

Not So Simple After All: A Comment on *Ravndahl v. Saskatchewan*

DIANNE POTHIER*

Ravndahl became entitled to a survivor's pension under workers' compensation legislation upon the death of her husband in 1975, and disentitled upon remarriage in 1984. In 2000 she filed a statement of claim alleging the disentitlement constituted a section 15 *Charter* breach. The Saskatchewan government brought a pre-trial motion claiming the action was barred because of a six-year statute of limitations.

The Supreme Court of Canada assumed without deciding that the *Charter* applied. The author contends the Court should have affirmatively concluded that the *Charter* applies, on the basis that the claim is founded on the claimant's on-going status as a survivor, not on the 1984 remarriage as a discrete pre-*Charter* event.

The Court concluded that, as a one-time cause of action arising on April 17, 1985, the statute of limitations barred any *in personam* remedy (section 24 of the *Charter*). However, the Court concluded that the statute of limitations did not bar *in rem* remedies against the statute pursuant to section 52 of the *Constitution Act, 1982*. The author questions the premise that a statute of limitations is properly applied in a constitutional claim against a statute. Even assuming it can be, the author contends that this case should be analysed as a rolling claim, recurring each month of non-payment of pension. The author also raises questions about the relationship between section 24 and section 52, indicating confusion and uncertainty as to whether retroactive relief pursuant to section 52 is possible where section 24 remedies are statute barred.

Au décès de son conjoint, en 1975, madame Ravndahl a été admise, en vertu de la législation sur les accidents du travail, à recevoir la rente du conjoint survivant; par la suite cependant, son remariage survenu en 1984 l'a rendue inadmissible à la recevoir. En 2000, elle a déposé une plainte dans laquelle elle soutenait que sa non-admissibilité au bénéfice des prestations constituait une violation de l'article 15 de la *Charte*. Le gouvernement de la Saskatchewan a alors déposé une motion préalable au procès soutenant que son action était prescrite en vertu d'une loi sur la prescription de six ans.

La Cour suprême du Canada a acquiescé sans se prononcer sur la question de l'application de la *Charte* en l'espèce. L'auteur soutient que la Cour aurait dû conclure que la *Charte* s'appliquait à la demande soumise, au motif qu'elle se fondait sur le statut permanent de la demanderesse en qualité de survivante, et non pas sur la base du remariage 1984 en tant qu'événement ponctuel antérieur à la *Charte*.

Selon la Cour, la loi sur la prescription, en tant que cause d'action ponctuelle survenue le 17 avril 1985, empêchait toute forme de réparation personnelle (article 24 de la *Charte*). La Cour a toutefois statué que cette même loi n'empêchait pas d'intenter un recours *in rem* à l'encontre de la loi conformément à l'article 52 de la *Loi constitutionnelle de 1982*. L'auteur remet en question la prémisse selon laquelle une loi sur la prescription peut s'appliquer dans le cadre d'une affaire de nature constitutionnelle intentée à l'encontre d'une loi. Quand bien même ce serait le cas, l'auteur soutient qu'il faudrait plutôt analyser cette cause en tant que demande récurrente dans la mesure où elle est présentée chaque mois, lors de chaque non paiement de la pension. L'auteur soulève en outre des questions au sujet des liens entre l'article 24 et l'article 52, en soutenant qu'il existe une confusion et une incertitude quant au caractère rétroactif du recours en vertu de l'article 52 lorsque les réparations visées à l'article 24 sont frappées de prescription.

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I. INTRODUCTION

It is a longstanding adage that there is no right without a remedy.¹ A perhaps less obvious corollary is that there cannot be a thorough and proper analysis of a remedy without a full understanding of the underlying right. The Supreme Court of Canada's recent decision in *Ravndahl v. Saskatchewan*² illustrates both of these propositions. The identified legal issue concerned the application of a statutory limitation period to a *Charter*³ claim. But beneath the surface, many other legal issues lurk. The fact that the case arose from a pre-trial motion contributes to the absence of resolution of important constitutional questions.

Ravndahl's statement of claim was filed on March 31, 2000. The Supreme Court of Canada's decision to dismiss only part of the action, leaving the rest to proceed to trial, was issued on January 29, 2009. Yet, after almost nine years of preliminary skirmishes, there is much that is unclear about how the trial (assuming it proceeds) is supposed to unfold.

