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"Dollars Versus [Equality] Rights": Money and the Limits on Distributive Justice

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I. INTRODUCTION

Questions about the constraints "money" places on justice, what Binnie J. in his reasons for the Court in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees* called the "dollars versus rights controversy",[2] arise frequently in the adjudication of rights claims under the *Canadian Charter of Rights and Freedoms*.[3] They are particularly salient in the social benefit challenges under section 15, the Charter's equality guarantee, in which equality is invoked to argue that a governmental benefit or program exacerbates inequality by not going far enough in its coverage or because of discriminatory under-inclusiveness. Government parties often respond to such challenges by asserting that cost factors — the strain on government budgets, the need to channel financial resources in other directions — explain and justify the alleged inequality. The tension between scarcity and justice that structures this exchange between rights holders and governments lies at the heart of conceptions of distributive justice.

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[1] Justice Binnie, for the Court, in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381, at para. 65 (S.C.C.) [hereinafter "*NAPE*"].

[2] *Id.*

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

The mechanisms for state redistributive efforts range from taxation provisions, to labour market adjustments, to direct distribution of financial benefits such as income assistance, and to the distribution of goods in kind such as medical care or child care. The latter two vehicles — social welfare programs — are associated in Canada and other western democracies with the brief heyday, in the first two or three decades following the Second World War, of the liberal welfare state. Reinforced by the political optimism and economic prosperity of that era, liberal polities such as Canada displayed a relatively strong commitment to distributive justice and, in varying degrees, to public responsibility in that regard.[4] The programs for social support developed during this era, albeit typically amended and often reduced in generosity and scope, are the focus of the social benefit cases. Taken together, the cases raise the question of whether an equality litigant, no matter how convincing his or her claim of inequality, can win if the cost to governments is too high.

This volume celebrates the Charter's 30th anniversary. Our Charter has come of age in a neo-liberal era, one in which whatever political consensus there once was regarding distributive justice has splintered and dissolved. It is also an era in which courts do not hesitate to ask where and when "dollars" should trump rights, and where and when the market, rather than the state, should be left to distribute the basic resources on which individual security depends. Indeed, in *Chaoulli v. Québec (Attorney General)*, a number of judges embrace the notion that the market is the ultimate source of security for individual Canadians and that government efforts at redistribution, such as the national medical care program, should not impede access to the market by economically advantaged individuals seeking a faster, more efficient satisfaction of their basic medical needs.[5] Under this model, the private (individual) not

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[4] It is important not to overstate the progressive character of welfare state regimes and politics during this historical period. Much scholarship has pointed out the racist and (hetero)sexist character of the programs put in place during this era, as well as their middle-class bias. See discussion of this literature in Hester Lessard, "Substantive Universality: Reconceptualizing Feminist Approaches to Social Provision and Child Care", in Shelley A.M. Gavigan & Dorothy E. Chunn, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford and Portland, OR: Hart, 2010) 217, at 222-23 and in Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2002) 39(4) Osgoode Hall L.J. 717 [hereinafter "Empire of the Lone Mother"]. Nevertheless, a key marker of the shift in political values from welfare liberalism to neo-liberalism is the diminished notion of collective state responsibility for individual human need. *Id.*

[5] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli*"]. See in particular the judgment by McLachlin C.J.C. and Major J., with whom Bastarache J. agreed. See also the reasons by Deschamps J. which, although based on the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, express a similar view.

the public (state) has a primary and relatively enlarged responsibility for well-being.

In this paper, I review the Supreme Court of Canada's equality decisions, from 1985 to the present, that fall roughly within the category of social benefit challenges, namely, challenges to public programs or initiatives that distribute goods in kind or in cash.[6] The rights claims in these cases — a cohort of 13 — directly require governments to expend money, leading courts and commentators to refer to the "positive" nature of equality rights. It has long been argued by advocates of such interpretations and of the entrenchment of socio-economic rights, that many procedural rights, as well as rights that are generally characterized as "negative", also may entail large government expenditures.[7] The point made is that the reluctance of courts to recognize claims that have a "positive" component simply because, as such, they entail government expenditures, is not warranted. I agree with that argument. However, one of my purposes in this paper is to explore how judges at our highest court engage with the budgetary impacts on governments of rights recognition. Thus, it makes methodological sense to focus on the social benefit cases, given that they are more clearly perceived by judges to be about redistribution and about a public responsibility for social provision that is

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[6] To identify this cohort of cases, I started with the list of all S.C.C. equality cases compiled for the study by Bruce Ryder *et al.*, "What's *Law* Good For? An Empirical Overview of Charter Equality Decisions" in P. Monahan & J. Cameron, eds. (2004) 24 S.C.L.R. (2d) 103, at Appendix A [hereinafter "Ryder *et al.*"]. I updated it to the present and then winnowed out the benefits cases. I included *NAPE* even though it is not a social benefit case because it concerns a direct financial award to rectify a (pay equity) inequality. It is also, of course, a key case in the "dollars versus rights" jurisprudence. I hemmed and hawed over whether or not to include *Health Services and Support – Facilities Sector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"], which is also not a social benefit case in the narrow sense used here. It concerned the distribution of and respect for collective bargaining rights. The financial implications for government budgets lay at the heart of the case and of many of the arguments made by the B.C. government. However, in the end I excluded it because it did not fit the social benefit template, although I do reference it in the discussion of doctrinal approaches to factoring "public purse" impacts into s. 1 analysis. See discussion *infra*, at note 109.

[7] See, for example, *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.) addressing the right of the accused to be tried within a reasonable time. See also the discussion of *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.) [hereinafter "*Singh*"], *infra*, at notes 85-89. Finally, see also the discussion of *Askov* and other similar procedural fairness cases in Patrick Macklem & Craig Scott, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141(1) U. Pa. L. Rev. 1, at 48 to 53. Macklem and Scott argue that courts in liberal societies have routinely interpreted so-called "negative" civil and political rights in a manner that imposes positive obligations on governments to take steps that often involve the significant expenditure of financial resources. The social benefit cases do not require that deconstructive analysis, as they are more commonly perceived as entailing positive financial obligations on governments.

financially burdensome. Finally, it is useful to distinguish my selected cohort from the companion cohort of "private" benefit cases, namely, equality cases in which similar arguments about discriminatory under-inclusion and inequality are made in relation to access to private, rather than public, sources of support, such as spousal support under family law regimes or coverage under accident insurance regimes. This latter cohort raises its own set of questions about distributive justice and neo-liberal politics, in particular about the relative willingness of judicial actors to articulate robust commitments to redistribution when the burden is viewed as a private individual rather than public collective responsibility.[8]

In both cohorts — the social or public benefit cases and the private benefit cases — the theoretical question about where responsibility for individual social security resides, to which the *Chaoulli* plurality gave a neo-liberal answer, is not always explicitly discussed. However, it hovers in the background, shaping the "common sense" that underpins judicial line-drawing and parsing of alternatives. As already noted, many of the regimes challenged in the social benefit cases developed in the very different political climate of the post-war era. Given that Charter jurisprudence commenced in earnest in the mid and late 1980s, the cases explored in this paper, as in *Chaoulli*, sometimes represent a complex encounter between two political rationalities, one welfare liberal and the other neo-liberal.[9]

There are two principled justifications typically offered in the case law for judicial reluctance to find in favour of rights claims where doing so would entail significant expenditures by governments. The first is the institutional limitations concern, namely, that courts lack the institutional competence to make complex budgetary decisions. The second is the legitimacy or separation of powers concern, namely, that decisions with a significant budgetary impact lie outside the appropriate constitutional role of the judicial branch in relation to the legislative branch. The competence concern has been thoughtfully and critically analyzed, with a particular focus on its deployment in anti-poverty litigation, by David Wiseman.[10] Legitimacy concerns have been a key theme in the work of

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[8] See discussion in "Empire of the Lone Mother", *supra*, note 4, at 745-46.

[9] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal and Kingston: McGill-Queen's University Press, 2010), at 51-57, analyzing how conceptions of government that more generally inform the political discourse in a given historical period can shape judicial interpretations of rights and limits on rights under the Charter.

[10] David Wiseman, "Competence Concerns in *Charter* Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill L.J. 503 [hereinafter "Competence Concerns"];

Andrew Petter.[11] This paper does not delve into those institutional and normative considerations, but rather pursues two more modest objectives.

