

Applying the Principle of Proportionality in Employment and Labour Law Contexts

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Unedited Version; Forthcoming in the McGill Law Journal

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This research project was supported by the Centre for Labour Management Relation, Ryerson University. The authors would like to thank Brian Langille, two external referees, and the participants in the Labour Law Research Network conference held at Universitat Pompeu Fabra, Barcelona, 2013, for their insightful comments on earlier drafts and Annice Blair, Suzie Kotzer and Stephen Spong for their excellent research assistance.

A. Introduction

The principle of proportionality is designed to limit abuse of power and infringement of human rights and freedoms by governments and other public officials to the minimum necessary in the circumstances. As a philosophical notion, proportionality may be traced back to the ancient Silver Rule of “that which is hateful to you, do not do to your fellow”.¹ As a legal principle it originated in the 19th Century in Prussian administrative law, where it imposed constraints on police powers which infringed individual’s liberty or property.² Throughout the years the principle of proportionality expanded and migrated to other European countries,³ where it is now a central and binding public law principle,⁴ and to other jurisdictions including Canada, New Zealand, Australia, South Africa, Hong Kong, India, and countries in South America.⁵ Furthermore, it has become part of many constitutional and international documents.⁶ It is also relevant in other contexts such as international

¹ See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (New York: Cambridge University Press, 2012) at 175.

² *Ibid.* at 178. Courts examined whether police action was for a legitimate purpose, whether the action was suitable to reach this purpose, and whether there was a less intrusive means to achieve this purpose. In some cases, the courts also assessed whether a proper balance was struck between the adverse effects of the action and the benefits of achieving the purpose. See Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 U. Toronto L.J. 383 at 384-85.

³ In 1949, the Basic Law for the Federal Republic of Germany was adopted, and although it did not contain any explicit reference to proportionality, the Constitutional Court gradually applied, without explanation, the test of proportionality whenever a law infringed fundamental rights (except for the right to dignity which is absolute). An explanation on how this principle operates came in subsequent cases in the 1960s. See Grimm, *supra* note 2 at 385-86. See also the seminal work of Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans., Oxford University Press, 2002 (1986)), who argues that constitutional rights are not rules but rather principles, “optimization requirements” which are subject to a balancing and proportionality analysis.

⁴ See e.g. Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996); Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart, 1999). The European Court of Justice views proportionality as a general principle of EU law which regulates the exercise of powers and measures chosen by the EU institutions and Member States affecting fundamental freedoms. See *R. v. Minister for Agriculture, Fisheries and Food; Ex parte Fedesa* (C-331/88) [1990] ECR I-4023, 4062-4. The principle of proportionality is laid down in Article 5 of the Treaty on the European Union. The principle of proportionality is also used to assess limitations on fundamental rights and freedoms (see EU Charter, *infra* note 6). While the European Convention for the Protection of Human Rights and Fundamental Freedoms does not include a specific reference to proportionality, the European Court of Human Rights applies the test of proportionality when rights are infringed (see Barak, *supra* note 1 at 183-84).

⁵ See Barak, *supra* note 1 at 180-202, 208-10. See also David M. Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004). Furthermore, the principle of proportionality has been recently advocated in the U.S. See E. Thomas Sullivan & Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford: Oxford University Press, 2009) at 6, who provide an overview of the long-standing acceptance of proportionality in western countries and argue that “every intrusive government measure that limits or threatens individual rights and autonomy should undergo some degree of proportionality review”.

⁶ This includes for example the *Canadian Charter of Rights and Freedoms* [Charter] (s. 1), the Constitution of the Republic of South Africa (art. 36), Israeli Basic Law: Human Dignity and Liberty (art. 8) and the Israeli Basic Law: Freedom of Occupation (art. 4), the Federal Constitution of Switzerland of 1999 (art. 36), the Constitution of Turkey (art. 13), the European Convention of Human Rights and Fundamental Freedoms, November 4, 1950, 213 UNTS 222 (arts. 8-

law (e.g. the doctrine of just war, the laws of self-defence and international human rights law)⁷ and criminal law (e.g. punishment should be proportional to the offence).⁸

The principle of proportionality was first recognized in Canadian constitutional law in *R. v. Oakes* (1986),⁹ when the Supreme Court of Canada interpreted s. 1 of the *Canadian Charter of Rights and Freedoms*,¹⁰ which allows the government to limit constitutional rights and freedoms to a reasonable extent,¹¹ as entailing a proportionality test. Similar to other jurisdictions,¹² the Court established a three-stage test which examines the relationship between the measure adopted by the government to achieve a legitimate objective and the legitimate objective. First, the measure adopted by the government must be *rationaly connected* to the justifiable objective it aims to achieve. Second, the government has to select the measure that is the least harmful to the right or freedom in question (*minimal impairment*) but similarly achieves the objective. Third, there must be proportionality *stricto sensu* between the harms caused by the measure and the benefits of achieving the important objective (“The more severe the deleterious effects of a measure, the more important the objective must be”).¹³

In a neo-liberal capitalist era, employers often exert as much control over an individual’s life as governments. Should the application of the principle of proportionality extend to the private sphere and impose some limitations on employers’ actions? The question is not about constitutional cases; the constitutional analysis undoubtedly involves a proportionality analysis in labour and employment contexts as in any other context. The question is rather about non-constitutional cases, involving private-sector employers: can (and should) we demand that such employers conform to the requirements of proportionality when making decisions affecting employees? Can (and should) we place similar constraints on labour unions making decisions that affect employers and the public at

11), New Zealand Bill of Rights Act 1990, No. 109 (art. 5) and the EU Charter of Fundamental Rights of the Union, O.J. C. 2007 303/01 (art. 52).

⁷ See Barak, *supra* note 1 at 202-06.; and Sullivan & Frase, *supra* note 5 at 15-26.

⁸ See Barak, *supra* note 1 at 175-76.

⁹ *R. v. Oakes*, [1986] 1 S.C.R. 103. See also Sujit Choudhry, “So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 Sup.Ct.L.Rev. (2d) 501.

¹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11.

¹¹ S. 1 states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

¹² There is of course some disparity between the tests used by each jurisdiction. For example, the UK test did not include the third stage at first (see *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80). However it was later added (see *Huang v. Secretary of State for the Home Department* [2007] 2 AC 167, 4 All ER 15). In France, the test did not include the minimal impairment stage but this has been changed recently by the French Constitutional Court (see Barak, *supra* note 1 at 132, n. 3).

¹³ *Oakes*, *supra* note 9 at paras. 70-71.

large? A number of scholars have recently explored this possibility in other jurisdictions and advocated the use of proportionality in some labour and employment contexts.¹⁴ The three-step test appears to offer a useful structure for discretionary decision making, which aims to ensure that decisions are rational and considerate and may prevent abuse of power by both employers and unions.¹⁵

Geoffrey England examined the impact of the *Charter* on employment contract law including the application of proportionality in “just cause” cases.¹⁶ But a complete account of the role that proportionality plays or should play in Canadian employment and labour law has not yet been offered. In this paper we wish to advance two main arguments: First, a survey of employment and labour decisions by courts and other adjudicators in Canada reveals that the principle of proportionality is already being used in certain contexts. Sometimes, the application is explicit, even if incomplete (*i.e.* does not closely follow all three stages of the test). But more often the application is implicit. That is, courts and other adjudicators analyze different situations while using tests akin to the proportionality test without an explicit reference to proportionality. Second, we argue that this trend is normatively justified and that a more explicit and structured use of the proportionality test should be advanced in various employment and labour spheres.

The paper proceeds as follows. Part B exposes the contexts in which proportionality is currently used in Canadian employment and labour law decisions. We argue at a descriptive level that proportionality already plays a major role – although often not explicitly – in Canadian labour and employment law. Part C turns to the normative level and explores the justifications for extending the application of proportionality to the private sphere and more specifically to the employment relationship. First, we explain why a higher standard of behaviour is required in employment relationships as opposed to other contracts. Second, we defend the use of proportionality in these contexts stressing its legal and analytical merits. Lastly, we demonstrate that the application of

¹⁴ In Israel, see Guy Davidov, “The Principle of Proportionality in Labor Law and Its Impact on Precarious Workers” (2012) 34(1) *Comparative Labor Law and Policy Journal* 63; in the U.K., see Aaron Baker, “Proportionality and Employment Discrimination in the UK” (2008) 37 *Industrial Law Journal* 305 and A.C.L. Davies, “Judicial Self-Restraint in Labour Law” (2009) 38:3 *Industrial Law Journal* 278.

¹⁵ Davidov, *supra* note 14 at 79.

¹⁶ Geoffrey England, “The Impact of the *Charter* on Individual Employment Law in Canada: Rewriting an Old Story” (2006-2007) 13 *Canadian Lab. & Emp. L.J.* 1. In this paper, England argues that the *Charter* has had a significant direct and indirect impact on employment law in Canada. The direct impact revolves around various constitutional challenges of different statutory provisions on employment standards, pay equity and workers compensation. The indirect impact is demonstrated by the expansion of general *Charter* values such as fairness, equality and proportionality in the law of the employment contract. He advocates protecting these new developments through explicit legislation. However he warns against an over-extension of employee rights which may compromise the productive efficiency of employers. He therefore urges courts to carefully consider the economic effect of their decisions upon employers.

proportionality fits within contemporary legal doctrines and advances legal coherence. We therefore advocate a more explicit use and structured application of the three-stage proportionality test in the contexts mentioned above. Part D proposes additional applications of proportionality in the labour context, showing how this principle can provide a more balanced approach to the resolution of contemporary labour relations conflicts in Canada, limiting the use of excessive power by both employers and trade unions. Part E concludes. Generally speaking, we believe that the incorporation of proportionality into labour and employment law could be an important and useful development. Our findings are also of great relevance to the more general discussion about the applicability of the principle of proportionality outside the boundaries of public law.

B. Proportionality in Canadian Employment and Labour Contexts

1. Introduction

The principle of proportionality is employed both explicitly and implicitly in various employment and labour law decisions. In some cases, the *Charter* (including s. 1 and the principle of proportionality) is directly relevant in an employment setting. Sometimes a governmental action or legislation infringes the rights and freedoms of employees, trade unions or employers guaranteed under the *Charter*.¹⁷ Setting aside these constitutional cases, there are scenarios where a private dispute arising between an employer and an employee or a trade union is also analyzed within a proportionality framework. Sometimes the court or the relevant adjudicator will make concrete reference to proportionality but may not follow all three stages of the *Oakes* test. Occasionally the legal analysis will not make explicit reference to proportionality but will significantly resemble the three-stage test. This Part will canvass myriad employment and labour law decisions to demonstrate this argument.

2. Explicit Use

(1) Disciplinary Procedure and Just Cause

¹⁷ See e.g. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (considering whether provisions in human rights legislation limiting the protection against age discrimination in employment to the age of 65 infringe s.15 of the *Charter*); *Ontario Nurses' Association v. Mount Sinai Hospital*, [2005] O.J. No. 1739 (considering whether a denial of severance pay to disabled employees provided for in the Ontario Employment Standards Act violates s.15 of the *Charter*); *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 (considering whether the BC Health and Social Services Delivery Improvement legislation infringes s.2(d) of the *Charter*).

The most obvious example of an explicit use of proportionality in the employment sphere is “just cause” cases. As the imbalance of bargaining power between employees and employers and the importance of work to the lives of individuals have been increasingly recognized,¹⁸ the Supreme Court of Canada developed in *McKinley v. B.C. Tel* the notion of proportionality in disciplinary procedures.¹⁹ The Court held that misconduct, in and of itself, does not necessarily warrant just cause for summary dismissal. The principle of proportionality helps to assess whether, considering the context and circumstances, an employee’s conduct was so serious,²⁰ that it should give rise to just cause for dismissal. That is, employers claiming just cause for dismissal are required to show that the sanction imposed upon an employee was *proportional* to his or her misconduct. Only if the misconduct was very serious (for example, “theft, misappropriation or serious fraud”), an employer may have a just cause to summarily dismiss the employee, without an advance notice or pay in lieu of that notice.²¹ In other cases, an employer should use progressive discipline (“lesser sanctions for less serious types of misconduct”).²² Only when the misconduct or poor performance repeats itself or continues despite discipline and clear warnings, may it amount to just cause for summary dismissal.²³

The test for establishing just cause, developed by the Supreme Court, was named “proportionality”,²⁴ building on, perhaps, the well-established test for disciplinary action in labour arbitration jurisprudence.²⁵ Thus, no reference was made to s.1 of the *Charter* or the *Oakes* test. The test includes two stages: Whether the evidence established the employee’s misconduct on a balance of probabilities; and if so, whether the nature and degree of the misconduct warranted dismissal.²⁶ But a closer inspection of this test reveals some similarity to the *Oakes* test. One might argue that when employers make a decision to discipline or dismiss an employee, the decision infringes the employee’s right or interest to have job security or at least receive advance notice. Assuming that the objective of disciplining or dismissing an employee is to ensure that the workplace is composed of the most competent and cooperating workers, employers are required to show that the measure chosen to achieve this objective was proportional.

