living Tree' in Oliver, Macklem, Des Rosiers (n 4) 22, 1.

17 *Edwards v Attorney-General for Canada* [1930] AC 124, 136

18 For a general overview analysing the evolution the doctrine see Waluchow (n 16).

19 *R. v Big M Drug Mart Ltd.,* [1985] 1 SCR 295.

20 *Hunter v Southam* [1984] 2 SCR 145, 155.

21 Hogg (n 8) 87.

22 For the critics of this contrast see: Waluchow (n 16) 22, 14–16.

23 Hogg (n 8) 78.

24 Hogg (n 8) 83.

The *purposive interpretation* probably fits the best with the examination of fundamental rights disputes. As Joanna Harrington emphasises, in the Supreme Court's view, 'this approach requires the interpreter to determine the underlying purpose of each Charter guarantee, taking also into account «the nature of the interests it is meant to protect»'.[25] Among these interests and purposes, there can be highlighted 'cultural values as respect for equality and the inherent dignity of human person' and other 'individual and collective goals', as well as 'Canada's international human rights obligations'.[26] At the general level, this approach aims at 'fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection'.[27] One can add that this purposive approach allows the interpreter to define the function of fundamental rights affected in the legal dispute in question, and so the examination of the conflict of fundamental rights can be performed more precisely.

Peter W. Hogg points to the fact that 'the original purpose of a right (…) is usually unknown', therefore it is up to the courts to identify the purpose and to determine the level of generality of it. At the same time, Hogg warns the courts that 'the widest possible (…), the most generous interpretation (…) can overshoot the [real] purpose of the right',[28] therefore a careful investigation is needed in this regard. It can be added that the purposive approach also supports the appropriate use of the proportionality reasoning. The precise identification and assessment of the purpose of the constitutional value (another fundamental right or public interest) which is in conflict with the right in question is the first subtest and a premise for other subtests of proportionality.

The *generous interpretation*[29] refers to a 'generosity requiring the absence of rigid and pedantic formalism so as to give individuals the full measure of their rights'.[30] However, the generous interpretation on its own does not lead to convincing conclusions: as Peter W. Hogg demonstrates, if the scope of a right is taken too broadly (based on generous interpretation) the standard of justification of its limitation will be inevitably more relaxed.[31] According to his conclusion, 'generosity is a helpful idea only if it is subordinate to purpose'.[32] Joanna Harrington adds to this that generous interpretation should also be subordinate to progressive interpretation, as the purpose itself needs to be interpreted in an evolutive manner.[33]

The generous interpretation can be also understood as 'large and liberal' interpretation in contrast with 'narrow and technical' approaches.[34] The large and liberal approach accords

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25 Harrington (n 4) 23, 7.
26 Harrington (n 4) 23, 7.
27 Stéphane Beaulac, 'Constitutional Interpretation: On Issues of Ontology and of Interlegality' in Oliver, Macklem, Des Rosiers (n 4) 29, 44.
28 Hogg (n 8) 89–90.
29 Articulated in the decisions *Hunter v Southam Inc.* and *R. v Big M Drug Mart Ltd,* cited above (n 20 and 19).
30 Harrington (n 4) 23, 8.
31 Peter W. Hogg, 'Interpreting the Charter of Rights: Generosity and Justification' (1990) 28 (4) Osgoode Hall Law Journal 817–838, 819.
32 Hogg (n 31) 821.
33 Harrington (n 4) 23, 8.
34 Hogg (n 8) 87.

wide amplitude for the exercise of the legislative powers, as well as for individuals to exercise their fundamental rights. One can add that this approach offers more effective protection for fundamental rights, as the possible infringement of them can be detected in more cases, which will be followed by an in-depth examination of the acceptability of the limitation.

The application of these methods of interpretation is general and consistent in the practice of Canadian courts. One reason for the balanced ractice could be the fact that none of these techniques requires the acceptance of any special justification theory. The most common justifications of judicial review[35] do not require and do not exclude the use of any of the above described interpretation techniques, which is why judges can apply them regardless of their personal and professional beliefs related to judicial review.

