LECTURE

Section 1: Justifying Breaches of *Charter* Rights and Freedoms

THE HONOURABLE MARSHALL ROTHSTEIN*

I. INTRODUCTION

THIS PRESENTATION ADDRESSING SECTION 1 OF THE *CHARTER*[1] takes us into the famous four-part *Oakes*[2] test. What I propose to do is to briefly review that test and then consider it in the context of the type of case that I think poses some difficulty to the section 1 analysis—namely, where social benefit legislation is found to be under-inclusive. I see two pressure points in the *Oakes* test in such cases that are reflected in recent Supreme Court decisions. The first difficulty arises out of the need for the articulation of a more rigorous pressing and substantial objective test. Secondly, there are problems in how judges deal with the issue of cost when deciding whether a public benefit program that violates a *Charter* right is justifiably under-inclusive under section 1.

II. SECTION 1 AND THE OAKES TEST

EVEN IF YOU ARE NOT A LAWYER, if you have read a newspaper or watched a television news broadcast, you will know that the *Charter* establishes a number of rights and freedoms. When an individual is able to demonstrate that one of

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* Justice, Federal Court of Canada—Appeal Division.

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

2 *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138–140 [hereinafter *Oakes*].

his or her rights or freedoms has been violated, the law enacted by Parliament, the provincial legislature or a regulation of the Cabinet is said to infringe the individual's *Charter* right or freedoms. Nonetheless, the government may still defend its action on the grounds that the law is a reasonable limit on the *Charter* rights or freedom and is demonstrably justified in a free and democratic society. In doing so, the government is arguing that the infringing law is necessary to achieve one of the fundamentally important goals of society.

The words of section 1 are:

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

The words "demonstrably justified" suggest a rigorous review by the courts and a heavy burden on the government. In *Oakes*, Chief Justice Dickson of the Supreme Court of Canada said as much in his discussion of the burden on the government in section 1.[3] Indeed, the structure of section 1 is to presume a guarantee of certain rights and freedoms and then provide for an exception. A violation of a *Charter* right or freedom is a violation of the most important individual rights and freedoms known to Canadian law. One might think that section 1 defences would hardly ever be successful.

However, between 1986 and 1999, in Supreme Court cases where *Charter* rights and freedoms were found to be violated and where section 1 defences were raised, almost 40 per cent were decided in favour of the government.[4] Thus, it is apparent that the Supreme Court has not adopted as rigorous a standard of review of questionable laws in its section 1 analysis as one might expect.

The Supreme Court has not invariably applied the *Oakes* test in analysing section 1 defences, yet it is safe to say that it has been applied in the vast majority of cases—approximately 85 per cent.[5] The *Oakes* test may be formulated as two main tests with subtests under the second branch, but it is easier to think of it in terms of four independent tests. If the legislation fails under any one test, it cannot be justified and must be declared to be of not force or effect.

The four tests ask the following questions: is the objective of the legislation pressing and substantial; is there a rational connection between the government's legislation and its objective; does the government's legislation minimally

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[3] *Oakes*, *supra* note 2 at 136–138.

[4] The statistical references in this presentation are largely based upon the recently published study by L.E. Trakman, W. Cole-Hamilton & S. Gatien, "R. v. *Oakes* 1986–1997: Back to the Drawing Board" (1998) 36:1 Osgoode Hall L.J. 83 [hereinafter Trakman *et al.*]. For this presentation, section 1 decisions of the Supreme Court in 1998 and up to October 1999, have been considered in addition to the data of Professor Trakman *et al.*

[5] *Ibid.* at 146 (Appendix B, Table 2).

impair the *Charter* right or freedom at stake; and, is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?

The questions, or tests, articulated in *Oakes* raise many difficult issues in an emerging area of *Charter* litigation—specifically, social benefit programs. I was recently told that there are currently some 80 *Charter* challenges to benefit programs before various courts throughout the country.

These challenges are usually based on under-inclusiveness under the right to equality in subsection 15(1) of the *Charter*.[6] They arise when an individual claims that a public benefit program such as Employment Insurance,[7] the *Canada Pension Plan*,[8] or provincial health care legislation provides benefits to others while discriminating against the claimant by either omission or express exclusion. The claim is based on one of the enumerated or analogous ground established under subsection 15(1).