¹⁸ See *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38 at paras. 53-54.

¹⁹ “An effective balance must be struck between the severity of an employee’s misconduct and the sanction imposed” (*ibid.* at para. 53).

²⁰ A serious misconduct “violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer” (*ibid.* at para. 48).

²¹ *Ibid.* at para. 51.

²² *Ibid.* at para. 52.

²³ The employer may still dismiss the employee but will have to provide advance notice or pay in lieu of that notice.

²⁴ “Underlying the approach I propose is the principle of proportionality” (*McKinley*, *supra* note 18 at para. 53).

²⁵ See *infra* note 34.

²⁶ *McKinley*, *supra* note 18 at para. 49.

The test developed in *McKinley* resembles the first two stages of the *Oakes* test although a more structured analysis could have been beneficial. First, it requires a proof of incompetence or misconduct. That is, disciplining or dismissing without notice employees who were engaged in misconduct or incompetence appears to be rationally related to the aforementioned objective, because it creates deterrence – and in the case of dismissals conclusively prevents future misconduct/incompetence from the same employee in the future. By contrast, where an employee’s action was just an error in judgment, trivial or unintentional, discipline or dismissal without notice does not seem to advance these goals. Certainly if the employee is wrongly accused or the accusations are not substantiated – if there is no proof of the alleged misconduct – the disciplinary measure will not advance the stated goals (so no rational relation exists). Second, the *McKinley* test examines whether a less severe response is possible while still achieving the aforementioned objective. Summary dismissal is a severe punishment. A less severe response, such as a warning, is usually sufficient to achieve the objective when the misconduct is not very serious.²⁷ However, when the employee’s actions are serious, intentional or numerous, the employer may argue that there is no less intrusive way to achieve its legitimate business objective other than to dismiss this employee without notice.²⁸

The *McKinley* test was further developed in subsequent cases and now entails elements of all three stages of the *Oakes* test, including a requirement for balancing the benefits gained and harms caused by the chosen sanction. In *Dowling v. Ontario*,²⁹ for example, the Ontario Court of Appeal held that the test requires a consideration of the particular circumstances of both the employee and the employer: “In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee’s position within the organization, and the degree of trust reposed

²⁷ *Ibid.* at para. 52. See also para. 56: “[a]bsent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as ‘dishonesty’ might well have an overly harsh and far-reaching impact for employees”.

²⁸ Gillian Demeyere argues that the just cause test and the bona fide occupational requirement test are similar as they both limit the power that the employer has over its employees to control the work: “Both root out attempts by the employer, under the guise of its managerial authority, to control more than the work by setting terms and conditions of employment that are neither rationally connected nor reasonably necessary for the discharge of the employee’s contractual duty to do the work ... The common law doctrine of just cause is thus just a broader version of the bona fide occupational defence under human rights legislation. That is, the just cause doctrine is best understood as imposing a duty on employers to set only occupational requirements that are reasonably necessary for the performance of the work” (Gillian Demeyere, “Human Rights as Contract Rights: Rethinking the Employer’s Duty to Accommodate” (2010-2011) 36 *Queen’s L.J.* 299 at 318-19). Indeed, both requirements appear to resemble the same proportionality test.

²⁹ *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 246 DLR (4th) 65; 37 CCEL (3d) 182; 192 OAC 126.

in the employee”.³⁰ This contextual evidence is needed, so it appears, to assess the severity of the harm to the employee versus the importance of the objective to the employer in the specific circumstances – as in the third proportionality test.

The same analysis applies not only in dismissal cases but also in disciplinary cases. In *Haddock v. Thrifty Foods*,³¹ for example, an employee had been working for 16 years for the same chain of grocery stores. His last position was seafood department manager. He was a good employee for most of the period, but later had some personal problems which led to alcohol abuse. In response, he was warned twice in 2002 and 2003, and then about a year later was demoted to a non-managerial position with a 16-20% decrease in income. The Supreme Court of British Columbia held that demotion was not the proper response to his poor performance (but rather amounted to constructive dismissal) and that a further warning was needed before the employer could terminate without notice, because of the time that had passed since the previous warnings and the employee’s efforts to rehabilitate and improve performance during that period. The additional warning requirement manifests the second stage of the *Oakes* test. The employer should have chosen a less severe measure (i.e. a warning) to achieve its legitimate objective of having the most competent body of employees in the organization.

In unionized settings the principle of proportionality in discipline and dismissal cases is even more established. Collective agreements generally require employers to establish just cause prior to the imposition of any form of discipline (oral and written warning, suspension, discharge etc.).³² Furthermore, legislation provides arbitrators with the power to substitute their authority for that of the employer, and reduce the penalty imposed by an employer to one that is “just and reasonable” in the circumstances.³³ Interestingly, when attempting to give concrete meaning to these vague concepts, arbitrators appear to use the proportionality test.

³⁰ *Ibid.* at para. 52.

³¹ *Haddock v. Thrifty Foods (2003) Limited*, 2011 BCSC 922.

³² See e.g. Article 3.04 of the Collective Agreement between E - Z - RECT Manufacturing Ltd. and Marine Workers’ and Boilermakers’ Industrial Union, Local No. 1, Effective September 1, 2007 – August 31, 2012, online: <<http://www.lrb.bc.ca/cas/WTD7.pdf>>; and Article 502 of the Collective Agreement between the Elementary Teachers’ Federation of Ontario (Representing the Occasional Teachers of the Elementary Teachers’ Federation of Ontario) and the Lambton Kent District School Board, Effective September 1, 2008 – August 31, 2012, online: <<http://www.lkdsb.net/Staff/col-agt/ETFO%20Occ%20-%202008-2012.pdf>>.

³³ See e.g. in Ontario s. 48(17) of the *Labour Relations Act*, S.O. 1995, c. 1: “Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances”. Other provinces and the federal jurisdiction use similar clauses. See e.g. s. 60(2) of the *Canada Labour Code*.

Arbitrators consider two main questions in just cause cases. First, whether the conduct in question amounts to just cause for the imposition of some form of discipline. As noted, this part resembles the first stage of the *Oakes* test. Dismissing or disciplining only those employees who misbehaved or poorly performed is rationally connected to the employer's objective of having the most competent body of employees. Second, arbitrators consider whether the method of discipline selected by the employer is appropriate in the circumstances. Various mitigating factors have been identified as justifying the substitution of a lesser penalty for discharge, including: whether the employee was confused or mistaken as to whether an act was permitted; whether the act was impulsive or non-premeditated; whether the harm to the employer was trivial; whether the employee sincerely acknowledged the misconduct; the past record of the employee; the length of service; and whether the penalty imposes severe hardship upon the employee given his or her age and personal circumstances.³⁴ This part combines both the second and third stages of the *Oakes* test. It requires the employer to choose the least intrusive punishment while still achieving its objective. It also balances between the benefits of achieving this objective and the harms imposed upon the employee.

(2) *Privacy in the Workplace*

Another explicit use of the proportionality principle can be demonstrated in invasion of privacy cases, for example when an employer requires his or her employees to pass a drug or alcohol test, uses surveillance cameras or monitors emails and computer use. The clearest examples are those within the jurisdiction of the federal *Personal Information and Protection of Electronic Documents Act* (PIPEDA).³⁵ The purpose of this Act is to balance between “the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances”.³⁶ S. 5(3) of the PIPEDA stipulates that “An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in

³⁴ See *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees* (1979), 23 L.A.C (2d) 227 at 230 (Arthurs). See also *Re Sifto Canada Corp. and Communications, Energy and Paperworkers Union, Local 16-0*, [2010] O.L.A.A. No. 585, 200 L.A.C. (4th) 305, Grievance No. 20091120 (Luborsky). For the applicability of *McKinley* in unionized workplace, see *e.g. Canadian Office and Professional Employees v. Yellow Pages Group Co.* [2012] O.J. No. 2880, 2012 ONCA 448.

³⁵ S.C. 2000, c. 5, s. 3.

³⁶ Section 3.

the circumstances”.³⁷ This section was interpreted by the Privacy Commissioner as well as by arbitrators and federal courts as including a proportionality test.

The Privacy Commissioner of Canada has set out a fourfold test for determining when personal information may be collected for purposes a reasonable person would find appropriate in the circumstances.³⁸ The Commissioner held that when examining s. 5(3), one has to consider the appropriateness of the organization’s purposes for collecting personal information and the circumstances surrounding those purposes. Once the purpose is identified, to determine whether the use was reasonable in the circumstances, one has to consider the following questions: “Is the measure demonstrably necessary to meet a specific need? Is it likely to be effective in meeting that need? Is the loss of privacy proportional to the benefit gained? Is there a less privacy-invasive way of achieving the same end?”³⁹

This test, which had been upheld by the Federal Court⁴⁰ and is followed in many arbitration awards,⁴¹ is very similar to the *Oakes* test. The first inquiry corresponds to the second stage of the *Oakes* test because it examines whether the measure is *necessary* to meet the objective, *i.e.* whether there are less intrusive ways of achieving the same objective. The second inquiry is akin to the first stage of the *Oakes* test because it examines whether the measure chosen for the collection of information is effective in achieving the objective, *i.e.* whether it is rationally related to it. The third inquiry resembles the third stage of the *Oakes* test because it weighs the benefits of collecting information against the damages to the employee’s privacy. Finally, the fourth inquiry which asks whether the employer explored other less privacy-invasive ways of achieving the objective is identical to the second stage of the *Oakes* test.

³⁷ See also the Model Code for the Protection of Personal Information (Schedule 1 of the Act). The Model Code contains a number of principles such as the requirement to explicitly identify purposes before collecting information (article 4.2).

³⁸ PIPEDA Case Summary # 2003-114, issued January 23, 2003, online: <http://www.priv.gc.ca/cf-dc/2003/cf-dc_030123_e.asp>.

³⁹ *Ibid.*

⁴⁰ See *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043, 2004 FC 852 at paras. 126-27.

⁴¹ See *e.g. Teamsters Canada Rail Conference v. Canadian Pacific Railway Company*, Case No. 3900, Canadian Railway Office of Arbitration & Dispute Resolution, online: <http://onlinedb.lancasterhouse.com/images/up-PicherM_CR3900.pdf>. Following serious collisions in the railway industry, the Canadian Pacific Railway Company adopted a policy of asking employees to provide copies of their personal wireless telephone records where a significant unexplained accident occurred. The arbitrator held that the disclosure of telephone records was demonstrably necessary for promoting public safety, given the recent history of collisions in the railway industry. The arbitrator found that the policy would be effective in meeting the company’s need to know whether personal cell phone use was a distraction which may have contributed to an accident or incident. The arbitrator also held that the loss of privacy was very limited to the act of sending and receiving communications. Furthermore, the benefit of avoiding accidents outweighs the relatively minor loss of privacy. The arbitrator concluded that there was no equally reliable and less privacy-invasive way of achieving the purpose of promoting safety (*ibid.* at paras. 35-42).

In *Eastmond v. Canadian Pacific Railway*,⁴² for example, digital video recording surveillance cameras installed in the work yard were held justifiable because the employer successfully demonstrated that it used the least intrusive means available to accomplish a reasonable purpose. The Federal Court used the term “proportional” while not referring specifically to the *Oakes* test. In reaching its decision, the Court considered the above mentioned questions.⁴³ The Court found that the purpose of collecting information through video cameras was appropriate in the circumstances. The employer successfully established a legitimate aim (numerous past incidents) and the Court also mentioned the importance of these cameras for theft and vandalism deterrence and for increasing security of individuals and goods. Furthermore, the Court found the loss of privacy minimal. Collection of information was not surreptitious (there were warning signs). Nor was it continuous. It was not limited to employees only. It captured every person who walked in the yard. It did not measure work performance. The recorded images were kept under lock and key and were accessed only when an incident was reported. Otherwise, they were destroyed. Moreover, the employer explored other alternatives (such as fencing and security guards) but they were too expensive or unfeasible. Finally, the Court found the loss of privacy proportional to the benefit gained from the collection of information.⁴⁴

It is worth noting that these tests had been used prior to PIPEDA by arbitrators adjudicating privacy cases and “balancing privacy interests of employees with the legitimate interests of employers”.⁴⁵ Indeed, in the *Canadian National Railway* case,⁴⁶ which deals with drug and alcohol testing in a unionized federally-regulated workplace prior to PIPEDA, proportionality is not mentioned explicitly, yet the arbitrator engaged in an analysis which required balancing “the interest of the employees in the privacy and integrity of their person with the legitimate business and safety concerns of the employer”,⁴⁷ and applied tests akin to the *Oakes* test. In examining whether the drug and alcohol testing violated the collective agreement, the arbitrator asked: First, whether there is evidence of a drug and/or alcohol problem in the workplace and a need for management’s policy (“test of justification or adequate cause”).⁴⁸ This alludes to the first stage of the *Oakes* test. Second, whether the employer considered the alternatives available and whether the problem in the

⁴² *Supra* note 40.