The classic theoretical debate on whether constitutional interpretation differs from statutory interpretation[36] is not crucial in the practice of Canadian courts related to the Charter. Stéphane Beaulac emphasises that there is convergence between statutory and constitutional interpretation methods.[37] As a reason for that, he refers to the strong impact of Elmer Driedger's 'modern principle' of statutory interpretation[38] on the practice of the Supreme Court.[39] According to this principle, acts shall be interpreted in their context, harmoniously with their object and the intention of the legislator[40] – contrary to the strict and restrictive interpretation of the legislation (the plain meaning rule).[41] One can note that these particularities are closely connected with the purposive interpretation presented above, as well as the negation of formalism related to the generous interpretation. Alongside Dridger's approach, the living tree doctrine presumably also had a powerful effect on the practice of Canadian courts in the case of statutory interpretation as well.

Despite the point of view taken in the debate on the differences or convergence of constitutional interpretation and statutory interpretation, one can add that, in fundamental rights disputes, both are present. When analysing the content of the challenged law or another legal instrument, the court's task is statutory interpretation, while when examining its con-

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35 According to a Canadian scholar, David M. Beatty, *the contract theory*, *the process theory* and *the moral theory* are the most significant theories in this regard. See: David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2010, Oxford) 1–35. However, it is worth mentioning that the contract theory is in close connection with the originalist method of interpretation that did not become a dominant technique in Canada.

36 Those scholars who are of the position that the difference is relevant usually emphasise that the language of constitutional acts is inevitably vague and abstract and contains many principles and few imperative rules, therefore the identification and explanation of the meaning of these is a more difficult task, which calls for special methods and interpretive techniques. Conversely, proponents of the convergence between statutory and constitutional interpretation highlight that, despite the difference in subject, the methods used by interpreters (courts) are essentially identical.

37 Beaulac (n 27) 29, 5.

38 Elmer A. Driedger, *The Construction of Satutes* (Butterworths 1974, Oxford) 67.

39 Cited for the first time: *Stubart Investments Ltd. v The Queen* [1984] S.C.R. 417.

40 Stéphane Beaulac, Pierre André Coté, 'Driedger's „Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization' (2006) 40 Revue juridique Thémis 135.

41 Beaulac (n 27) 29, 6.

formity with the provisions of the Charter, constitutional interpretation takes place. When considering the coherence and persuasiveness of the reasoning, it is a better option to use identical or similar methods in statutory and constitutional interpretation when examining the same legal dispute – from the structural point of view, the proportionality analysis offers a common framework for both. One can also note that the above-presented particularities of constitutional interpretation also affect the proportionality analysis and its possible outcomes.

III The Principle of Proportionality in Canada

The practice related to the principle of proportionality has a relatively short but considerable history in Canada: the first decision of the Supreme Court referring to this method dates back to 1986. However, in the three succeeding decades, proportionality analysis became a constant element of the reasoning of judicial decisions examining fundamental rights disputes. Moreover, – like many other judicial organs – the Supreme Court restructured the proportionality test, creating its special, Canadian form – a point of reference for many other jurisdictions and a subject of analysis in Comparative Constitutional Law.

The enactment of the Charter (1982) was a milestone not only from the point of view of Canadian constitutional history but also from the perspective of the migration[42] of the proportionality principle from Europe to the American continent.[43] In this regard, Article 1 of the Charter, the limitation clause, is the most significant as it set boundaries to limitations of fundamental rights but at the same time called for a method to assess those boundaries in particular fundamental rights disputes:

> 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.

Scholarly works and especially the above-cited Peter W. Hogg[44] made a significant contribution to the recognition of proportionality analysis as an appropriate method for examining the justifiability of limitations on fundamental rights based on Article 1. He argued that Canadian courts will have to follow a reasoning process similar to that used by the European Court of Human Rights (ECtHR), especially in the Sunday Times case.[45] It can be added that the

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[42] The phenomenon of migration of legal principles and institutions was first analyzed in the comrehensive volume edited by Sujit Choudry. See: Sujit Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006).