Although the legal analysis is complicated, the basic facts of the case are not complex. On November 17, 1975, the plaintiff's husband died from work-related circumstances, entitling her to a survivor's pension under Saskatchewan's workers' compensation legislation. On October 20, 1984, the plaintiff remarried. Pursuant to the then in-force provisions of the statute, the plaintiff's survivor's pension was terminated, but with a lump-sum payment equivalent to two years of pension benefits. Because section 15 of the *Charter* was not yet in force,⁴ there was no basis for a con-

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1. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 25, 232 D.L.R. (4th) 577 [*Doucet-Boudreau*].
 2. 2009 SCC 7, [2009] 1 S.C.R. 181, 301 D.L.R. (4th) 513 [*Ravndahl*]. The appeal was heard on December 17, 2008, before the appointment of Justice Cromwell to the Supreme Court of Canada. Thus, there was a seven judge panel hearing the appeal; Justice Fish did not sit.
 3. *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 [*Charter*].
 4. *Ibid.*, s. 32(2) reads as follows: "Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force."

stitutional challenge. Various amendments to the survivor's pension provisions of the workers' compensation scheme were subsequently implemented, but never provided full coverage for those survivors who remarried prior to April 17, 1985, the date on which section 15 of the *Charter* came into force. The first amendment, effective September 1, 1985, stopped the survivor's pension from terminating upon remarriage, but only for remarriages on or after the date of the amendment.⁵ Eventually, this amendment was retroactively applied to remarriages on or after April 17, 1985.⁶ For remarriages prior to the coming into force of section 15 of the *Charter*, a 1999 amendment provided for a one-time lump-sum payment of \$80,000.⁷ There was a two-year window to apply for the \$80,000, but payment was conditional on the applicant signing a release of all other claims, which Ravndahl was not prepared to do. As noted above, Ravndahl's statement of claim was not filed until March 31, 2000. Neither the judgment of first instance,⁸ nor those of the Saskatchewan Court of Appeal⁹ or the Supreme Court of Canada, provided any explanation of why the claim was not filed earlier. Nor did any of the judgments reveal whether the man who became Ravndahl's husband in 1984 is still her husband or even still alive. This reflects the premise that the claim was based not on the plaintiff's current marital status, but on her on-going status as a survivor of a worker covered by workers' compensation.

Ravndahl's statement of claim sought the following relief:

- a) A declaration pursuant to section 52 of the *Constitution Act 1982* that section 98.1(5) of *The Workers' Compensation Amendment Act 1985* is unconstitutional and of no force or effect;
- b) A declaration that section 98.1(5) of *The Workers' Compensation Act, 1979* c. W-17.1 is unconstitutional and of no force and effect;
- c) A declaration that *The Special Payment (Dependent Spouses) Act* is unconstitutional and of no force and effect;
- d) An Order reinstating the Plaintiff's spousal pension;
- e) Damages;
- f) Interest in accordance with *The Pre-Judgment Interest Act*;
- g) Costs;
- h) Such further and other relief as the Plaintiff may advise and this Honourable Court may allow.¹⁰

5. *The Workers' Compensation Amendment Act, 1985*, S.S. 1984-85-86, c. 89.

6. *The Workers' Compensation General Amendment Regulations, 1999 (No.2)*, Sask. Reg. 15/1999, s. 2.

7. *The Special Payment (Dependent Spouses) Act*, S.S. 1999, c. S-56.01.

8. *Ravndahl v. Saskatchewan*, 2004 SKQB 260, 251 Sask. R. 156, 119 C.R.R. (2d) 372 [Ravndahl (Q.B.)].

9. *Ravndahl v. Saskatchewan*, 2007 SKCA 66, 299 Sask. R. 162, [2007] 10 W.W.R. 606 [Ravndahl (C.A.)].