⁴³ *Ibid.* at para. 127.

⁴⁴ *Ibid.* at paras. 176-82.

⁴⁵ *Ibid.* at para. 128.

⁴⁶ *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2000] C.L.A.D. No. 465.

⁴⁷ *Ibid.* at para. 183.

⁴⁸ *Ibid.* at para. 28.

workplace could be combated in a less invasive way (“test of reasonableness”).⁴⁹ This is similar to the second stage of the *Oakes* test. The arbitrator held that the employer demonstrated the need for that policy because of the safety-sensitive nature of the national railway operations,⁵⁰ and provided sufficient evidence to justify its substance abuse policy, including drug and alcohol testing as reasonable.⁵¹ Furthermore, the employer explored other less intrusive alternatives to deal with the substance abuse problem.⁵² However, the arbitrator took issue with some policy rules that did not meet these tests. For example, one rule stipulated that “a positive drug test is, of itself, grounds for discipline or discharge”,⁵³ *i.e.* did not distinguish between “a positive drug test, standing alone, and impairment while on duty”.⁵⁴ This rule was unreasonable because it made no “reference to any clearly demonstrated legitimate employer interest”,⁵⁵ and there were less intrusive ways of achieving the goal of combating drug and alcohol use among employees in non-safety sensitive jobs.⁵⁶ Yet, it may be reasonable when employees in risk-sensitive positions are concerned.⁵⁷ The arbitrator held that for risk-sensitive employees, who “work in locations spread across Canada, often without supervision or with only partial supervision”,⁵⁸ the benefits of the rule for fitness assessment, discipline matters and monitoring substance abuse in the workplace, outweigh the cost of infringing privacy rights of individuals, “whose expectations must conform to the risk sensitive concerns of the industry in which they seek to hold employment”.⁵⁹ This last part clearly reflects the third part of the *Oakes* test.

Note that PIPEDA also applies to provincially regulated organizations and businesses which collect information in the course of “commercial activities”. However, it does not extend to employee personal information that was collected and used by provincially-regulated organizations and businesses because this generally does not amount to “commercial activity”. Some provinces have passed specific legislation on privacy which covers employment, while others have not yet done so. Consequently, different jurisdictions and adjudicators use a variety of tests when it comes to employers invading the privacy of employees. However, there is an increasing recognition of the

⁴⁹ *Ibid. ibid.*

⁵⁰ *Ibid.* at para. 196.

⁵¹ *Ibid.* at para. 197.

⁵² *Ibid.* at para 198.

⁵³ *Ibid.* at para. 203.

⁵⁴ *Ibid.* at para. 202.

⁵⁵ *Ibid.* at para. 202. See also *ibid.* at paras. 219-20.

⁵⁶ Those employees “can be adequately dealt with by the employer through traditional means of detection, treatment and, where necessary, the enforcement of discipline” (*ibid.* at para. 220).

⁵⁷ *Ibid.* at para. 218.

⁵⁸ *Ibid. ibid.*

⁵⁹ *Ibid.* at para. 209.

employee's right to privacy in the workplace, and the principle of proportionality which is well established in PIPEDA cases gradually penetrates into non-PIPEDA cases. As we will argue later, this evolving area of law will benefit from a more explicit, structured use of the proportionality test.

Alberta, for example, has adopted comparable legislation – the *Personal Information Protection Act* in 2004.⁶⁰ S. 11 stipulates: “(1) An organization may collect personal information only for purposes that are reasonable; (2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.”⁶¹ In *Parkland Regional Library*,⁶² an employer installed keystroke logging software to monitor computer usage of one of its employees, without his knowledge, following low productivity concerns and suspicion of an inappropriate use for personal purposes. When the employee found out about this, he filed a complaint with the Privacy Commissioner of Alberta. The Commissioner held that the collection of personal information did not comply with the legislation. There was no legitimate reason for monitoring the employee (no sufficient evidence to support the employer's suspicions).⁶³ This can be seen as lack of rational relation (although the Commissioner did not refer to this test). Moreover, the chosen method of collection was not necessary for managing the employee; it provided a broad range of information about the employee, while other computer-based methods may assess productivity more specifically.⁶⁴ That is, the chosen software was not the least intrusive way of collecting this information – the Commissioner was thus using the second stage of the *Oakes* test (again without referring to it explicitly). The employer could have, for example, simply asked the employee to explain his apparently low productivity or used performance measures and performance reviews which are widely-accepted management tools.⁶⁵

Similarly, a Nova Scotia arbitrator held that the Regional Municipality of Halifax, which recorded and stored for one year all incoming calls at a call centre, violated provincial privacy legislation (Part XX of the Municipal Government Act which protects privacy of information collected or used by the municipality),⁶⁶ and the collective agreement which included a duty to act

⁶⁰ *Personal Information Protection Act*, SA 2003, c P-6.5.

⁶¹ See also B.C. *Personal Information Protection Act*, SBC 2003, c 63, especially s. 11: “Subject to this Act, an organization may collect personal information only for purposes that a reasonable person would consider appropriate in the circumstances and ...”.

⁶² Order F2005-003 *Re Parkland Regional Library*, [2005] A.I.P.C.D. No. 23 (Office of the Information and Privacy Commissioner of Alberta).

⁶³ *Ibid.* at para. 24.

⁶⁴ *Ibid.* at paras. 25-26.

⁶⁵ *Ibid. ibid.*

⁶⁶ Section 483(1)(c) states: “Personal information shall not be collected by, or for, a municipality unless ... that information relates directly to, and is necessary for, an operating program or activity of the municipality.” Further, a

reasonably.⁶⁷ Although it was for a legitimate business purpose (quality control, training and dispute resolution), it was unnecessary in the circumstances, disproportionate to the invasion of the employees' inherent privacy rights, and therefore unreasonable. Quality deficiencies had already improved through coaching and supervision. The arbitrator concluded that the invasion of privacy was "significantly out of proportion to any benefit, potential or actual, gained or to be gained, by the employer".⁶⁸ Note that the arbitrator referred specifically to proportionality when balancing between the benefits of collecting information and the harms of invading the employee's privacy: "Proportionality is a tool to assist in the assessment of whether justification has been made out. It calibrates the intrusion to the interest protected. The operating principle is that the more serious the intrusion, the heavier the burden will be, and *vice versa*".⁶⁹

In provinces where no such legislation exists, one should differentiate between unionized and non-unionized workplaces. In a unionized environment, employers are required to exercise their managerial rights and discretion reasonably.⁷⁰ In privacy cases, this reasonableness standard has evolved into a "balancing of interests" test: weighing the employer's interest in running its business effectively and safely against the privacy interests of employees. Arbitrators often assess the reasonableness of the employer's action or policy, the nature of the employer's interests in advancing this action or policy, whether there are less intrusive means available to address these interests, and the impact of the employer's action or policy on the employees.⁷¹

municipality may use personal information only with consent (s.485(1)) and may disclose personal information only to "meet the necessary requirements of municipal operation" (s.485(2)).

⁶⁷ *Nova Scotia Union of Public and Private Employees, Local 2 v. Halifax (Regional Municipality)*, [2008] N.S.L.A.A. No. 13 (QL), 171 L.A.C. (4th) 257. On judicial review, the finding regarding the violation of the provincial act was reversed by the Supreme Court of Nova Scotia holding that voice recording did not amount to "personal information". The finding regarding the violation of the collective agreement was upheld. Although the court did not agree that the implementation of the call recording system was unreasonable, the arbitrator's finding fell within the range of the possible legal outcomes available (see *Halifax (Regional Municipality) v. Nova Scotia Union of Public and Private Employees, Local 13*, 2009 NSSC 283).

⁶⁸ *Nova Scotia Union of Public and Private Employees, Local 2 v. Halifax*, *supra* note 67 at para. 154.

⁶⁹ *Ibid.* at para. 133.

⁷⁰ See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson); *Metropolitan Toronto (Municipality) v. C.U.P.E., Local 43*, (1990) 69 D.L.R. (4th) 268 (C.A.).

⁷¹ See *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, para. 27. In this recent case, the Supreme Court upheld an arbitration award concluding that the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use. The Majority explicitly applied a proportionality test used by "a substantial body of arbitral jurisprudence" (para. 4), and stressed that "[t]he dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise" (para. 4). Weighing the employer's interest in random alcohol testing as a workplace safety measure against the harm to the privacy interests of employees, the Court held that "when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse" (para. 5). It also stated that "a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been

This reasonableness test embodies the first and second stages of the *Oakes* test. But some elements of the third stage may be identified too. One might argue, for example, that surveillance cameras placed in workplace washrooms are reasonably needed to prevent thefts in a workplace. That is, it is the most effective way to prevent thefts and there is no less intrusive way of achieving this purpose. However, most people will agree that this is still “unreasonable” due to the severity of privacy infringement which cannot be offset by the benefits of preventing thefts. That is, the reasonableness test sometimes entails a balancing act which is the third stage of the *Oakes* test.⁷² As will be argued later, it would be useful to break the reasonableness test, which is a vague standard, into the three more concrete stages of the *Oakes* test.⁷³

Finally, in non-unionized workplaces, employers are generally allowed to collect and use information on their employees in the absence of specific legislation or common law rule. This has led courts to seek creative ways to remedy employees whose privacy was brutally invaded by their employers in some cases,⁷⁴ and to acknowledge employees’ reasonable expectation of privacy even where workplace policies allowing search and surveillance were in place.⁷⁵ Recently, a tort of

overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace” (para. 6). The dissenting opinion applied a reasonableness test (para. 81). It held that there is an arbitral consensus that an employer has to demonstrate evidence of an alcohol problem in the workplace to justify a random alcohol testing policy (para. 97) and that the arbitration board came to an unreasonable decision because it departed from this arbitral consensus when it required evidence of a *significant* or a *serious* problem (para. 104) and that the evidence of alcohol use be tied to accident or injury at the plant (para. 105).

⁷² See Harold M. Smith & Joseph L. Anthony, “Walking the Centre Line: Balancing an Employee’s Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry” (2003) 26 *Dalhousie L.J.* 591, who argue that reasonableness is “predicated on a proportionality between the extent to which an employer-imposed rule is necessary to protect a legitimate interest of the employer and the impact of said rule upon an employee’s interests” (*ibid.* at 599). That is, reasonableness requires “a two-step inquiry one must first, assess whether there is adequate cause or justification for the rule (i.e., a legitimate employer interest to be protected or objective facilitated by the operation of the rule), and second, assess the reasonableness of the rule by considering whether the employer’s interest could be protected or facilitated in a less intrusive fashion” (*ibid.* at 599-600).

⁷³ Indeed, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, *supra* note 71, proportionality was explicitly used and the question was framed in line with the third stage test: “Was the benefit to the employer from the random alcohol testing policy in this dangerous workplace proportional to the harm to employee privacy?” (*ibid.* at para. 43).

⁷⁴ See *e.g. Colwell v. Cornerstone Properties Inc.* [2008] O.J. No. 5092, 173 A.C.W.S. (3d) 492: An employee who found out that a secret surveillance was installed for several months in her office, suffered mental stress and left her job. She sued for breach of contract amounting to constructive dismissal. The court held that the duty of each party to treat each other in good faith was an implied term in her employment contract and that the employer’s actions breached that duty. See also *Entrop v. Imperial Oil Ltd.*, *infra* note 88 on drug and alcohol testing in a non-unionized workplace which was dealt through the lens of discrimination as it infringed the rights of an employee with a history of substance abuse.

⁷⁵ See *R. v. Cole*, 2012 SCC 53: A high-school teacher was charged with possession of child pornography and unauthorized use of a computer. The school policy permitted the use of work-issued laptop computers for incidental personal purposes, but expressly prohibited the use or storage of inappropriate content and allowed access by the school to private emails. The Supreme Court of Canada held, among other things, that the ownership of the computer by the school board was not determinative of the teacher’s expectation of privacy, and that “while workplace policies and

invasion of privacy (“intrusion upon seclusion”) has been established in Ontario and may be used against employers who invade the privacy of their employees.⁷⁶ However, this is merely a partial solution because it covers only extreme cases of intentional action, thus allowing most employers to continue collecting and using information on their employees. Subjecting employers’ actions to the principle of proportionality, even in the absence of specific privacy legislation, may be an appropriate solution.