[43] For a comprehensive overview of the historical orgins and migration of proportionality see Barak (n 2) 175–210.

[44] See: P. W. Hogg, *Constitutional Law of Canada* (2nd edn, Carswell 1985, Toronto) 687; B. Hovius, 'The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?' (1985) 17 Ottawa Law Review 213, cited by Aharon Barak (n 2) 189.

[45] *Sunday Times v the United Kingdom* (Application no. 6538/74), Judgment of 26 April 1979.

ECtHR was influenced by the practice of the Federal Constitutional Court of Germany related to proportionality and elaborated its own proportionality analysis in the '70s[46] – with a special focus on the notion of 'democratic society'[47] which explicitly appears in the text of the Charter.

The Supreme Court issued the first decision applying proportionality analysis in 1986, in the famous Oakes decision[48] – after whom the test was named. The reasoning of the decision – based on *purposive interpretation* – declares that Article 1 of the Charter has two functions: safeguarding the rights and freedoms included in the Charter and stating explicitly 'the exclusive justificatory criteria against which limitations on those rights and freedoms may be measured.'[49] These justificatory criteria – according to the wording of Chief Justice Dickson – are the following: 'the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom'[50] and the means limiting the right have to be 'reasonable and demonstrably justified.'[51] According to the second criteria, the Oakes decision explicitly refers to a proportionality test with three components:

> To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.[52]

This test was regularly cited in future decisions and became a stable part of court reasonings dealing with fundamental rights issues. The test itself was also the subject of reconsideration and correction, while the practice of the Supreme Court was in the focus of scholarly works and critiques.[53] It is probably a speciality of the Canadian constitutional culture that the Court itself answered some of these in its reasonings – a good example is the *Alberta v Hutterian Brethren* case, presented later in this paper. It is not the task of this paper to analyse the theoretical and methodological debates related to the Oakes test and so the test will be presented based on a descriptive approach, focusing on those considerations which are accepted by consensus in legal scholarship.

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46 Barak (n 2) 184.

47 See Yutaka Arai, 'The System of Restrictions' in Pieter Van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006, Cambridge) 340, and Robin C. White, Clara Ovey, *The European Convention on Human Rights* (Oxford University Press 2010, Oxford) 325.

48 *R v Oakes* [1986] 1 SCR 103.

49 *R v Oakes* [1986] 1 SCR 105.

50 *R v Oakes* [1986] 1 SCR 105.

51 *R v Oakes* [1986] 1 SCR 106.

52 *R v Oakes* [1986] 1 SCR 106.

53 For an overview of the evolution of the test see: Sujit Choudry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference.

The identification of the infringement of a fundamental right precedes the application of the proportionality test. The test takes place only if there is a limitation, and no other rule excludes[54] the examination of it based on the test. The *progressive* and the *generous interpretation* of the Constitution support the court in that identification by interpreting the conflicts related to the affected right in a dynamic way, reflecting the changing social circumstances and by identifying the protected scope of the right over a wide range.[55]

Probably the most significant feature of the Canadian understanding of the proportionality test is the dominant role of the examination of the *purpose*.[56] According to the Oakes test, the substantive part of the analysis begins with examining whether the objectives to be served by the measures limiting a Charter right are sufficiently important to justify overriding the right in question. The theoretical version of the proportionality analysis sets, as a general criterion related to the purpose, for it to have a legitimate aim, a proper purpose[57] – typically the protection of a concurring fundamental right or another constitutional value (related in most of the cases to a public interest). In theory, in this stage of examination, there is no need for an assessment of the relation between the purpose and the limitation of the right in question – the existence of a legitimate aim is a satisfying condition on its own (further questions can be answered in later stages of the test). However, according to the Canadian understanding of the examination of the purpose, the 'sufficient importance' of the purpose shall be examined in light of the limitation of the fundamental right in question. The importance of the purpose can be also described by its 'pressing and substantial' nature in order to promote the values of a 'free and democratic' society.[58] This approach is a kind of 'preliminary balancing', which accords much more weight to the first stage of the test.

