THE COURT'S MULLIGAN: A COMMENT ON *CANADA (ATTORNEY GENERAL) v. HISLOP*

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The Supreme Court of Canada's decision in Canada (Attorney General) v. Hislop *reveals a significant disagreement over the nature of judicial precedents and the attendant costs of deviating from them. In the context of devising a test for remedial retroactivity, a majority of the Court rules that a "substantial change in law," even one short of overruling a precedent, can lead to a purely prospective remedy. In this view, the Court's reasoning in any particular case should be applied as broadly as possible and understood as modifying any existing precedents to the contrary. In dissent, Justice Michel Bastarache accuses his colleagues of conflating a change in judicial interpretation with a change in the Constitution itself. At the root of the disagreement between Bastarache and the rest of the Court are differing conceptions of the Court's role in policy making. While Bastarache prefers a more traditional adjudicatory role, the majority's more policy-centric approach calls for increased flexibility and lower costs when the Court chooses to abandon precedents made in error.*

La décision de la Cour suprême du Canada dans l'affaire Canada (Procureur général) c. Hislop révèle un différend important sur la nature des précédents jurisprudentiels et les coûts afférents encourus lorsqu'on s'en écarte. Dans le contexte de l'élaboration d'un test pour la rétroactivité réparatrice, une majorité de la cour a déclaré qu'un « changement considérable en droit », même un changement qui n'irait pas aussi loin que d'écarter un précédent jurisprudentiel, peut occasionner un recours purement potentiel. Selon ce point de vue, le raisonnement de la cour, dans toutes les affaires, devrait être appliqué de façon aussi large que possible. En outre, il devrait être entendu que ce raisonnement modifie les précédents incompatibles existants. Le juge Michel Bastarache, en dissidence, accuse ses collègues d'amalgamer un changement dans l'interprétation judiciaire avec un changement dans la Constitution elle-même. À l'origine de ce différend entre le juge Bastarache et le reste de la cour sont des conceptions différentes du rôle de la cour dans l'élaboration des politiques. Alors que le juge Bastarache préfère un rôle juridictionnel plus traditionnel, l'approche de la majorité, davantage centrée sur les politiques, exige une souplesse accrue et des coûts réduits lorsque le tribunal choisit d'écarter des précédents créés par erreur.

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I. INTRODUCTION

With a few exceptions, the Supreme Court of Canada's decision in *Canada (Attorney General) v. Hislop*[1] has been the subject of little academic scrutiny. This is somewhat surprising given the attention that the Court's earlier gay rights cases garnered (*Vriend v. Alberta*[2] and *M. v. H.*,[3] to mention two blockbusters). Scholarship on *Hislop* has thus far been limited to fairly technical issues: the strategic dimensions of remedial litigation[4] and class actions,[5] the significance of the Court's comments on the doctrine of qualified immunity,[6] and the case's potential impact on tax law.[7] As those topics suggest, *Hislop* is viewed by academic commentators as primarily interesting to lawyers and other judges, and not at all like the compelling rights-defining cases that normally attract public controversy. This is unfortunate because the technical question — concerning the availability of a retroactive remedy for unconstitutionally excluded Canada Pension Plan[8] beneficiaries — has provoked an interesting and revealing disagreement between Justice Bastarache and the rest of the Supreme Court bench over the Court's proper role in interpreting the Constitution. This article attempts to highlight this aspect of the decision in order to demonstrate that *Hislop* is a significant case for understanding the nature of judicial precedents and the attendant costs of deviating from them.

The key to understanding *Hislop* from this perspective is to concentrate upon what separates Bastarache from his colleagues. In one of the few press accounts of the case, *Globe and Mail* reporter Kirk Makin, usually a keen observer of the Court, found Bastarache's concurrence mysterious and characterized it as "an extraordinary cry in the wilderness from a Supreme Court

1 2007 SCC 10, [2007] 1 S.C.R. 429 (CanLII) [*Hislop*].

