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Hislop v. Canada — A Retroactive Look

Daniel Guttman[*]

I. OVERVIEW

In the recent case of *Hislop v. Canada*, the Supreme Court stated as follows:

> The supremacy clause, now enshrined at s. 52, is silent about the remedies which may flow from a declaration of nullity. Does it mean that such a declaration is always both prospective and retroactive? This does not appear to have been the position of our Court throughout the incremental development of the law of constitutional remedies after the adoption of the *Charter*. A body of jurisprudence now accepts the legitimacy of limiting the retroactive effect of a declaration of nullity and of fashioning prospective remedies in appropriate circumstances.
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> .....
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> When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.[1]

The Court went on to unanimously hold, in the circumstances of the *Hislop* appeal, that Canada was not obliged to extend *retroactive* benefits to claimants to remedy the effect of an unconstitutional law.[2] In

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[*] Counsel, Attorney General of Ontario. The views expressed in this article are the author's own and should not be attributed to the Attorney General or the government of Ontario. I disclose that I was counsel in *Hislop v. Canada* for the intervenor Attorney General of Ontario at the Court of Appeal and the Supreme Court of Canada (the intervention was restricted to the payment of retroactive arrears issue). I would like to thank my colleagues Robert Charney and Mark Crow for their comments on a previous draft.

[1] *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at paras. 80, 93 (S.C.C.) [hereinafter "*Hislop*"].

[2] The Supreme Court found that Mr. Hislop and the rest of the class claimants (Hislop was the class representative) were entitled to up to one year of retroactivity because the CPP provided this in a general provision (R.S.C. 1985 c. C.-8 s. 72(1)).

so doing, the Court confirmed that it would be in only the rarest of cases that a government would be obliged, when it remedied under-inclusive legislation by extending a benefit, to extend that benefit retroactively to April 17, 1985 — the date section 15(1) of the *Canadian Charter of Rights and Freedoms*[3] came into force.

Part II of this paper briefly sets out the facts of *Hislop* and summarizes the Supreme Court's decision. Part III examines the theoretical underpinnings of the retroactive nature of declarations of invalidity in the Supreme Court's jurisprudence before *Hislop*. Part IV offers some commentary on the new test created by the Supreme Court to determine whether a declaration of invalidity is to be fully retroactive in nature. Part V offers a possible alternative basis to support the Supreme Court's decision in *Hislop* not to award retroactive arrears.

II. *HISLOP V. CANADA*

At issue in *Hislop* was the validity of several provisions of the *Canada Pension Plan*,[4] including provisions that Canada had enacted in *Modernization of Benefits and Obligations Act*[5] which extended survivor pension benefits provided by the CPP to same-sex survivors.[6] On a purely prospective basis, the provisions treated same-sex contributors and their spouses equally with all other people. However, the amendments limited same-sex survivor pensions in two critical ways.

The first was that imposed in section 44(1.1) of the CPP. That subsection specified that the survivor pension was extended to only those same-sex survivors whose contributing partners died after January 1, 1998, rather than simply to all same-sex survivors of contributors. Under this provision, any surviving partner whose partner died prior to 1998 could not receive a pension. This retrospective limit on the extension of the benefit was found to be unconstitutional at all levels of court.

The second limit was on the arrears that eligible survivors could receive pursuant to section 72(2). Under that section, survivors were eligible for benefits only with respect to the period after July 1, 2000

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[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[4] R.S.C. 1985, c. C-8 [hereinafter "CPP"].

[5] S.C. 2000, c. 12 [hereinafter "MOBA"].

[6] The relevant provisions of the CPP are excerpted in the Appendix at the end of this article.

(*i.e.*, the month section 72(2) came into force) and were not therefore eligible for any arrears that would have accrued before July 1, 2000. This section was a more severe limit on the class claimants than the general limit on retroactive arrears in the CPP (section 72(1)) which limited the payment of arrears to one year prior to the date of application.[7] The Court had to determine whether the stricter restrictions on recovery of arrears in section 72(2) violated the equality rights of the class claimants. The Court was also asked to determine whether the class claimants could receive a constitutional exemption from the application of the general limitation on retroactivity in section 72(1).

The trial judge found that section 72(2) was unconstitutional and that the claimants were entitled to benefit arrears extending back to April 1, 1985. Faced with the one-year general limitation on arrears in section 72(1), MacDonald J. granted class members a constitutional exemption from that section (as well as from section 60(2)), without finding that it was unconstitutional, and despite the fact that a challenge to that subsection had not been included in the Notice of Constitutional Question filed at trial.[8] This remedy entitled survivors to arrears beginning one month after the date of their partner's death.