The first objective is to examine the relation between the public cost of rights recognition in each of the cases in my selected cohort and the pattern of wins and losses. In other words, this objective is about noting the purported price of rights recognition in each Supreme Court of Canada section 15 social benefits case, and then charting the correlation with success or defeat of the rights claim. I did my best to find the dollar figure that the Court itself or the government parties used as an estimate of budgetary impact. Most of the time, where that impact has been a key element in the arguments put forward by government parties, I have not needed to look beyond the judgments themselves. In some of the cases, I have referred to the decisions below to find a figure. In others, I have resorted to print media accounts of government claims about budgetary impacts. In one case, I was fortunate to have counsel for one of the parties help me establish a rough estimate. In a few, I found it impossible to find anything very concrete.[12]

Given that my ultimate goal is to arrive at a more precise mapping of how the Supreme Court of Canada takes account of the limits "money" places on justice, it makes sense to use the dollar figure that is actually in play in the litigation rather than to attempt to establish the "real" or actual cost. However, it soon became evident that the manner of calculating budgetary impacts varied quite significantly from case to case. In some, the "past injustice" amount, namely, the cost of repairing the injustice done to the claimants, is the benchmark. In others, it is the future burden on governments if they are obliged to extend a benefit to an expanded, more inclusive class of beneficiaries. Sometimes, it is a combination of both. By itself, this variation raises questions that need to be more clearly addressed. I return to this and similar points in the conclusion of this paper.

My second objective is to outline the doctrinal tools offered by the case law for factoring the public cost of rights recognition into Charter analysis. For this second task, I looked at the same range of cases plus a few additional ones in which key propositions about "dollars versus

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and "Taking Competence Seriously" in Margot Young *et al*., eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press, 2007), at 263-80.

[11] Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

[12] A future research agenda may allow for more thorough research into court records and facta. However, that was not possible within the time frame for this paper.

rights" have been articulated. Key to this discussion regarding doctrinal approaches is the overall framework for Charter analysis. As the jurisprudence has developed, assumptions and questions have recurred about which of the three main steps in a typical Charter analysis — the rights analysis, the section 1 limitation, or the remedy stage, or all three — is the appropriate point at which to factor in the budgetary impact of rights recognition.

I have divided this paper into two parts to explore these two objectives. I then conclude with some reflections on the gaps and inconsistencies in the case law. In my view, it is unrealistic to expect courts to seriously engage with questions of distributive justice under the Charter unless there is a better, more transparent approach to assessing budgetary impacts and to factoring them into the overall framework for adjudicating rights.

II. WHAT HAS THE SUPREME COURT DONE? THE COST OF RIGHTS RECOGNITION AND THE PATTERN OF WINS AND LOSSES

If you look at the cases simply in terms of budgetary impacts, *i.e.*, the cost of rights recognition, a pattern emerges. The pattern is quite stark. All the cases that are successful are ones in which rights recognition is costless, is of comparatively low cost, or is characterized by the Court as an inexpensive or even money-saving outcome. All the cases in which rights recognition is "expensive" fail. Some "inexpensive" claims also fail, but that does not alter the "follow the money" pattern.[13] I will examine in chronological order the five successful cases first, followed by the eight unsuccessful cases.

1. Cases in which the Claim Was Successful

The successful cases are *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*,[14] *Schachter v. Canada*,[15] *Eldridge v. British Columbia (Attorney General)*,[16] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v.*

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[13] The same conclusion is reached by David Wiseman in "Competence Concerns", *supra*, note 10, at 528, in a study that looks at a slightly different collection of cases.

[14] [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 (S.C.C.) [hereinafter "*Tétreault-Gadoury*"].

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

[16] [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.) [hereinafter "*Eldridge*"].

Laseur[17] and *Canada (Attorney General) v. Hislop*.[18] *Tétreault-Gadoury* is the first "dollars versus rights" equality case. Marcelle Tétreault-Gadoury challenged the exclusion of persons over the age of 65 from eligibility for full benefits under the *Unemployment Insurance Act 1971*.[19] She was successful at the Federal Court of Appeal, whereupon the federal government repealed the exclusionary provision retroactive to the date of the decision, namely, September 23, 1988. However, Ms. Tétreault-Gadoury turned 65 before that date, but after the equality provisions came into force on April 17, 1985. Consequently, she represented a significant but numerically fixed group of persons whose claims remained unsatisfied, and pursued her claim to the Supreme Court of Canada. A unanimous Court, in reasons written by La Forest J. for himself and Lamer C.J.C., found in her favour. Justice La Forest adopted Lacombe J.'s observation at the Federal Court of Appeal that the federal scheme "permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for a new job ... [She] must at that point become the complete responsibility of the special social assistance programs of the government...".[20] Justice La Forest, at the minimal impairment stage of the section 1 analysis, also commented that Lacombe J. "properly" noted that the government did not provide any evidence that it could not afford to extend benefits to those over 65.[21] In short, although the case does not yield a specific dollar figure for the cost of rights recognition, it seems fair to assume that it was not an amount that the federal government thought would sway the Court. Moreover, recognizing rights in *Tétreault-Gadoury* did not involve an ongoing liability for the government, and, in fact, is portrayed as a way to avoid such a liability by assisting claimants in reintegrating into the labour market rather than steering them toward government-funded pension benefits.[22] As such, *Tétreault-Gadoury*, the first in this line of cases, is completely in step with the neo-liberal political winds that, by 1991, were beginning to gather force across the political spectrum. In the

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[17] [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter "*Martin*"].

[18] [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [hereinafter "*Hislop*"].

[19] S.C. 1970-71-72, c. 48, s. 31(1). Persons over 65 were provided a lump sum payment in lieu of full benefits, if they met other criteria. The lump sum was equal to three weeks of benefits. See s. 31(2).

[20] *Tétreault-Gadoury*, *supra*, note 14, at 40-41, *per* La Forest J. for the Court, quoting Lacombe J., [1989] F.C.J. No. 818, [1989] 2 F.C. 245, at 268 (F.C.A.).

[21] *Tétreault-Gadoury*, *id.*, at 46.

[22] *Id*.

Tétreault-Gadoury judgment, the unemployment insurance regime is aligned on the side of private, market-based solutions — namely, paid employment — to well-being, while regimes aimed at support for the elderly are aligned on the side of public, state-funded welfare responses to individual social security needs.

Schachter is the second in our line of successful cases as well as a foundational case on remedies. It established that, under section 52(1) of the *Constitution Act 1982*, courts have considerable remedial flexibility. As the majority stated, "[d]epending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in."[23] At stake was the entitlement of new biological parents to the same parental benefits accorded new adoptive parents under the federal employment insurance scheme. The scheme provided for maternity benefits for biological mothers and parental benefits for adoptive fathers and mothers.[24] Hence, biological fathers like the claimant, Shalom Schachter, were ineligible for any benefits, and the case was frequently referred to as a "fathers' benefit" case. Shalom Schachter's equality challenge was successful at the Federal Court Trial Division and at the Federal Court of Appeal. Leave was then granted to the Supreme Court of Canada.

The main focus of argument at the Court was on the issue of what sort of remedy to grant in the face of the federal government's concession that the exclusion of biological fathers from any kind of parental benefit violated equality rights and could not be justified under section 1.[25] The Court considered as well how the costs to government of various remedial options should be factored into the analysis of appropriate remedy. In advance of the trial decision, the press had reported that the cost to the federal government of extending benefits to biological fathers would be around $500 million per year.[26] In the context of other cases in my cohort that deal with impacts on the federal budget, this is a serious impact and would certainly put this case in the group of "expensive

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[23] *Schachter*, *supra*, note 15, at 695, *per* Lamer C.J.C. for the majority.

[24] *Unemployment Insurance Act, 1971*, *supra*, note 19, s. 32.

[25] Chief Justice Lamer, for the majority, was dissatisfied with the government's concession on the s. 15 issue and with their failure to attempt a s. 1 justification at trial. He noted that the Court was thereby deprived of the opportunity to assess the merits of the s. 15 issue and of access to the sort of evidence generated by s. 1. *Schachter*, *supra*, note 15, at 695.

[26] Ken MacQueen, "Father's paternity-leave court fight could cost govt. millions in benefits", *Ottawa Citizen* [Final Edition] (August 19, 1987) A16.

rights claims".[27] However, in between the Supreme Court's granting of leave and its hearing, the federal government resolved the "inequality" problem and avoided much of the budgetary impact of rights recognition by equalizing down, *i.e.*, by making biological fathers eligible but at the same time cutting back the entitlement for all parental benefits.[28]

The legislative revision of the regime in the middle of the *Schachter* litigation offers two ways of thinking about the result in *Schachter*, both of which are consistent with the larger "follow the money" pattern. By the time the Supreme Court of Canada heard the case, a legislative resolution had been found that rendered a finding in favour of the equality claimant "costless", in rough terms, from the perspective of the public purse. Hence, this case is one in which rights recognition is not simply "inexpensive" but in which the Court knows the budgetary impacts are either effectively nil or have already been absorbed. However, the majority reasons by Lamer C.J.C. nevertheless explored the factors that should be weighed in remedying under-inclusive legislation in *Schachter* type circumstances. Chief Justice Lamer found that the appropriate remedy would have been to declare invalid the provision providing parental benefits for new adoptive fathers and mothers and, at the same time, to suspend the declaration in order to give Parliament time to consider the option of preserving the benefit while correcting the inequality problem. In other words, the majority would have decided to get rid of the benefit altogether rather than add the excluded group by "reading in".[29] The suspension held out the hope, but not the promise, of some sort of reconfigured benefit. A key circumstance for the majority was the fact that the size of the excluded group, biological fathers, was much larger than the size of the included group, adoptive parents, and that, therefore, the "financial shake up" for the federal budget that would

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[27] See the table at the end of this Part for a summary of the costs of rights recognition in relation to federal and provincial budgets in my cohort of cases. What counts as "serious" is of course a key question in my study. I have generally taken the Court's word for it. If the judgments are treating an impact as serious, I am more interested in simply noting what amount is being treated as serious rather than challenging that assessment. However, in the conclusion, I do comment on some of the inconsistencies in how the Court measures the seriousness of a budgetary impact. See discussion *infra*, between notes 129 and 130.