2 1998 SCC 816, [1998] 1 S.C.R. 49 (CanLII) [*Vriend*].

3 1999 SCC 686, [1999] 2 S.C.R. 3 (CanLII) [*M. v. H.*].

4 Debra M. McAllister, "The Year in Review: Highlights From the 2006-2007 SCC Charter Decisions" (2007) 23 National J. of Constitutional Law 1 (comparing *Hislop* to *Council of Canadians with Disabilities v. Via Rail Canada Inc.* [2007] 1 S.C.R. 650).

5 R. Douglas Elliott, "Eeny, Meeny, Miny, Moe: Choice of Forum and Process in Constitutional Litigation" (2006) 21 National J. of Constitutional Law 167; Lorne Sossin, "Class Actions against the Crown: A Substitution for Judicial Review on Administrative Law Grounds" (2007) 57 Univ. of New Brunswick Law J. 9.

6 Gary S. Gildin, "Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence" (2009) 24 National J. of Constitutional Law 121.

7 Michael Pal, "The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law" (2008) 66 Univ. of Toronto Faculty of Law Rev. 65 (arguing that *Hislop* might have been better decided using the principles of "unjust enrichment").

8 *Canada Pension Plan*, R.S.C. 1985, c. C8 [CPP].

of Canada judge considered to be a staunch conservative."[9] Why, Makin wondered, would such a conservative justice take "umbrage with his eight colleagues for refusing to make the federal government fully compensate hundreds of gays who had been denied pension survivor benefits for many years"?[10] However, as Makin himself notes, Bastarache's opinion is a *concurrence* and not a *dissent* — meaning that Bastarache was not any more liberal with the public purse than the rest of the panel. In fact, the Court's unanimity is lost not as a result of differences over fiscal prudence but rather a disagreement over the nature of judicial power and, on this score, Bastarache does take an arguably more conservative approach than his colleagues. If one understands *Hislop* as a case of inter-institutional rule, the question is not one of more-or-less benefits for this particular set of litigants, but, rather, more-or-less power for a policy-minded Court. In this regard, from an *institutional* rather than fiscal perspective, Bastarache is perhaps the conservative that Makin believes him to be. While the rest of the Court favours a strong power of doctrinal correction with respect to its policy-making powers — a judicial "mulligan," if you will, for erroneous precedents — Bastarache offers a weaker and less court-centric corrective power. To develop this argument further, one must examine the details of *Hislop* and observe its place in the Court's evolving gay rights jurisprudence.

II. THE INSTANT CASE

Hislop might be thought of as the denouement of the Supreme Court's high-profile series of gay rights cases. The central rulings, for the purposes of the *Hislop* Court, are *Egan v. Canada*[11] and *M. v. H.*[12] In the 1995 *Egan* case, a fractured Court (5-4 on the result, 4-1 versus 3-1 on the reasoning) held that the opposite-sex definition of "spouse" in the *Old Age Security Act*[13] was constitutionally valid. In the 1999 *M. v. H.* case, on the other hand, the Court ruled (8-1 on result, 6-1-1-1 on the reasoning) that the opposite-sex definition of spouse in the Ontario *Family Law Act*[14] was constitutionally underinclusive. The plurality judgment in *M. v. H.*, written by Justices Cory and Iacobucci, explicitly distinguished that case from *Egan* (where the limits

9 Kirk Makin, "Supreme Court cautious about dictating government spending" *The Globe and Mail* (9 April 2007) A5.

10 *Ibid.*

11 1995 SCC 98, [1995] 2 S.C.R. 513 (CanLII) [*Egan*].

12 *Supra* note 3. Another key case in the *Hislop* context is *Vriend*, *supra* note 2 (sexual orientation must be included as a protected ground against discrimination in provincial human rights codes).

