Rights versus Dollars, Round 2 :
The Pragmatic Fiscal Politics of *Newfoundland (Treasury Board) v. N.A.P.E.*

Dennis Baker
University of Calgary
drbaker@ucalgary.ca

Presented to
The Canadian Political Science Association Conference
University of Western Ontario,
June 3, 2005
(Panel L5(b))

When the Supreme Court of Canada handed down its ruling in the Newfoundland Pay Equity case[1] on October 28, 2004, the press hailed the Court's new sense of fiscal realism. According to an editorial in the Globe & Mail, "the Supreme Court now feels free to say: The Charter is not a blank cheque."[2] This characterization arises from the Court's explicit recognition that imposing pecuniary remedies in order to address rights infringements may prevent cash-strapped governments from providing other needed public goods and services. However laudable this newfound pragmatism might be, the Court has failed to provide a workable and justiciable standard for the future. While the 'financial crisis' standard it provided resulted in judicial restraint in the instant case, future applications may present difficulties arising from the Court's comparative institutional disadvantages and the criterion's vulnerability to results-based jurisprudence. While the Court's re-engagement in the 'dollars versus rights' debate is to be celebrated, it is necessary also to emphasize that this decision continues but does not resolve this complex controversy.

As an atypical s.15 equality case, the *N.A.P.E.* decision arises out of a peculiar set of facts requiring some elaboration. Despite the lack of a clear constitutional ruling compelling it to do so, the government of Newfoundland entered into an agreement in favour of female health sector employees in 1988 to redress systemic wage inequalities. The agreement stipulated a gradual adjustment of wages over four years with a full balance to achieve Pay Equity to be paid out by 1992. As a result of difficulties arising from the calculation of wage adjustments, the financial analysis required by the agreement was not completed until 1991. By this point, the province found itself operating under severe fiscal constraints

[1] *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 [hereinafter *N.A.P.E.*].
[2] "The court defers to fiscal realism," Globe & Mail (Oct. 30, 2004), A20.

requiring the enactment of the *Public Sector Restraint Act* (*PSRA*)[3] in 1991 to freeze the wages of all public employees. By virtue of s.9 of this legislation, the implementation of the Pay Equity agreement was adjusted from 1988 to 1991. According to the President of the Treasury Board, the effect of this change meant that payments from 1988 to 1991 would be unpaid and therefore "erases an obligation we had there of approximately $24 million."[4] The Newfoundland Association of Public Employees challenged the constitutionality of section 9 of the *PSRA* on the grounds that it violated the s.15 equality guarantee since it "repudiates recognition by the state of the undervaluation of work done by women, it identifies pay inequity for women as acceptable and it repudiates state responsibility for redressing systemic discrimination for women."[5]

Curiously, the constitutional questions at stake do not involve the substance of Pay Equity but rather the government's commitment and subsequent retraction of its own voluntary remedial action. Thus, Pay Equity is not necessarily a constitutional right (the *N.A.P.E.* decision, however, leaves open this possibility)[6] but the bargaining process "converted pay equity from a policy argument into an existing legal obligation"[7] Despite the ruling that "legislative adoption of a remedial measure does not 'constitutionalize' it so as to fetter its repeal," and the lack of clear underlying constitutional right to Pay Equity, the Court found that the failure to repay this "debt… due to a historically disadvantaged minority in the workforce" constituted a breach of s.15.[8] Even though Justice Binnie's unanimous decision clearly finds a s.15 violation, the sense that the right violated here is of

[3] *Public Sector Restraint Act*, S.N. 1991, c.3 [hereinafter *PSRA*].
[4] *N.A.P.E.* at para 9.
[5] *N.A.P.E.* at para 38.
[6] *N.A.P.E.* at para 37.
[7] *N.A.P.E.* at para 34.
[8] *N.A.P.E.* at para 36.

a 'second-order' or 'contingent' permeates the decision and may provide the grounds for distinguishing this case from future ones and perhaps lessening its authority as a precedent for the general rules it suggests.

Having found an infringement of s.15, Justice Binnie turns to s.1 to consider whether the limitations imposed by the *Act* are demonstrably justified in a free and democratic society. Despite some concern with the "casually introduced s.1 record" (an evidentiary problem discussed below), Binnie finds the budgetary objectives of the Newfoundland government to be pressing and substantial.[9] While this part of the *Oakes* test is routinely passed by most legislation, the endorsement here is somewhat surprising since, as will be shown, earlier s.1 jurisprudence clearly rejected financial considerations as sufficiently important objectives on their own. Once the legislation's objective is approved, Binnie is able to rely on recognized techniques of s.1 deference to protect the legislature's 'line-drawing' between competing rights and interests from being upset by the Court under the 'minimal impairment' and 'proportional effects" portions of the *Oakes* test.[10] The net result is that s.9 of the *PSRA* is ruled constitutional because its limitation of s.15 is justified by the province's difficult fiscal conditions.