A recent well-known benefits case is *Law* v. *Canada*[9] where the claimant challenged the *Canada Pension Plan* on the basis that she was denied survivor benefits because she was under 35 years of age when her husband died. The Supreme Court of Canada dismissed Ms. Law's claim of age discrimination as it determined that her essential human dignity and freedom—which are protected by 15(1)—were not violated. The Court recognised that the age-based structure of the survivor benefits program reflects the reality that younger persons have a better chance of recovering financially from the death of a spouse through such means as employment or remarriage than older members of society. *Law* did not reach the section 1 stage for this reason. This is only one example of the growing number of cases where lines are drawn by the government as to who may or may not benefit from a social program and are being challenged under subsection 15(1) of the *Charter*. When a violation of essential human dignity can be established in these cases, the courts will be faced with section 1 defences by the government.

What I would like to do for the next few moments is to deal with some recent section 1 developments and difficulties that are applicable in dealing with government benefit programs that are discriminatory by reason of under-inclusiveness.

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6 Subsection 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7 *Employment Insurance Act*, S.C. 1996, c. 23.

8 R.S.C. 1985, C-8.

9 [1999] 1 S.C.R. 497 [hereinafter *Law*].

III. THE PRESSING AND SUBSTANTIAL OBJECTIVE TEST

LET US LOOK AT THE FIRST PART of the *Oakes* test—whether the legislation has a pressing and substantial objective. From 1986 to 1997, the government succeeded in justifying the pressing and substantial test in 97 per cent of the cases where section 1 was decisive.[10] This is a rather startling number as it is so lopsided.

Until recently, one might seriously have questioned whether the pressing and substantial objective test was serving a useful purpose. We do not live in a totalitarian regime. In the Canadian parliamentary democracy, one would expect that laws are passed with the protection and advancement of the public interest being the paramount consideration; that laws enacted by the legislature are intended to address pressing and substantial objectives.

The problem is that until recently, the pressing and substantial test has been somewhat unfocused. Generally, under the test, the courts examine the relevant legislation as a whole or perhaps only the impugned provision to determine if it has a pressing and substantial objective. It would be unusual for the legislation as a whole or even the impugned section to be antithetical to the objective of a free and democratic society. For example, in *Egan* v. *Canada,*[11] a same-sex partner was denied access to the spousal allowance paid to the 60–64 year old heterosexual cohabiting spouses of pensioners. While the majority would have saved the legislation under section 1, even the dissenting judges unanimously found that the spousal allowance provisions of the *Old Age Security Act*[12] met a pressing and substantial objective. That objective was the provision of benefits to a needy group—poor heterosexual households where a retired spouse had become a pensioner and was supporting the household on that single pension. The Court found that a spouse's allowance in addition to the pensioner's benefits and guaranteed income supplement was a pressing and substantial objective of the legislation. In making that finding, the focus was placed on that part of the legislation that provided the benefit.

However, in 1998, the Supreme Court decided *Vriend* v. *Alberta,*[13] involving the omission of protection on the ground of sexual orientation from the Alberta

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10 Trakman *et* al., *supra* note 4 at 140 (Appendix A, Table 1).

11 [1995] 2 S.C.R. 513 [hereinafter *Egan*].

12 R.S.C. 1985, c. 0–9, as am. by R.S.C. 1985, c. 34 (1st Supp.).

13 [1998] 1 S.C.R. 493 [hereinafter *Vreind*]. See paragraphs 109–116 *per* Iacobucci J. for his analysis respecting the pressing and substantial objective test.

Individual's Rights Protection Act.[14] In *Vriend*, Iacobucci J. refined the pressing and substantial objective analysis in under-inclusive cases. He stated that the Court was to be concerned with the legislation as a whole, the impugned provision and the particular omission, with the omission being the focal point of the analysis. Focusing on the omission means that the omission itself must have a pressing and substantial objective. In *Vriend*, the Supreme Court found that the omission of protection for sexual orientation was the antithesis of the objective of the *Individual's Rights Protection Act.* Further, the protection provision and the omission of protection on the grounds of sexual orientation had no pressing and substantial objective.