[28] The amendments made parental benefits available for all new parents, biological and adoptive, but reduced the entitlement from 15 to 10 weeks of benefits: *Act to amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, S.C. 1990, c. 40.

[29] The concurring reasons by La Forest J., writing for himself and L'Heureux-Dubé J., were in general agreement with Lamer C.J.C.'s approach.

be caused by the Court "reading in" would be considerable.[30] In short, *Schachter*, at least theoretically, is a case in which a rights recognition claim that had a serious budgetary impact was successful; however, the remedy that would have been granted would have actually "saved" Parliament money because it solved the equality problem by getting rid of the benefit altogether — a rather hollow victory from a distributive justice perspective. Indeed, on this analysis, it might make more sense to treat *Schachter* as a case in which an expensive claim was lost, and in which both the included and excluded group were left at risk of having no benefit at all. Because of the intervening action by Parliament in the form of equalizing down, the actual outcome was to maintain, roughly speaking, the budgetary status quo.

The larger public/private dimension of *Schachter* is equally complex. In contrast to the unemployment benefits in *Tétreault-Gadoury*, state-funded parental benefits are aligned with public responsibility for social reproduction in contradistinction to private, familial responsibility. However, the location of the benefit program in an employment insurance regime ties the benefit, as in *Tétreault-Gadoury*, to a vision that gives primacy to market-based responses to social security that, in turn, ultimately place responsibility on the shoulders of individuals. In short, being a parent is not enough; you have to have engaged in the requisite amount of paid employment in order to qualify for the benefit. The cross-cutting factor of gender further complicates the public/private dynamic, as social patterns of engagement in the unpaid work of social reproduction were and are deeply gendered. To the extent that public supports fall short of fully addressing the work of social reproduction, that work tends to be taken up by women. Parliament's gender-neutral "equalize down" solution is viewed in the feminist commentary as an approach that, in the end, undermined the amount of support for primary caregivers, the bulk of whom are women.[31] Also, the majority's implicit preference for a "strike and suspend" remedy in the context of under-inclusive legislation has been criticized for "increas[ing] the vulnerability of groups which currently receive social benefits".[32]

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[30] *Schachter*, *supra*, note 15, at 723.

[31] Nitya Iyer, "Some Mothers are Better than Others: A Re-examination of Maternity Benefits" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168, at 182-84.

[32] Nitya Duclos (now Iyer), "A Remedy for the Nineties" (1992) 4 Const. Forum Const. 22, at 23.

Next comes *Eldridge*, a case in the mid-1990s in which hearing-impaired patients at Vancouver General Hospital successfully challenged the failure of the hospital to provide them with sign-language translators for their interactions with medical personnel. The cost of doing so was estimated at $150,000 per year.[33] After finding that section 15 had been violated, La Forest J., writing for a unanimous Court, turned to the section 1 stage of analysis. Here he assumed without deciding that the objective of "controlling health expenditures" qualified as a substantial and pressing objective to which the decision regarding sign-language translation costs of the hospital's committee was rationally connected.[34] However, he found that the decision was not minimally impairing. The insignificance of the cost to government played a crucial role in La Forest J.'s analysis. He characterized the amount as "approximately 0.0025 percent of the provincial health care budget" and "a relatively insignificant sum".[35] The refusal to spend such an amount, he concluded, "cannot possibly constitute a minimal impairment of the appellants' constitutional rights".[36]

The next case, *Martin*, occurred in the early 2000s. It concerned a successful equality challenge to provisions in the Nova Scotia workers' compensation regime that excluded chronic pain claims from coverage under the regular part of the regime and, instead, provided much more limited compensation for successful claimants.[37] The question of budgetary impacts came up, as in *Eldridge*, at the section 1 stage. Justice Gonthier, writing for a unanimous Court, dealt with them in relation to the "substantial and compelling objective" prong of analysis. He tiptoed around the question of whether "controlling expenditures" could in fact serve as a substantial and compelling objective, instead dismissing the government's argument in this regard for lack of evidence. He observed:

> Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability.[38]

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[33] *Eldridge*, *supra*, note 16, at para. 4.

[34] *Id.*, at para. 84.

[35] *Id.*, at para. 87.

[36] *Id.*

[37] *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 10B – *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96.

[38] *Martin*, *supra*, note 17, at para. 109.

This suggests that, as in *Tétreault-Gadoury*, the economic impact on government of including chronic pain sufferers in full coverage was not significant enough to be explicitly advanced as a factor justifying under-inclusion.[39]

Hislop, in 2007, is the last in the line of successful claims. It was a class action that challenged the limits placed on the retroactivity of survivor benefits for same-sex spouses under the *Canada Pension Plan*.[40] The provisions in question had been enacted to rectify the exclusion of same-sex spouses from the scheme, in the wake of the Court's 1999 decision in *M. v. H.*[41] The latter case is a key private benefit case in which a same-sex challenge to exclusion from access to the spousal support provisions in family law legislation was found to violate equality in a manner that could not be justified under section 1.[42] In *Hislop*, as in *Tétreault-Gadoury*, the retroactive reach of the amendments with respect to eligibility for benefits (triggered by the death of the contributor spouse) stopped significantly short of April 17, 1985, the date when section 15 became effective.[43] Moreover, the statute contained a provision that limited all claimants to 12 months of retroactive compensation calculated from the date at which an application for benefits was made.[44] However, the remedial amendments denied same-sex survivors the benefit of the 12 months of arrears if they applied after July 2000.[45] More fundamentally, the amendments failed to recognize the unfairness of the "only 12 months of arrears" rule in relation to the members of the *Hislop* class who had no opportunity to apply for benefits in a timely manner because of their unconstitutional exclusion from the regime during the years before the *M. v. H.* decision.[46] The majority at the Supreme Court

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[39] *Id.*, at para. 109. Justice Gonthier went on to consider government arguments based on three other objectives: developing a consistent legislative response, avoiding fraudulent claims, and implementing early medical intervention and return to work as the treatment for chronic pain. All were dismissed. The first failed the substantial and compelling objective test and the other two the minimal impairment test. *Id.*, at paras. 110 to 117.

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

[41] *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.).

[42] *Id.* A majority, in reasons by Cory and Iacobucci JJ., found that the exclusion of same-sex spouses from the family law regime was a violation of equality rights that could not be justified under s. 1. Justice Major and Bastarache J. each wrote separate reasons concurring in the result. Justice Gonthier dissented.

[43] Eligibility for survivor benefits was limited to those whose spouse died on or after January 1, 1998. See s. 44(1.1) [ad. 2000, c. 12, s. 44(3)] of the CPP.

[44] CPP, s. 72(1).

[45] *Id.*, s. 72(2) [ad. 2000, c. 12, s. 54].

[46] In addition, section 60(2) of the CPP limited the right of estates of survivors to apply for benefits to a 12-month time period after the survivor's death. The *Hislop* class argued that the Court

of Canada found that eligibility for benefits should be extended to any same-sex survivor whose spouse died after April 17, 1985, and that all same-sex survivors should be provided with the benefit of 12 months of arrears, but that there was no adverse impact on equality rights stemming from the 12-month restriction.

The *Hislop* majority was willing to take account of budgetary impacts in the course of the section 1 proportionality analysis,[47] but noted that the federal government had not provided sufficient evidence of those impacts.[48] Indeed, the Crown conceded at trial that a successful claim by the litigants would "not have a significant impact on the solvency of the *CPP*".[49] Thus, the federal government's section 1 arguments failed with respect to the retroactive reach of the provisions regarding eligibility and entitlement to 12 months of arrears. The challenge to the application of the general restriction on arrears to the *Hislop* class was treated by the majority as an argument about remedy. As such, the majority found that the financial nature of the remedy was a legitimate factor to consider, among others, given the overarching principle of the separate constitutional roles of courts and legislatures with respect to "the allocation of public resources".[50] Accordingly, the majority denied the arrears part of the claim on the "separation of powers" basis, namely, that courts should defer to legislative decisions to place general limits, in this manner, on eligibility for financial benefits.