Purposive interpretation (with regard to both constitutional and statutory interpretation) obviously supports the precise identification of the legislative purpose, the appropriate assessment of it and of the relevant substantive subquestions. However, as the importance of the purpose of the legal act in question will be assessed in the light of the particularities of the affected fundamental right, the *generous* (and related to that the *contextual*) *interpretation* also supports the 'sensitive case-oriented'[59] assessment of the context of the conflict.

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54 In theory, in the case of absolute rights there is no possibility for limitations, therefore there is no room for the application of the proportionality test. In the Canadian context, Section 33 of the Charter, the *'override clause'* is also relevant, as it empowers the legislative power to declare that a piece of legislation shall operate, notwithstanding the provisions of the Charter (for a period of five years). Accordingly, if a legislative act contains a 'notwithstanding' clause, proportionality analysis has no place, even if the legislative act contains possible limitations on fundamental rights. See in detail: Hogg (n 8) 69–70.

55 There are also critical views on the application of generous interpretation in this stage. In Aharon Barak's view, constitutional rights 'should receive neither narrow nor broad interpretation'; he calls for purposive interpretation. See: Barak (n 2) 72.

56 Dieter Grimm, 'Proportionality in Canadian and German Jurisprudence' (2007) 57 University of Toronto Law Journal 383–397, 387–388.

57 Barak (n 2) 251.

58 Choudry (n 53) 505.

59 See Harrington (n 15).

When turning to the evaluation of the relation between the purpose and the measures taken in the challenged legal act, the classic version of the proportionality test focuses on *suitability,* namely on whether the means are capable to promote the aim which was identified in the previous stage of the test. This examination is, in most of the cases, fact-based, as the relation in question can be assessed based on practical experience or common knowledge.[60] The Canadian understanding of suitabililty has these considerations at its core, as courts refer to the existence of the rational connection between the purpose and the means used. However, the original version of the Oakes test also requires that the measures taken shall be 'fair and not arbitrary', and 'carefully designed to achieve the objective'. All these are substantive requirements that shall be also taken into consideration alongside the rational connection (suitability) itself between the purpose and the measures taken. As a consequence, this stage of the test offers supplementary aspects for the examination.

As in the subtest of suitability the courts examine factual questions (on the relation between the purpose and the means used), the methods of interpretation are less significant in this stage. However, as the courts also assess substantive elements (the 'fair' and 'carefully designed' nature of the measures) at this stage, the reference to *'unwritten principles'* as sources of constitutional interpretation[61] can be significant. In other cases, when factual relations are uncertain, courts can also take a deferential view.[62]

The next subtest of proportionality relates to the assessment of the measures taken *(necessity).* According to the theoretical form of the test, the purpose shall be accomplished by choosing the least restrictive means. In the Oakes decision, the Supreme Court prescribed a slightly different requirement, saying that the 'means should impair the right in question as little as possible' – shifting slightly the focus from the measurement of the means by comparison with alternative means to the assessment of the effects of the measure taken on the right. Later, the Court examined the minimal impairment requirement between those (alternative) means that could reasonably be taken into consideration.[63] As a result, the strictness of this stage of the test lowered but, on the other hand, the evaluation of the context gained more significance.

Similarly to the subtest of suitability, when comparing the measures taken with alternative measures which are also suitable for supporting the purpose, the court examines factual questions and assesses factual relations. However, as the court has to assess possible negative effects of the alternative measures on the right in question as well, *contextual interpretation* also becomes relevant.[64]

In theory, the last subtest, 'proportionality in the strict sense' is the most important part of the examination when courts are dealing with fundamental rights disputes. According to

[60] One can also note that in some cases 'factual uncertainty' can also occur. See Barak (n 2) 308.
[61] See Hogg (n 10).
[62] Grimm (n 56) 391.
[63] See Choudry (n 53) 507.
[64] See Harrington (n 15).