Focussing on the omission in under-inclusive cases creates this problem. Before getting to section 1, the omission or exclusion has already been found to constitute a violation of a right or freedom guaranteed by the *Charter*. It has been held, as far back as *R.* v. *Big M Drug Mart*[15] in 1985, that a law with an impermissible purpose will not be saved under section 1. Thus, narrowing the focus to the omission could mean that any law found to constitute a violation of the *Charter* could never pass the pressing and substantial test.

Prior to *Vriend*, almost all laws passed the pressing and substantial test as they were considered quite broadly. Following *Vriend*, the concern was that no law could pass the pressing and substantial test it would be examined too narrowly. Indeed, in M. v. *H.*,[16] that was the conclusion arrived at by Justice Bastarache . He noted that the exclusion of same-sex couples from the spousal support provisions of the *Family Law Act*[17] of Ontario specifically detracted from the general legislative purpose of the *Act* and, therefore, the objective of the exclusion could not be considered pressing and substantial. He cited *Vriend* in support of this conclusion.

However, Iacobucci J., for the majority, disagreed with Bastarache J. and found the objectives of the spousal support provisions to be pressing and substantial. In rejecting Bastarache J.'s interpretation of *Vriend*, that a provision that violates subsection 15(1) cannot be pressing and substantial, Iacobucci J. stated that a provision that violates subsection 15(1) may still be consistent with the values of the *Charter*. This conclusion may be reached if the provision

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14 R.S.A. 1980, c. I-2, am. S.A. 1985, c. 33, S.A. 1990, c. 23. By further amendment (the *Individual's Rights Protection Amendment Act*, S.A. 1996, c. 25), the legislation came under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H. 11.7.

15 [1985] 1 S.C.R. 295.

16 [1999] 2 S.C.R. 3 [hereinafter M. v. *H.*].

17 *Ontario Family Law Act, 1986* S.O. 1986, c. 4 [hereinafter *O.F.L.A.*].

is designed to promote *other* values and principles of a free and democratic society.[18]

One interpretation of Iacobucci J.'s comments is that he was leaning away from *Vriend* and not focusing on the exclusion. Rather, he was focussing on the impugned provision that he said still had a pressing and substantial objective. This objective is found in the assertion that, where it did apply, it provided for the equitable resolution of economic disputes where intimate relationships broke down and alleviated the burden on the public purse to provide for dependent spouses.

In the September 1999 decision of the Supreme Court in *Delisle* v. *Attorney General*,[19] Iacobucci and Cory JJ. addressed this difficulty again. While not entirely clarifying the question of how rigorously one must focus on the exclusion or omission as opposed to the impugned provision, they considered what happens when legislation—or an exclusion from legislation—has more than one purpose. They determined that where one provision is impermissible and offends rights under the *Charter* and the other has a justifiable purpose, the justifiable purpose will be sufficient to satisfy the pressing and substantial objective test.[20]

In *Delisle*, the exemption of R.C.M.P. members from federal labour legislation had the valid purpose of maintaining accountability and stability in the national police force. However, the invalid purpose was to keep individual R.C.M.P. members vulnerable to management interference with their association activities which is contrary to the *Charter* right of freedom of association. Iacobucci and Cory JJ. thought the valid purpose was sufficient to permit the legislation to pass the pressing and substantial test.[21] Although they were in dissent in *Delisle*, this aspect of their reasoning was not contrary to anything said by the majority and, I think, it is a helpful clarification of the narrowing focus of the pressing and substantial test largely to the omission or exclusion mandated in *Vriend*.

In dealing with under-inclusive benefit programs, it may be that the government will have excluded some potential claimants for discriminatory reasons. However, if the government can demonstrate that the exclusion was in aid of making the program available, the legislation may still pass the pressing and substantial test.

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18 O.F.L.A., *supra* note 17 at para. 107.

19 (1999), 176 D.L.R. (4th) 513 (S.C.C.) [hereinafter *Delisle*].