Because the financial impact argument was not pursued by the federal government, it is hard to calculate what the actual cost of rights recognition was in *Hislop.* Print media reported an array of possible impacts ranging from $22 million[51] to $400 million.[52] R. Douglas Elliott,

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should suspend s. 60(2) to the extent necessary to allow estates of members of the *Hislop* class to claim benefits as if they had been recognized as survivors at the date of the deceased contributor. The *Hislop* majority rejected this aspect of the claim, finding that estates do not have Charter rights. *Hislop*, *supra*, note 18, at para. 73. An exception was made for Mr. Hislop, however. Although Mr. Hislop died in between the notice of appeal to the Court and the hearing, his estate was able to get the full benefit of the Court's decision because he had been alive when a judgment in the case was first obtained. Indeed, the estate of any class member who died after the conclusion of argument at trial in the Ontario Superior Court was entitled to benefit from the ultimate decision of the Supreme Court of Canada. *Id.*, at paras. 74-77.

47 *Id.*, at para. 64.

48 *Id.*, at para. 65.

49 *Hislop v. Canada (Attorney General)*, [2003] O.J. No. 5212, 234 D.L.R. (4th) 465, at para. 116 (Ont. S.C.J.).

50 *Hislop*, *supra*, note 18, at para. 100.

51 Tracey Tyler, "Same-sex survivor benefits challenged: Effective date is 1998, not '85. Ottawa argues First anniversary of gay ruling" *Toronto Star* (June 11, 2004) A21.

counsel for the class of *Hislop* claimants, has extrapolated from the actuarial evidence on the cost of the claim, estimated at $50 million, provided at trial by a Crown witness to arrive at a rough estimate of the actual cost to federal coffers of the partial victory for the *Hislop* class. After the reduction of the class by deaths and taking account of the fact that the Court upheld the 12-month restriction on arrears, he calculates that the federal government was obliged to pay out approximately $25 to $30 million in benefits in the wake of the decision.[53] In terms of justice trumping "money", this case is the high-water mark.

The cost of the successful claims can be summarized as follows:

Table 1

Case	**Amount**	**Government**	**Regime**
Tétreault-Gadoury 1991	no figure provided, less expensive than denial of claim	Federal	employment insurance
Schachter 1992	Actually, $0 Theoretically, $500 million and described as a "financial shake up". Avoided by choosing remedy that eliminates benefit altogether thereby reducing budgetary liability.	Federal	employment insurance
Eldridge 1997	$150,000 per annum 0.0025% of health care budget	British Columbia	health care
Martin 2003	no figure provided, evidence of budgetary impact unconvincing	Nova Scotia	workers' compensation
Hislop 2007	Entire claim $50 million Successful part of claim $25 to $30 million Crown conceded budgetary impact of $50 million insignificant	Federal	pensions (CPP)

[52] Allan Woods, "Court extends same-sex benefits: Ont. ruling on CPP death benefits" *Edmonton Journal* (December 20, 2003) A8.

[53] Conversation with R. Douglas Elliott at "Constitutional Cases" workshop, May 2012, and further email correspondence June 8, 2012, on file with author.

When charted in this way, it is clear that equality litigants have been successful in the social benefit cases only when the cost of rights recognition is small or can be in some way minimized by the Court. I should stress that the link between the cost of rights and the success or failure of a claim is a correlation only. Typically, there are multiple reasons why an equality claim succeeds so that the fact that the cost of rights recognition is seen to be manageable is, at best, only one factor in many. However, the overall pattern in wins and losses would seem to indicate that it is a very important element.

2. Cases in which the Claim Was Unsuccessful

The unsuccessful cases in my selected cohort are: *Egan v. Canada*,[54] *Eaton v. Brant (County) Board of Education*,[55] *Law v. Canada (Minister of Employment and Immigration)*,[56] *Gosselin v. Québec (Attorney General)*,[57] *Hodge v. Canada (Minister of Human Resources Development)*,[58] *NAPE*,[59] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[60] and *Withler v. Canada (Attorney General)*.[61] In these eight cases, there are some in which the costs to government of a victory would have been staggering, and others in which the cost to government would have been within the range of some of the successful claims discussed above. In many of the cases, budgetary impacts play a prominent role in the decision; in a few, they appear to play no role at all.

We begin with three cases in the 1990s: *Egan*, *Eaton* and *Law*. *Egan* concerned an equality challenge by same-sex spouses to the heterosexual definition of spouse in the *Old Age Security Act*.[62] Five judges found that the exclusion violated section 15 and four of them went on to find that it was an unjustifiable exclusion under section 1. The fifth, Sopinka J., disagreed with the section 1 analysis of this group primarily because of the "novel" nature of the claim[63] and the budgetary line-drawing and

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54 [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"].
55 [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.) [hereinafter "*Eaton*"].
56 [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].
57 [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin*"].
58 [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.) [hereinafter "*Hodge*"].
59 *Supra*, note 1.
60 [2004] S.C.J. No. 41, [2004] 3 S.C.R. 657 (S.C.C.) [hereinafter "*Auton*"].
61 [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.) [hereinafter "*Withler*"].
62 R.S.C. 1985, c. O-9 [hereinafter "OAS"].
63 *Egan*, *supra*, note 54, at para. 111.

trade-offs involved in the design of social benefit regimes.[64] His judgment, combined with that of four judges who refused to find an equality violation, resulted in the denial of the claim. The cost of rights recognition to the federal government was estimated at between $12 million and $37 million per annum, or between two and four per cent of the OAS program's costs.[65] The amount was challenged at trial and an argument made that the government figures were inflated.[66] Two of the judges at the Supreme Court characterized the evidence of budgetary impacts as "highly speculative and statistically weak".[67] The calculation of budgetary impact in *Egan* is based not on the cost of remedying the harm to the specific claimants but on attempts to predict what the government's annual liability going forward would be if same sex-spouses were included in the regime.

The *Eaton* and *Law* judgments offer much less direct engagement with the issue of budgetary impacts. *Eaton* focused on the decision by provincial educational authorities to transfer Emily Eaton, a severely disabled child, from her placement in an integrated regular classroom at her neighbourhood elementary school to a special classroom at a school outside her neighbourhood. Although there are no doubt different cost implications for the provincial school system in relation to these two kinds of placements, budgetary impacts do not feature in the judicial analysis. I was unable to find an estimate in the decisions below or in the media regarding the public cost of recognizing Eaton's claim. The key issue dividing judicial decision-makers was whether the transfer out of an integrated and into a segregated setting on the grounds of Emily's "best interests" constituted a violation of section 15. Only Arbour J.A., writing for a unanimous Court of Appeal, thought so and would have sent the case back for a rehearing, at which point expense considerations might have become more prominent.[68] A unanimous Supreme Court of Canada overturned her decision, finding that there is no Charter-derived presumption of integration into mainstream institutions in a situation such as that of Emily Eaton, and that the decision to place her in a

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[64] *Id.*, at paras. 108-110.

[65] *Id.*, at para. 99, *per* L'Heureux-Dubé J., dissenting.

[66] *Id.*

[67] *Id.*, at para. 193, *per* Cory and Iacobucci JJ., dissenting on the s. 1 issue, in reasons written by Iacobucci J.

[68] *Eaton v. Brant (County) Board of Education*, [1995] O.J. No. 315, 22 O.R. (3d) 1 (Ont. C.A.).

segregated setting neither imposed "a burden or disadvantage" nor constituted "the withholding of a benefit or advantage".[69]

The next case is *Law* in 1999. Here the challenge was to an age cut-off in the CPP with respect to spousal survivor benefits.[70] It was reported in the media that court documents estimated it would cost $80 million by 2000 to extend benefits to all survivors.[71] A unanimous judgment by the Supreme Court of Canada found that there was no equality violation. Again, as in *Eaton*, government concerns about budgetary impacts did not feature in the Court's analysis.

As we enter the 2000s, the list of failed challenges continues to grow. *Gosselin* in 2002 concerns a claim that, of all the cases in my selected cohort, carries the highest price tag for a provincial government. The budgetary impact of the challenge to an age-based barrier to full social assistance benefits under Quebec legislation was quantified at $389 million plus interest accrued since 1985.[72] A majority at the Supreme Court of Canada, in a deeply divided decision, rejected Gosselin's claim on both section 15 and section 7 grounds. *Gosselin* heralds a much more explicit embrace of neo-liberal values. The contrast with *Tétreault-Gadoury*, roughly 10 years earlier, is instructive. In the latter case, the Court finds that Marcelle Tétreault-Gadoury should not be steered, on the basis of age, toward long-term dependency on an income assistance program by the denial of access to a program aimed at facilitating re-entry into the labour force. Here, conventional understandings of the liberal values of choice and equality are preserved unchanged and converge with the primacy given to market solutions by neo-liberalism. Tétreault-Gadoury's right to choose the path leading to reintegration into the workforce is vindicated. In *Gosselin*, an age-based distinction deployed to deny access to social assistance, in order to steer youth into workfare programs, is applauded as facilitative rather than undermining of human dignity. Conventional understandings of choice and equality would seem to be at odds with the coercive aspects of the regime, which makes use of the economic desperation of income assistance clients to obtain the desired result. However, referring to the Quebec program, McLachlin C.J.C. observed:

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[69] *Eaton*, *supra*, note 55, at paras. 79-81, *per* Sopinka J. for eight of nine judges. The ninth judge, Lamer C.J.C., agreed in separate reasons.