Financial Justifications for Rights Infringements, Pre-2004

Prior to its decision in *N.A.P.E.*, the Court had consistently maintained that 'administrative convenience' and 'cost' could never alone provide the sufficient grounds for

[9] *N.A.P.E.* at para 39.
[10] *N.A.P.E.* at paras 53, 78-97; Unlike the portion of the test evaluating the legislative objective, these parts of the *Oakes* test have occasionally included financial considerations as factors that might justify the infringement of a right. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 284 (Lamer C.J.) [hereinafter *Judges's Salaries Reference*]. *R. v Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

a rights infringement. This position implied that insulation from fiscal reality was a necessary conceptual aspect of what it meant to hold a right. As Lorraine Weinrib argues, "[i]t is inherent in the nature of constitutional rights that they must receive a higher priority in the distribution of available government funds than policies or programmes that do not enjoy that status." [11] Weinrib concedes that judicially-identified rights may compete with other judicially-identified rights for remedial funding but rejects the notion that non-rights-based interests can have budgetary priority over established rights. From her perspective, "[a] different preference for allocation of resources cannot justify encroachment on a right."[12] In other words, a government cannot advance a cost-based justification for infringing rights even if those funds are necessary to provide or maintain other public goods (i.e. those not directly connected to a judicially-identified right). This absolutist approach best characterizes the Court's jurisprudence leading up to the *N.A.P.E.* decision.

The most recognized precedent for the claim that financial considerations cannot justify rights-limitations is the 1985 case of *Singh v. Minister of Employment and Immigration*.[13] In reviewing the refugee determination process, the Court held that an oral hearing was a necessary part of the fundamental justice due to applicants regardless of the extra administrative costs it might impose. Justice Wilson explicitly rejected the "type of utilitarian consideration" that might balance rights against their financial cost.[14] In an oft-cited passage, Wilson states that

> …the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No

[11] Lorraine Weinrib, "The Supreme Court of Canada and Section 1 of the Charter," (1988) 10 *Supreme Court Law Review* 469 at 486. Hogg cites this passage approvingly in Peter Hogg, Constitutional Law of Canada (loosleaf), Scarborough: Carswell, 1997 (2004) at 35-28.
[12] Lorraine Weinrib, "The Supreme Court of Canada and Section 1 of the Charter," (1988) 10 S.C.L.R. 469 at 486.
[13] [1985] 1 S.C.R. 177 [hereinafter *Singh*].
[14] *Singh* at 218.

> 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.[15]

In order to work around this holding in *N.A.P.E.*, Justice Binnie says that Wilson's "broad statement must be read together with her concluding observations" where she says that "[e]ven if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1."[16] According to Binnie, Wilson's concluding remark meant that her *Singh* opinion "certainly cautioned against the limitation of rights to save dollars, but the scope of the caution was left open for a case where the evidence warranted its consideration."[17] Binnie's attempt to distinguish *Singh* is not persuasive because he interprets Wilson's lawyerly contingency ("even if…") as a concession. The concluding comment that Binnie depends so much upon is more easily read as a critique of the opposing case ('the government fails to meet even your wrong-headed test') than an admission that her reasoning is uncertain and needs further refinement in future cases. It is difficult to understand Wilson's judgment in *Singh* as anything other than a denial that fiscal savings alone could ever justify a rights infringement.

Certainly that is how *Singh* has been generally understood. In his well-known text on the Canadian Constitution, future Federal Court Judge Barry Strayer explains that Wilson's *Singh* opinion means "…concerns for savings in time and money could never

[15] *Singh* at 218-9.
[16] *Singh* at 220.
[17] *N.A.P.E.* at para 67.

constitute a justification under s.1…"[18] In *Adler v. Ontario,* Justice L'Heureux-Dubé understood *Singh* as holding "that budgetary considerations alone will not constitute a reasonable justification for an infringement of a *Charter* right, a result which has not been overruled by this Court."[19] By 1992, the Court could simply state, as it did in the *Schachter* decision, that "[t]he Court has held, and rightly so, that budgetary consideration cannot be used to justify a violation under s.1."[20] Again, in 1997, the Court would recognize (and underline) that "budgetary considerations do not count as a pressing and substantial objective for s. 1."[21] It was because of this rule against budgetary objectives that the government counsel in *N.A.P.E.* strenuously denied that the *PSRA* was "just about money."[22] If it were, then *Singh* and its progeny would provide a strong precedential basis for holding the *PSRA* unconstitutional.