13 R.S.C., 1985, c. O-9 [Old Age Security].

14 R.S.O. 1990, c. F.3.

of a publicly funded social program were at stake) largely on the basis that public funds were not at issue in the family law context of *M. v. H.* (where the benefit to one party would be at the cost of the other).[15] Thus, even though a plurality of judges in *M. v. H.* "recognize[d] the fundamental role of precedent in legal analysis," the case was "based on entirely different legislation with its own unique objectives and legislative context."[16] Presented with the narrow judgment in *M. v. H.* that affected only one Ontario statute, the federal government opted for a much broader response with the *Modernization of Benefits and Obligations Act*,[17] which changed the definition of spouse to include same-sex couples in sixty-eight pieces of legislation. In other words, the federal government acted more generously towards same-sex couples than a strictly doctrinal (or "narrow") reading of *M. v. H.* would require.

One of the federal schemes affected by this change was the Canada Pension Plan,[18] which would now provide survivor benefits for same-sex spouses and thus legislatively expand the more exclusive policy that the *Egan* Court had earlier endorsed. Two general questions of retroactivity arose from this legislative change: first, are the benefits available to same-sex partners whose spouses died *before* the legislative changes? (Section 44(1.1) of the CPP limits benefits to individuals whose spouses died on or after 1 January 1998.) Second, are survivors owed back payments for benefits not paid before the legislative change? (Section 72(2) of the CPP precluded any payment before July 2000, the date the amendments came into force.)

All nine members of the *Hislop* Court agree on the result for both issues. On the eligibility question, the Court ruled that benefits are to be "understood in terms of the current status of being a survivor," and thus the date of the relevant spouse's death is irrelevant. On the matter of payments, they are to begin when an application is made, "or where no application [is] made because of the unconstitutional provisions, the date on which the statement of claim [is] filed." This means that "in no event are benefits payable in respect of a month prior to August 1999," which is the earliest month that a same-sex survivor could statutorily claim on the day the *MBOA* came into force.[19] The remedy in *M. v. H.* is thus characterized as purely prospective for the litigants in *Hislop*. While the Court is unanimous in determining that the government is not responsible for the back payment of benefits prior to August 1999,

15 *M. v. H.*, *supra* note 3 at para. 130.
16 *Ibid.* at para. 75.
17 S.C. 2000, c.12 [*MBOA*].
18 *Supra* note 8.
19 *Hislop*, *supra* note 1 at paras. 132 and 134.

Bastarache and the majority disagree over the appropriate legal test for granting a retroactive remedy. Since the *Hislop* litigants fail both tests, one might be tempted to dismiss this disagreement as a relatively arcane bit of legal minutia. To the contrary, it is the result which is a constitutional footnote, while the reasoning reflects deep uncertainty about the Court's interpretive power.

III. RETROACTIVE AND PROSPECTIVE REMEDIES

Both Bastarache and the majority agree in *Hislop* that "[t]he Constitution empowers courts to issue constitutional remedies with *both* retroactive and prospective effects."[20] Furthermore, they agree that retroactivity can be restricted if it is necessary to accommodate and reconcile the following factors: (1) the government's good faith attempts to follow the law (as it understood it at the time), (2) a respect for fairness to the litigants, and (3) a recognition of Parliament's leading role in distributing public resources. More can be said about each of these factors, but for the moment let us consider an additional factor the majority requires but that Bastarache rejects: a substantial change in the law.

For Justices LeBel and Rothstein, writing for a majority of the Court, a substantial change in the law is a necessary condition for denying a retroactive remedial effect. The basis for applying retroactive remedies, in this view, is a consequence of accepting a "declaratory approach" to law, whereby "judges do not create law but merely discover it."[21] This "Blackstonian" approach requires that remedies "be fully retroactive because the legislature never had the authority to enact an unconstitutional law."[22] As such, this approach "reflects a traditional and widespread understanding of the role of the judiciary in a democratic state governed by strong principles of separation of powers."[23] In this view, "[c]ourts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings"; thus "they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling."[24] As the majority notes, the declaratory approach has been often criticised for its failure to acknowledge the significant degree of law-making inherent in judicial deci-

20 *Ibid.* at para. 81 (emphasis in original).
21 *Ibid.* at para. 84.
22 *Ibid.* at para. 83.
23 *Ibid.* at para. 84.
24 *Ibid.* at para. 86.

sion making. In other words, the declaratory approach is a poor description of what judges (and especially appellate judges) actually do.