[70] CPP, ss. 44(1)(d) and 58.

[71] Janice Tibbetts, "The Federal pension plan's survivor benefit rules not discriminatory" *Ottawa Citizen* [final edition] (March 26, 1999) A4.

[72] *Gosselin*, *supra*, note 57, at para. 4, *per* McLachlin C.J.C. for the majority.

> The participation incentive worked towards the realization of the goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity.[73]

In short, in *Gosselin* the liberal values of choice and equality are not simply trumped or ignored, but rather rewritten so that they appear to converge, as in *Tétreault-Gadoury*, with neo-liberal conceptions of individual and social well-being. This remarkable normative shift in the content of core liberal ideals occurs relatively invisibly under cover of the flexible language of human dignity.[74]

Next come three cases decided in 2004: *Hodge*, *NAPE* and *Auton.* In *Hodge* the budgetary impact of the issue is treated as insignificant; in *NAPE* and *Auton*, budgetary impact is very much on the minds of the judges. *Hodge* focused on eligibility for survivor benefits for common law spouses under the CPP.[75] The Supreme Court of Canada judgment does not address financial impacts on government as a factor. However, the Federal Court of Appeal decision did note that the federal government had not provided any clear evidence in that regard.[76] This suggests that the amount was not sufficiently large to support such an argument.[77] A comparison with *Hislop* reinforces this inference, as both involve a subset of common law spouses and the CPP. *Hodge* involves survivors who had been separated from their spouses but continued to experience the effects of financial interdependencies and *Hislop* involves survivors who had been in intact same-sex spousal relationships.[78]

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[73] *Id.*, at para. 65, *per* McLachlin C.J.C. for the majority.

[74] Note that the doctrinal role of human dignity has since been much reduced, although the normative shift in terms of what should count as an equality harm and what should count as equality-enhancing remains firmly embedded in the jurisprudence. See *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 at paras. 21 and 22 (S.C.C.) [hereinafter "*Kapp*"], lamenting the doctrinal missteps facilitated by the language of human dignity. See Margot Young, "Unequal to the Task; 'Kapp'ing the Substantive Potential of Section 15" in S. Rodgers and S. McIntyre, eds. (2010) 50 S.C.L.R. (2d) 183 for an analysis of the way in which *Kapp* reinforces neo-liberal justice at the expense of social justice.

[75] CPP, s. 2(1) "spouse" [ad. c. 30 (2nd Supp., s. 1(3)] and s. 44(1)(d).

[76] *Hodge v. Canada (Minister of Human Resources Development)*, [2003] F.C.J. No. 900, [2003] 1 F.C. 271, at para. 52 (F.C.A.), *per* Malone J.A., Evans and Linden JJ.A. concurring.

[77] Exactly how large is sufficiently large is of course unclear. However, for my purpose of determining how the Court perceives different amounts, comparison with other cases offers the best guidance.

[78] To clarify, while the group of survivors of all common law relationships is of course much larger than the group of survivors of same-sex common law relationships, note that *Hodge* dealt with the subset of survivor spouses who had *separated* from the contributor spouse shortly before the death of the contributor.

NAPE, the second case in the 2004 cohort, notoriously pivoted on the budgetary impact argument.[79] The equality challenge was to the cancellation by the Newfoundland and Labrador government, on the basis of an alleged financial crisis, of an agreement to pay three years of pay equity arrears to female hospital workers. The amount was $24 million.[80] The Court, in unanimous reasons by Binnie J., accepted the government's argument that a financial emergency existed of sufficient proportions to justify, in accordance with section 1, the infringement of equality rights. Finally, in *Auton*, the challenge was aimed at the failure of the Medicare regime in British Columbia to cover the costs of an autism therapy. The cost to the province was estimated at between $45,000 and $60,000 per annum per autistic child between the ages of three and six, and was described as expensive.[81] Although the claimants succeeded at trial and appeal, the Supreme Court of Canada, in a unanimous decision by McLachlin C.J.C., found that there was no infraction of equality rights.

The last case is *Withler* in 2011. Here the challenge was to age based limits on the eligibility of survivor spouses for death benefits under two federal pension schemes.[82] The federal factum asserted that the cost of rights recognition would be financially prohibitive.[83] Press reports put costs at $2.3 billion if retroactive payments were ordered.[84] The Court, in joint reasons by McLachlin C.J.C. and Abella J., found that equality rights had not been violated by the under-inclusiveness in the two regimes. This case bears the highest price tag for rights recognition for any government — provincial or federal — of all the cases considered.

The financial impact of the eight losing cases is summarized as follows:

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[79] For critiques of the budgetary analysis at the heart of the decision in *NAPE*, *supra*, note 1, see Robin L. Reinerston, "Discrimination and Difference: A Comment on *Newfoundland (Treasury Board) v. N.A.P.E.* (2004) 3(1) J.L. & Equality 227; Jennifer Koshan, "*Newfoundland (Treasury Board) v. N.A.P.E.*" (2006) 18 C.J.W.L. 327 [hereinafter "Koshan"]; and Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23 S.A.J.H.R. 235.

[80] *NAPE*, *id.*, at para. 6, *per* Binnie J. for the Court.

[81] *Auton*, *supra*, note 60, at para. 5, *per* McLachlin C.J.C. for the Court.

[82] *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17; *Public Service Superannuation Act*, R.S.C. 1985, c. P-36.

[83] As quoted in Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16 Rev. Const. Stud. 31, at 55 [hereinafter "Koshan & Hamilton"].

[84] Amy Minsky, "Widows lose appeal for death benefits; No age discrimination in government policy" *Ottawa Citizen* (March 5, 2011) A3.

Table 2

Case	Amount	Government	Regime
Egan	$12 to $37 million or 2-4% of program budget at most	Federal	pensions (OAS)
Eaton	no figure provided	Provincial	special education
Law	$80 million	Federal	pensions (CPP)
Gosselin	$389 million plus 17 years of accrued interest	Provincial	social assistance
Hodge	no figure provided, described as insignificant	Federal	pensions (CPP)
NAPE	$24 million	Provincial	pay equity agreement
Auton	no figure provided, described as expensive	Provincial	health care
Withler	$2.3 billion	Federal	pensions

Again, the charting of wins and losses in this simple manner both clarifies and obscures. The table shows only correlations, not firm causal links. This is perhaps more obvious here than in the first table, as the amounts at stake for government vary wildly. As with the first table, this second table leaves out all the factors, other than budgetary impact, that might have influenced the Court's resolution of each of these cases. Even *NAPE*, which of all the 13 cases in my selected cohort is most clearly about budgetary impact, cannot be explained entirely in those terms. Nevertheless, the pattern presented is stark enough to support some important inferences. Because of the variation in amounts at stake, the second table is best read in combination with the first table. Together they suggest that a minimal budgetary impact is a necessary but not sufficient condition for a successful social benefit challenge under section 15, while a serious budgetary impact poses a serious, if not impossible, hurdle.

III. WHAT HAS THE SUPREME COURT SAID? FACTORING BUDGETARY IMPACT INTO THE CHARTER FRAMEWORK OF ANALYSIS

The Supreme Court of Canada's response to the question of what role budgetary impacts should play in rights adjudication has evolved over the years from a position of high principle — money and administrative convenience should never trump justice — to a position where such concerns can be considered at virtually every step of the analysis, particularly in equality claims. The starting point for any discussion of the tension between money and justice is *Singh v. Canada (Minister of Employment and Immigration)*,[85] one of the first Supreme Court of Canada Charter cases, in which claimants argued that the procedures under federal legislation for redetermining the denial of refugee status violated section 7 of the Charter and section 2(e) of the *Canadian Bill of Rights*.[86] The Court was unanimous in finding for the claimants but evenly split between three judges who relied on the Charter and three who relied on the *Bill of Rights*.[87] In relation to the section 1 Charter argument, the federal government submitted that to require an oral hearing before the Immigration Appeal Board "would constitute an unreasonable burden on the Board's resources".[88] Justice Wilson, writing for the three judges who founded their decision on the Charter, referred to the federal government's arguments as a "type of utilitarian consideration" and asserted:

> No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.[89]

The *Singh* decision required the creation of an adjudicative structure for determining refugee claims, a result that was extremely expensive for

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[85] *Supra*, note 7.

[86] S.C. 1960, c. 44 [hereinafter "*Bill of Rights*"].

[87] Justice Ritchie was one of the seven judges on the panel at the hearing but did not take part in the decision.