The retroactive nature of the constitutional remedy given by the trial judge was scaled back by the Court of Appeal in a nuanced judgment.[9] The court found that section 72(2) was overly restrictive but only in comparison to section 72(1). The effect of the Court of Appeal's judgment was that claimants would get the survivor benefit on a retrospective basis but could only receive arrears to a year before they had applied for the survivor benefit, if they would otherwise qualify for it. Thus, if a survivor's partner died January 1, 1986 but the survivor had only applied for a pension on January 1, 2000, the survivor would only get arrears for one year rather than 14 years.

The Supreme Court unanimously upheld the Court of Appeal's decision, stating that a prospective remedy was appropriate in the circumstances of this appeal and that "a retroactive remedy would be unwarranted in respect of s. 72(1) *CPP*".[10] In reaching this conclusion,

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[7] Section 60(2) requires that an application for a survivor's pension made by the estate of a deceased survivor be made within 12 months of the survivor's death.

[8] Decision of the trial judge, [2003] O.J. No. 5212, 234 D.L.R. (4th) 465, at paras. 116-19 (Ont. S.C.J.).

[9] [2004] O.J. No. 4815, 246 D.L.R. (4th) 644 (Ont. C.A.).

[10] *Hislop*, *supra*, note 1, at para. 78.

they reconciled the competing strands of jurisprudence regarding the retroactive nature of a declaration of invalidity.

The effect of the Supreme Court's decision was that all same-sex survivors alive in January 2000, regardless of the date of death of their contributing partner, would receive an equal pension on a prospective basis to their heterosexual counterparts. However, these survivors would not receive arrears back to the date of their partner's death — rather they would receive arrears to one year prior to their date of application. While some may view this as a results-oriented decision that both Canada and the class claimants could live with, in my view, as I explain below, the decision was a principled one despite the split result for each party.

III. A Theoretical Look at the Retroactive Nature of Declarations of Invalidity

1. The Blackstonian View

Under the traditional view — termed the "declaratory approach" in the *Hislop* judgment[11] — section 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority to enact an unconstitutional law. The traditional view starts from the basis that a declaration of constitutional invalidity "involves the nullification of the law from the outset".[12] On this theory, if the law is invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past. The declaratory approach is derived from Blackstone's famous aphorism that "judges do not create law but merely discover it".[13] This aphorism reflects the view that courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. The traditional view accepts that the courts are adjudicative bodies that are called upon to decide the legal consequences of past happenings, and thus they generally grant remedies that are to the extent necessary to ensure that successful litigants will have the benefit of the ruling.

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11 *Id.*, at para. 83*ff*.

12 *Id.*, at para. 83, quoting Peter Hogg, *Constitutional Law of Canada*, Vol. 2, loose-leaf ed. (Toronto: Carswell, 2007), at 55-2 [hereinafter "Hogg"].

13 *Id.*, at para. 84.

2. Limited Application of the Blackstonian Approach in the Jurisprudence of the Supreme Court of Canada

While the Supreme Court has almost always espoused the traditional view in its judgments, this approach has not been free from criticism. The alternative view recognizes that "[j]udges do not merely declare law; they also make law … especially in the common law world" and that "judges fulfill a legitimate law-making function".[14] Under this view, Blackstone's view is a fiction and that fiction should not be turned into an ironclad principle.

Without abandoning the traditional approach, the Supreme Court has found that a fully retroactive declaration is not always a practical solution and for this reason, among others, has strayed from the traditional approach and limited the retroactive nature of declarations of invalidity in many cases. The Supreme Court has limited the fully retroactive nature of declarations of invalidity in at least five major ways: (a) temporary suspensions; (b) prospective overrulings accompanied by transition periods; (c) the doctrine of qualified immunity; (d) the general rule limiting individual remedies in combination with a declaration of invalidity; and (e) *res judicata* and the *de facto* doctrine. I will examine each in turn.