The limitations of the declaratory approach guide the majority towards a means of testing whether retroactive effect should be given to a particular remedy. LeBel and Rothstein explain that a retroactive or purely prospective remedy "will be largely determined by whether the Court is operating inside or outside of the Blackstonian paradigm."[25] In this view, the Court has two alternatives: if "the Court is declaring the law as it existed, then the Blackstonian paradigm is appropriate and retroactive relief should be granted,"[26] but if the "court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment."[27] In other words, if the Court makes a radical departure from existing law, it is likely that the remedy it offers will be purely prospective.

Much depends on this distinction between "developing new law" and "declaring the law as it always existed," and an obvious concern is how interested parties can determine when the Court is (in its own view) creating new law. One suspects that we will not see decisions that bluntly state that "this decision is outside of the Blackstonian paradigm." This indeterminacy is particularly problematic since the "substantial new law" criterion includes not only obvious changes in law (when, for instance, the Supreme Court "departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision"[28]), it also includes situations where "[t]he right may have been there, but it finds an expression in a new or newly recognized technological or social environment."[29] According to the majority, just such a substantial change in law occurred in the time between *Egan* and *M. v. H.*, and thus retroactive relief may be denied to the *Hislop* litigants.

IV. WHAT DID EGAN DECIDE?

The majority's assertion that there was a substantial change in law relies upon a strong version of judicial interpretive supremacy. LeBel and Rothstein bluntly declare, in terms never before used in a Supreme Court of Canada ruling, that "in our system, the Supreme Court has the final word on the in-

25 *Ibid.* at para. 93.
26 *Ibid.*
27 *Ibid.*
28 *Ibid.* at para. 99.
29 *Ibid.*

terpretation of the Constitution."[30] In their view, the "final word" means more than simply the authority to resolve the case before the bench; it means that the principles and reasoning in a Supreme Court opinion should be accepted immediately by other political actors and applied as broadly as possible. If the Court's opinions are given this broad a scope, then the case for a substantial change in law between *Egan* and *M. v. H.* is easy to make. *M. v. H.* "marks a clear shift in the jurisprudence of the Court" because "[i]t was a fact that this Court held in *Egan* that the Constitution did not require equal benefit for same-sex couples… [t]his fact only changed after *M. v. H.*"[31] In this view, the statutory context of each case is irrelevant and the underlying jurisprudential story — from same-sex inequality to equality — is what matters.

To make this argument the majority must ignore what was actually said, not only in the *Egan* decision, which might be understandable, but also in *M. v. H.*, the very case that announced the jurisprudential shift relied upon to deny retroactivity. The story the majority wants to promote is a simple one of judicial change: *Egan* says the government can discriminate between same-sex and common law couples, whereas *M. v. H.* says they cannot. If the majority's account were accurate, however, one would expect *M. v. H.* to explicitly overrule *Egan* but, as noted above, the plurality opinion in *M. v. H.* was careful to distinguish the case from *Egan* rather than overrule it. Again, the key to the distinction, according to the *M. v. H.* opinions themselves, is that public funds were at issue in *Egan* (Old Age Security payments) but not in *M. v. H.* (where the monetary awards were not from the government, but rather from one spouse to another). The question of whether the government can constitutionally discriminate between same-sex and common law couples in the distribution of public funds remains unaddressed by the Supreme Court, if only for the simple reason that the government acted (by implementing the *MBOA*) before further litigation became necessary. It is true that given the current disposition of the Court, *Egan* would *probably* be overturned if a direct challenge arose, but that is a statement of probability not law. It is presumably open to the federal government to revoke the *MBOA* and contest the constitutionality of its new policy before the courts, even if this path leads

30 *Ibid.* at para. 111; in one instance, the "final say" on the interpretation of the Constitution was assigned by the Court to the legislature by virtue of section 33 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [*Charter*] (see *Vriend*, *supra* note 2 at para. 137). The author explores the implications of the assertion of a judicial "final say" in Dennis Baker, Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation (Montreal & Kingston: McGill-Queen's University Press, 2010).