[88] *Singh*, *supra*, note 7, at para. 68.

[89] *Id.*, at para. 70.

the federal government. *Singh* thus pushed the issue of the cost of rights recognition into the foreground. Using the equality cases discussed so far as the unifying theme, I have organized an overview of the evolution of the Court's position, in the wake of *Singh*, on how to resolve the tension between money and justice into four chronological stages represented by four emblematic cases: *Schachter*, *Egan*, *NAPE* and *Withler*. As mentioned in the introduction, much of the discussion in the jurisprudence focuses on which of the three main steps in the Charter framework — the rights analysis, the section 1 limitation analysis (and its sub-parts), and/or the remedy stage — should be the main location for factoring in the budgetary impact on governments of rights recognition in any particular case.

1. *Schachter* and the "Substantial and Compelling Objective" Analysis

Justice Wilson's 1985 assurance that constitutional principle should prevail over administrative convenience became in 1992, in *Schachter*, the narrower rule that budgetary considerations cannot serve as a substantial and compelling objective that justifies limits on rights under section 1 of the Charter. The *Schachter* case also clarified that financial impacts should be an element of the analysis of remedy. In the context of a discussion of the importance of taking account of legislative objectives in fashioning remedies, Lamer C.J.C. for the majority stated:

> This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder. [90]

Chief Justice Lamer then went on to set out the framework for crafting remedial orders under the Charter in a way that included a direct consideration of the budgetary impact on government.[91]

The *Schachter* majority's embrace of budgetary impacts as a key factor at the remedy stage makes sense when placed in the context of the overall design of Charter argument. On closer reading, Wilson J.'s "principle trumps utility" sentiment was only ever meant to be a starting

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[90] *Schachter*, *supra*, note 15, at 709.
[91] *Id.*

point for the eventual elaboration of a more nuanced approach.[92] To confine this elaboration to the remedy analysis in the overall framework of Charter adjudication would seem to be very faithful to the spirit of Wilson J.'s assertion. It ensures that full play will be given to questions of whether rights have been violated and, if so, whether there are non-utilitarian considerations that can justify the violation. *Schachter*, however, does not go this far. Rather, consideration of budgetary impacts is ruled out at the first step of the section 1 inquiry into government objectives, and then treated as highly relevant at what, in most successful Charter claims, is the very last "remedy" step. Of course, as discussed earlier, the remedy question was the only one left open by the time the case reached the Supreme Court of Canada. The key doctrinal issue left unanswered by *Schachter* is whether there are places in the section 1 analysis, other than the substantial and compelling objective inquiry, where budgetary impacts can play a role.

2. *Egan* and Judicial Deference in the Proportionality Analysis

That question is quickly taken up in subsequent cases. Three of these cases (*McKinney v. University of Guelph*,[93] *Egan* and *Irwin Toy Ltd. v. Québec (Attorney General)*)[94] are cited in support of the proposition, presented as such in 1997 in *Reference re Provincial Court Judges*, that financial concerns can be a legitimate consideration in the minimal impairment analysis so long as such concerns are not the objective of the legislation.[95] As Lamer C.J.C. stated in the latter case: "While purely financial considerations are not sufficient to justify the infringement of *Charter* rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial."[96] The moral high ground thus becomes maintaining the clear bright line, emphasized by Lamer

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[92] Justice Wilson alludes to this in the final sentence of the above quotation: "Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals": *Singh*, *supra*, note 7, at para. 70. Justice Binnie in *NAPE* also reads Wilson J.'s statement in less absolute terms: *NAPE*, *supra*, note 1, at para. 67.

[93] [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.) [hereinafter "*McKinney*"].

[94] [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"].

[95] [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 283 (S.C.C.) [hereinafter "*Provincial Judges Reference*"]. Note that of these four cases, only *Egan* concerns an equality challenge that involves the distribution of scarce financial resources. Hence, like *Singh*, these cases were left out of my survey in Part I.

[96] *Id.* (emphasis in original).

C.J.C.'s literal underlining, drawn around the substantial and compelling objective analysis by the rule in *Schachter*.

The conundrum of what stance courts should take when recognition of Charter rights has high financial costs for governments presents itself in these early years as a subset of the much broader issue concerning how courts should weigh governmental choices regarding the distribution of all manner of scarce resources as well as regarding the trade-offs between competing demands and interests. Of the three cases cited in support of the *Provincial Judges Reference* proposition, only *Egan* is a case in which there are implications for scarce *financial* resources. In *McKinney*, the different interests of younger and older workers are balanced in a scheme that is distributing human rights protection. In *Irwin Toy*, the interests of children in being protected from manipulation by advertisers are prioritized over the interests of commerce and of freedom of expression for both children and commercial interests. Neither of these cases is about the kind of budgetary line-drawing that is so clearly front and centre in cases like *Egan* and *Auton*. The slippage between these two sorts of situations — one involving budgetary concerns and the other policy trade-offs — is important, for it allows the Court to gloss over their differences. This is particularly true in the context of Charter challenges to social benefit regimes where these two dimensions of much governmental decision-making are often intertwined. However, they are conceptually distinct and, in some contexts, concretely and actually distinct. *Egan*, the case I see as emblematic of this second stage in the evolution of a "dollars versus rights" jurisprudence, is unusual in that the slippage becomes a point of sharp disagreement between some of the judges.

Recall that in *Egan*, Sopinka J.'s reasons, finding that the violation of equality rights under section 15 could be justified under section 1, made up the majority in combination with the reasons of four other judges finding that section 15 had not been violated at all. Despite his solitary stand in *Egan* on the section 1 issue, Sopinka J.'s statement in the course of his reasons that "it is not realistic for the Court to assume that there are unlimited funds to address the needs of all" came to represent a quickly solidifying pragmatic stance.[97] The doctrinal expression of this pragmatism is judicial deference to legislative decisions. Justice Sopinka

[97] *Egan*, *supra*, note 54, at para. 104. See *Provincial Judges Reference*, *supra*, note 95, at para. 283 for examples of the citation of Sopinka J.'s s. 1 analysis for support for a deferential approach to the proportionality analysis where significant budgetary impacts on the "public purse" are at stake.

articulates the trigger for this deferential posture in the broadest terms possible, namely, in terms of a legislative policy choice: "This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so."[98] Justices Cory and Iacobucci in dissent differ quite sharply. For them, it is significant that the *Egan* challenge to the under-inclusive OAS provisions does not, as in *McKinney*, involve balancing an array of competing interests. As Iacobucci J. put it in their joint reasons, "[t]he only competing interest in the case at bar is budgetary in nature."[99] Justices Cory and Iacobucci are also much more willing to scrutinize the claimed budgetary impact. As noted earlier, they find the Crown's financial evidence "highly speculative and statistically weak".[100] They also take the view that "[t]he jurisprudence of this Court reveals, as a general matter, a reluctance to accord much weight to financial considerations under s. 1 analysis."[101]

Although these two points of dispute pale beside the profound disagreements over the nature of equality and the viability of the equality claim that divided the Bench in *Egan*, they nonetheless raise significant issues. The first point of dispute demands that we think about the implications of the distinction between judicial interference in government budgetary decisions and judicial interference in complex, polycentric policy distinctions. Are different concerns at play in these two situations, demanding different judicial postures and inquiries? The second point of dispute pertains to the question of how thorough and convincing Crown evidence of budgetary strain should be before courts turn to the question of whether a deferential posture is appropriate. Even if we agree that courts should behave extremely deferentially where large financial commitments are at issue, should the precondition be subject to a much more rigorous scrutiny?

3. *NAPE* and the Crisis Exception to the *Schachter* Rule

The third significant marker in the "dollars versus rights" jurisprudence is the *NAPE* decision itself. The *Schachter* rule, reinforced in *Provincial Judges Reference*, that financial concerns cannot serve to

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98 *Egan*, *id.*, at para. 105.
99 *Id.*, at para. 214.
100 *Id.*, at para. 193.
101 *Id.*, at para. 194.

meet the "substantial and compelling objective" requirement at section 1, is reopened and an exception made for situations of extreme financial crisis.[102] This is the *ratio* that comes out of the *NAPE* case, along with the political lesson that women's equality rights are altogether too easily trumped.