20 *Ibid.* at para. 118.

21 *Ibid.* at para. 115–117.

This is the issue that arose in *Collins* v. *The Queen*[22]—spousal allowance under the *Old Age Security Act*.[23] The allowance was payable to spouses of pensioners where the spouse was between 60–64 years of age. However, it was not payable to separated spouses.[24] It was not difficult to find that the exclusion of separated spouses constituted discrimination under subsection 15(1) on the analogous ground of marital status.

The exclusion of separated spouses from the spousal allowance was a violation of Mrs. Collins' rights under the *Charter* and, therefore, the exclusion could not be said to have a pressing and substantial objective on that ground. However, the program was selective, and not all encompassing—that is, to provide a guaranteed income at age 60 to all needy Canadians. The evidence was that if the spousal allowance was to be provided at all, it must be on a selective basis. On this foundation, it was possible to find that the exclusion of separated spouses from the spousal allowance did have a pressing and substantial objective—that it enabled the program to be provided at least to those for whom it was targeted. As one purpose of the exclusion was permissible, the exclusion satisfied the pressing and substantial test.

IV. THE RATIONAL CONNECTION TEST

I WILL NOW TURN TO THE RATIONAL CONNECTION TEST. About 6 per cent of section 1 cases have been decided at this stage;[25] the objective was found pressing and substantial, but the legislation failed to provide a rational connection to its objective. A law passed by Parliament or a provincial legislature is unlikely to be irrational in the sense that it is enacted without reasons and, therefore, the rational connection test is one that the vast majority of legislation should pass. There will be exceptions, however, and indeed, *Vriend* was one. Iacobucci J. found, in *Vriend*, that the exclusion of sexual orientation from the *Individual's Rights Protection Act* of Alberta was antithetical to the goal of the legislation—protection of persons from discrimination when such persons have been found to be members of an historically disadvantaged group.[26]

I think *Vriend* provides a clue as to how the courts will assess underinclusive programs at the rational connection stage. When the program has a

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22 [1999] F.C.J. No. 1578 (F.C. C.A.) *per* Rothstein J, online: Q.L. (F.C.J) [hereinafter *Collins*].

23 R.S.C. 1985, c. O-9, as am. by R.S.C. 1985, c. 34 (1st Supp.).

24 See para. 19(1)(a) and subsection 19(5).

25 Trakman *et* al., *supra* note 4 at 146 (Appendix B, Table 3). In one post–1997 section 1 case the infringement failed the rational connection test after passing the pressing and substantial test [see the majority section 1 judgment of Iacobucci J. in M. v. *H.*, *supra* note 16].

26 *Vriend, supra* note 13 at para. 119.

broad, all-encompassing purpose, it may not be rational to exclude some groups on a basis that has nothing to do with the objective of the legislation. On the other hand, when the purpose is more narrowly focused or targeted, it may not be irrational that some groups are excluded. Of course, the onus is still on the government to prove the rational connection.

V. THE MINIMAL IMPAIRMENT TEST

THE NEXT CONSIDERATION IS THE MINIMAL IMPAIRMENT TEST. It is this test that has become pivotal in the section 1 analysis. From 1986 to 1997, 49 per cent of cases failed at the minimal impairment stage of the *Oakes* test.[27] Furthermore, inimal impairment has consistently been the main battleground of section 1.

The words "minimal impairment," or the alternative term "least intrusive means," imply that the courts must strike down a law if it is possible to conceive of another means that might be less intrusive to a protected right or freedom. When Parliament or the provincial legislatures enact laws, they do so selecting from a range of possible alternatives. The approach selected is the one that they think is most likely to achieve the government's aims. A literal application of the minimal impairment test could give rise in any given case to real or hypothetical alternatives that might conceivably be less intrusive than the one selected. In other words, this may cause the minimal impairment criteria to be an almost impossible test for the government to satisfy.