31 *Hislop*, *supra* note 1 at paras. 110-11.

to an opposed Supreme Court (but then who can predict when another "substantial change in law" might occur?).

This opens the question of whether one should take the opinions expressed in *M. v. H.* seriously at all. A political scientist sceptical of jurisprudential factors, for example, might suggest that the rhetorical compromise in *M. v. H.* (namely the emphasis that no public funds were at issue) was a strategic necessity to accommodate the members of the *Egan* Court who were still on the bench at the time of *M. v. H.* This strategic account is unconvincing, however, since the *Egan* plurality had already collapsed by 1999. Two of the five judges agreeing in the *Egan* result — Justices La Forest and Sopinka — were no longer on the Court, leaving only three judges (Chief Justice Lamer and Justices Major and Gonthier) who had ruled in favour of the opposite-sex definition of spouse (in the Old Age Security context) by the time of *M. v. H.* The panel that ruled in *M. v. H.* (Lamer and Justices L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie) included five judges who could have ruled according to their preference and simply declared opposite-sex definitions of spouse unconstitutional, regardless of whether or not public funds were at issue (L'Heureux-Dubé, Cory, Iacobucci, and McLachlin had dissented from the result in *Egan*; we can infer that Binnie would have provided the crucial fifth vote against the constitutional validity of the opposite-sex definition of spouse because he later joined the *Hislop* majority). Two judges were part of the *M. v. H.* majority and the *Egan* plurality (Lamer was part of the *Egan* plurality and the *M. v. H.* majority; Major was part of the *Egan* plurality and concurred with the result in *M. v. H.*), and thus the opinion might have been crafted to avoid the appearance of an embarrassing reversal of opinion. The important point, however, is that Lamer and Major's votes were *not necessary* for the *M. v. H.* majority. In other words, no compromise was needed at all and a majority of the *M. v. H.* Court could have overruled *Egan* and simply ruled that all opposite-sex definitions of spouse were unconstitutional whether or not public funds were at stake. Thus, as a strategic move the attempt to make *M. v. H.* consistent with *Egan* is not imperative. This suggests that some of the judges (and not just Lamer and Major but possibly also Iacobucci and Cory, who were *M. v. H.* authors and not members of the *Hislop* Court) considered the public funds distinction important and legally significant.

But why does this distinction matter so little to the *Hislop* majority? In its view, all governments in Canada are obligated to understand and adopt the broadest understanding of the principles announced in *M. v. H*, but if *M. v. H.* is to be respected it must be in its reasoning and not only in its result. That

reasoning, in the eyes of the *Hislop* majority, meant that "[a]fter *M. v. H.*, it became apparent that the *Egan* dissent prevailed."[32] So, even though *Egan* was explicitly distinguished, the dissenting opinion was now to be treated as the opinion of the Court. However, this substantial change in the law does not result in government provision of retroactive payments because "the benefit of hindsight does not undermine the government's reasonableness in relying on *Egan*."[33] In other words, the government should not be faulted for simply following *Egan* and obeying what was then judicial command.