This is not to suggest, of course, that the Court has not carved out exceptions to the *Singh* holding. The entire *Oakes* test for s.1 aims for balance and proportionality and, as recognized at its inception, rights are not absolute but subject to limitations "where their exercise would be inimical to the realization of collective goals of fundamental importance."[23] Following the balancing purpose of the *Oakes* test, the Court found that budgetary considerations *alone* would not justify a rights infringement, they could in appropriate circumstances be *part* of a sufficiently compelling justification. Thus, in *R. v. Lee* (1989), measures preserving judicial economy could be upheld because they "went

---

[18] Barry Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3rd ed.), Toronto: Butterworths, 1988 at 339.
[19] *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para 112, L'Heureux-Dubé J. (dissenting).
[20] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709.
[21] *Judges's Salaries Reference* at para 281 (Lamer C.J.).
[22] *Newfoundland (Treasury Board) v. N.A.P.E.*, 2002 NLCA 72 (Nfld. C.A.) at para 378 (Marshall J.A.).
[23] *Oakes* at 136 (Dickson C.J.).

beyond the purely financial" by helping to maintain the proper administration of justice.[24] Similarly, the Court ruled that budgetary considerations could be relevant to both the minimal impairment portion of the *Oakes* test and the choice of judicial remedy imposed. As Justice La Forest noted in *Eldridge* (1997), it is "clear that while financial considerations *alone* may not justify Charter infringements, governments must be afforded wide latitude to determine the proper distribution of resources in society," particularly when Parliament must choose between "disadvantaged groups"[25] (emphasis added). Chief Justice Lamer ably summarised the jurisprudence in the *Reference re Remuneration of Judges* (1997):

> Three main principles emerge from this discussion. First, a measure whose *sole* purpose is financial, and which infringes Charter rights, can never be justified under s. 1 (Singh and Schachter). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (Irwin Toy, McKinney and Egan). Third, financial considerations are relevant to the exercise of the court's remedial discretion, when s. 52 is engaged (Schachter)[26] (emphasis added).

The exceptions here, however, prove the rule. All of the exceptions Lamer identifies allow financial factors to be considered *after* a non-financial pressing and substantial objective has been found. The judicial attempts to mitigate the effect of *Singh* are themselves evidence of the rule's existence and doctrinal status. As Lamer concedes, a measure "whose *sole* purpose is financial" (emphasis added) – as was the case in N.A.P.E. – is "never" sufficient to justify a *Charter* infringement. To the extent there are bright-lines in Canadian Constitutional law, the *Singh* holding against financial objectives for rights-limiting legislation appeared to be one of them.

---

[24] *R. v. Lee*, [1989] 2 S.C.R. 1384 at 1390 [hereinafter *Lee*].
[25] *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 at para 85 (La Forest J.); La Forest cites *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at p. 288 and *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 104 (Sopinka J.).
[26] *Judges's Salaries Reference* at para. 284 (Lamer C. J.).

By 2003, however, there were signs the Court was rethinking the strictness of the *Singh* rule even as it applied to the *Oakes* criterion of a sufficiently important objective. In *Nova Scotia (Workers' Compensation Board) v. Martin*, Justice Gonthier noted in obiter that "[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*"[27]. Justice Binnie seized upon this comment in *N.A.P.E.*, emphasizing Gonthier's "normally" to suggest that extraordinary circumstances could permit a solely financial justification for infringing rights. In the election financing case of *Figueroa v. Canada (Attorney General)*, Justice Iacobucci similarly opined, again in obiter, that he did "not wish to rule out the possibility that there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens."[28] With this small opening in the jurisprudence, Justice Binnie was able to establish in *N.A.P.E.* the "fiscal emergency" test which would save the constitutionality of the *PSRA*.

The Judicial Recognition of Fiscal Trade-Offs

At the heart of Binnie's ruling is the acceptance of inevitable fiscal trade-offs when dealing with the funding of public goods. Recognizing that the monetary savings from only partially remedying a rights infringements can, in the context of scarce resources, be used to supply valuable – but not rights-based – public goods, Binnie reconsiders the validity of legislative objectives aimed solely at generating such savings. He claims that the Newfoundland government, in adopting the *PSRA*, "was not just debating rights versus

[27] [2003] 2 S.C.R. 504, 2003 SCC 54 at para 109 (Gonthier J.).
[28] [2003] 1 S.C.R. 912 at para 66 (Iacobucci J.).

dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare."[29] While *Charter* 'rights' to access a hospital bed or attend a reasonably sized classroom might yet be found, there is little case-law identifying these interests as rights and not simply public goods. Similarly, the Supreme Court has not found any *Charter* right that guarantees employment or even a right to a minimum income.[30] Contrary to the priority of rights approach (as Lorraine Weinrib would have it), Binnie is unwilling to place judicially-identified *Charter* rights at the front of the queue for public funding. He notes that "[i]t is not convincing simply to declare that an expenditure to achieve a s. 15 objective must necessarily rank ahead of hospital beds or school rooms."[31] Rights, in other words, operate with a nexus of interests, each of which might claim priority over scarce resources. The failure to distinguish between 'official' rights and other interests for the purposes of the s.1 test for a valid legislative objective suggests the Court is now taking a more global view of the costs and benefits of its rights jurisprudence.

The inclusion of interests other than judicially-identified rights allows Binnie to work around the *Singh* restriction against limitations justified solely through financial reasons. Binnie invokes the *Lee* precedent to suggest that Newfoundland's *PSRA* is only partly about the financial cost:

> It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise "whose sole purpose is financial". The weighing exercise has as much to do with social values as it has to do with dollars.[32]

---

[29] *N.A.P.E.*, at para 75.
[30] *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429.
[31] *N.A.P.E.*, at para 95.
[32] *N.A.P.E.*, at para 72.

Unlike *Lee*, however, where there is a judicially-identified right to the proper administration of the criminal justice system,[33] the competing interests, regardless of their substantial benefits, are not (yet) *Charter* rights that have been clearly established by the Court. Under Binnie's expansive approach, it is difficult to understand what would constitute a legislative objective that is solely financial. Given that the Court would be understandably wary of suggesting a constitutionally required level of taxation, the government can always claim that savings in one area are necessary to offset spending in another. Only legislation that restricted a rights remedy simply to add to a government surplus would fail Binnie's test and it is doubtful any politically-sensitive government would ever characterize its legislation in such a manner.

While the Court's awareness and recognition of the more global scope of the trade-offs between rights and other interests is surely laudable, the wider judicial field of vision poses important questions about a potentially expanded judicial role in understanding and managing these trade-offs. Two obvious concerns about the judicial supervision of economic trade-offs are immediately apparent. First, what relative advantages and disadvantages does the Court, as an adjudicative institution, have in assessing the economic realities which might justify a rights violation. Second, what standard should separate those trade-offs which are legitimately made by the executive and legislature from those that warrant judicial intervention. The analytical distinction between these questions, of course, may be artificial since the question of relative institutional advantage may provide the grounds for a higher deferential standard. Still,

[33] *R. v. Askov* [1990] 2 S.C.R. 1199.

these two potentially interrelated questions (by no means the only aspects of this debate worthy of consideration) frame the remaining portion of this paper.

Despite the efforts codified in the *Oakes* test, the adjudicative process may continue to distort the evidence of an economic trade-off and hinder the Court's ability to perceive the relative weight of costs and balances. The defects of adjudication in this respect have been long recognized, most notably by Lon Fuller in his influential Storrs Lectures on *The Morality of Law* and by David Horowitz in his 1977 book, *Courts and Social Policy*. Fuller argues that the adjudicative process lacks the necessary panoptic perspective and flexibility to be an effective manager of economic trade-offs:

> To act wisely, the economic manager must take into account every circumstance relevant to his decision and must himself assume the initiative in discovering what circumstances are relevant. His decisions must be subject to reversal or change as conditions alter. The judge, on the other hand, acts upon those facts that are in advance deemed relevant under declared principles of decision. His decision does not simply direct resources and energies; it declares rights, and rights to be meaningful must in some measure stand firm through changing circumstances. When, therefore, we attempt to discharge task of economic management through adjudicative forms there is a serious mismatch between the procedure adopted and the problem to be solved… The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion, and frustration.[34]

The potential for 'hypocrisy, moral confusion, and frustration' may be realized when the Court finds a rights infringement but also decides that economic conditions prevent its remedy. While this may be an inevitable consequence of characterizing (what were formally known as) benefits as rights, one can surely sympathize with complainants, like the underpaid female nurses in *N.A.P.E.*, who are told their rights are being infringed but that the remedy sought is too costly to be imposed. The mismatch Fuller identifies between

[34] Lon L. Fuller, The Morality of Law (Revised Edition), New Haven: Yale University Press, 1969 at 172-3.