this subtest, the importance of purpose shall be balanced against the degree of infringement of the right in question.[65] As this balancing necessarilly requires the comparison of two notions with different particularities, it is no surprise that this step of the examination is at the heart of the most theoretical and methodological debates.[66] However, in the Canadian practice, this subtest has less significance: because the previous steps can lead to a precise and sophisticated examination (even 'preliminary balancing' with regard to the examination of the purpose), the Court rarely reaches this stage.[67] In most cases, the dispute can be resolved based on the findings of the previous stages of examination. Nevertheless, the practice related to this subtest also has an important feature: as indicated in the original version of the Oakes test, the deleterious effects of the measure (affecting the right in question) should be examined separately, which later is to be followed by the examination of the salutary effects (from the point of view of the purpose). As will be highlighted later in this paper, this distinction offers a clear structure for the reasoning of the court.

As in the latest subtest the court has to balance the importance of the legal act (concurring fundamental right or other constitutional value or interest) against the harm caused by the limitation of the fundamental right in question, this complex assessment calls for the repeated use of all the relevant methods of (constitutional and statutory) interpretation. The *purposive interpretation* supports the precise identification of the concurring constitutional interest and the *generous* (and the *contextual*) interpretation helps to assess the relevant circumstances of the case, while the *progressive* and the *purposive* interpretation together support the overall evaluation of the effects of limitation of the affected fundamental right.

The above-described particularities will be highlighted in the following during the analysis of the *Alberta v Hutterian Brethren* case.

IV Case Study Analysis

The *Alberta v Hutterian Brethren case* related the regulation of the province of Alberta which required all persons who drive motor vehicles on highways to hold a driver's licence. The former regulation allowed religious objectors to hold non-photo licences; however, the new regulation (2003) made the photo requirement universal. At the time of the enactment of the new regulation, 450 non-photo licences had been issued in Alberta, 56 percent of which were held by the members of the Hutterian Brethren colonies. The members of the colonies believe that the Second Commandment prohibits them from having their photograph willingly taken. They objected to having their photographs taken on religious grounds and challenged the

65 Barak (n 2) 340.

66 See e.g. Niels Petersen, 'How to Compare the Lengths of Lines to the Weight of Stones. Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 German Law Journal 1387; Kai Möller 'Proportionality: Challenging the critics' (2012) 10 International Journal of Constitutional Law 709.

67 Grimm (n 56) 394.

constitutionality of the new regulation, referring to the limitation of their religious freedom, as set out in Article 2(a) of the Charter. The Province of Alberta claimed that the universal photo-requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences. The Court of Appeal of Alberta held that the infringement of the freedom of religion was not justified according to the limitation clause of the Charter.

The substantive reasoning of the majority opinion of the Court (by the Chief Justice) begins with a structure of the questions to examine related to the limitation of the freedom of religion.[68] The reasoning begins with (1) the analysis of the nature of the limit on the freedom of religion and continues with (2) the analysis of the justification of the limitation, in the following path: (2a) the limitation prescribed by law, (2b) the pressing and substantive purpose of the limitation, (2c) the analysis of proportionality. The last question is divided into three subquestions (i) the rational connection between the limit and the purpose, (ii) the minimal impairment of the right, and (iii) the proportionate effect of the limitation. The analysis ends with (2d) the conclusion on justification.

In section (1), when analysing the possible infringements of the freedom of religion, there is an explicit reference to the purpose of the provision of the Charter which ensures this freedom: 'the purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being'.[69] Accordingly, the *purposive interpretation* takes place right at the beginning of the reasoning, when identifying what is at stake in the legal dispute.