Bastarache's account of the inter-institutional exchange is starkly different from the majority's even though they arrive at the same denial of retroactive benefits. Bastarache accepts that "the Court has the final word on the interpretation of the Constitution," but it is clear that he has a different notion of what it means for the Court to have the final word.[34] According to Bastarache, "it difficult to believe that *Egan* was the final word — even for a time — on the application of s. 15(1) to same-sex couples."[35] "After *Egan*," Bastarache writes,

> it was far from clear whether its reasoning would apply outside the realm of social assistance schemes such as Old Age Security... [G]iven the contradictory decisions both before and after *Egan*, the closeness of the decision in that case, and the difficult nature of the issues at stake, it is difficult to see *Egan* as definitively establishing what the Constitution required. The reality is that it was for a time unclear exactly how s. 15(1) would apply to same-sex couples. The judicial process can be slow. It took time for this Court and others to articulate the correct constitutional principles to be applied to legislative exclusions of same-sex couples.[36]

It would be unfair, during this period of "jurisprudential uncertainty," to hold the government financially responsible for its good faith efforts to help discern constitutional norms. Unlike the majority's justification suggesting that the government should not be faulted for obeying the judicial command in *Egan* (because that command shifted in *M. v. H.*), Bastarache conceives of both the courts and Parliament as good faith participants in the period during which there are plural interpretations of the Constitution. Before the "final word" of *M. v. H.* (at which point Bastarache himself adopts the stance of judicial supremacy in constitutional interpretation), Parliament was given interpretive space to advance its understanding, even after a supposedly definitive

32 *Ibid.* at para. 112.
33 *Ibid.*
34 *Ibid.* at para. 156.
35 *Ibid.*
36 *Ibid.* at paras 156-57.

Supreme Court ruling (in *Egan*).

To further this point, Bastarache insists upon a distinction between the Constitution and the Court's interpretation of it. The majority, according to Bastarache, implies that "s. 15(1) of the *Charter* did not extend to same-sex couples until this Court said it did."[37] Bastarache notes that his "colleagues are not simply saying that this Court's *interpretation* of the Constitution changed between 1985 and 1999," because "[i]f that were the case, it would be sufficient to base their denial of retroactive relief solely on the good faith reliance of the government."[38] The majority goes further, according to Bastarache, and equates the Court's interpretation with the Constitution itself: if the Court *says* the Constitution allows for the discrimination in *Egan*, then that is what the Constitution *is* and the government should act accordingly; if the Court says the Constitution requires equality for same-sex couples, then that too *is* the Constitution and the government should act consistently with *that* Constitution, when it arrives. Such an approach, Bastarache suggests, collapses constitutional supremacy into judicial supremacy *simpliciter* and thus denies the Constitution any enduring character divorced from contemporary judicial whim. He disagrees with the majority's conception of the Constitution and notes that:

> [t]he Constitution exists independently of judicial decisions. Judges do not "make" the Constitution every time they interpret its provisions. Interpretations of what the Constitution requires may change, but the underlying rights and freedoms endure. *Charter* rights are not created every time that that a court expressly overrules or implicitly repudiates a prior decision... The rights and freedoms in the *Charter* were guaranteed to all Canadians from the moment the *Charter* came into force.[39]

This is the very same Blackstonian approach of "finding" law that the majority suggests is an implausible account of judicial decision making, especially in the post-*Charter* era where judges are inevitably called upon to make policy judgments that may be transitory and necessarily tentative. It is this abandonment of the traditional judicial role, I suggest, that is at the core of Bastarache's objection.

37 *Ibid.* at para. 146.
38 *Ibid.*
39 *Hislop*, *supra* note 1 at para 142.

V. WHAT'S REALLY GOING ON — THE COST OF MAKING POLICY

The essence of the disagreement between Bastarache and the majority is over the conception of the Supreme Court as policy maker or law maker. This is hardly a novel question of judicial authority — it has been explored in Canadian "law and politics" literature since at least the publication of Paul Weiler's *In the Last Resort*[40] and Peter Russell's "Anatomy of a Constitutional Decision"[41] — and it is generally accepted that the Court must inevitably make policy in some situations. Even the most ardent proponents of judicial restraint concede that courts must be interstitial policy makers, producing new rules when confronted with a case that cannot be answered by reference to statute or existing jurisprudence. Judicial policy making is traditionally conceived, however, as primarily *adjudicative*, meaning that it is limited by a court's function *as a court* and not as a more general policy maker (such as the legislature). The promulgation of judicial policy making relies entirely on the machinery of precedent; a court's decision in a specific case is turned into policy by its application by other courts (or repeatedly by the same court). This mode of policy making has a number of advantages but, as David Horowitz noted in his classic 1977 account, the doctrine of precedent places "special inhibitions on changing judicial course":