We have seen that proportionality is used *explicitly* in at least two labour and employment law contexts: just cause and privacy. However, while the term “proportionality” has been invoked by courts in these two contexts, this has not been consistent. In some cases this term has not been mentioned. Moreover, the three proportionality tests, although they can often be found between the lines, are not usually applied separately and systematically.

3. Implicit Use

(1) Introduction

In this Section we describe restrictive covenants, workplace discrimination, picketing and unfair labour practice cases, where courts have developed legal tests, which are very similar to the proportionality test yet absent any direct reference to proportionality.⁷⁷ The legal tests developed in some of these contexts are well established and structured. One might then ask why using proportionality in an explicit manner will be beneficial in these contexts. Our answer is twofold: First, once it is realized that the tests used in these contexts are in fact very similar to proportionality, it could prove beneficial to start using all three stages of the test – which in some cases would add some additional relevant considerations into the analysis. Second, even if no change is made to the jurisprudence on this particular topic and the same test prevails without referring to proportionality, by showing that courts are *de facto* using implicitly the proportionality tests, the argument that we wish to advance is that these tests are generally useful in various contexts of labour and employment law. They are already used in some contexts, and can be used in other contexts. In other words, we

practices may diminish an individual’s expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely” (*ibid.* at para. 3).

⁷⁶ See *Jones v. Tsige*, 2012 ONCA 32.

⁷⁷ Cases on constructive dismissal (which limits managerial prerogative) can also be viewed as reminiscent of proportionality. While employers’ legitimate objective is to run a productive and profitable business and they often make changes in the workplace to achieve that aim, a unilateral fundamental change, which a reasonable person in the employee’s position would find unreasonable and unfair, such as major changes to the compensation package, significant changes in duties (demotion) or substantial changes to the location of employment (*i.e.* disproportionate change) amounts to repudiation of the employment contract. See e.g. *Farber v. Royal Company*, [1996] S.C.J. No. 118; *Mifsud v. MacMillan Bathurst Inc.* [1989] O.J. No. 1967.

are taking a broad look at several topics in labour and employment law, in which tests have developed in a way that appears unrelated to one another, and we show that in fact the tests are very similar in all of those contexts, and they are also very similar to the *Oakes* test. This observation is, in our opinion, useful as a general jurisprudential point: demonstrating the importance and prevalence of proportionality as a general principle of law – including private law – even when it is not mentioned explicitly. This also supports the argument that proportionality tests *should* be used in some additional contexts.

(2) Restrictive Covenants

A prominent example of an implicit use of proportionality in the employment sphere is found in restrictive covenants cases. Generally, non-competition clauses in an employment contract are viewed as a restraint of trade and are presumed unenforceable, unless the employer shows that the non-competition clause is necessary to protect the employer's legitimate proprietary or business interests; that the non-competition clause covers a reasonable length of time and geographic area; and that a non-solicitation clause would not suffice to protect the employer's legitimate interests in the circumstances.⁷⁸ As the Supreme Court of Canada held:

A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. ... competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable." The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case.⁷⁹

Reasonableness is a relatively vague legal concept. Proportionality, on the other hand – which could be seen as a *concretization* of reasonableness – provides more guidance through the three different tests. And in fact, the test used by judges to assess restrictive covenants appears to be in line with proportionality. While proportionality is not mentioned explicitly in the prevalent legal analysis, two stages of the *Oakes* test can be clearly identified. The employer is required to identify a legitimate objective (proprietary or business interest) and to explain why a non-competition clause is necessary to protect this objective. This requirement resembles the test of rational connection.

⁷⁸ See e.g. *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916 at 925-26; *Friesen v. McKague* (1992) 96 D.L.R. (4th) 341; *Lyons v. Multari*, (2000) 50 O.R. (3d) 526.

⁷⁹ *Elsley v. J.G. Collins Ins. Agencies*, *supra* note 79 at 923.

Furthermore, the employer has to draft a reasonable restrictive covenant in terms of time and space and to use a non-solicitation clause (rather than a non-competition clause) when it is effective in obtaining the legitimate objective. These requirements are very similar to the test of minimal impairment. Where there are less intrusive ways of achieving the goal, the employer has to choose them. As the Manitoba Court of Appeal held:

The onus of proving that a covenant is reasonable as between the parties falls upon the party relying on it, i.e. the plaintiffs in this case. The presumption is rebuttable by evidence showing that the covenant is reasonable in that it goes *no further than is necessary* to protect the legitimate rights of an employer, and *does not unduly restrain* the employee.⁸⁰

(3) *Discrimination*

Another test which turns out to be very similar to proportionality is the *bona fide* occupational requirement (BFOR) defence in workplace discrimination cases. In *Meiorin*,⁸¹ the Supreme Court of Canada developed a three stage test to determine whether an employer established the BFOR defence, after an employee or a job applicant has shown a *prima facie* case of discrimination. Proportionality was mentioned briefly when the Court explained why direct discrimination and adverse effect discrimination should be subject to the same analysis, despite some semantic differences across provinces: “In both cases, whether the operative words are ‘reasonable alternative’ or ‘proportionality’ or ‘accommodation’, the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual”.⁸²

By contrast, the test itself, which includes three limbs, does not refer to proportionality but clearly includes elements of the *Oakes* test. To determine whether a *prima facie* discriminatory standard is a BFOR, an employer has to justify the impugned standard by establishing on the balance of probabilities that:

the employer adopted the standard for a purpose rationally connected to the performance of the job; that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be

⁸⁰ *Friesen v. McKague*, *supra* note 78 [emphasis added].

⁸¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*Meiorin*].

⁸² *Ibid.* at para. 38.

demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁸³

The first limb of this test explicitly adopts a rational connection test (the first stage of the *Oakes* test). The second limb, requiring honesty and good faith, can be understood as an additional check on the legitimacy of the purpose. If the employer acts in bad faith – in an attempt to achieve illegitimate goals – then it arguably fails the same rational connection test. The third limb includes elements of all three stages of the *Oakes* test. The employer’s justifiable objective is to assign jobs to the most competent employees and for this purpose the employer develops workplace standards (*i.e.* the measures). The third limb of the *Meiorin* test examines first whether the workplace standard is reasonably necessary to the accomplishment of that purpose. This requires a rational connection between the workplace standard and the employer’s purpose. It also requires necessity, *i.e.* consideration of alternative ways of achieving the employer’s goals which are less intrusive. Alternatives may include for example “various ways in which individual capabilities may be accommodated”.⁸⁴ As the Court explains, “there may be different ways to perform the job while still accomplishing the employer’s legitimate work-related purpose... The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible”.⁸⁵ Finally, the third limb involves an act of balancing the interests and rights of the employer, the employee, and other workers, as part of the duty to accommodate and undue hardship analysis. As the Court elucidates, this act of balancing includes factors such as “the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees”.⁸⁶

The Court then lists a number of supporting questions which again reflect a very similar analysis to the *Oakes* test.⁸⁷ The questions “Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?”, “If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?” and “Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?” are all akin to the second stage of the *Oakes* test. The question “Is it necessary to have all employees meet the single

⁸³ *Ibid.* at para. 54.

⁸⁴ *Ibid.* at para. 64.

⁸⁵ *Ibid.* at para. 64.

⁸⁶ *Ibid.* at para. 63.

⁸⁷ *Ibid.* at para. 65.

standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?” reflects the first stage of the *Oakes* test (or alternatively could be understood as referring to minimal impairment as well). The question “Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?” resembles the third stage of the *Oakes* test.

Subsequent cases have followed the same analysis. In *Entrop v. Imperial Oil Ltd.*,⁸⁸ for example, Imperial adopted an employee alcohol and drug testing policy with a sanction for positive testing of automatic termination of employment. The issue was whether this policy was discriminatory on the basis of disability (which includes substance abuse). The legitimate purpose of minimizing risk of impairment due to substance abuse and ensuring a safe workplace free of impairment, especially in safety-sensitive positions, was clearly identified. The Ontario Court of Appeal held that while drug testing was in general rationally connected to work performance, it cannot measure present impairment of ability to perform work safely, but only past drug use. Accordingly, the Court held that this testing cannot be justified as reasonably necessary to accomplish Imperial’s legitimate goal – which in this case appears to suggest that the policy failed the rational connection test.⁸⁹ It was also held that the sanction for a positive test was too severe, “more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities” (*i.e.* failed the minimal impairment test).⁹⁰

(4) Picketing

Another context we would like to discuss under implicit use of proportionality involves picketing cases. Proportionality may be relevant to picketing in two different contexts. The first context is constitutional and examines whether picketing should be permitted or restricted by legislation or common law rules. The second focuses on the relationship between the union and the employer and assesses whether the use of picketing is appropriate – *i.e.* it concerns the application of the legislation (or common law rule) in the specific circumstances. The relevance of proportionality in the first constitutional context is clear. Picketing is a form of expression and as such is protected under s. 2(b) of the *Charter*. Imposing limitations on picketing may therefore be justifiable only in accordance with s. 1 and the *Oakes* test. Our focus in this paper is on the second, less obvious relevance of proportionality. When determining whether to issue an injunction or not, courts examine the union’s

⁸⁸ [2000] O.J. No. 2689.

⁸⁹ *Ibid.* at para 99.

⁹⁰ *Ibid.* at para 100.

actions and require certain standards (sometimes imposed by an injunction order) in line with the principle of proportionality.

In the case of *Pepsi Cola*,⁹¹ the Supreme Court of Canada dealt with both contexts. First, it examined the constitutionality of banning or limiting secondary picketing at common law and held that secondary picketing should be allowed unless it involves a wrongful action (e.g. a crime or a tort) because picketing engages freedom of expression which is constitutionally protected under s. 2(b) of the *Charter*.⁹² The Court held that the *Charter* is relevant despite the private nature of the matter because:

The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.⁹³

Furthermore, since freedom of expression is not unlimited and is subject to reasonable limitation under s.1,⁹⁴ the Court subjected the common law to s. 1 values: “Limitations are permitted, but only to the extent that this is shown to be ‘reasonable and demonstrably necessary in a free and democratic society’”.⁹⁵

Next, the Court moved to assess the dispute between the private parties – Pepsi Cola and the trade union – and asked whether the use of secondary picketing was appropriate. It held that the protest outside the homes of Pepsi-Cola’s management personnel was tortious and upheld the injunction order, but allowed the peaceful picketing outside retail outlets selling Pepsi Cola products.⁹⁶ Although this “wrongful action approach” does not require a balancing act on its face,⁹⁷ the Court recognized that courts and legislatures may have to provide supplementary guidelines:

Doubtless issues will arise around the elaboration of the relevant torts and the tailoring of remedies to focus narrowly on the illegal activity at issue. Doubtless too, circumstances

⁹¹ *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] S.C.J. No. 7, 2002 SCC 8 [*Pepsi Cola*].

⁹² The Court first delved into the relationship between common law and the Charter in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603, where it stated that the common law “does not grow in isolation from the Charter, but rather with it”.

⁹³ *Pepsi Cola*, *supra* note 91 at para. 18. As was stated in *RWDSU v. Dolphin Delivery Ltd.*, when a private party sues another private party under common law, the *Charter* does not apply, but the principles of the common law should apply and be developed “in a manner consistent with the fundamental values enshrined in the Constitution” (*supra* note 92 at para. 39).

⁹⁴ *Pepsi Cola*, *supra* note 91 at para. 36.

⁹⁵ *Ibid.* at para. 37.

⁹⁶ *Ibid.* at para. 116-117.

⁹⁷ See Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers – and to all Canadians” (2012) 34 *Dalhousie L.J.* 143 at 153.

will present themselves where it will become difficult to separate the expressive from the tortious activity. In dealing with these issues, the courts may be expected to develop the common law sensitively, with a view to maintaining an appropriate balance between the need to preserve third-party interests and prevent labour strife from spreading unduly, and the need to respect the Charter rights of picketers.⁹⁸

In our view, “maintaining an appropriate balance” requires a proportionality analysis which may be developed at common law. The Court recognized that picketing may cause economic harm to employers and third parties, but maintained that it is usually allowed because it is “anticipated by our labour relations system as a necessary cost of resolving industrial conflict”.⁹⁹ However, in the case of “most problematic” picketing, “whose value is clearly outweighed by the harm done to the neutral third party” and which causes irreparable harm to the employer, picketing will not be allowed or will be subject to some restrictions.¹⁰⁰ These statements have opened the door for a proportionality analysis in subsequent cases.