Section (2) continues with a general explanation of the analysis of the justification of the limitation. The Court states that the government must be accorded a measure of leeway in determining limits on certain rights when regulating social and commercial interactions.[70] On the other hand, the Court declares that the Charter guarantees (from the point of view of the freedom of religion) shall be taken into consideration on a broad scope.[71] Both statements reflect the *generous interpretation* of the Charter. The Court also expressly recognises that the issue of identity theft is a social problem that has grown exponentially – even if in this regard there is no explicit reference to any constitutional provision, the way the Court interprets the sphere of action of the government in regulating this social field is strongly related to the *progressive interpretation*.

Subsection (2a) refers to a formal question, whether the limitation of the fundamental right is prescribed by law – the court accepts the form of the regulation in this regard.

In subsection (2b) the Court examines the purpose for which the limit was imposed – the first subtest of the proportionality analysis. The Court expresses that in this case, the government's primary goal behind the regulation is traffic safety – that is why the government

[68] The reasoning also continues with questions related to equality – for the purposes of this analysis there is no need to refer to these separately.

[69] *Alberta v Hutterian Brethren* 32.

[70] *Alberta v Hutterian Brethren* 35.

[71] *Alberta v Hutterian Brethren* 36.

introduced a system of licensing drivers. The Court accepts that this general purpose can serve collateral effects as well, such as maintaining a system capable for general identification. However, these collateral effects can cause collateral problems as well, for example identity theft.[72] In this regard, the Court states that 'maintaining the integrity of the driver's licensing system in a way that minimises the risk of identity theft is *a goal of pressing and substantial importance*'.[73] The Court's primary task in this regard is assessing the supporting arguments provided by the government – these were expressly presented in the previous part ('Facts') of the reasoning. Accordingly, identity theft is a serious and growing problem in Alberta; the photo requirement is essential to ensure the efficacy of the software-based facial recognition data bank, and the government offered options for the Colony members to have no direct contact with the photos.[74] The Court has accepted the 'sufficient importance' of the purpose based on the data presented by the government of Alberta in light of the limitation of the freedom of religion, therefore the examination continued.

In subsection (2c) the Court examines the subtests of proportionality. (i) Related to the question of whether the limit is rationally connected to the purpose, the Court recalls Alberta's evidence which 'demonstrates the ways in which the existence of exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud'. Related to the exemption, the Court also refers to the possible frauds based on one-to-one correspondence between individuals, as well as to the fact that a 'non-photo licence can be obtained and used to obtain credit or enter into other commercial relationships to the detriment of the other parties to the transactions'.[75] All these data supporting the rational connection were provided by the province of Alberta, however; it was the Court's task to assess explicitly whether these facts are in rational connection with the purpose of the legislation. As in this subtest the Court examined factual questions, it did not apply any special methods of interpretation.

In the (ii) second subtest the Court focused on the minimal impairment of the religious freedom. The Court starts its reasoning in this regard with a detailed explanation of this subtest. As the minimum impairment test requires the government to choose the least drastic means of achieving its objective, the Court points to the fact that the alternative, less drastic means shall achieve the objective in a 'real and substantive manner'.[76] On the other hand, the Court 'should not accept an unrealistically precise formulation of the government's objective which would effectively immunise the law from scrutiny'.[77] After the detailed interpretation of the method, the Court turns to the assessment of the possible alternative measures, capable for achieving the purpose. The Court emphasises that 'the

[72] *Alberta v Hutterian Brethren* 45.
[73] *Alberta v Hutterian Brethren* 42.
[74] *Alberta v Hutterian Brethren* 10–12.
[75] *Alberta v Hutterian Brethren* 50.
[76] *Alberta v Hutterian Brethren* 55.
[77] *Alberta v Hutterian Brethren* 55.

Province's proposed alternatives which maintain the universal photo requirement but minimize its impact on Colony members. In the Court's view, as the claimants rejected these proposals, the Province's goal was compromised. However, the goal must be taken 'as it is'. While the Court accepted that the freedom of religion in many cases leads to 'all or nothing' dilemmas, in this case the Court concluded that the universal photo requirement minimally impairs the freedom of religion. There were offered a range of reasonable (alternative) options for the claimants which preserved the integrity of the driver's license system, but these were not accepted by them.[78] On the other hand, in the Court's view, other options would not promote in a 'real and substantive' manner the government's objective. By this assessment, the Court evaluated (and *interpreted*) *the context* of the conflict.