economic management and adjudicative form returns to the question of what is meant by a 'right.' Horowitz partly agrees with Weinrib on this point when he notes judicial "focus on rights is… a serious impediment to the analysis of costs, for, in principle at least, if rights exist they are not bound by considerations of cost. If a person possesses a right, he possesses it whatever the cost."[35] If a right is intended to 'stand firm through changing circumstances' and normally 'not bound by considerations of cost,' one might ask, why are they not given the utmost budgetary priority? Even the budgetary trade-offs that Binnie worries about could be avoided if the Court increased the available public funds by increasing taxes. Binnie does not propose this alternative precisely because he is aware that the raising of public funds is a notorious power of legislatures ("no taxation without representation") and well beyond the capacity of judicial institutions.[36] For reasons of both capacity and accountability, legislatures, not courts, are thought to be the legitimate source of budgets and public spending. Introducing the concept of rights into the matrix of public spending may be unavoidable in modern times but it also drops an institution, the judiciary, into waters that it is ill-prepared to wade.

Horowitz argues that adjudication "is narrow in a double sense… The format of decision inhibits the presentation of an array of alternatives and the explicit matching of benefits to costs."[37] By exclusively relying on the adversarial process, the Court suffers from being informed only by the interested parties and thus open to (often subtle) manipulation. The government, for example, will almost always argue that its measure is

[35] Donald L. Horowitz, The Courts and Social Policy, Washington, D.C.: The Brookings Institution, 1977 at 34.
[36] Binnie does note that the Newfoundland government claimed to have considered and rejected the idea of raising taxes. *N.A.P.E.* at para 90 .
[37] Donald L. Horowitz, The Courts and Social Policy, Washington, D.C.: The Brookings Institution, 1977 at 34.

the sole feasible means of achieving its objective. Challengers, on the other hand, will stretch the bounds of feasibility and supply the Court with a range of (perhaps only marginally) unrealistic alternatives the government could have undertaken. In some cases, the range of alternative policies offered will benefit the complainant but also introduce negative effects on those who are not directly party to the case. In the instant case, for example, the Labour Arbitration Board accepted N.A.P.E.'s argument that the *PSRA* was unconstitutional and could not be saved under s.1 because the government failed to demonstrate that it had considered less drastic means "such as unpaid leave, job sharing, early retirement or reduced employee pension contributions in respect of *all* public sector employees."[38] One might wonder whether or not N.A.P.E. would truly accept the alternatives suggested given their concurrent representation of employees unaffected by the Pay Equity agreement. In any event, the presentation of policy alternatives before the Court will likely be narrowly tailored to suit the litigants. In order to counter this tendency, the Court will have to generously permit intervener status and adopt an investigative stance that is a poor fit with traditional common law conceptions of judging.

In order to match benefits to costs, the Court must either examine cabinet deliberations in great detail or simply accept the government's characterization of the decision-making process. In *N.A.P.E.*, Binnie agrees with the Labour Board's complaint that "the government ought to have called witnesses who were better placed to explain the government account and ministerial observations."[39] At the same time, however, Binnie cautions that "there are serious limits to how far the courts can penetrate Cabinet

[38] *N.A.P.E.* at para 17.
[39] *N.A.P.E.* at para 58.

privilege."[40] For the purposes of the *N.A.P.E.* case, Binnie uses a simple technique to side-step the problematic balancing that would be otherwise necessary: judicial notice. As described in the *Find* case, "[j]udicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination." [41] In other words, the Court simply accepts some claims as facts. In order to take judicial notice, the fact must be "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy . . ."[42] In the *N.A.P.E.* case, Binnie took judicial notice of Newfoundland's poor economic condition since it could not "reasonably be disputed that the provincial government faced a severe fiscal crisis in the spring of 1991."[43] The judicial notice technique allows Binnie to make this conclusion with only a "casually introduced s.1 record" (normally a "serious concern") that consisted of nothing more than a few *Hansard*-recorded statements of the Minister of Finance and the President of the Treasury Board combined with the public accounts of the province as reported to the House of Assembly.

The employment of judicial notice to accept the minimal evidence of fiscal distress in *N.A.P.E.* has attracted considerable criticism. Noted constitutional lawyer David Stratas chastises the Court for accepting Newfoundland's claims uncritically, noting that "[i]t called no witnesses, not a single governmental official stepped into a witness box to

[40] *N.A.P.E.* at para 58.
[41] *R. v. Find*, [2001] 1 S.C.R. 863 at para 48 (McLachlin C.J.) [hereinafter *Find*].
[42] *Find* at para 48.
[43] *N.A.P.E.* at para 59.

defend the rationale for the legislation and to be tested by cross-examination."[44] Legal scholar Kent Roach characterizes the government's case as telling the Court "[t]here are good reasons for what we did, and we considered all the alternatives, but we can't tell you what they were because of cabinet confidence."[45] As Horowitz might have predicted, the *N.A.P.E.* adjudicative process meant that the government's characterization of the fiscal situation was adopted without much critical analysis.