> However innovative or experimental it is in fact, adjudicative policymaking is sanctified as law, which is in principle permanent. The courts, therefore, have only limited ability to admit candidly the tentative nature of conclusions they have reached. To say that a person or group "has a right" is to take a position difficult to reverse. Courts are on this account loath to give the appearance of fickleness that might attend unrestrained willingness to change course whenever circumstances seem to require change.[42]

In a very real sense, judicial power is legitimated by its adjudicatory character — it is permissible for an individual judge (or panel of judges) to rule over others *only* because he or she is an independent decision maker applying rules that are public and knowable. Horowitz's charge of judicial fickleness is loathed by judges precisely because an "unrestrained willingness to change course when-

40 Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974)

41 Peter H. Russell, "The Anti-Inflation Case: The Anatomy of a Constitutional Decision," 20 (1977) Canadian Public Administration 632.

42 Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institute, 1977) at 36.

ever circumstances seem to require change" undermines this foundational source of judicial power. If cases are determined by judicial preference and not law, then there is less reason to defer to the courts' decisions. Why should the policy preferences of nine unrepresentative actors (to use the example of the Supreme Court) trump the policy preferences endorsed by a democratically-elected legislature? This is a difficult question to answer without recourse to the notion that what comes from the courts is in some sense law and not simply policy.

The adjudicatory character of judicial power is double-edged since its strength over litigants is tempered by the fact that it must be wielded in accordance with knowable, and thus relatively stable, law. One of the mechanisms that inhibits judicial uncertainty — preventing that "unrestrained willingness to change course" — is cost. Like all governing institutions, courts are — and must be — cognizant of the financial costs their rulings impose on the public purse. Even if pecuniary matters cannot justify a rights infringement on their own, the knowledge that a particularly large imposition on government revenue will result from one course of judicial action will surely give pause to a judge leaning in that direction.[43] This factor is particularly acute in a case like *Hislop* in which the right to a government entitlement is at stake. Since even a slight change in benefits policy can result in a large number of potentially expensive retroactive claims, cost-minded judges are likely to avoid shifts in jurisprudence that will expose the government to such liabilities.

The majority in *Hislop*, of course, tries to circumvent this potential trap for policy-minded judges by encouraging the use of purely prospective remedies. If remedies are purely prospective, then the government, which has hitherto been acting in good faith and in accordance with existing jurisprudence, does not have to bear any fiscal burden that might result from a judicial policy amendment so long as the government distributes future benefits in accordance with the new Court-mandated scheme. By avoiding the payment of accrued benefits, the *Hislop* majority's solution could be increasingly valuable to judicial policy makers as the *Charter* ages. If another *M. v. H.*-like change in the law occurs fifty or seventy-five years after the introduction of the *Charter*, then the prospect of back payments for benefits could be far greater than they are in *Hislop*. Without the *Hislop* work-around, and if the government were to be burdened with an immediate and potentially crippling fiscal penalty, it would take a brave Court to craft such new law. By contrast,

43 See for example, *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (CanLII).

a new exclusively forward-looking obligation should be an easier pill for the government to swallow.