In the (iii) third subtest, the Court examined proportionality in the strict sense, whether 'the overall effects of the law on the claimants [were] disproportionate to the government's objective'.[79] Before analysing the case in this regard, the Court summarised the method of examination based on two sources: the Oakes decision, which formulated the test, and also academic writings, especially the works of the above-cited Peter W. Hogg. Based on Oakes, the Court summarised that 'the more severe the deleterious effects of the measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society'.[80] As the Court recalls it, in Hogg's view the proportionality analysis in the strict sense is redundant in the practice of the Supreme Court, as 'finding a law's objective »pressing and substantial« at the first stage of Oakes will always produce a conclusion that its effects are proportionate'.[81] As a response, in the majority opinion, Chief Justice McLaughlin argues that (a) proportionality analysis in the strict sense has a distinct role, namely, to assess 'in light of the practical and contextual details' (…) whether 'the benefits which accrue from the limitation are proportional to its deleterious effects'.[82] (b) Furthermore, she also refers to analytical clarity and transparency that support distinguishing between the different stages of examination.[83] At this point it is worth noting another particularity of the interpretation techniques of the Court: *academic writings* are recognised *as legitimate sources of constitutional interpretation*. By citing and entering into dialogue with these, the Court offers a better understanding of the provisions of the Constitution (the Charter) and the methods of examination following from these.

The reasoning of the subtest is divided into three parts: (a) assessing the salutary effects of the legislative goal, (b) assessing the deleterious effects of the legislation on the fundamental right in question and (c) weighing the salutary and deleterious effects.

As to the salutary effects, the Court recalls the evidence provided by the province of Alberta: 'enhancing the security of the driver's licensing scheme, assisting in roadside safety

78 *Alberta v Hutterian Brethren* 57–60.
79 *Alberta v Hutterian Brethren* 73.
80 *Alberta v Hutterian Brethren* 74.
81 *Alberta v Hutterian Brethren* 75.
82 *Alberta v Hutterian Brethren* 77.
83 *Alberta v Hutterian Brethren* 76.

and identification and eventually harmonising Alberta's licensing scheme with those in other jurisdictions'.[84] The Court emphasises that 'it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, (however), the internal integrity of the system would be compromised.[85] The Court cites other cases related to the 'security concern' and concludes that 'the salutary effects of the universal photo requirement for driver's licences are sufficient, subject to final weighing against the negative impact on the right'.[86] The sufficient nature of the salutary effects are in close connection with the purpose of the regulation, which was found 'of pressing and substantial importance' (based on *purposive interpretation*).

According to the deleterious effects, the Court focused on the seriousness of the effects of the limit on the Colony member's freedom of religion. By doing this, the Court *interprets the freedom of religion in a dynamic (progressive) way:* 'religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, such as prayers and the basic sacraments, may be so sacred that any significant limit verged on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to adherents than to others'.[87] The Court cites Canadian and US cases, as well as cases of the ECtHR, when examining the possible conflicts with the freedom of religion. After this, the Court highlights the core question of the limitations on the freedom of religion in general: whether the affected persons still have a *meaningful choice* about their religious practice. Turning to the case in question, the majority opinion of the Court concludes that 'it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion'[88], as they can make alternative arrangements for highway transport. The Court also recognises that these arrangements will be different from the community's tradition of being self-sufficient in terms of transport and will impose a financial cost on the community.[89] At this point, another particularity of the interpretation of the Court can be highlighted: *cases of other jurisdictions* are also recognised *as sources of interpretation* when defining the protected scope of the right.