While the low evidentiary burden established in *N.A.P.E.* may itself be problematic, it is the sheer malleability of the judicial notice technique that may cause greater concern. A judge who preferred to insist upon the pay equity payments may have taken judicial notice that the admittedly difficult fiscal conditions *did not* constitute a severe fiscal crisis. Binnie's use of judicial notice suggests that he thinks such a position would be unreasonable but this simply illustrates the danger of collapsing the judicial notice of fact (ie. 'Newfoundland has a deficit of $120 million dollars") with judicial notice of a legal standard being met (ie. 'Newfoundland is in a severe fiscal crisis'). It is surely possible to reasonably agree with the former but disagree with the latter. It is unclear whether future financial justifications for rights infringements will be subjected to more scrutiny than the judicial notice manoeuvre in *N.A.P.E.* allows, but, to the extent that judicial notice is used to resolve future 'rights versus dollars' cases, the ability to engage in results-based jurisprudence will become easier and thus more tempting.

The Court's tendency to focus on a single discrete case at a single point in time also distorts its ability to effectively weigh costs and benefits. Unlike the panoptic view of the Cabinet (as manager of all government departments), the Court makes its

[44] Kirk Makin "Little evidence produced by province, judge admits," Globe & Mail (Oct. 29, 2004), A11.
[45] Kirk Makin "Little evidence produced by province, judge admits," Globe & Mail (Oct. 29, 2004), A11.

assessment of costs based on a single sample that may prove to be unrepresentative. In one notable example, the Court, in *Eldridge*, ordered sign-language interpreters to be available at all hospitals to remedy a s.15 equality infringement denying deaf patients effective communication of health services. The Court stressed that the expenditure would be "only $150,000" and a mere 0.0025% of B.C.'s health care budget. Justice Binnie even cites this figure in *N.A.P.E.* as an example of a minor cost which could not justify a rights infringement.[46] Critics, however, have questioned whether the $150,000 figure represents the true financial cost of the right. Sylvia LeRoy notes that

> This estimate… was based on the costs incurred by the nonprofit agency currently providing the service for hospitals in the Vancouver area. The court failed to consider that these costs would be significantly higher in more remote regions of the province where no nonprofits existed to voluntarily provide the service.[47]

Courts may often fall into similar calculation errors simply because they can see the real benefit of the right to the complainant before them but have only a hazy grasp of the full cost its ruling might incur as a binding precedent for like cases. Jeffrey Simpson suggests that the total cost considerations rejected by Wilson in the *Singh* ruling were far more than might have been understood at the time of the decision:

> It is impossible to calculate how much the Singh case has cost in dollar terms, but it would certainly run into the billions in the past two decades. Those costs include policing, many more immigration officials, more refugee-board members, more Canadian staff at foreign embassies to administer visas, a vast upsurge in paperwork, backlogs at the Federal Court, increased illegal immigration from false refugees, and more false refugee claims from people overseas who were alerted to the porous Canadian system and so headed to Canada.[48]

---

[46] *N.A.P.E.* at para 84.
[47] Sylvia LeRoy, "Equality: the Leviathan of Rights," *Fraser Forum* [August 2003], 27; Christopher P. Manfredi and Antonia Maioni, "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada," *Journal of Health Politics, Policy and Law* 27(2) April 2002 at 227.
[48] Jeffrey Simpson, "The 'fundamental justice' that swallowed a minister," Globe & Mail (Jan. 18, 2005), A19.

To some extent, it is the responsibility of government counsel, during their s.1 submissions, to make the courts aware of the potential costs of their rulings. In addition to the problem Binnie identified regarding the piercing of the veil of Cabinet secrecy, however, the government may itself be unsure of the total cost at the time the case is heard. As Lon Fuller recognized, it is precisely this need for modification in light of changing circumstances that makes the one-off narrow perspective of adjudication a poor vehicle for managing economic trade-offs. For reasons of institutional competence, one must remain sceptical of judicial tests and conclusions that rely on the assessment of economic data.

The Standard for Financial Justification

Even assuming that the judiciary could accurately assess the economic costs and relative benefits, it is unclear what standard should warrant judicial interference with the assignment of costs and benefits set out by the elected and accountable institutions. In *N.A.P.E.*, Binnie establishes a 'financial crisis' standard that shields government allocations from judicial intervention during periods of severe financial difficulty. "At some point," he argues

> a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected *Charter* interests.[49]

[49] *N.A.P.E.*, at para 64.