In recent years, the Supreme Court, in such cases as *RJR-MacDonald*[28] and *Libman*,[29] has adopted a more flexible approach to the minimal impairment test. If the law falls within a range of reasonable alternatives, it will not be found to be overly broad simply because another alternative might be less intrusive than the one selected. Thus, some leeway is accorded to the legislator in the selection of policy options enacted into legislation.

Although deference to the legislator may arise in any of the four branches of the *Oakes* test,[30] it is usually only explicitly addressed at the minimal impairment stage. The Supreme Court has provided some guidance as to when judicial restraint should be exercised. Since *Irwin Toy*,[31] in 1989, and *McKinney*,[32] in

27 Trakman *et al.*, *supra* note 4. Out of seven Supreme Court cases between 1998 and October 1999, where a section 1 analysis was conducted, the legislation failed at the minimal impairment stage in three occurrences.

28 *RJR-MacDonald* v. *Canada*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

29 *Libman* v. *Quebec* [1997] 3 S.C.R. 569 [hereinafter *Libman*].

30 *M.* v. *H.*, *supra* note 16 at para. 80 *per* Iacobucci J.

31 *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 at 993–994 [hereinafter *Irwin Toy*].

32 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 288 [hereinafter *McKinney*].

1990, the Court has stated that deference is more readily granted to the legislature where the impugned legislation involves a balancing of claims by competing groups as opposed to the State acting as the "singular antagonist" of the individual. The singular antagonist role generally arises in *Charter* cases in the criminal context. Where the court is looking at competing claims when the nature of the issue is polycentric—involving interlocking or interacting interests—the legislator is seen as having a representative function and is better suited to such policy choices than is the court. More particularly, where there are competing claims for scarce resources, it is far less certain as to whether a specific policy choice is the least intrusive of the available alternatives.

One of the most difficult questions involves the role financial considerations should play in the section 1 analysis. As a general rule, cost is not a justification for a violation of a right protected by the *Charter*. However, at the minimal impairment stage of the analysis, the degree of deference owed to the legislator may be affected by financial considerations. Frequently cited are the words of Sopinka J. in *Egan*:

> ... government must be accorded some flexibility in extending social benefits ... It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.[33]

In assessing the financial implications, significant subjectivity often creeps into the court's minimal impairment analysis. For example, *Eldridge* v. *British Columbia (Attorney General)*[34] was a case involving a claim on behalf of the hearing impaired for public funding under the British Columbia *Hospital Insurance Act.*[35] The claim requested the provision of sign language interpretation to assist in the communication with medical practitioners. It was based on the denial of the right to equal benefit of the law on the basis of physical disability, contrary to subsection 15(1) of the *Charter*. The Supreme Court found that the claimants were subject to discrimination under subsection 15(1) and refused to uphold the discrimination under section 1. In his section 1 analysis, La Forest J. agreed that while financial considerations alone may not justify *Charter* infringement, governments must be afforded wide latitude to determine the proper distribution of resources in society.[36]

La Forest J. then rejected the British Columbia government's minimal impairment defence. The Government's evidence was that the cost to provide such a service would be $150,000.00 per year or 0.0025 per cent of the provincial health care budget. In response, La Forest J. stated:

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33 *Egan*, *supra* note 11 at para. 104.

34 [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

35 R.S.B.C. 1996, c. 204.

36 *Eldridge*, *supra* note 34 at para. 85.

> In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.[37]

Thus, a line-drawing exercise is commenced. What if the cost was 1 per cent, 10 per cent or 25 per cent of the provincial health care budget? Might the decision have been different? Perhaps *Eldridge* was an easy case in which to dismiss financial considerations since the amount was considered to be *de minimis*.

However, what is significant is that the Supreme Court did not say that cost was irrelevant. Rather, it only stated that the amount was too small to justify the exclusion. Thus, one is left with the impression that, under the minimal impairment test, financial considerations may be relevant and that at some point cost might be a justification for a discriminatory law.