When weighing the salutary and deleterious effects, the Court focused on the whether 'the overall impact of the law is proportionate'.[90] According to the conclusion of the majority opinon, 'the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious

84 *Alberta v Hutterian Brethren* 79.
85 *Alberta v Hutterian Brethren* 81.
86 *Alberta v Hutterian Brethren* 85.
87 *Alberta v Hutterian Brethren* 89.
88 *Alberta v Hutterian Brethren* 98.
89 *Alberta v Hutterian Brethren* 99.
90 *Alberta v Hutterian Brethren* 100.

convictions'.[91] As a consequence, the Court found the limitation proportionate and justified. One can note that, based on the previously presented arguments related of the salutary and deleterious effects, the result of the last, balancing question is not surprising. However, this particularity has mostly positive effects. As the previous steps of examination were structured exhaustively and precisely, they therefore transformed balancing into a sophisticated and simple question. One can also recall that balancing in this narrow sense is in the focus of the most harsh critiques – claiming that balancing operates with incommensurable values.[92] If the previous questions are structured and answered with convincing arguments, balancing could be a simpler task and its results could be more acceptable.

As noted earlier, the complex assessment of balancing calls for the repeated use of all the relevant methods of interpretation. In this regard (at the very general level), the *generous*, *progressive* and *purposive* interpretations together support the overall evaluation of the effects of the limitation of the freedom of religion – these were found justified in this case.

The reasoning part of the decision continues with the examination of claims based on other provisions of the Charter, as well as with the concurring opinions – however, there is no need to present these for the purposes of this paper. Nevertheless, comparing the argumentation of these with the arguments expressed in the majority opinion is an easy task, as concurring opinions have the same structure of reasoning. This assessment leads us the most important feature of the reasoning based on proportionality in the practice of the Supreme Court: the *consistent use of structured reasoning,* which enhances the *transparency* and the *verifiability* of the argumentation. All these particularities support the justification of the judicial decisions on a substantive basis.[93]

V Conclusions

Why is the approach of Canadian courts (especially the Supreme Court) to constitutional interpretation and reasoning in fundamental rights disputes exceptional? First, it is important to emphasise that this assessment does not follow from the fact that Canadian courts apply unique methods of constitutional interpretation or a special version of the proportionality test. Unique and special methods of interpretation and reasoning are present in the practice of many jurisdictions, and even individual judges can have personal preferences in this regard.

According to my understanding, the Canadian *methodological exceptionalism* is rooted in three key factors. (a) The first of these is the *transparency of the reasoning*. As demonstrated above, the structure of the reasoning of the court follows a fixed path, especially regarding proportionality analysis. The chain of arguments is therefore traceable and the

91 *Alberta v Hutterian Brethren* 104.

92 See (n 66).

93 See Zoltán Pozsár-Szentmiklósy, 'The formal and substantive functions of the principle of proportionality' (2015) 56 (2–3) Acta Juridica Hungarica.

coherence and completeness of the arguments is verifiable. This particularity also promotes the precise comparison of the majority opinion with concurring opinions. (b) The second factor is the *general and consistent use* of these *methods* by the judicial fora. As academic writings emphasise, the application of the above-presented methods of constitutional interpretation, as well of the Canadian form of proportionality analysis, is a general trend in Canadian jurisprudence. Moreover, there is a living dialogue related to these methods between courts and academia. One can conclude that this engagement to methodological clarity belongs to the Canadian constitutional culture, the 'culture of justification'.[94] (c) The third particularity lies in the fact that *methods of interpretation and structures of reasoning are intertwined* and together support the foundation of the judicial decisions. In scholarly works, the traditional approach to constitutional interpretation and reasoning methods in fundamental rights disputes is distinct; the analyses focus on the related methodological questions separately. However, in judicial practice these methods are simultaneously present when analysing legal questions. As the practice of the Supreme Court of Canada demonstrates, interpretation and reasoning can be applied consciously in a common framework: reasoning methods (especially proportionality analysis) form the structure for the chain of arguments, while interpretation methods support answering the substantive questions.

Needless to say, all of these factors can be present in the practice of other jurisdictions as well. As the Canadian example demonstrates, this type of *methodological exceptionalism* is worth following.

[94] See Moshe Cohen-Eliya, Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013, New York) 111.