In some jurisdictions, injunction orders in labour disputes are regulated by a statute. In Ontario, for example, an employer or a third party has to show that there are activities taking place that cause danger of damage to property, or danger of injury to people, or obstruction of or interference with lawful entry or exit from the property.¹⁰¹ While the statute does not explicitly refer to proportionality, post-*Pepsi Cola* cases have engaged in an analysis that closely resembles the *Oakes* test. As will be argued later, a more explicit use could make a better sense in the reasoning, put it into order, and provide much better guidance for future cases. In *Unilux Boiler Corp. v. Fraser*,¹⁰² for example, when employees committed tortious acts and criminal misconduct in the course of their picketing, Unilux sought an injunction that would, among other things, limit the number of picketers. The Ontario Superior Court of Justice examined this request and held that it was “an unmerited infringement on the Union’s ability to provide support for the remaining strikers and to exert pressure on their employers”.¹⁰³ In other words, the union met the first stage of the *Oakes* test: its actions were rationally related to the aim of exerting pressure upon their employer. However, the Court was willing to issue an order restraining the union from preventing entrance or exit for any time longer than five minutes.¹⁰⁴ That is, the union failed to meet the second stage of the

⁹⁸ *Pepsi Cola*, *supra* note 91 at para. 107.

⁹⁹ *Ibid.* at para. 45.

¹⁰⁰ *Ibid.* at para. 106.

¹⁰¹ See Ontario Courts of Justice Act, R.S.O. 1990, c. C.43, s. 102.

¹⁰² [2005] O.J. No. 2410.

¹⁰³ *Ibid.* at para 39.

¹⁰⁴ *Ibid.* at para. 40.

Oakes test. Apparently the Court felt that a five-minute delay at the entrance was sufficient to achieve the goals of picketing (conveying information about the dispute and exerting social and economic pressure on the employer) – and accordingly a longer delay could not be justified. Alternatively, perhaps the Court felt that the union did not meet the third stage of the *Oakes* test because the costs to the employer outweighed the benefits of picketing when people were delayed at the entrance for more than five minutes. It is not clear from the judgment which of the two tests was applied; the Court only emphasized the fact that some of the union’s actions were unlawful.¹⁰⁵ But some form of a proportionality test is obviously required if injunctions are issued only against delays at the entrance that are longer than five minutes. Why five and not more or less? Either a minimal impairment test or the third proportionality test is necessary to justify such a conclusion.

In *Ogden Entertainment*,¹⁰⁶ at issue were striking workers of the Corel Centre in the City of Kanata, where NHL games were played, who had set up large picket lines on nights of hockey games. They impeded the access of passenger vehicles, public transit, commercial vehicles, team buses and more. Traffic jams resulted, causing traffic on the highway to back up for many miles. The picketers did not distribute leaflets or try to communicate with the occupants of any vehicles. The Ontario Court of Justice held that the picketing amounted to a criminal offence and nuisance, and stressed that the only thing the picketers achieved was the obstruction of vehicles.¹⁰⁷ It also stated that there might be a need for special rules to apply in cases which involve large numbers of people who are not party to the labour dispute.¹⁰⁸ The Court issued an injunction restraining the picketers from interfering, blocking or delaying any person or vehicle from entering or exiting the Centre.¹⁰⁹

This is another example of how courts resort *de facto* to a proportionality analysis, and a more structured analysis in line with the three stage *Oakes* test could have been beneficial. The Court maintained that the picketers did not convey information to the public and achieved nothing other than the obstruction of vehicles. This appears to mean that they failed the first proportionality test: no rational connection to a legitimate goal. However, a better articulation of the union’s goal – which recognizes the need to exert economic pressure on the employer – could have led to a different conclusion. Arguably, the analysis would have benefited from a discussion of the second stage: did

¹⁰⁵ *Ibid.* at para. 22.

¹⁰⁶ *Ogden Entertainment Services v. USWA, Local 440* [1998] O.J. No. 1769, (1998) 159 D.L.R. (4th) 340 (Gen. Div.).

¹⁰⁷ *Ibid.* at paras. 9, 18-19.

¹⁰⁸ *Ibid.* at para. 25.

¹⁰⁹ *Ibid.* at para. 31. The Court of Appeal upheld the order except for the part where the court directed the Ontario Provincial Police to enforce the order because the order arises out of a civil proceeding ((1998) 38 O.R. (3d) 448, [1998] O.J. No. 1824).

the union have other alternatives – less harmful to the employer – to achieve its legitimate goals? The court did hold that the picketers committed the tort of nuisance which is clearly harmful to the employer, but it did not consider whether other, less harmful ways to achieve its legitimate goals were actually available to the union. Moreover, as part of the "balance of convenience" examination which courts employ to consider petitions for injunctions, the Court weighed the employees' interest in obstructing traffic against the employer's right to enjoy lawful entrance to and exit from its premises by its tenants, other employees and members of the public.¹¹⁰ Not surprisingly, it concluded in favour of the employer.¹¹¹ An explicit resort to the third proportionality test could have led to a better articulation of the rights and interests involved. Employees obviously do not have a right to obstruct traffic *per se*; but they have a right or at least a legitimate interest to exert pressure on the employer as a way to secure better work conditions. The Court should have considered not only the damage to the employer and the public, but also the importance of the actions for the picketers themselves.

In *Ledcor*,¹¹² the workplace was under substantial renovations and as a result of picketing at the entrance, which included delays of vehicles, construction had to be shut down. The Ontario Superior Court of Justice allowed picketing, but to ensure that construction workers were let in it limited the maximum number of picketers to 20. They were further prohibited from obstructing or blocking entrances to or exit from the site. This resembles the second test of minimal impairment.¹¹³ The Court in effect concluded that there were less intrusive ways to achieve the objective and since the union had not chosen them, the Court had to impose some limitations.

In *Industrial Hardwood*,¹¹⁴ the strikers set up a picket line and blocked the entrance of vans carrying replacement workers. The delay was up to an hour and included harassment of replacement workers and damage to the vans. The Ontario Superior Court of Justice issued an order which prohibited picketers from preventing vehicular access to the workplace and also prohibited all picketing at the plant except for the purpose of communicating information to those wishing to receive it and only for a maximum of five minutes. The order also limited the number of picketers to

¹¹⁰ *Ogden Entertainment Services v. USWA, Local 440*, *supra* note 106 at para. 30.

¹¹¹ *Ibid.* at para. 28.

¹¹² *Ledcor Industries v. Sheet Metal Workers' Association*, 2004 ONSC 10148.

¹¹³ *Ibid.* at para. 23.

¹¹⁴ *Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Workers of Canada, Local 2693*, [2000] OJ no. 536.

four at each plant entrance. The Court of Appeal upheld the order except for the limitation on the number of picketers.¹¹⁵

This analysis again echoes the three stage *Oakes* test. The Court of Appeal stated the union's legitimate objective as follows: picketing "provides striking workers with the collective opportunity to seek to persuade others of the rightness of their cause. It allows them to express through collective action their solidarity in pursuit of that cause. And it provides an important outlet for collective energy in what is often a charged atmosphere".¹¹⁶ Based on this starting point, the first stage of the *Oakes* test was not met: blocking the entrance and harassing replacement workers is not effective in achieving this objective. Providing them with information, as the order suggests, is rationally related to the objective. The second stage of the *Oakes* test was not met: there were less intrusive means to achieve the objective. As the Court of Appeal stated, "the delays were in the range of half an hour, considerably longer than reasonably necessary for the picketers to effectively communicate their position to the occupants of the vans".¹¹⁷ The order therefore limited the delay to five minutes. The third stage of the *Oakes* test was not met: the harms caused by the picketing outweighed its benefits. The case did not involve any property damage or personal injury, but the Court considered the degree and duration of obstruction to entry or exit to be very substantial.¹¹⁸ To be sure, the results could have been different had the Court considered the goal of exerting pressure on the employer or preventing strike-breaking as well. Even if the three proportionality tests are applied explicitly and separately, there is always room for discretion (and disagreement) on how to apply them. But such an analysis can help in pointing attention to all relevant considerations and creating a more structured decision process.¹¹⁹

(5) *Unfair Labour Practice*

A final example of an implicit use of proportionality we would like to discuss revolves around unfair labour practice cases. Although the requirement does not appear in certain (often central) provisions on employers' interference with trade unions, labour relations boards and courts have insisted on a finding that employers were *intentionally* involved in unfair labour practice before holding them

¹¹⁵ (2001), 52 OR (3d) 694; [2001] OJ no. 28 (CA).

¹¹⁶ *Ibid.* at para. 14.

¹¹⁷ *Ibid.* at para. 25.

¹¹⁸ *Ibid.* at paras. 23-27.

¹¹⁹ For an additional example see *Aramark Canada Ltd. v. Keating*, [2002] O.J. No. 3505. Note that in this case, the Court does consider the legitimate goal of exerting pressure on the employer (*ibid.* at para. 29).

liable.¹²⁰ A more balanced approach could be to prohibit any sort of anti-union action subject to the principle of proportionality. That is, employers often exercise their managerial prerogative to advance various actions in the workplace. These actions might interfere with trade unions. When an employer shows that there was a legitimate objective behind its action that is rationally connected to the action; that the action was the least intrusive one to achieve the legitimate objective; and that the harm to employees' rights and interests is not disproportional to the benefits of achieving that objective, the action would be allowed. In contrast, anti-union actions that are not proportional would be considered unfair (and thus illegal) regardless of the employer's intention.

A few cases have followed this proportionality analysis, though implicitly. The leading example is *CBC v. Canada Labour Relations Board*¹²¹ where the union filed an unfair labour practice complaint, claiming that CBC interfered with its actions when it forced the union president (Goldhawk) to choose between his job as host of a radio program and his role as union president. This move by CBC followed an article which Goldhawk had written, and that the network thought was in violation of its journalistic policy. The complaint was upheld by the Canada Labour Relations Board and the Supreme Court of Canada. While CBC's actions were not intentionally anti-union, it was found liable because the unfair labour practice provision in the federal code (as well as in other Canadian jurisdictions) is not limited to intentional actions but broadly prohibits any interference. As Brian Langille and Patrick Macklem describe it, it was clear that CBC had interfered with employee representation, yet:

The issue, just as it is in human rights and constitutional analysis, is of possible justification. This requires ... a balancing or proportionality analysis. And this is what the board and the Court did, with the result that the CBC was not able to justify its decision by reference to a compelling business justification of its action.¹²²

In *Hydro One*, the Board explained which factors come into play when assessing an employer's conduct to determine whether it constitutes an unfair labour practice. The Board employed elements of proportionality (especially the third stage test which measures the severity of the interference to the trade union against the benefits of achieving the legitimate business goal) when it looked for "more than incidental interference with the trade union" and examined whether there was an "imbalance of interests in favour of the protected activity", "whether the conduct

¹²⁰ See e.g. s. 70 (as opposed to s. 72) of the Ontario Labour Relations Act, S.O. 1995, c.1; *International Wallcoverings*, [1983] OLRB Rep. 1316; Brian Langille & Patrick Macklem, "The Political Economy of Fairness: Frank Iacobucci's Labour Law Jurisprudence" (2007) 57 U. Toronto L.J. 343 at 353.

¹²¹ [1995] 1 S.C.R. 157 [*Goldhawk*].

¹²² Langille & Macklem, *supra* note 120 at 353. See e.g. *International Wallcoverings*, [1983] O.L.R.B. Rep. 1316.

threatened the formation or very existence of a trade union” and “whether the employer conduct [was] classic business activity, such as a bona fide exercise of a managerial prerogative, such as a lay off, or subcontracting decision”.¹²³ An explicit resort to all three stages of the proportionality test could be more beneficial. It would ask whether the action which may interfere with the trade union will achieve the legitimate business goal (rational connection). It would also ask whether the action is necessary or whether there are other less intrusive ways to achieve the legitimate business goal.

C. Justifications for Applying Proportionality in Labour and Employment Law

1. Introduction

In the previous part we have shown that proportionality tests are already an important feature of Canadian labour and employment law. In the current part we turn from the descriptive to the normative. To justify the growing practice of resorting to proportionality tests – and to suggest that this practice should be expanded, and become more explicit and structured – we proceed in three steps. First, in section 2, we argue that it is justified to place a high standard of behaviour on employers vis-à-vis their employees – higher than the standard demanded in other contracts. It is similarly justified to demand a higher standard from unions when they are exercising powers that harm employers and the public at large. Then in section 3 we argue that the proportionality tests are an appropriate choice for such a higher standard: they are more concrete than other (vague) standards, providing clear guidance, and they generally refrain from intervening in the choice of goals (thus offering balanced solutions).¹²⁴ In this context it will be shown that proportionality is already used by other legal systems and has proven useful to solve labour law questions. Finally, in section 4 we discuss the doctrinal issues. We argue that applying the proportionality tests is within the discretion of the courts when developing the common law and in some cases when interpreting legislation; and that applying these tests will have the added advantage of improved coherence within the legal system.

2. A Higher Standard of Behaviour is Normatively Justified

¹²³ *The Society of Energy Professionals v. Hydro One Inc.* [2005] O.L.R.D. No. 4472 at para. 76.