(a) Temporary Suspensions

The practice of the Supreme Court in recent years has largely been to suspend a declaration of invalidity, most usually for one year, in order to allow the government time to enact legislation to respond to the court's finding of unconstitutionality. Thus, the purpose of a suspended declaration of invalidity is to facilitate the legislature's function in crafting a remedy. If the government fails to enact new legislation within the period of suspension, the Court's declaration would apply retroactively, unless they receive an extension from the Court. The Court has stated that it is appropriate to suspend its declaration of invalidity in three instances: when giving immediate retroactive effect to the Court's declaration of invalidity would (a) "pose a danger to the public"; (b) "threaten the rule of law"; or (c) "result in the deprivation of benefits from deserving persons", such as when the legislation was "deemed

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[14] *Id.*, at para. 85, citing Lord Reid, "The Judge as Law Maker" (1972-1973), 12 J.S.P.T.L. 22.

unconstitutional because of underinclusiveness rather than overbreadth".[15] However, suspensions have now become routine at the Supreme Court of Canada with little analysis.[16]

The suspended declaration of invalidity is inconsistent with retroactive remedies and the Blackstonian approach. By suspending the declaration of invalidity, the Court allows the constitutional infirmity to continue temporarily so that the legislature can fix the problem. In other words, the Court extends the life of a law which, on the Blackstonian view, never existed. The temporal delay in striking down the law also has the effect of extending the life of an unconstitutional law.

As others have noted, the practice over the last decade of the Supreme Court of Canada has been to suspend its declaration of invalidity where, as in most cases, it is unsure how government would have proceeded if it had known what it did was unconstitutional.[17] The general practice of governments to rectify the constitutional infirmity has been to enact corrective legislation that is entirely prospective (the limited retroactivity included in the MOBA amendments is a rare exception). Before *Hislop*, the Court had not commented on the acceptability of prospective remedial legislation or heard a case in which remedial legislation was challenged as being insufficiently retroactive.[18]

(b) Prospective Overrulings and Transition Periods

While common in the United States, the Supreme Court has rarely issued a declaration that was expressly prospective only.[19] On my review, the only case is *Reference re Remuneration of Judges of the*

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[15] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at para. 85 (S.C.C.) [hereinafter "*Schachter*"].

[16] Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 S.C.L.R. (2d) 205, at 211 and 218; Bruce Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267. See also Hogg, *supra*, note 12.

[17] In *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.), the Supreme Court actually decided to suspend its declaration even though Ontario had expressly asked the Court not to do so.

[18] In my view, the fact that there has been no challenge or comment on the validity of prospective remedial legislation by the Supreme Court because it has been assumed that prospective legislation was sufficient to cure a constitutional defect in cases where the Court has suspended its declaration of invalidity. If this is the case, then the use of suspended declarations, which allow for and anticipate a prospective government remedy, reflects a further departure from the traditional Blackstonian approach than the one described in the text above.

[19] Hogg, *supra*, note 12. However, the Court routinely suspends its declaration of invalidity, the consequences of which is that claimants do not usually receive a retroactive remedy.

Provincial Court of Prince Edward Island.[20] In that reference, the Court held that the provinces' remuneration scheme for provincial judges violated the right to a trial before an independent and impartial tribunal. In fashioning its remedy, the Court provided for a "transition period of one year before th[e] requirement [took] effect".[21] The Court's use of a prospective overruling with a transition period is inconsistent with the traditional declaratory approach as it continued in force a law that it had found to be unconstitutional (and therefore, theoretically, to have never had force or effect) and eliminated any retroactive effect of its declaration.

(c) The Rule against Individual Remedies in Combination with a Declaration of Invalidity

The Court has established a rule that individual claimants cannot receive an individual damage award in conjunction with a declaration of invalidity because to allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court's decision to grant a suspended declaration of invalidity.[22]

(d) Qualified Immunity

The declaratory approach is also not easily reconcilable with the well-established doctrine of qualified immunity which states that where legislation is found to be invalid as a result of a judicial shift in the law, it will not generally be appropriate to impose liability on the government.[23] As recognized by the Supreme Court, "it is a general rule of public law that absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional".[24] The rationale for this qualified immunity, which applies equally to actions for damages based

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20 [1998] S.C.J. No. 10, [1998] 1 S.C.R. 3 (S.C.C.).

21 *Id.*, at para. 18.

22 *Schachter*, *supra*, note 15, at 720.

23 *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405 (S.C.C.); *Guimond v. Quebec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347 (S.C.C.).

24 *Mackin*, *id.*, at para. 78.

on the general law of civil liability and to claims for damages under section 24(1) of the Charter, was set out in *Mackin* as follows:

> the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.[25]

(e) Res Judicata *and the* De Facto *Doctrine*

The *de facto* doctrine, which validates acts done under laws subsequently found to be unconstitutional, has been used by the Supreme Court of Canada to temper the retroactive nature of declarations of invalidity under the traditional approach. *De facto* characterizes a state of affairs which, for all practical purposes, must be accepted notwithstanding its illegality or illegitimacy.[26]

The *de facto* doctrine was discussed in detail by the Supreme Court in the seminal case of *Re Manitoba Language Rights*.[27] In that case, the Court found that all the Acts of the Legislature of Manitoba were invalid because they were unilingual, contrary to the requirement in section 23 of the *Manitoba Act, 1870* which required all Acts to be passed in both French and English. However, the Court applied the *de facto* doctrine to avoid "a legal vacuum in Manitoba".[28] The Court explained that the doctrine recognizes and gives effect to justify expectations of those who have relied upon the acts of those administering invalid laws:

> ... thus, the de facto doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies

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[25] *Id.*, at para. 79.