The troubling point is that the level of cost that would or would not meet the minimal impairment test is left to the court, and in this inevitable line-drawing exercise, the subjective views of judges will be a determining factor. In the British Columbia Court of Appeal in *Eldridge,*[38] Lambert J.A., who wrote concurring reasons finding discrimination but justified the violation under section 1, stated in support of judicial restraint or deference to the legislature:

> There is a national debate underway at the moment about the reduction of funds to be transferred from Canada to the provinces in the future for health, for welfare and for education. There is a debate underway in each province about the expenditure priorities for the reduced funds. In the allocation of scarce financial resources, each province will be required to make choices about spending priorities.[39]
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> ...
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> How can we say, in those circumstances, that expenditure of scarce resources on services that remedy infringed constitutional rights under s. 15, on the one hand, are more desirable than expenditures of scarce resources on things that cure people without affecting constitutional rights, on the other. And, indeed, how can we prefer the allocation of scarce resources to services that remedy the infringed constitutional rights of one disadvantaged group over the allocation of scarce resources to services that remedy the infringed constitutional rights of a different disadvantaged group.[40]

Lambert J.A. exercised restraint. The Supreme Court thought that the amount involved was too small to justify deference. The Supreme Court's decision begs the question: what amount would not have been too small to validate the restraint exercised by Lambert J.A.?

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[37] *Eldridge, supra* note 34 at para. 87.

[38] *Eldridge* v. *British Columbia (Attorney General)* (1995), 125 D.L.R. (4th) 323 (B.C. C.A.) [hereinafter *Eldridge* (C.A.)].

[39] *Ibid.* at para. 57.

[40] *Ibid.* at para. 58.

Another troubling aspect that arises at the minimal impairment stage is the extent to which, in under-inclusive cases, the court should have regard for the wider consequences of its decision. In *Eldridge*, the British Columbia government attempted to point out wider consequences—if sign language services were provided, non-official language speakers would have a claim for interpretation services to communicate with English or French speaking doctors. La Forest J. dismissed the argument that the possibility of claims by others should be considered, essentially on the ground that whether or not they had a valid claim of discrimination under subsection 15(1) could not be predicted.[41]

On the other hand, *Charter* rights claimants may bring claims incrementally in order to avoid a significant comprehensive cost argument by the government. It could be argued that the government carries the onus under section 1 and if the wider consequences argument is to be made, it is for the government to do so. However, what this means is that the government, under section 1, would have to lead evidence on the assumption that if the plaintiff was successful under subsection 15(1), there are others in similar circumstances who would also be entitled to make the claim made by the plaintiff. This places the government in the invidious position of having to make its wider consequences argument in support of the plaintiff's subsection 15(1) claim of breach of a *Charter* right or freedom which it is actually opposing.

This is an issue that arose in *Collins* where the spousal allowance under the *Old Age Security Act* was involved. The cost of the spousal allowance program was $400 million per year. The cost of extending the spousal allowance to separated spouses was estimated at between $50–75 million per year. This was an increase of 12 to 20 per cent. While these are not trivial amounts or increases, if the spousal allowance is extended to separated spouses, what about divorced persons, single persons or, indeed, those who are 60–64 years of age and are in need but whose spouse is not a pensioner? If the spousal allowance was extended to these other groups, the cost could go from $400 million per year to $2.4 billion—an annual increase of $2 billion.[42]

Should these potential consequences have been taken into account? Mrs. Collins' claim, while based on the analogous ground of marital status, was that she was a separated spouse. If the case was to be restricted to the cost of extending the spousal allowance only to separated spouses, would the court ever be in a position of being able to consider the entire financial picture arising from marital status discrimination in respect of the spousal allowance?

Ironically, in *Collins*, the plaintiff actually claimed that marital status should be excluded from the legislation entirely and brought evidence to support the extension of the spousal allowance to other groups—be they divorced, single, or

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41 *Eldridge*, *supra* note 34 at para. 89.

42 See *Collins*, *supra* note 22 at para. 151.

other.[43] Therefore, based on the significance of the cost to extend the spousal allowance and on the grounds that the cost of the extension of the spousal allowance to these other groups should not be ignored, restraint was exercised under the minimal impairment aspect of the *Oakes* test.[44] The legislation was saved.