¹²⁴ Section 2 and the first part of section 3 are based to some extent on Davidov, *supra* note 14 and Guy Davidov, “The Principle of Proportionality in Labour Law” (2008) 31 *Iyunei Mishpat* (Tel-Aviv University L. Rev.) 5 [Hebrew]. For additional references, see there.

A market economy is based to a large extent on self-interest. People are allowed to act to advance their own interests. Indeed, they are *expected* to do so, and contract laws assume that a meeting of (self) interests will lead to an agreement beneficial to both parties, and indirectly, to society at large. The law therefore generally supports such agreements, without requiring individual actors to consider the interests of others with whom they contract or otherwise societal interests. There are exceptions, as we shall see shortly, but this is the default rule.

The government, on the other hand, is expected to uphold to a higher standard. Government officials making a decision obviously think first and foremost about the Government's interests, and so they should. But they also have to consider the implications for others; if a decision harms someone else, they have to take this into account. The leading benchmark used in recent years to examine governmental decisions is proportionality. In Canada as in many other countries, society expects the Government to act in accordance with the standard of proportionality, meaning that the decision has to pass the three tests mentioned above. Why does the law demand a higher standard of behaviour from the Government, compared with the one required in dealings between private actors? One answer could be the fact that the Government acts as our "long arm". Government officials represent us and make decisions on our behalf. It is only natural that we demand that they do so with a degree of respect to our interests – at the very least take them into consideration.

There is, however, another justification, which is just as valid. Governments have power, and power should be used responsibly. In various contexts, the law is designed to prevent abuse of power by those who hold it; public law can be seen as an example of this general legal rule. But power is held by private actors as well. Corporations have significant powers, which the law limits in various ways – for example, with competition (anti-trust) laws, or consumer laws. In these cases private actors can no longer act freely to promote their self-interest. Rather, the law creates limitations to ensure that the interests of other parties are considered – that harms to others are minimized.¹²⁵ Employment standards are in effect another example for this general rule. They are based on the understanding that employment relationships are characterized by a power imbalance. Employers sometimes abuse their superior powers, and employment laws are designed to prevent that – for

¹²⁵ Accordingly, in Germany, the Constitutional Court "recognized a constitutional duty to protect fundamental rights not only vis-a-vis the state but also vis-a-vis threats stemming from private parties or societal forces. Since threats of this sort are themselves a result of the exercise of fundamental rights, this duty can be fulfilled only by limiting one group's rights in order to protect the rights of another". As Grimm points out, Canadian law also recognizes that "protecting a 'vulnerable' or 'not ... powerful group in society' may justify a limitation vis-a-vis those who profit from this vulnerability" (Grimm, *supra* note 2 at 392, citing *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713).

example by setting a minimum wage. If the interests of employees are sufficiently considered, the wage cannot fall below a certain minimum.

In collective relations, both parties have powers, and the same ideas apply. Here it is not only the employer but also the union that is expected to use its power responsibly. The law recognizes the right to strike (or picket, etc.) and protects striking employees; in effect, unions have been given a legal power to take collective industrial actions. At the same time it is justified to demand that decisions concerning such actions – which create significant harms to both employers and the public at large – measure up to a high standard of behavior, to ensure that the power is not abused.

3. Proportionality is an Appropriate Choice of a Higher Standard of Behaviour

It should be fairly easy to accept the argument in the previous section. After all, labour and employment laws already create various limitations on the exercise of power by employers and by unions. And without getting into the details of these laws, their basic existence is uncontroversial. The question, however, is why should we add an additional limitation (proportionality) to the ones that are already detailed in legislation? Here we offer two separate answers. First, adopting the principle of proportionality does not necessarily create *additional* limitations. As we have shown in the previous part, in many cases the current law – whether legislation or common law – already places limits on the use of power by employers (or unions). Thus, for example, employers are legally entitled to dismiss employees, but this power has various limitations. Unions are legally entitled to organize picketing, but again this power is not without limitations. Judges are left with broad room for discretion when applying these laws – and the three proportionality tests can be a useful aid. In other words, in many cases proportionality would simply put the analysis into order. While employee rights have been granted considerable weight in the case law, applying proportionality would strike an appropriate balance between the rights of employees and rights and interests of employers. As England argues, the use of proportionality is essential in ensuring that employee rights are not “advanced at the expense of unduly impairing employers’ economic efficiency, from which everyone ultimately benefits”.¹²⁶

The second answer refers to situations in which proportionality would indeed create new limitations on employers (or unions). We argue that this too is justified, at least in some contexts. This can be achieved by judicial development of the common law. We discuss the doctrinal viability

¹²⁶ England, *supra* note 16 at 5.

of this proposal in the next section. Here we wish to justify the choice of instrument; why proportionality and not some other standard?

The employment relationship is dynamic. Demands from an employee change over time. Mutual expectations evolve and so do workplace norms and rules. New managers and co-workers replace old ones. Power can be used (and abused) in different and unexpected ways. Some are addressed by specific regulations, but these can never cover the entire range of possibilities. It is therefore useful to leave some degree of discretion for courts through various open-ended standards to prevent the abuse of power in unforeseen situations. Indeed, legislatures have established and adjudicators have also developed a *de facto* requirement of fairness in some employment contexts.¹²⁷ And as we have seen, employers are sometimes required by common law to stand up to a “reasonableness” standard.¹²⁸ Canadian courts have recognized implied contractual duties to treat employees with civility, decency, respect and dignity,¹²⁹ and to exercise discretion reasonably or at least honestly and in good faith when discretion may adversely affect employee’s interests.¹³⁰ In other legal systems a requirement of “good faith” in employment relations is increasingly gaining ground.¹³¹

The advantage of these open-ended standards is their ability to cover new problems in an ever-changing landscape. There is, obviously, a price in term of indeterminacy and vagueness.¹³² To allow workers to know their rights and employers to know their obligations, we need concrete rules. To some extent such rules can be developed over the years by courts implementing the open-ended concepts, but such rules are always incomplete. We believe that the principle of proportionality

¹²⁷ See discussion in Section B specifically on just cause dismissal and privacy in the workplace.

¹²⁸ See discussion above in Section B specifically on privacy and discrimination in the workplace. Furthermore, Sullivan & Frase, *supra* note 5 at 14 argue that the “common law originally embraced proportionality in the general sense”, specifically common law limitations on compensatory damages in contract and tort (see *ibid.* at c. 2).

¹²⁹ See Kevin Banks, “Progress and Paradox: the Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law” (2011) 32:3 Comp. Lab. L. & Pol’y J. 547 at 574-77.

¹³⁰ *Ibid.* at 578-80. See also *Metropolitan Toronto (Municipality) v. C.U.P.E., Local 43*, *supra* note 70 on the obligation of management in a unionized setting to exercise its discretion reasonably (that is, collective agreements include an implied term of “reasonable contract administration”).

¹³¹ See e.g. in Israel, Davidov, *supra* note 14 at 71-72. In Canada, there is no general duty to act in good faith during the course of the employment relationship. There is however a duty to act in good faith in the manner of dismissal (see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). Furthermore, there are many cases where courts in fact imposed an implied duty of fairness in the course of the employment relationship. These cases revolve around constructive dismissal but reveal some important duties of fairness such as obliging “employers to conduct performance appraisals in a fair and sensitive manner, and to assign work duties in a fair and reasonable way” (England, *supra* note 16 at 23-24). See also Banks, *supra* note 129, who argues that common law implied contractual duties and constraints imposed by tort law upon employers closely resemble a general duty of good faith and fair dealing.

¹³² On the imprecision of good faith doctrines see e.g. Reuben A. Hasson, “Good Faith in Contract Law – Some Lessons from Insurance Law” (1987-1988) 13 Canadian Business Law Journal 93; Shannon Kathleen O’Byrne, “The Implied Term of Good Faith and Fair Dealing: Recent Developments” (2007) 86:2 Canadian Bar Review 193.

offers a balance: it is open-ended and yet includes relatively concrete rules – the three proportionality tests. Admittedly they do not offer clear-cut solutions for any given case. Yet the three-test structure offers a principled way to analyze the problem which promises a degree of determinacy and predictability higher than that existing in open-ended standards.¹³³

Proportionality also offers a balance in terms of respecting the rights and interests of both parties. The default rule is that the employer is free to make any managerial decision – the principle of proportionality does not generally intervene in business judgments and choices. The exception is that society insists on a degree of respect for the rights and interests of employees. Employers are not expected to completely internalize the costs of their decisions on employees. They are, however, expected to refrain from choosing means that do not advance their own goals; means that harm the employees more than necessary to achieve these goals; or means that infringe the rights of employees in a way that inflicts harms disproportionate to the expected gains. In short, the proportionality tests ensure that the harms to employees are minimized, while also minimizing any intervention in business decisions.

This does not mean that every decision by every employer (and union) must be subject to a proportionality analysis. Some decisions are entirely prohibited, and should remain so (for example, dismissing an employee because of union activities). Other decisions are entirely within the employer's discretion, and should remain so (for example, choosing the managers). Our focus here is on decisions that fall somewhere in between: they are allowed in principle but subject to limitations – and we argue that the proportionality tests are a useful and appropriate way to articulate such limitations and to structure their analysis. We believe that this is warranted and justified in the various contexts discussed in the previous part. We also believe that the same tests could be useful and justified in other labour and employment contexts. We give two examples in the next part; additional contexts could be considered in future research.

There are two possible critiques of proportionality that should be considered here. First, a relatively open-ended standard could be difficult to enforce. One could argue that such a standard would be relevant as a matter of practice only for high-level employees, with access to legal advice and resources. This could lead to more disparity and higher inequality between workers. However, if employers change their decision-making process to consider the impact on employees – as required by proportionality tests – lower-income employees can be expected to benefit as well. Moreover, we

¹³³ As David Beatty argues, proportionality is more impartial and neutral than many other legal principles. Beatty, *supra* note 5 at 162. See also *ibid.* at 166-68.

do not propose to replace other (more concrete) standards, only to add another layer. There is no reason to believe that a requirement to avoid unnecessary or excessive harms to employees would detract in any way from the rights of other employees.

A second possible critique is that applying the principle of proportionality, especially the third part of the test, requires adjudicators to engage in an act of balancing and weighing of various considerations. This might be problematic especially in a private sector context where the decision makers (in the current context, employers or trade unions) are in the best position to engage in such an analysis and their discretion should not be replaced by the adjudicators' discretion. Intervening in managerial decisions infringes the autonomy of employers and could be detrimental to efficiency. Intervening in union decisions could be similarly detrimental to their autonomy and ability to achieve their goals. Our response is twofold. First, as the examples in the previous part show, courts are already required to engage in balancing when applying the law. We simply suggest replacing existing standards such as reasonableness with the more structured tests of proportionality. Second, proportionality analysis includes almost no intervention in the choice of goals (except for very extreme situations in which goals will be deemed illegitimate). Employers and unions will thus continue to have very broad discretion in choosing their goals. The demand to choose means that are rationally related to that goal, and will minimize the negative impact on others as much as possible, is hardly a cause for concern. Rationality and minimal respect for others are not a recipe for inefficiency – quite the contrary.¹³⁴ The situation is a bit different with regard to the third proportionality test, requiring employers (and unions) to internalize, to some extent, the costs of their decisions on others. To limit the harms of this demand, we suggest that the level of scrutiny vary depending on the type of decision that is in question. For example, when fundamental rights are at stake (such as equality, privacy or freedom of association), stricter scrutiny is more appropriate compared with the protection of other interests (such as one's job in just cause cases). In the latter cases, the third proportionality test could be relaxed, allowing intervention only in extreme cases of dis-proportionality.

The many advantages of a proportionality test delineated above probably explain the ever-growing reliance on proportionality in the labour and employment laws of other countries. Most notably, proportionality is heavily used as a labour and employment law standard in Germany

¹³⁴ Admittedly there are litigation costs, as well as costs of possible judicial mistakes (i.e. when a court or adjudicator will decide that an employer's actions were not in line with the proportionality tests, due to failing to understand the evidence). But such costs are not significantly different than in any other context of labour and employment law. In practice, employees rarely have the resources to sue, and the overall number of cases is not likely to rise substantially when a new right is created.

(*verhältnismäßigkeitsprinzip*). Interestingly, the strongest example is found in cases on the legality of strikes governing the relationship between trade unions and employers.¹³⁵ The principle was established in 1971, where the Federal Labour Court held that due to their negative impact on the participants as well as third parties and the public in general, strikes and lockouts have to comply with the principle of proportionality.¹³⁶ To meet this requirement, industrial action must be suitable and necessary to achieve legal aims and be proportional to those aims; must be used only after all other negotiations have failed (last resort or *ultima ratio* principle); must not exceed what is necessary to achieve the aim; and both parties must contribute to restore peace as extensively and as soon as possible after the industrial action is over.¹³⁷

In the European Union, the principle of proportionality applies in various private spheres including discrimination law. In October 2000, the EU adopted the Directive establishing a general framework for equal treatment in employment and occupation for all people irrespective of a range of factors.¹³⁸ While direct and indirect forms of discrimination are prohibited,¹³⁹ Article 2(2)(b) provides that indirect discrimination can be justified if it serves a legitimate aim and the means of achieving this aim are objectively necessary and proportionate.