[26] The *de facto* doctrine validates the acts of officials administering laws subsequently found to be unconstitutional. The *de facto* doctrine preserves the valuable interests of finality and certainty in the law.

[27] [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

[28] *Id.*, at para. 67. The court in that case also applied *res judicata*, mistake of law and the doctrine of state necessity.

> corporate, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and always will be, enforceable and unassailable.[29]

The *de facto* doctrine has also been applied in the criminal context in conjunction with *res judicata* to respond to the practical problems that flow from declarations of constitutional invalidity — specifically to uphold convictions on charges that were subsequently found to be unconstitutional. In the leading case of *R. v. Sarson*,[30] after the accused was convicted of constructive murder and sentenced, he challenged the validity of his sentence on the basis that the constructive murder provisions of the *Criminal Code* had been found to be constitutionally invalid by the Supreme Court in another case.[31] The decision of Watt J. [as he then was] upholding the sentence was affirmed by the Court of Appeal and the Supreme Court. Justice Watt found that the *de facto* doctrine was a complete defence to the accused's challenge:

> The applicant entered a plea of guilty which was accepted, recorded and acted upon by the trial judge who imposed a sentence authorized by law for the offence of which the applicant was convicted. All actions were taken or performed upon the basis of a statutory provision later determined to be constitutionally invalid. It is under that law that the applicant's obligations arise. They arise out of actions performed pursuant to an invalid statute by a court acting upon colour of authority. The *de facto* doctrine precludes any challenge to the enforceability of the sentence.[32]

The *de facto* doctrine and *res judicata* are another example of doctrines which the Supreme Court has employed to diminish the retroactive nature of declarations of invalidity. These doctrines are inconsistent with the Blackstonian approach as they preserve the past effects of a provision later found to be constitutionally flawed.

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29 *Id.*, at para. 80.

30 [1992] O.J. No. 1089, 73 C.C.C. (3d) 1 (Ont. Gen. Div.), affd [1994] O.J. No. 769, 88 C.C.C. (3d) 95 (Ont. C.A.), affd [1996] 2 S.C.R. 223 (S.C.C.).

31 *Id.*, at 28-29. *Criminal Code*, R.S.C. 1985, c. C-46.

32 *Id.*, at para. 65.

3. Reconciling the Practice with the Theory: the Court's Judgment in *Hislop*

In *Hislop*, after reviewing the exceptions to the declaratory approach, the Court accepted that there is no sound theoretical basis for applying the Blackstonian approach in all instances where the Court has made a declaration of invalidity. Thus, the Court found that the extent to which a declaration of invalidity would be retroactive depends on the circumstances of the case. The fully retroactive Blackstonian approach applies when judges are "applying the existing law" but does not apply to situations in which judges are fashioning new legal rules or principles. The Court explained that "where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive".[33]

However, according to the Supreme Court, "when the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm".[34] It is in those situations that courts can consider issuing a prospective rather than a retroactive remedy. As stated by the Court:

> Fully retroactive remedies might prove highly disruptive in respect of government action, which, on the basis of settled or broadly held views of the law as it stood, framed budgets or attempted to design social programs. Persons and public authorities could then become liable under a new legal norm. Neither governments nor citizens could be reasonably assured of the legal consequences of their actions at the time they are taken.
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> .....
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> People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected.

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33 *Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at para. 86 (S.C.C.).

34 *Id.*

> In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.[35]

Thus the Court has established that whether the retroactive effect of a declaration of constitutional invalidity should be limited and a purely prospective remedy granted "will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm".[36] The test developed in *Hislop* to determine whether a declaration will have retroactive effect is as follows:

> I. Has there been a substantial change in the law?
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> II. If so, the following non-exhaustive factors should be weighed to determine whether a retroactive remedy is appropriate:
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> 1) reasonable reliance by government;
> 2) good faith reliance by government;
> 3) "the fairness of the limitation of the retroactivity of the remedy to the litigants"; and
> 4) "whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources".[37]