As doctrine, the *NAPE* qualification of the *Schachter* rule is not all that surprising, and I would speculate that even Wilson J. would concede that an extreme financial emergency justifies restrictions on rights. *NAPE* is more significant in that the Court, invoking legitimacy concerns, was willing to accept an admittedly flimsy amount of evidence to justify the government's assertion of a fiscal crisis. As Binnie J. put it, "[w]hat transpires in the budgetary process, of course, lies at the high end of Cabinet confidences... ."[103] The contrast with Cory and Iacobucci JJ.'s demand in *Egan* for more convincing evidence of budgetary distress is disheartening.[104]

The comparison of *NAPE* with *Egan* is instructive with respect to another aspect, that of the murkiness of the distinction between budgetary and social policy decisions. Although Binnie J. could have left us with simply the "financial emergency" story as an explanation for the Court's decision, he strained to characterize governmental purposes in relation to the cancellation of the pay equity agreements as not simply cost-cutting in the face of a financial crisis but as a decision to trade off women's equality against the priorities of other programs that address social needs such as health and education.[105] Citing the Court's 1989 decision in *R. v. Lee*[106] for support, Binnie J. asserts: "It was thus clear from an early date that financial considerations wrapped up with other public policy considerations *could* qualify as sufficiently important objectives under s. 1."[107] This is quite a significant departure from the Court's more typical stance, which is to treat the *Schachter* rule as a serious constraint.[108] It is also a disquieting move. Justice Binnie's

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[102] *NAPE*, *supra*, note 1, at para. 72.

[103] *Id.*, at para. 58.

[104] See also Jennifer Koshan's detailed analysis of the fiscal situation in Newfoundland and Labrador at the time of the litigation and her conclusion that the fiscal situation was, in fact, "normal". Koshan, *supra*, note 79, at para. 112.

[105] *NAPE*, *supra*, note 1, at para. 75.

[106] [1989] S.C.J. No. 125, [1989] 2 S.C.R. 1384 (S.C.C.) [hereinafter "*Lee*"].

[107] *NAPE*, *supra*, note 1, at para. 69 (emphasis in original).

[108] I have come across one other place in which the *Schachter* rule is ignored, namely, in *Martin*, where Gonthier J. cites *Eldridge* for the proposition that financial concerns can serve as substantial and compelling objectives. *Martin*, *supra*, note 17, at para. 109. However, in *Eldridge*, La

reconstruction of a cost-cutting decision as a policy choice illustrates how easily the *Schachter* rule can be circumvented — either for ulterior purposes or because it actually is impossible to disentangle some budgetary decisions from policy choices. Subsequent cases illustrate that this is likely to be a recurring dilemma.

Health Services and Support — Facilities Sector Bargaining Assn. v. British Columbia,[109] a decision handed down three years after *NAPE*, provides an example. Here, the wages of hospital workers were once more sacrificed in the name of cost-cutting, this time by the British Columbia government. The cost-cutting took the form of legislative cancellation of collective bargaining rights and agreements. The equality challenge failed. However, a section 2(d) argument was successful, in part. At section 1, the Court found that the legislative purpose was to save costs and thus could not serve as a substantial and compelling objective.[110] It went on, however, to accept the concurrent purpose of improving health care delivery as substantial and compelling. Although the Court did not treat the objective as a "mix" of financial and other types of objectives, as Binnie J. suggests in *NAPE*, the case nonetheless illustrates how difficult it can be to give the *Schachter* rule any real force. The government's claim in *Health Services* failed at a later stage of the proportionality analysis.[111]

4. *Withler* and Frontloading the Proportionality Analysis

The final stage in the shift in judicial attitudes towards limits on rights made in the name of financial considerations occurs specifically in the equality context, namely, in the *Law* to *Withler* line of cases. Under the rubric of "correspondence" in *Law*,[112] as so many constitutional scholars pointed out in the decision's wake, a version of the section 1 proportionality analysis was frontloaded into the rights analysis stage of the Charter framework.[113] This significantly undermined the effective-

Forest J. for the majority only assumed without deciding that the objective of "controlling health expenditures" is substantial and compelling. See discussion *supra*, notes 37 to 39.

[109] *Supra*, note 6.

[110] *Id.*, at para. 147, *per* McLachlin C.J.C. and Bastarache J. for the majority.

[111] *Id.*, at paras 150-161, *per* McLachlin C.J.C. and Bastarache J. for the majority.

[112] *Supra*, note 56, at paras. 69-71.

[113] For an analysis of the way in which the correspondence analysis in *Law* duplicates the s. 1 analysis, see Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299; Peter Hogg, *Constitutional Law of Canada*, student ed. (Scarborough, ON: Carswell, 2002), at 1059; June Ross, "A Flawed Synthesis of the Law" (2000) 11(3) Const. F. Const.

ness of section 15 in achieving equality.[114] *Withler* has revised the equality framework somewhat but preserved the language of correspondence, now under the rubric of "stereotype".[115] Indeed, *Withler* has, if anything, expanded the number of situations in which courts can dismiss equality claims on the basis of governmental concerns, including financial concerns, at the rights analysis stage. The upshot is that in many cases, especially challenges to benefit regimes, courts need no longer grapple directly with the question of whether the government's only pressing and substantial concern in limiting rights is saving money. Rather, such concerns become, at the initial rights violation stage of analysis, subsumed under the rhetoric of "balancing competing interests" and "distributing scarce resources" as a way to describe the general character of a legislative regime. Such a character entitles legislatures to a measure of deference at this early stage in the analysis. The rules in *Schachter* and *Provincial Judges Reference* about budgetary considerations are completely irrelevant as, without the formal structure of section 1 analysis, there is no attention to whether financial concerns are or are not the exclusive or dominant legislative objective of the impugned provision, or whether the legislative measure is proportional. *Withler* is the key case as it cements into place this new equality framework and does so in the context of an under-inclusiveness challenge to social benefit regimes.

As mentioned earlier, *Withler* concerned a challenge to provisions in two federal pension schemes that reduced death benefits for survivors, a group composed disproportionately of elderly women and one that is already subject to broader economic disadvantage. The reduction provisions meant that the older the survivor at the time of the death of the contributor, the less the amount of the benefit. The Court, in reasons by McLachlin C.J.C. and Abella J., stipulated that the analysis of the equality right and its infringement, in challenges involving such benefit programs, must take account of the legislative purposes of both the impugned provision and the scheme as a whole, concerns about the

74; and Beverly Baines, "*Law v. Canada*: Formatting Equality" (2000) 11(3) Const. F. Const. 65. For an argument that *Law* directs the judicial focus, at the rights analysis stage, to a consideration of legislative objectives, see Ryder *et al*., *supra*, note 6, at 120. The authors also provide empirical support for the proposition that the correspondence analysis is the most important factor in determining the outcome of a s. 15 claim. *Id.*, at 121-22.

[114] Ryder *et al.*, *id.*

[115] *Withler*, *supra*, note 61, at para. 36.

allocation of scarce resources and policy objectives.[116] Jennifer Koshan and Jonette Hamilton note that the federal factum characterized the objective of the reduction provisions in purely financial terms, stating that unreduced benefits would be "financially prohibitive ... either because of the contribution required from younger employees or the tax attribution if it's employer paid".[117] In *Withler*, the general character of the legislative scheme — in terms of distributing scarce resources, addressing competing needs or ameliorating disadvantage — entitles government to a more deferential standard of review at the rights-infringement stage, with the result that the equality challenge is dismissed before getting to the fuller review of the governmental position at section 1.[118] As Koshan and Hamilton point out, the more specific cost-cutting as well as discriminatory objective of the impugned provisions does not actually feature in the examination of whether equality rights have been infringed.[119]

In *Withler*, not only is section 1 bypassed, but the scope of the equality protection itself is further diminished. Before *Withler*, the frontloading of the proportionality analysis to create an internal limitation on the scope of section 15 had significantly hampered the success rate of section 15 claims.[120] *Withler*'s reaffirmation of the internal limit in expanded terms will further curtail the effectiveness of section 15, especially in social benefit cases, thereby further undermining the Court's commitment to substantive equality.[121]

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[116] *Id.*, at para. 67. Note that the Court specified in *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 109 (S.C.C.) that it is important in an under-inclusiveness challenge to look at both the general legislative purpose and that of the impugned provision at the "substantial and compelling objective" stage of s. 1 analysis. *Withler* brings this focus on both the overarching legislative purpose and the sub-purpose of the challenged provision into the rights analysis stage.

[117] Koshan & Hamilton, *supra*, note 83, at 55.

[118] *Withler*, *supra*, note 61, at para. 38. See also the more extensive analysis of this aspect of *Withler* in Koshan & Hamilton, *supra*, note 83, at 58-60.

[119] Koshan & Hamilton, *id.*

[120] Sujit Choudry and Claire Hunter, in "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525, treat s. 15 rights as ones in which courts have read in an internal limitation to the scope of the rights (what I have described as frontloading the proportionality analysis), and therefore, those in which one can expect a lower government "win" rate at s. 1 compared to rights the scope of which are relatively unlimited. The empirical data in their study support this hypothesis. The government success rate at s. 1 in s. 15 cases was 20 per cent, compared to 44.4 per cent in s. 2(b) cases. The latter rights have very few internal limits. *Id.*, at 551. They also found that the *lower* the government win rate at s. 1, the *higher* its win rate overall is likely to be. Thus, s. 15 cases, with a lower win rate for government at s. 1, have a higher win rate for government than s. 2(b) cases. *Id.*, at 552.