As Binnie notes, "there are always budgetary constraints and there are always other pressing government priorities,"[50] so the test for an economic justification must be set higher, at a 'crisis' level. According to Binnie, this is a very stringent test such that "courts will continue to look with strong skepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints." [51]

Despite its deferential orientation, Binnie's standard provides relatively little guidance for future decisions and therefore little certainty for legislators and executives attempting to budget constitutionally under difficult economic conditions. Kent Roach, for one, is skeptical that such a standard is sufficiently high enough to regularly protect rights. "In my lifetime," Roach argues, "it seems like we have gone from one financial crisis to another… The idea that financial emergencies will be relatively rare events is open to question"[52] The opposite critique is equally tenable. With terms like "emergency," "crisis" and Binnie's endorsement of "strong scepticism," it is entirely possible that only the most severe of fiscal difficulties will qualify. In this sense, the *N.A.P.E.* decision may even increase the Court's resistance to financial justifications when the budgetary constraints are significant but fall short of 'crisis' – a result which will undermine the Court's newfound appreciation of the trade-offs that are always involved when public goods are distributed (whether there is a 'crisis' or not). Whether a 'financial crisis' is a rare or frequent occurrence will depend entirely upon what constitutes such an emergency.

Binnie does not explain what constitutes a financial crisis with any precision. What is known, from the facts of *N.A.P.E.* itself, is that the financial situation of

[50] *N.A.P.E.*, at para 73.
[51] *N.A.P.E.*, at para 73.
[52] Kirk Makin, "Charter rights can be violated, top court rules," Globe & Mail (Oct. 29, 2004), A11.

Newfoundland in 1992 qualified. With a $130m shortfall in expected federal funding, the government of Newfoundland faced the possibility of an annual deficit of almost $200m. Without significant cost-cutting or revenue-raising, the province worried that its bond rating would be lowered and thus its cost of borrowing would raise and further worsen Newfoundland's fiscal plight. Binnie's recognition of the bond rating problem opens the possibility that a 'financial crisis' is, at least in part, defined by independent (and private) economic institutions. In the final analysis, however, the discretion to find a financial crisis lies solely with the courts. *N.A.P.E.* demonstrates that a $200m budgetary deficit may justify delaying a $24m rights-infringement remedy but the calculus that achieves that result is not reproduced in the opinion. Is the budget deficit so large that it could justify virtually delaying any remedial payment (ie. those less than $24m)? Is the cost of the remedy so high that even a government facing a smaller deficit could avoid payment? By taking judicial notice of the financial crisis, the Court avoids identifying the determinative definitional elements of such a crisis.

Again, however, the difficulty may lie less with the stated threshold than the malleability of the test itself. The 'financial crisis' standard bears a remarkable resemblance to the national emergency standard in federalism jurisprudence and the history of this criterion provides little assurance for those concerned with the potential flexibility of the *N.A.P.E.* standard. In seeking to interpret s.91's federal power to legislate for the "peace, order and good government" of Canada, the Court (and the Judicial Committee of the Privy Council before it) struggled with federal legislation that purported to address matters of national dimensions but infringed on what would otherwise be provincial powers. One criterion developed by the judicial branch was the

"national emergency" standard, which suggested that the federal government could enact temporary legislation to address crisis conditions even if it trespasses on provincial power.[53] In the famous *Unemployment Insurance Reference*, the JCPC invalidated federal unemployment legislation because the Great Depression failed to qualify as an economic emergency.[54] Conversely, the double-digit inflation and stagnation of the 1970s ("stagflation") was deemed by the Supreme Court of Canada to be urgent enough to warrant federal intervention using the same emergency criterion.[55] One cannot, of course, make too much of this analogy, but the judiciary's inconsistent treatment of what constitutes a national economic 'emergency' should at least establish a *prima facie* case for the Court being more careful with its new financial crisis standard.

There are at least two additional standards or factors that may mitigate in favour of allowing financial justifications that merit more attention from the Court. In fact, both are reflected in Binnie's *N.A.P.E.* decision but they are not directly incorporated into the (modified) *Oakes* test for a pressing and substantial objective and they are not given the prominence they deserve. The first, what might be called the 'broadbased cuts' standard, suggests that economic justifications for infringing rights may be more acceptable if they are part of a package of economic measures aimed at budgetary restraint. The second alternative is a 'good faith' standard by which economic difficulties may provide a justification for *partly* remedying a rights infringement. Each standard deserves a

[53] *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 (P.C.). See also Peter Russell, "*The Anti-Inflation* Case: The Anatomy of a Constitutional Decision," 20 *Canadian Public Administration* (1977) 632 at 634.
[54] *Attorney General of Canada v. Attorney General of Ontario,* [1937] A.C. 355 (P.C.). Peter Russell, "*The Anti-Inflation* Case: The Anatomy of a Constitutional Decision," 20 *Canadian Public Administration* (1977) 632 at 634.
[55] *Reference re Anti-Inflation Act,* [1976] 2 S.C.R. 373.

lengthy exploration beyond the scope of this short paper but a brief discussion of their role in the *N.A.P.E.* decision is warranted.