Applying this test, the Court found that *Hislop* was a case where the declaration of invalidity should not be fully retroactive. First, the Court noted that its 1999 decision of *M. v. H.* (which necessitated the change to the CPP) represented a "clear shift in the jurisprudence of this Court".[38] Second, the Court found that the additional four factors supported a prospective remedy. According to the Supreme Court "given the state of the jurisprudence prior to *M. v. H.* the exclusion of same-sex partners from the former *CPP* was based on a reasonable understanding of the state of s. 15(1) jurisprudence as it existed after *Egan* and before *M. v. H.*"[39] Similarly, the Court found "the government did not act in bad faith in failing to extend survivors' benefits to same-sex couples prior to *M. v. H*".[40] In relation to the four factors, the Supreme Court stated as follows:

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35 *Id.*, at paras. 101-103.
36 *Id.*, at para. 93.
37 *Id.*, at para. 100.
38 *Id.*, at para. 110; *M. v. H.*, *supra*, note 17.
39 *Id.*, at para. 112.
40 *Id.*, at para. 115.

> Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class's claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.[41]

The Supreme Court found that the fairness to litigants factor did not compel a retroactive remedy in the circumstances of this case.[42] When considering this factor, it supported its decision not to award arrears by relying on the fact that the legislation being challenged was remedial legislation that was enacted in response to the Court's previous decision in *M. v. H.*:

> *Although M. v. H. declares what the Constitution requires, it does not give rise to an automatic right to every government benefit that might have been paid out had the Court always interpreted the Constitution in accordance with its present-day understanding of it. M. v. H.* was not a case like *Miron* where limiting the retroactive effect of the s. 52(1) remedy would have granted the "successful" claimant a hollow victory. In contrast, a *purely prospective remedy* in *M. v. H.* was not meaningless. *M. v. H.* resulted in wide-scale amendments to federal and provincial legislation across the country to extend government benefits to same-sex couples. Equally important, *M. v. H.* helped usher in a new era of understanding of the equal human dignity of same-sex couples. One could not say that *M. v. H.* granted those litigants only a Pyrrhic victory. [emphasis added.][43]

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41 *Id.*, at para. 117.

42 In my view, the Court unduly minimized the "fairness to litigants" factor. It was clearly *unfair* that a same-sex survivor whose partner died on the same day as a heterosexual contributor would not receive a pension equal to that of the heterosexual contributor's survivor despite the fact their respective spouses would have been governed by the same contribution requirements to the CPP. This fact was not mentioned in the Court's analysis of this factor (para. 116). However, in my view, this would not have changed the outcome of the analysis as this factor is outweighed by the other factors.

43 *Supra*, note 33, at para. 116.

In this passage the Supreme Court is recognizing that it would have been appropriate in *M. v. H.*, if the Court had not suspended the declaration of invalidity in that case, to award a remedy that was prospective only.[44] This being the case, following the suspended declaration in *M. v. H.*, there was no obligation on the government to enact remedial legislation that was anything more than prospective.

IV. COMMENTARY ON THE NEW TEST FOR RETROACTIVITY

The test as set out by the Supreme Court of Canada in *Hislop* raises a new issue in many constitutional challenges: is the claimant asking the court to make new law or to apply old law, which determines whether the court is operating inside or outside the Blackstonian paradigm. In many cases, the answer to this question will not be obvious. The problems raised by this issue may be somewhat muted by the fact that in almost every case, the decision of a court other than the Supreme Court of Canada to declare legislation unconstitutional will not reflect a "substantial change in the law" (because these courts are of course bound to apply the law of the Supreme Court).[45] Thus, in most cases, lower courts will still be operating in the Blackstonian paradigm and therefore claimants that would otherwise receive a retroactive remedy are unlikely to be withheld one on the basis of *Hislop* by lower courts.[46] However, many substantial challenges to legislation will reach the Supreme Court and the nebulous nature of the test makes it difficult to predict ultimate outcomes with any certainty. Because of this, most

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[44] See the concurring judgment of Bastarache J. at para. 164, where he states:

> Particularly relevant, it seems to me, is the fact that the *Modernization of Benefits and Obligations Act* was enacted in response to this Court's decision in *M. v. H.* In that case, a suspension of the declaration of invalidity was ordered so as to allow the Ontario government flexibility to cure the constitutional defect. That flexibility implicitly included the ability to limit the retroactive effect of any remedial legislation. Indeed, this is what the Ontario legislature chose to do. The remedial legislation was made prospective from November 20, 1999 (*Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, S.O. 1999, c. 6, s. 68(2)). Similar flexibility should be accorded to the Canadian government in this case. The legislative branch is better able to deal with distributional concerns than are courts, and its choices should be respected so long as they fall within the limits of the Constitution.