Furthermore, the European Court of Justice subjects trade unions to the principle of proportionality. In the controversial *Laval* case,¹⁴⁰ it was held that the right to take collective action (*i.e.* the right to strike) was a fundamental one, but was subject to certain restrictions. Since it might have infringed the right to provide services, which is one of the fundamental freedoms guaranteed by

¹³⁵ See Manfred Weiss & Marlene Schmidt, *Labour Law and Industrial Relations in Germany*, 4th rev. ed. (Netherland: Wolters Kluwer, 2008) at paras. 493-97.

¹³⁶ BAG (GS) AP Nr 42 on art 9 GG Industrial Action.

¹³⁷ See Carl Mischke, "Industrial Action in German Law" (1992) 13 *Indus. L.J.* 1 at 9; Weiss, *supra* note 174 at 6-7; Weiss & Schmidt, *supra* note 135 at para. 494; Jens Kirchner & Eva Mittelhamm, "Labour Conflicts", in Jens Kirchner, Pascal R. Kremp & Michael Magotsch, eds., *Key Aspects of German Employment and Labour Law* (Heidelberg: Springer, 2010) 199 at 201. The application of proportionality in this context raises extensive criticism, especially because in the constitutional and administrative law proportionality sets limits on the use of power to infringe fundamental rights, whereas in this context it sets limits on the exercise of freedoms. See Mischke, *supra* note 137 at 9, n. 39.

¹³⁸ European Union Council Directive 2000/78/EC of 27 November 2000, OJ L303 at 16-22.

¹³⁹ Article 2.

¹⁴⁰ *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* (C-341/05) [2008] All E.R. (EC) 166; [2007] E.C.R. I-11767; [2008] 2 C.M.L.R. 9; [2008] C.E.C. 438; [2008] I.R.L.R. 160. When Laval Un Partneri Ltd (Latvian company) won a contract from the Swedish government, it posted Latvian workers to Sweden to work on site, who earned much less than comparable Swedish workers. A Swedish Union requested Laval to sign a collective agreement to improve those workers' conditions. But when Laval refused, the Union called a strike to blockade Laval's premises. When Laval could not execute the contract, it claimed that the blockade infringed its right to free movement of services. The Swedish Court referred the case to the European Court of Justice.

the Treaty on the Functioning of European Union, it had to be exercised proportionately.¹⁴¹ This case and other similar cases¹⁴² were criticized for their outcome, which prioritizes economic interests over social interests. Brian Bercusson, for example, argues against the use of proportionality in the context of strikes because strikes are linked to a collective bargaining process and it is difficult to apply proportionality to unions' demands which change and evolve through a process of negotiation. Also, applying proportionality may negatively affect the impartiality of the state in economic conflicts.¹⁴³ On the other hand, while the outcome of these cases was controversial, it does not mean that the application of proportionality should be eliminated altogether. Several commentators have proposed different ways of applying the proportionality tests in this context.¹⁴⁴ Moreover, the justification for using this standard as a limitation of strikes becomes stronger when employers as well have to conform to the same standard.

In the UK, the more structured principle of proportionality has replaced or been called to replace the standard of reasonableness in various employment contexts.¹⁴⁵ The principle of proportionality is well established in discrimination law.¹⁴⁶ This development was influenced by the jurisprudence of the ECJ applying EU equal treatment Directives.¹⁴⁷ These Directives have led to the amendment of existing measures and to the adoption of new measures prohibiting employment

¹⁴¹ *Ibid.* at para. 94. The Court ruled that protecting the workers of the host state against possible social dumping generally constituted a justifiable objective. However, in that case, it did not because the collective bargaining regime in the host state (Sweden) was not precise and accessible enough for an undertaking to determine its obligations in advance (*ibid.* at para. 110).

¹⁴² See e.g. *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* (C-438/05) [2007] ECR I-10779.

¹⁴³ See Brian Bercusson, "The Trade Union Movement and the European Union: Judgment Day" (2007) 13 *European Law Journal* 279 at 304.

¹⁴⁴ Catherine Barnard, "A Proportionate Response to Proportionality in the Field of Collective Action" (2012) 37(2) *E.L. Rev.* 117; Nikolett HÖS, "The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review?" (2010) 1(2) *E.L.L.J.* 236; A.C.L. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ" (2008) 37:2 *Industrial Law Journal* 126 at 148.

¹⁴⁵ See e.g. David Cabrelli, "The Hierarchy of Differing Behavioural Standards of Review in Labour Law" (2011) 40:2 *Indus. L.J.* 147, who discusses the emergence of a "hierarchy" of standards of review for managerial prerogative. He argues that the "by-product of the common law and statutory initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards of review in the employment relationship. The common law and statutory employment protection obligations which are imposed on employers entail that their decision making and general conduct be assessed by adjudicators in accordance with a variety of differing standards of review" (*ibid.* at 147). He argues that in disability discrimination cases the "range of reasonable responses" standard was replaced by a proportionality test (*ibid.* at 160).

¹⁴⁶ Baker, *supra* note 14; Davies, *supra* note 14; and David Cabrelli, "Rules and Standards in the Workplace: A Perspective from the Field of Labour Law" (2011) 31 *Legal Studies* 21.

¹⁴⁷ See Council Directive No. 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, etc. (as amended by Directive 2002/73); Council Directive No. 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

discrimination on various grounds.¹⁴⁸ They also required the application of a proportionality test as part of the defence in indirect cases of discrimination.¹⁴⁹ That is, a neutral-on-its-face provision, criterion or practice can be justified if the employer shows that it was a proportionate means of achieving a legitimate aim.¹⁵⁰ While most cases deal with employers who discriminated against their employees, trade unions are also subject to the same analysis.¹⁵¹ However, English courts often apply a test integrating proportionality and reasonableness, which requires an objective balance between the discriminatory effect and the reasonable needs of the discriminator but avoids subjecting employers to the stricter ECJ standard demanding that indirect discrimination be necessary to meet a real need of the business.¹⁵²

Proportionality also applies in cases of unfair dismissal under the Human Rights Act, 1998, where courts evaluate the justification for dismissal of an employee while infringing his or her rights guaranteed under the Act. The Act incorporates the European Convention on Human Rights protections into UK law.¹⁵³ Although the Act focuses on the public sphere (in the current context: public sector employees), a claim can be invoked against private employers and trade unions by various indirect ways prescribed by the Act.¹⁵⁴ Baker argues that the Act provides a great opportunity to enhance the application of proportionality in British discrimination law cases.¹⁵⁵ Similarly, it was argued for the application of proportionality in workplace privacy cases to reconcile employee privacy with employers' interests.¹⁵⁶

In France, there is a general rule grounded in the Labour Code that prohibits any infringement of workers' rights that is not in line with the principle of proportionality.¹⁵⁷ In Israel, labour courts

¹⁴⁸ This influence had first emerged in the area of sex discrimination. See Paul Davies & Mark Freedland, "The Impact of Public Law on Labour Law, 1972-1997" (1997) 26 *Indus. L.J.* 311 at 327-34. See also the new Equality Act, 2010, which brings together the different grounds of discrimination within one piece of legislation.

¹⁴⁹ Baker, *supra* note 14 at 305-06.

¹⁵⁰ S. 19(2) of the Equality Act, 2010.

¹⁵¹ Davies, *supra* note 14 at 288.

¹⁵² Baker, *supra* note 14 at 307-08; Davies, *supra* note 14 at 300. Baker critiques the way British courts apply proportionality "as if it means only that if the employer can point to strong enough reasons, even an 'unnecessary' rule can be justified, but never the other way around. It is nearly impossible to find a UK employment discrimination decision where the impact of the discrimination is measured or weighed at all" (*ibid.* at 310). Davies argues against the tendency of British courts to respect the employer's decision where economic arguments are made (*ibid.* at 301-03).

¹⁵³ S. 3 of the Act.

¹⁵⁴ Davies, *supra* note 14 at 288, 298. Davies criticizes the way courts apply the proportionality test, *i.e.* the deference to expertise of employers although human rights are at stake (*ibid.* 299-300).

¹⁵⁵ Baker, *supra* note 14 at 316-17.

¹⁵⁶ See Oliver Hazel Oliver, "Email and Internet Monitoring in the Workplace: Information Privacy and Contracting-Out" (2002) 31 *Indus. L.J.* 321.

¹⁵⁷ Code Du Travail, art. L. 120-2 which states that "no one can limit the rights of the individual, or individual and collective freedoms, unless the limitations are justified by the task to be performed or are in proportion to the goal towards which they are aimed". See Jean-Emmanuel Ray & Jacques Rojot, "Worker Privacy in France" (1995) 17 *Comp.*

have been using proportionality tests *de facto* for many years, and more recently they have started referring to the principle explicitly.¹⁵⁸ It is reasonable to assume that this trend will expand into many more countries in the near future.¹⁵⁹

4. Applying the Proportionality Tests is Doctrinally Possible and will Improve Coherence

So far we have argued that it is justified to apply the proportionality tests in the labour and employment sphere, and on private-sector employers as well. But some could question whether this is possible as a matter of doctrine, given the current jurisprudence of the Supreme Court concerning the inapplicability of the *Charter* in private relations. The proportionality tests have been developed in *Oakes* as an aid for the application of the *Charter*'s s. 1. It is therefore not surprising that any mention of proportionality tends to evoke the thinking that the *Charter* is being applied. Nonetheless, our argument does not rely on any change in constitutional jurisprudence. It squares perfectly well with the current jurisprudence, because we are not advocating the direct application of the *Charter* in relations between individuals. We simply use the same legal tool – proportionality – as an aid in another context. For this reason, the use of proportionality is not necessarily limited to situations in which fundamental rights have been infringed. While most of the examples considered in this paper implicate fundamental rights, the same kind of analysis – which we argue it useful for deciding labour and employment law cases – can be useful to analyze the impact on other interests (when those are deemed to be justifying protection).

There are two separate doctrinal routes in which we have argued that proportionality is used (and *should* be used): interpretation of legislative provisions and the development of common-law rules. In both cases, proportionality tests can be infused into current doctrines (and to some extent, they already *have* been infused). It does not mean that employees have constitutional rights vis-à-vis the employer. It simply means that limitations on employers (and unions) are placed into the same structure of analysis – the three proportionality tests – that is used in constitutional law.

Lab. L.J. 61 at 64-65. See also Christophe Vigneau, “Information Technology and Workers’ Privacy: The French Law” (2002) 23 Comp. Lab. L. & Pol’y 351.

¹⁵⁸ Davidov, *supra* note 14.

¹⁵⁹ In Australia, for example, the principle of proportionality which includes three parts (suitability, necessity and balancing) assumes a critical role in constitutional law. It was first introduced in *Commonwealth v. Tasmania* (1983) 158 CLR 1, 259-61 and was influenced by the jurisprudence of the ECJ and the European Court of Human Rights. See Jeremy Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 Melb. U. L. Rev. 1. Kirk raises the question whether the application of the principle should be limited to interests and rights guaranteed by the constitution or should extend to any fundamental interest and right which any institution (not just governmental) aims at overriding. He points out that many Australian cases refer to interests which derive from the common law. In one case, the court indicated that proportionality will protect “fundamental values traditionally protected by the common law” (*ibid.* at 43).

The common law route is perhaps more controversial. Brian Langille has argued against any kind of “balancing” when applying the common law: he maintained that people should be able to exercise their freedoms without limitations even when such freedoms negatively and substantially affect others and their interests, unless one has a legal *right* that limits the other’s freedom.¹⁶⁰ Such a right, he argues, arises from legislation, and can also arise from the common law. At the same time he assumes that judges cannot develop the common law to create new rights. It is here that we respectfully disagree. Take restrictive covenants for example. Judges developed rules to decide cases involving such covenants – to place limits on the “freedom” of employers to use such covenants – by relying specifically on the concept of reasonableness. It will be odd to suggest that they are not allowed to further develop this law, by replacing the vague reasonableness test with the three proportionality tests.