The relation of the legislative measure limiting remedial payments to a larger package of economic measures is significant because it suggests that the government is not cavalierly dismissing the rights-infringement but simply concerned with the harsh trade-offs necessary during periods of particularly scarce resources. In *N.A.P.E.*, Binnie emphasizes that the government employed a variety of measures aimed at addressing the fiscal crisis in addition to the delay of Pay Equity implementation:

> [They] froze or cut budgets for government- funded agencies; closed 360 acute care hospital beds; froze per capita student grants and equalization grants to school boards; made government-wide reductions in operating budgets; reduced or eliminated a range of programs; imposed a 10 percent reduction in executive and management positions; laid off 1,300 permanent, 350 part-time and 350 seasonal employees and eliminated a further 500 vacant positions in government departments; and terminated medicare coverage for items such as routine dental surgery in hospitals and basic vision assessment under the optometry and medicare programs.

For Binnie, this is additional evidence that the Government thought itself to be in the midst of a financial crisis and not, directly, an element of the s.1 test on its own. In fact, this factor cannot be part of the test because the Court had rejected this criterion in the *Judges's Salaries Reference* as a sufficient justification for the infringement of rights. In that case, Justice Mitchell of the Manitoba Court of Appeal had suggested that financial justifications for a rights infringement might be permissible if they were part of an "overall public economic measure."[56] Despite the endorsement of constitutional experts William Lederman and Peter Hogg,[57] Chief Justice Lamer rejected Mitchell's approach because it inadequately protected against "political interference through economic

[56] *Judges's Salaries Reference* at para 25 (Lamer C.J.).
[57] *Judges's Salaries Reference* at para 154 (Lamer C.J.).

manipulation" and thus required the additional protection of an independent tribunal to maintain judicial independence when settling judicial salaries.[58] Facing this precedent, one can understand why Binnie would downplay the significance of this factor in his *N.A.P.E.* decision. Still, a rule permitting economic justifications so long as they were part of an overall package of economic restraints would provide a justiciable guidance for future cases and position the legislature as the primary manager of the economic distribution of public goods.

A 'good faith' standard would permit legislation that restricts remedial payments to be justified on economic grounds if the government makes some effort at remedying the infringement even if it fails to do so completely. Binnie notes that the Newfoundland government did not cut the pay equity payments entirely: "[i]n a very tight budget, $3.5 million was set aside for the immediate payment on the pay equity account" which "affirmed pay equity in principle."[59] For Binnie, this affirmation factors into the 'minimal impairment' portion of the *Oakes* test only and not the testing of the legislation's objective. Surely, however, the government's good faith effort at remedying what they concede to be a rights-violation worth addressing speaks to the benevolence of their legislative objective as well. Evidence of good faith may also work in concert with the 'broadbased cuts' standard since it indicates that the government is less likely to be engaging in "political interference through economic manipulation." Although this approach would not guarantee legal certainty (what level of payment would demonstrate good faith?), it assures that (a) the legislature takes the rights infringement seriously, (b) the legislature is sincerely concerned with budgetary constraints and (c) the

[58] *Judges's Salaries Reference* at para 156 (Lamer C.J.).
[59] *N.A.P.E.*, at 88.

representative institutions take the leading role in managing the economic trade-offs necessary.

The suggestion that these two additional factors play a greater role in the test for testing legislative financial justifications for rights violations is far from a complete answer. In the context of rights and financial restraints, there are no easy answers and one should always be suspicious of those who purport to find them. Only the absolute priority of rights approach, as articulated by Justice Wilson in *Singh*, manages to provide clear justicable guidance for future cases. With benefits being increasingly transformed into rights, however, such an approach fails to appreciate the very real trade-offs in terms of public goods required. For recognizing these unavoidable trade-offs, Justice Binnie's opinion in *N.A.P.E.* is a welcome and important step towards fiscal realism. Having done so, however, the Court is now faced with new challenges that may stretch its institutional tools and design to their limits. In the face of such challenges, it will take a wise Court to acknowledge its own limitations and restrain itself from unsettling arrangements it may only dimly perceive. From this perspective, the debate between rights and dollars is only beginning.