[45] As recognized by the Supreme Court in *Hislop*, *supra*, note 33, at para. 111.

[46] Theoretically, these courts will only be issuing retroactive remedies although practically, assuming the practice of suspending declarations is continued, the remedy received by claimants will be the prospective remedy enacted by the government in response to the declaration of invalidity.

lawyers advising their clients would be wise to caution that it is very difficult to predict whether the Court will grant a prospective or retroactive declaration in a given case.

1. The Threshold Question: A "Substantial Change" in the Law

In my view, the formulation of this threshold question is problematic. As the Court itself recognizes in relation to the threshold of substantial change, "given the often incremental nature of changes in judge-made law in a common law system, the question [*i.e.* whether the declaration of invalidity represents a substantial change in the law] is bound to raise difficulties."[47] Clearly there would be substantial change where "the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision".[48] Such clear situations would justify recourse to prospective remedies in a proper context. However those cases will be rare. The Supreme Court gave little guidance for less clear situations:

> But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law. The right may have been there, but it finds an expression in a new or newly recognized technological or social environment. Such a legal response to these developments properly grounds the use of prospective remedies, when the appropriate circumstances are met.[49]

2. "Substantial Change" Alone Does Not Justify a Purely Prospective Declaration

The Court held that a "substantial change in the law is necessary, not sufficient, to justify purely prospective remedies". It then went on to consider what more "must be considered once legal change has been established". As listed above, the factors include good faith and reasonable reliance by governments; the fairness of the limitation of the

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47 *Hislop*, *supra*, note 33, at para. 97.

48 *Id.*, at para. 99.

49 *Id.*

retroactivity of the remedy to the litigants; and whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources. For simplicity, I will refer to this as the "additional factors test".

In my view, it is quite likely that in most cases where there is a substantial change in the law, the Supreme Court will apply the additional factors test and find that a purely prospective remedy is justified. This is because where there is a substantial change in the law, it is likely that the government's reliance on that law will be found to be reasonable and in good faith. While the second factor will generally support a fully retroactive remedy, I believe this factor will be outweighed, as it was in *Hislop*, by the reliance factors in combination with the fourth factor. The fourth factor of respecting the proper roles of government and the courts will support a remedy that is purely prospective.[50] This is because in benefits cases, a range of options is open to government and the courts "normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter*".[51] The excluded group could simply be included in the existing benefit scheme, could be included in a modified benefit scheme or the government, facing the necessity of including an excluded group, could eliminate the benefit entirely. As stated by the Court "[i]n our political system, choosing between those options remains the domain of governments."[52]

Thus, the additional factors test will usually point towards limiting the retroactive effect of remedies in section 15 benefits cases. This view is consistent with the fact that there is no Supreme Court of Canada Charter case where the Court has imposed a retroactive remedy (without suspending its declaration) after determining that its finding of unconstitutional invalidity represented a substantial change in the law.[53]

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[50] The exception is cases of unconstitutional taxes, where the court has stated the fourth factor weighs against a purely prospective remedy since the only possible remedy is restitution to the taxpayer. Also, reliance interests are less significant since the government could simply legislate to recoup the unconstitutional tax retroactively. See *Hislop*, *supra*, note 33, at para. 108, where the Court discusses *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3 (S.C.C.).

[51] *Hislop*, *supra*, note 33, at para. 108.

[52] *Id*.

[53] Indeed, the only case where the Court has granted a retroactive declaration in a s. 15 case without suspending that declaration is *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.). In *Hislop*, the Court stated that its declaration of invalidity in *Miron* did not represent a substantial change in the law because the auto-insurance legislation at issue in that case was "out-of-

V. A POSSIBLE ALTERNATIVE BASIS FOR SUPPORTING THE DECISION NOT TO AWARD FULLY RETROACTIVE ARREARS

In my view, the result in *Hislop*, because of the general limit on retroactivity contained in section 72(1) of the impugned legislation, could have been upheld on the alternative basis that this subsection, even if it infringed section 15, was justified under section 1. Subsection 72(1) is a provision of general application that existed in the CPP before the MOBA and continued in force after the MOBA. On its face, this provision does not affect the class claimants (or any other group) differently than any other group.[54] The purpose of the limitation in section 72(1) is to control the predictability of claims on the fund by limiting applicants to 12 months arrears following the death of their partner.