As the Supreme Court held in *Pepsi Cola*, the law should be developed in line with the values enshrined in the *Charter*.¹⁶¹ The principle of proportionality has been a central part in Canadian jurisprudence, used as an aid to implement those *Charter* values.¹⁶² Applying the same tests has the added advantage of increasing coherence within the legal system. As David Beatty argues, “Exempting judge-made rules that regulate how people interact personally and privately in civil society from having to conform to the principle of proportionality is worse than incoherence”.¹⁶³ It is inconsistent with the hierarchic relationship between supreme and subordinate laws. Furthermore, while some argue that applying proportionality in private law might threaten individual autonomy and freedom, in fact the principle of proportionality is sensitive to these values and without it, the threat to privacy and autonomy is greater.¹⁶⁴

¹⁶⁰ Langille, *supra* note 97 at 150.

¹⁶¹ See text accompanying *supra* note 93. And see *Pepsi Cola*, *supra* note 91, at par. 20, 32 (although the *Charter* is not directly relevant to a dispute between private parties, “the right to free expression that it enshrines is a fundamental Canadian value” and the “development of the common law must therefore reflect this value”). See also Lorraine E. Weinrib & Ernest J. Weinrib, “Constitutional Values and Private Law in Canada” in Daniel Friedmann & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 43. See also June Ross, “The Common Law of Defamation Fails to Enter the Age of the Charter” (1996) 35 *Alta. L. Rev.* 117; and John D.R. Craig, “Invasion of Privacy and Charter Values: The Common-Law Tort Awakens” (1997) 42 *McGill L.J.* 355, who both argue that the tort of defamation and invasion of privacy should be developed in line with *Charter* values. Finally, see Susan B. Boyd, “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 *Can. J. Fam. L.* 293 (fundamental values such as equality enshrined in the Charter have recently been applied in different family law contexts even in the absence of government or state action and which require the interpretation of common law concepts).

¹⁶² See Beatty, *supra* note 5. See also Guy Régimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005) 31 *Man. L.J.* 239, who argues that a proportionality test, similar to s. 1 analysis, should be used in Canadian administrative law in order to guide the courts in the judicial review of administrative decisions when the standard of review is patent unreasonableness.

¹⁶³ Beatty, *supra* note 5 at 165.

¹⁶⁴ *Ibid. ibid.*

We have argued in part C that applying the three proportionality tests in the labour and employment context is normatively justified. This analysis followed the detailed exposition in part B of the various ways in which these tests are already being applied in Canadian labour and employment law. Our conclusion is therefore that the development exposed in part B is justified. However, as the examples have shown, the use of proportionality tests has so far been incomplete and inconsistent. We believe that an explicit reference to the three proportionality tests and a separate explicit application of each of them will be highly beneficial. First, it will ensure that all the right questions are asked and that the examination is structured and principled. Second, this will make it easier for employers, employees and unions to anticipate the results of litigation and understand the requirements demanded from them. Finally, an explicit resort to proportionality will add coherence to labour and employment law. As we have seen, courts invoke many different tests that are in fact very similar, and can be replaced with the same proportionality test.

D. Additional Applications

There are many employment and labour contexts where the principle of proportionality applies either explicitly or implicitly. This raises the question of whether there are additional labour and employment law contexts where proportionality could be relevant and its implementation beneficial. We believe that the answer is positive, and offer in this part one example: setting limits for strikes and lockouts. We hope that additional contexts will be explored in future research.

Canadian law stipulates some requirements prior to commencing a lawful strike or lockout. These are mostly technical requirements such as a conciliation process, a “no board” report and a strike vote.¹⁶⁵ Currently, there are no substantive restrictions on strikes or lockouts. For example, a union may commence a lawful strike once it meets the technical statutory requirements even if the strike is unreasonable in the circumstances or too destructive to the employer’s business or to third parties. One might argue that a strike should not be limited once it meets the technical statutory requirements because the right to strike is fundamental and arguably protected by the *Charter*.¹⁶⁶ However, there are two main justifications for the imposition of some limitations.

First, even the most fundamental and constitutional rights are not absolute. There is always a need to strike a balance between competing rights and interests. Second, when a strike is believed to

¹⁶⁵ See *e.g.* in Ontario, s. 79 of the *Labour Relations Act*.

¹⁶⁶ See (2010) 15:2 Canadian Labour & Employment Law Journal, a special issue on “Is There a Constitutional Right to Strike in Canada?”. See also the collection of essays in (2012) 16:2 Canadian Labour & Employment Law Journal for a discussion of recent developments.

be unreasonable or destructive, it is currently limited by provincial and federal government through back-to-work legislation,¹⁶⁷ specific legislation denying the right to strike in some workplaces,¹⁶⁸ and other legal proceedings which aim at delaying the strike.¹⁶⁹ These drastic actions against unions, which have become increasingly popular, often result in major infringements of freedom of association.¹⁷⁰ A more balanced approach could involve subjecting the act of strike or lockout to the principle of proportionality. Importantly, such a system is already in existence in several other jurisdictions.¹⁷¹ Instead of broadening the scope of what is considered to be “essential services” and consequently eliminating the right to strike altogether *ex ante*, the principle of proportionality would ensure that unions can go on strike but use it appropriately in a way that balances the interests of all parties. The Labour Relations Board will have the authority to determine on a case-by-case basis (when asked to issue an injunction) whether the strike was proportional or not, taking into account all relevant factors and circumstances. Obviously such proceeding will have to be swift, but there is no reason to think that this is not possible. The default is that a strike is allowed; and the Board can decide to issue an interim injunction until the final decision, if this seems justified in the circumstances.

For example, instead of preventing all Toronto Transit Commission [TTC] workers (regardless of their job position) from striking at all times (no matter if it is a rush hour or not),¹⁷²

¹⁶⁷ See e.g. in Ontario the *York University Labour Disputes Resolution Act*, S.O. 2009, c. 1; and the federal *Protecting Air Service Act*, S.C. 2012, c. 2. Note that while back-to-work legislation is usually passed following a continuous strike, this federal law prevented Air Canada workers from striking in the first place. For a full list of federal back-to-work legislation, see: <http://www.parl.gc.ca/Parlinfo/compilations/HouseOfCommons/Legislation/LegislationBackToWork.aspx>.

¹⁶⁸ See e.g. the *Toronto Transit Commission Labour Disputes Resolution Act*, 2011, SO 2011, c. 2.

¹⁶⁹ Take for example the federal government tactic of filing a reference under s. 87.4(5) of the *Canada Labour Code* (RSC 1985, c. L-2) with the Canada Industrial Relations Board asking the Board to determine whether the relevant workers should not be allowed to go on strike because a strike would cause “an immediate and serious danger to the safety and health of the public”. A reference under s. 87.4(5) suspends any work stoppage and buys some time for the federal government to introduce back-to-work legislation. The last reference was filed in response to the flight attendants’ union intention to commence a lawful strike during March break in 2012. See Scott Deveau, “Ottawa Steps in to Block Air Canada Labour Disruption” *Financial Post* (Mar 8, 2012), online: <http://business.financialpost.com/2012/03/08/air-canada-pilots-given-noon-deadline-to-accept-best-last-and-final-offer/>.

¹⁷⁰ On the increasing tendency to use back-to-work legislation since the conservatives were elected to a majority Government in May 2011, see “Harper History of Back-to-work Legislation”, *Global News*, online: <http://www.globalnews.ca/labour/6442649533/story.html>. For the ILO ruling in the matter of the back-to-work legislation in York University (*supra* note 167), see 360th Report of the Committee on Freedom of Association (Geneva: ILO, June 2011) at paras. 324-44, online: http://www.ilo.org/gb/GBSessions/WCMS_158223/lang--en/index.htm. The union argued that this was a dangerous precedent of forcing workers in non-essential services back-to-work while in a lawful strike position. The ILO ruled that the repeated use of back-to-work legislation might destabilize labour relations in Ontario, and that the legislative action in this matter was unjustifiable.

¹⁷¹ In Germany, see text accompanying *infra* notes 135-137; in the EU see text accompanying *infra* notes 140-144; and in Israel see Davidov, *supra* note 14 at 66-67.

¹⁷² As the Act does now, see *supra* note 168.

TTC workers will generally be allowed to strike. If the strike is too destructive, the TTC will be able to file a complaint with the Ontario Labour Relations Board, which will examine the particular circumstances of the case and determine whether the union used the strike weapon proportionately. Assuming the justifiable objective of the union is to reach a collective agreement, the Board will examine first whether a strike will be effective in achieving this purpose. It will then determine whether there are other means of achieving this objective. It could be, for example, that the conciliation failed because the union did not cooperate and rushed into a lawful strike position. It could be that the union's decision to strike during rush hours for more than a day is too intrusive. The Board will be able to limit the nature and scope of the work stoppage. Finally, the Board will consider whether the damages of the strike outweigh its benefits.

The same proportionality analysis should apply to lockouts. When a trade union commences a partial strike, an employer may impose a lockout for a legitimate purpose of protecting the business against inefficient operation. However, sometimes the use of a lockout could be disproportionate, for example, when an employer uses a lockout to force the government into passing back-to-work legislation. In June 2011, Canada Post Union went on rotating strikes for two weeks. In response, Canada Post decided to impose a full lock out and blamed the strikers for losses of \$100 million.¹⁷³ This created pressure on the government that was ended with the enactment of back-to-work legislation. One might argue that a more balanced approach would be to subject the right to lockout to the principle of proportionality. The employer will then have to show that it has used lockout for a legitimate purpose and that the lockout is rationally connected to this purpose, the lockout is the least intrusive way of obtaining this purpose and that the benefits of a lockout outweigh its damages.¹⁷⁴

We realize that these proposals assume a degree of faith in the judicial system (courts and labour boards). Judges and adjudicators will be given a greater role – broad discretion to assess the means chosen by labour unions and by employers in light of their legitimate goals. Admittedly, in other countries where proportionality is used in this context there are independent labour courts' systems, sensitive to the unique features of employment relations. We believe, however, that because of the important role played by proportionality in Canadian constitutional law, Canadian judges and adjudicators are well-positioned to perform this kind of analysis, based on the default rule that the right to strike should be respected, and limitations must be justified.

¹⁷³ See "Harper History of Back-to-work Legislation", *supra* note 167.

¹⁷⁴ Note that in Germany a lockout will be held to be in compliance with the principle of proportionality only when the lockout was commenced in response to a strike which endangered competition and thereby solidarity among employers. Consequently, lockouts are prohibited in essential services in the public sector. See Manfred Weiss, "The Settlement of Labour Disputes in Essential Services in the Federal Republic of Germany" (1997) 18 *Indus. L.J.* 1 at 6.

E. Conclusion

Proportionality is seen by enthusiastic proponents as “the ultimate rule of law”.¹⁷⁵ One does not have to go that far to appreciate the usefulness of this principle as a legal tool. A demand that those holding power will use it carefully and responsibly finds a concrete legal expression in the proportionality tests. An expectation that those infringing the rights of others will not do so gratuitously similarly materializes in the proportionality tests. Ever since the seminal *Oakes* judgment, proportionality has become an important pillar of Canadian law. One cannot think about constitutional law or discuss it – in Canada as in many other countries – without referring to proportionality. We have argued that the same principle plays an important role in Canadian labour and employment law as well, a role not sufficiently acknowledged thus far. We further argued that proportionality should play an even greater (and more explicit) role.

It is crucial to understand that by referring to proportionality, we do not settle for an abstract, vague concept. We rather refer to the three separate tests developed in the *Oakes* judgment, following other legal systems. These tests allow one to consider the means chosen to achieve a given goal. There is minimal intervention in the choice of goals: in practice, it simply has to be legitimate. This is appropriate for constitutional law (where the elected branches of government should be given as much freedom as possible to pursue the goals of their choice) and it is similarly appropriate for labour and employment law (where employers should be allowed to set their own managerial goals with as little intervention as possible). The focus of the proportionality tests is on the goal-means connection: first, a rational relation must exist between them; second, the impairment of rights (or, more generally, the harm to others) should be as minimal as possible; and finally, the harm caused by the action (the chosen means) should not be disproportionate to the benefits gained by it.

We began the paper by canvassing the different contexts in which proportionality is already used in federal and provincial labour and employment laws. In some cases, courts have inferred from legislation a requirement that employers act according to these tests (or some of them). In other cases, courts have developed similar tests as part of the common law, when considering problems without legislative solutions. In a few instances, we found explicit reference to proportionality; in other cases, we found that seemingly unrelated tests used by courts and adjudicators in fact closely

¹⁷⁵ Beatty, *supra* note 5.

resemble the proportionality tests. In all of these contexts, we believe that a more explicit application of all three proportionality tests will prove useful to the analysis and the decision-making process.

At least in some cases, demanding that employers and unions comply with the three proportionality requirements means that a higher standard of behaviour is imposed. Is this justified? In the next part of the paper we argued that it is. We further showed that one does not need to apply the *Charter* to private relations in order to accept this conclusion. We then explored the possibilities for further development and proposed an additional context in which proportionality tests can be used and potentially offer better solutions than current laws.