VI. THE PROPORTIONALITY TEST

I TURN NOW TO THE FINAL *OAKES* TEST—weighing the salutary effects of the breach against its deleterious effects. This test has rarely been decisive under section 1. Where a defence has passed the minimal impairment test, it almost always passes this proportionality test.[45] It seems that once a law is found to have a pressing and substantial objective; that it is rationally connected to the government's objectives; and that it minimally impairs a *Charter* right, it will rarely be found that the negative aspects of the violation outweigh its salutary effects. Under-inclusive cases have not been treated differently.

One exception was *J.G.* v. *New Brunswick*[46] where the Supreme Court focused solely on the proportionality issue. The Court determined that the salutary effect of the cost saving to the legal aid program was insufficient to outweigh the deleterious effect of denying state-funded counsel when child custody was suspended by the Province.[47] Interestingly, the wider consequences issue was not addressed, perhaps because no evidence was led on other similar claims that could be made on legal aid.

VII. CONCLUSION

SOCIAL PROGRAMS PROVIDED by the government are costly. They invariably involve line-drawing, resulting in some individuals being excluded. Where the line-drawing can be associated with an enumerated or analogous ground under subsection 15(1) of the *Charter*, there is a basis for a claim of discrimination. If

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[43] This was supported by the evidence of the expert witness for the plaintiff. See *Collins*, *supra* note 22 at para. 141.

[44] *Ibid.* at paras. 152 & 153.

[45] Trakman *et al.*, *supra* note 4 at 102. Trakman *et al.* argue that this part of the *Oakes* test plays a "wholly vestigial role within section 1 decision making."

[46] *J. G.* v. *New Brunswick Minister of Health and Community Services et al.* (1999), 177 D.L.R. (4th) 124 (S.C.C.) [hereinafter *J.G.*].

[47] New Brunswick Legal Aid instituted a policy of providing legal aid for respondents' *first* custody application hearings at a cost of less than $100,000.00 annually. The appeal in *J.G.*, *supra* note 46, concerned provincially-funded counsel at a hearing to *extend* an existing custody order. No figure was provided for the additional cost of legal aid for hearings to extend such orders.

essential human dignity is violated by the law, a section 1 analysis will be engaged to see if the law should be saved.

The Supreme Court repeatedly instructs that justifications under section 1 depend on context and that the *Oakes* test is to be applied flexibly. While some principles or guidelines are being established, section 1 cases are not readily predictable. The focus of the pressing and substantial objective test in under-inclusive cases is largely on the omission or exclusion. If some aspect of the omission or exclusion can be said to have a pressing and substantial objective, this test may be satisfied.

Whether or not one likes it, cost may be a relevant practical consideration in a section 1 defence of an under-inclusive social benefit program. The choices Parliament makes are cost-driven. If the program, as designed, is not acceptable, what is? Should Parliament reduce the amount of the benefit in order to cast the net wider? Should Parliament withdraw or restrict funds from other existing social programs? Should it forego future social initiatives in order to finance coverage of those who have been excluded from the program under attack? Or, should Parliament fund a broader program by raising taxes or foregoing a potential tax reduction or, in less robust economic times, increasing the deficit, the cost of which is borne by future generations? These questions point out the competing interests and cost considerations involved in a decision to restrict the benefit program.

I do not think that the courts can avoid the cost issue in these cases and I accept that subjective value judgments are involved. Nonetheless, if the courts adopt a flexible, contextual approach, cases could be decided with sensitivity to their particular circumstances. The courts must bear in mind that while cost may be a factor, it may be one among several. They will also have to remember that a section 1 analysis does not arise until it is determined that an individual's essential human dignity has been violated.

The judicial approach to section 1 should reflect these realities, but with due respect paid to the unique balancing role of this part of the *Charter*. Paraphrasing the words of Madam Justice Wilson in one of the early section 1 cases—*Singh* v. *Canada*[48]—if the courts set the threshold for justification too low they run the risk of emasculating the *Charter*. However, if the threshold is set too high, the courts run the risk of unjustifiably restricting government action. In cases involving violations of the *Charter* under social benefit programs, the courts will be reminded that the application of section 1 is not, as stated by Wilson J., a task to be entered into lightly.

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[48] *Singh et al.* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 217.