This enhanced policy making aspect of judicial power is clearly emphasized throughout the majority decision in *Hislop*. Responding to the objection that prospective remedies are unfair to the litigants before the Court, the majority argues that "a *purely prospective remedy* in *M. v. H.* was not meaningless" since "*M. v. H.* resulted in wide scale amendments to federal and provincial legislation across the country to extent government benefits to same-sex couples... One could not say that *M. v. H.* granted those litigants only a Pyrrhic victory."[44] In other words, justice for the individual litigants is secondary to policy making for the entire class of litigants. While this may indeed be what the litigants in *M. v. H.* sought, it is clear that the policy-oriented remedy is rather far afield of the courts' traditional role as arbiter of discrete controversies between parties. The majority's conception of the Constitution itself is consistent with this policy making focus:

> [T]he Constitution, at any snapshot in time, is only as robust as the court interpreting it. If the judiciary errs or is slow to recognize that previous interpretations of the Constitution no longer no longer corresponds to social realities, it must change the law. However in breaking with the past, the Court does not create an automatic right to redress for the Court's prior ruling.[45]

This vision of a fluid Constitution, offered by the majority in *Hislop*, is one that is highly amenable to judicial policy making since the Court can essentially shape public policy with only the same forward-looking consequences that the government operates under.

It is this free-wheeling approach to judicial policy making and constitutional rights that seems to trouble Bastarache. Throughout his concurrence, Bastarache is clear that the Court should be making *law*, which, for him, is typified by its permanence. Bastarache declares that he "cannot accept... that Charter rights can be here one day and gone the next" as the majority's policy-making approach would suggest.[46] The majority's endorsement of purely prospective remedies makes it easier — i.e., less costly — to substantially change the law and thus invites more changes in the future. By contrast, Bastarache views the change in jurisprudence as a change in *law* and not simply a change in *policy*. For him, this distinction means that Court must accept the legal and

44 *Hislop*, *supra* note 1 at para. 116.
45 *Ibid.* at para. 114.
46 *Ibid.* at para. 143.

fiscal consequences that flow from their change, namely that the Constitution always required the (now understood to be correct) result *even if the Court did not initially recognize this correct interpretation*. In his traditionalist view, what is unconstitutional has always been unconstitutional regardless of the Court's interpretative flaws, and there is no more appropriate subject for judicial remedy than to correct past illegality.

So why would Bastarache join his colleagues in denying retroactive effect to the *Hislop* remedy? For him, the question of retroactivity is solely a question of fairness to nonjudicial actors. The existence of a substantial change in law is not included in this calculation except as it relates to the expectations of actors (and thus does not need to be an independent consideration itself, as the majority suggests). This is significant since these expectations are not within the Court's control. Unlike a substantial change in law — a factor that is solely within the Court's power to refer to in determining retroactivity — the reasonable expectations of the government (in that they were obeying the then-constitutional guidance of the Court) is a factor that is difficult to manipulate according to judicial whim. Thus, Bastarache's test for retroactivity is, in an important sense, external to the Court. By attaching fiscal penalties to retroactivity and by placing the object of the test beyond judicial control, Bastarache's criteria for retroactivity are actually *more* restrictive — from the perspective of the bench — than the majority's. (This is a somewhat perverse outcome since the majority includes an *extra* and *necessary* consideration for denying retroactivity but, as Bastarache suggests, the focus on judicial policy making and the emphasis on purely prospective remedies means judicial creativity is less constrained by the majority's approach.) Understood in this way, Bastarache's concurrence is indeed more "conservative" than it might initially appear.

Certainly it is more conservative than the judgment of the *Hislop* majority. The net effect of that decision is to establish a judicial mulligan that allows future courts to embark on interpretive policy adventures safe in the knowledge that they can change course with fewer and less onerous consequences. Ironically, the creation of this policy tool, intended to free judicial power from the restrictive character of a traditionalist notion of law, also ensures that the Court's current jurisprudence is less permanent and more vulnerable in the future to policy-minded judges who might not share the preferences of today's bench. In other words, by seeking the power to devise policy as freely and prospectively as legislators do, judges have hampered their ability to wield the more permanent power of shaping law. Perhaps this is overstating the transformation, but it is my contention that *Hislop* marks a significant landmark along this road.