At the Court of Appeal and Supreme Court of Canada, the Hislop class argued that although section 72(1) is facially neutral, its 12-month limitation on pension arrears had an adverse effect on same-sex survivors. This is because same-sex survivors were unable, prior to July 2000, to make a claim for survivorship benefits. In this regard, the trial judge found that the members of the class did not sit on their rights. Most members of the class did not apply for the survivor's pension when their partners died because they were not entitled under the CPP to apply.[55]

The Supreme Court did not analyze the validity of section 72(1), preferring to characterize this attack as a disguised claim for retroactivity:

> Although the Hislop class frames the s. 72(1) argument as an adverse effect discrimination claim, the issue which the argument raises is, in fact, one of remedy. What the Hislop class is seeking is retroactive

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step" with other government legislation that included common law spouses in the definition of spouse.

[54] After MOBA, ss. 44(1.1) and 72(2) then excluded from eligibility all surviving same-sex partners whose partners died before January 1, 1998, and severely limited the retroactive payment of arrears.

[55] The Court of Appeal found it was unclear from the record to what extent s. 72(1) would limit the entitlement of any particular class member as this depended on the date of application, which in some cases was a complex factual matter. At [2004] O.J. No. 4815, 73 O.R. (3d) 641, at para. 110, it stated "This issue may turn both on the tolling of the limitation period for the class under s. 28 of the *Class Proceedings Act*, S.O. 1992, c. 6, as well as on the findings of the trial judge in the proceedings that will be held in order to determine the extent of each class member's entitlement to a pension." However, it recognized that there was a good possibility that pursuant to s. 72(1), members of the class would only receive a fraction of the total amount they would have received had they been able to apply at the time of their partner's death.

> *Charter* relief. Their request for a constitutional exemption from the limitation on arrears in s. 72(1) is, in effect, a request for a remedy in respect of their exclusion from the survivors' benefits by the pre-*MOBA CPP* between 1985 and 2000. As will be explained hereafter, this Court has been explicit in restricting entitlement to retroactive *Charter* relief of this nature. Because the remedy sought by the Hislop class is unavailable in any event, it is not necessary to undertake a s. 15(1) analysis in respect of s. 72(1).[56]

Unlike the Supreme Court, the Court of Appeal addressed this argument head on, rejecting it as follows:

> It is only once s. 44(1.1) and s. 72(2) are declared unconstitutional that s. 72(1) may have an adverse effect on members of the plaintiff class, by limiting their entitlement to pension to twelve months of arrears, no matter when their partner died.
>
> .....
>
> However, here, s. 72(1) had no effect on the claimants either before or after the *MOBA* was enacted. Rather, the complaint lies with the application of this provision to the class members in respect of the period between 1985 and 2000. However, the only provisions that were inconsistent with the *Charter* for that period of time were the opposite-sex spousal definition before the *MOBA* amendments, and s. 44(1.1) and s. 72(2) after the *MOBA* amendments, not the cap on arrears, nor the limitation in respect of estate claims.
>
> The general sections were, and still are, non-discriminatory in their purpose and their effect. The true cause of the adverse effect is not the general sections, but rather, the fact that the class members were altogether excluded from the *CPP* regime both before and after the *MOBA* amendments.[57]

And:

> Consequently, it was those specific sections added to the *CPP* by the *MOBA* that limited the rights of same-sex surviving partners. Section 72(1) did not limit same-sex survivors' rights.[58]

In my view, the Supreme Court ought to have conducted the analysis of the validity of section 72(1) (in the direct manner of the Court of Appeal) because this analysis may well have given the Court additional

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56 *Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at para. 69 (S.C.C.).

57 Decision of the Court of Appeal, *Hislop*, *supra*, note 55, at paras. 106-109.

58 *Id.*, at para. 105.

support for its decision not to award fully retroactive arrears. Whether or not section 72(1) infringed the section 15 rights of the claimants (I agree with the Court of Appeal that it did not), in my view it was justified under section 1.[59] This is because where the government enacts a general law to limit retroactive claims against a benefit scheme, for the reasons expressed by the Supreme Court in its retroactivity analysis, the limit would survive the *Oakes* test even assuming it had an adverse effect on an excluded group. The measure obviously has a pressing and substantial purpose — to ensure the financial integrity of the scheme by limiting the possibility of retroactive arrears — and the limit is obviously rationally connected to that purpose. There are also good arguments to make that the minimal impairment analysis — always the most controversial prong of the test — would also be satisfied in many of these cases. This is because in the context of a government decision to limit retroactivity, the courts should take a deferential approach and not engage in second guessing government line-drawing. To do otherwise could well put a chill on the development of government benefit schemes. Finally, assuming the minimal impairment analysis is met, it would be unlikely that the Court would find that the limit fails the final balancing in the third prong of the *Oakes* proportionality analysis.[60]