[121] Koshan & Hamilton, *supra*, note 83, at 56 make much the same point, as well as a number of others regarding the failure of *Withler* to move beyond the doctrinal features of equality jurisprudence that hamper the development of a substantive approach. *Id.*, at 59-61.

IV. CONCLUSION

The four junctures sketched out above capture key moments in the jurisprudence concerning "dollars versus rights", more specifically equality rights. It is a bleak story that begins with Wilson J. in *Singh* taking the moral high ground and ends with compromise in every possible direction. The bleakness does not reside in the fact that the jurisprudence, together with the pattern of wins and losses mapped out in the first part, indicate that money does indeed limit justice. The tension between scarcity and justice is an abiding theme in liberal societies. Most of us accept that "money" and the scarcity of other sorts of resources limit justice. The bleakness lies in the failure of the jurisprudence to yield a workable framework for navigating the justice/scarcity tension in a principled way. The history of equality rights provides a particularly disheartening overview of this failure.

Robert Charney and Daniel Guttman have argued that if equality rights are given substantive positive content, then courts should and must factor in financial constraints.[122] I agree with that position stated broadly in that way. However, I have two concerns. My concern is first and foremost that Charney and Guttman's first premise, namely, that we give substantive content to equality, remains unattainable except in cases where the financial stakes are very low. Indeed, the Court's unwillingness to assert principle over utility in the equality realm converges with a failure, now for almost three decades, to give equality rights substantive content, and indeed, recently, with the explicit characterization of section 15(1) as a negative protection.[123] As the record since the first benefit case in 1991 indicates, only inexpensive substantive equality claims or ones in which the budgetary impact is conceded by the Crown to be insignificant — *Tétreault-Gadoury*, *Schachter*, *Eldridge*, *Martin* and *Hislop* — succeed. It should also be noted that, except for *Eldridge*, these are all cases that fit fairly comfortably into a formal equality paradigm. Unless a viable framework for seriously engaging with governmental concerns about budgetary impacts can be developed, there would seem to be little hope for a more meaningful substantive equality jurisprudence.

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[122] Robert E. Charney & Daniel Guttman, "Is Money No Object?: Can the Government Rely on Financial Considerations Under the Charter Section 1?" in P. Monahan & J. Cameron, eds. (2004) 24 S.C.L.R. (2d) 137, at 139 [hereinafter "Charney & Guttman"].

[123] *Kapp*, *supra*, note 74, at para. 16.

This brings me to my second concern: what should a viable framework for addressing the costs of rights recognition look like? This is the "big picture" doctrinal question. I do not think one can complain about the "follow the money" pattern as well as demand a more robust substantive equality jurisprudence if the only approach to the "dollars versus rights" controversy on offer is an uncompromising version of Wilson J.'s stance. On the other hand, the current situation, in which financial impacts can be invoked at almost every stage of analysis, often foreclosing exploration of key aspects of the claim, is also unacceptable. Financial impacts do need to be seriously considered at some point. In particular, we need a "big picture" approach to the issue of where to locate that consideration, and how to do so in a way that takes account of and respects the many other fundamental questions raised in a full and meaningful consideration of rights claims with a distributive justice component.

Some have already taken up this discussion, and their thoughts provide a useful starting point. Charney and Guttman argue that governments should be able to argue that financial constraints are substantial and compelling objectives.[124] Wiseman argues against this and against the now well-entrenched practice of invoking either injusticiability doctrine or a deferential standard of review at the proportionality analysis where scarce financial resources are being distributed or large financial impacts are at play.[125] Instead, he urges that many budgetary concerns should be addressed at the remedy stage, and the remedial response should include what he calls competence-building measures.[126] His prime example of the latter is the *Provincial Judges Reference*, in which the majority set out the general features of an institutional framework for ensuring judicial independence while at the same time giving governments leeway to control budgets and determine judges' salaries in an arm's-length manner.[127] His second example is *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[128] a case pursued under section 23 of the Charter, in which in the same way, the majority approved the approach of the trial judge, who set out a framework within which the province of Nova Scotia had to make its "best efforts" to build five schools required by section 23.[129] In other words, the courts in these instances are not

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124 Charney & Guttman, *supra*, note 122, at 157.
125 "Competence Concerns", *supra*, note 10, at 524-32.
126 *Id.*, at 540-45.
127 *Id.*, at 540-42.
128 [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).
129 "Competence Concerns", *supra*, note 10, at 532-45.

ordering legislatures to directly fund a benefit or program, but rather setting out normative and institutional frameworks within which governments can manage resources and rights in a way that takes seriously the latter.

The current messy doctrinal situation requires that we pursue these and other ideas, and that the overarching framework for judicial analysis of the justice/scarcity tension be given serious consideration by academics, lawyers and judges. It is particularly important to situate the discussion in terms of the larger conceptions of public and private at play at this political juncture, and to navigate the encounter between welfare liberalism and neo-liberalism that so often underpins the social benefits challenges in a more self-reflective and creative way. The Charter cannot return us to the post-war era, but it should not, as in *Gosselin*, serve to erase or exacerbate the injustice of poverty and extreme social insecurity or, as in *Hodge* and *Withler*, to ignore the disproportionate impacts of such injustices on groups such as elderly women who experience marginalization in multiple dimensions.

There are other, more pedestrian but strategically crucial questions arising out of the empirical overview of the cases presented here. Some of them I have already raised in the course of my discussion. The first few questions have to do with the evidential precondition for deference to government decisions. First, it makes sense that where budgetary impacts are raised as a serious concern, governments should be required to provide convincing evidence of such impacts before deference is accorded. Evidence as to the proportion of the budget represented by the impact should be a more routine element in this evidence, as the absolute dollar figure by itself reveals little. Also, distinctions between claims where the number of claimants is numerically fixed (the *Tétreault-Gadoury* and *NAPE* situations), claims where expanded government liability will be ongoing into the future (the *Egan* situation) and claims where both of these are true (the *Auton* and *Law* situations), should carry more weight. Second, once a budgetary impact is convincingly established, courts should also strictly scrutinize any additional claim that budgetary trade-offs between competing groups are involved. Only when one or both of these aspects of the governmental claim is established, should deference be accorded rights violating measures. As well, I would question whether budgetary trade-offs, without any evidence that serious budgetary constraints demand such trade-offs, should be entitled to the kind of "carte blanche" deference represented by Sopinka J.'s stance in *Egan*. Rather, it is consistent with the judicial role to require that

constitutional values feature importantly in legislative decision-making involving complex policy choices.

The next questions pertain to the lack of nuance in the characterization of legislative regimes when deciding whether courts should defer. Thus, my third question is whether we need to ask whether equality claims that are about the distribution of financial benefits, goods in cash, should be treated differently from claims that are about the distribution of goods in kind. Many successful equality challenges to financial benefit regimes — such as pensions or income assistance — can be addressed, as they were in *Schachter*, by Parliament or the legislature equalizing down and thereby recognizing equality rights but mitigating the financial costs of doing so. With regimes that distribute goods in kind — such as medical treatments or sign language translation — there is often a clear price tag on rights recognition, but without the option of equalizing down, short of drastically reconfiguring or shutting down the entire program in question. Should legislative regimes that distribute financial benefits therefore be accorded less deference?

The fourth question is also about nuance. Should cases that are about social insurance schemes that are largely, if not entirely, self-sustaining be distinguished from cases that are about programs that governments fund out of tax revenues? *Hislop* is perhaps the most helpful case in this regard. The CPP, the regime under challenge in *Hislop*, is funded, not out of general tax revenues, but out of contributions by workers and their employers.[130] Justifying under-inclusiveness towards some of the contributors to the pension fund on the grounds of burdens on the "public purse" seems much less acceptable when the "purse" is really funded by and for contributors, including those being excluded, rather than when the purse is funded by all of us who meet taxation thresholds, to be redistributed in a fair and equitable manner for a range of purposes from environmental assessment processes to fighter jets to social assistance. Indeed, this distinction may partly explain why the Crown in *Hislop* conceded that the financial impact of a liability for $50 million would be insignificant, and why the majority felt comfortable with an award that imposed a liability of roughly $30 million.

To conclude, the general point I am making is that Binnie J.'s reference to the "dollars versus rights controversy" covers a range of situa-

[130] Canada, Office of the Chief Actuary, "Optimal Funding of the Canada Pension Plan: Actuarial Study No. 6", April 2007, online: <http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/oca/studies/Optimal_Funding_CPP_e.pdf>, at 13.

tions that are significantly different. One way to approach the controversy is to start, as Wiseman has done, with the large theoretical questions about institutional competence and legitimacy. Another approach is to assume, as I have done, that there are good reasons for the judicial reluctance to intervene in legislative decisions with direct budgetary consequences but that nonetheless, this does not excuse a messy, incoherent approach at the level of doctrine and adjudicative process. Perhaps if we work at the issue from multiple angles, we will end up with more clarity at multiple levels: political, conceptual, doctrinal and procedural.