VI. CONCLUSION

Hislop is an important case for many reasons. This paper has explored the Court's decision on the remedial issues in the case and its examination of the theoretical foundations for the retroactive nature of the declaration of invalidity. Up to this point in the jurisprudence, while

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[59] Other authors have argued that the Court should have conducted a s. 1 analysis in *Hislop* and that analysis would have led the Court to a different result on the retroactive payment of arrears issue, especially in light of the fact that the eligibility limit s. 44(1.1) was not upheld under s. 1 (*e.g.* Hogg, *Constitutional Law of Canada*, Vol. 2, loose-leaf ed. (Toronto: Carswell, 2007), at 58-4.2). With respect to those differing views, I do not agree. In my view, the question of whether a *retroactive* limit (*i.e.*, s. 72(2)) is justified under s. 1 is a very different question from whether a *retrospective* limit (*i.e.*, s. 44(1.1)), is justified under s. 1 and therefore the answer to these questions need not be the same, even if, as here, the financial cost to government was not insurmountable.

[60] This paragraph is a short response to those critics who suggest that the Supreme Court attempted to evade a s. 1 analysis on the issue of retroactive arrears in *Hislop* (see Hogg, *supra*, note 59). Professor Hogg argues that the Court erred in *Hislop* by recognizing that remedial legislation need not be retroactive. In his view, legislation curing a Charter defect must be retroactive to the inception of the Charter unless its non-retroactive element is justified under s. 1. His view leads to the incongruous result that, in contrast to legislation curing a Charter defect, legislation curing a constitutional defect arising from the *Constitution Act, 1867*, 30 & 31 Vict., c. 3, would always have to be fully retroactive since s. 1 only applies with respect to the Charter.

the practice has deviated from the theory, there was little examination of the underpinnings for deviations from the Blackstonian approach. With its decision in *Hislop*, the Court has begun to explore a theoretical justification for these deviations.

In conclusion, although extremely important on a theoretical level, I do not believe that there will be great practical consequences of the Supreme Court's decision on retroactivity in *Hislop*, for three primary reasons. First, in many cases claimants raising constitutional issues will be satisfied with a purely prospective remedy and *Hislop* does not restrict their ability to get a remedy of that nature in any way.[61] Second, in most cases where a declaration is sought, the Supreme Court of Canada will continue to grant a suspended declaration — *Hislop* provides more theoretical support for these suspended declarations. Third, those worried about the broad implications of *Hislop* could attempt in future cases to argue that *Hislop* should be seen as a case decided largely on the unique legislative record at issue.[62] As suggested by Professor Hogg, the Court's decision may have been influenced by the "appeal of keeping corrective action prospective only, both in terms of cost to government, simplicity of administration, and avoidance of tax complications and other unintended impacts on individuals".[63] While the approach in *Hislop* is a broad one and the language sweeping, it could be argued that the decision should be limited to situations where government acts proactively to cure constitutional defects. On this basis, a deferential approach in *Hislop* can be justified while at the same time distinguishing the case from other situations where the government has not taken proactive steps to cure constitutional defects.[64]

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[61] When a government adds previously excluded groups to benefit plans prospectively, it will not usually exclude part of that group in an unconstitutional manner. The retrospective restriction in *Hislop* (by date of partner death) provided an obvious target by creating a situation where claimants had to go to court to change the law to receive a retrospective remedy. The issue of retroactivity was a natural add-on to the retrospective claim.

[62] The success of this argument would depend on the persuasiveness of the submission that the Court's decision was heavily influenced by the unique fact that the impugned legislation was proactive remedial legislation intended to implement the Supreme Court of Canada's decision in *M. v. H*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.).

[63] Hogg, *supra*, note 59, at 58-4.1, note 8k.

[64] The fact that this case involved a challenge to an Act that already contained a general limit on retroactivity, although not a focus of the Supreme Court's remedial analysis, may turn out to be an additional way of limiting *Hislop* to its facts when a future claim for a retroactive benefit is made.

VII. APPENDIX: RELEVANT PROVISIONS OF THE CANADA PENSION PLAN

1. Retrospective *Eligibility* Limit

44(1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition of "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph 1(*d*) unless the common-law partner becomes a survivor on or after January 1, 1998.

2. Limit on Retroactive Payment of Arrears for Newly Included Same-Sex Survivors

72(2) In the case of a survivor who was the contributor's common-law partner and was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension may be paid for any month before the month in which this subsection comes into force.

3. General Provision Limiting Retroactive Arrears

72(1) Subject to subsection (2) and section 62, where payment of a survivor's pension is approved, the pension is payable... in no case earlier than the twelfth month preceding the month following the month in which the application was received.