10. Amended Statement of Claim of the Appellant at para. 30, cited in *Ravndahl*, *supra* note 2 at para. 10.

The government of Saskatchewan and the Workers' Compensation Board brought a pre-trial motion for a determination on a point of law to have the action dismissed on the basis of the six-year statute of limitations applicable where no other specific limitation period applied. Justice Pritchard, the judge at first instance, dismissed the entire claim as statute-barred and treated the claims for relief pursuant to subsection 24(1) of the *Charter*.¹¹ The majority of the Saskatchewan Court of Appeal (Gerwing J.A., Lane J.A. concurring) upheld the dismissal of paragraphs (d) to (h), but concluded that the trial could proceed on paragraphs (a) to (c) as claims under subsection 52(1) of the *Constitution Act, 1982*.¹² Smith J.A., dissenting, would have allowed the entire claim to proceed to trial, rejecting the premise that paragraphs (d) to (h) sought relief under section 24 of the *Charter*.

Ravndahl's appeal to the Supreme Court of Canada raised the following constitutional question:

Is s. 3 of *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, constitutionally inapplicable to the appellant's claims for personal relief, including damages, reinstatement and other monetary remedies, in an action alleging that s. 98.1(5) of *The Workers' Compensation Act*, 1979, S.S. 1979, c. W-17.1, and related legislation is of no force or effect to the extent that it breaches her rights under the *Canadian Charter of Rights and Freedoms*?¹³

The federal Attorney-General and seven of the provincial attorneys-general intervened.¹⁴ The Supreme Court of Canada ultimately answered the constitutional question in the negative and dismissed the appeal.

Since this case proceeded on a pre-trial motion, the merits of the section 15 claim were not yet before the courts. It may be that the legislative history reflects an assumption that, at least effective April 17, 1985, the *Charter* required that remarriage not terminate entitlement to a survivor's pension. However, there has been no determination that the legislature proceeded on that basis, nor, even assuming it did, that this is an accurate assessment of the constitutional law. Justice Smith in the Court of Appeal described the claim (without assessing it) as based on an argument that the statute "perpetuated stereotypical assumptions of women's dependent and subordinate status in a marriage."¹⁵ Yet, such arguments could be directed at both the enti-

11. *Charter*, *supra* note 3, s. 24(1) reads as follows: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
12. *Constitution Act, 1982*, s. 52(1) being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*] reads as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
13. *Ravndahl*, *supra* note 2 at para. 2.
14. Only Nova Scotia and Prince Edward Island did not appear.
15. *Supra* note 9 at para. 45.

tlement to a survivor's pension as well as to disentitlement upon remarriage. The merits of the case are not simple, and, at all levels, the courts were careful not to pre-determine them. Yet, the intertwining of the preliminary issues with matters of remedy makes the separation of preliminary issues difficult.

II. DOES THE *CHARTER* APPLY AT ALL?

The motion brought before the judge at first instance raised only the statute of limitations question, which was the only question of law stated by Pritchard J. Yet, in an agreed statement of facts, the parties posed the following further question: "Should the plaintiff's claim be denied on the basis that it involves a retrospective application of the *Canadian Charter of Rights and Freedoms*?"¹⁶ Neither the judge at first instance nor the majority of the Court of Appeal addressed this question. Smith J.A., dissenting specifically ruled that this question was not properly before the Court of Appeal, except to the extent it related to the limitation question stated by Pritchard J.¹⁷ In that context, Smith J.A. dealt with the retrospectivity question only in a partial way without ultimately resolving the question.¹⁸ The Supreme Court of Canada, speaking through Chief Justice McLachlin, made a point of not addressing this question: "These reasons assume, without deciding, that a challenge to a pre-*Charter* denial of benefits would be a permissible application of the *Charter*."¹⁹ I think it is unfortunate that the Supreme Court of Canada avoided answering this question. Although it is technically right to say the respondents had not properly raised it, if this is a valid argument, it is fatal to the claim. To send the case back for trial with this preliminary question unresolved potentially wastes a lot of time and effort. I contend the Supreme Court of Canada should have raised this matter *ex proprio motu* if necessary, and insisted on hearing submissions.²⁰ The high participation of intervening attorneys-general meant

16. *Ibid.* at paras. 4, 57.

17. *Ibid.* at para. 59.

18. *Ibid.* at para. 68.

19. *Ravndahl*, *supra* note 2 at para. 18.

20. There is certainly precedent for the Supreme Court of Canada deciding an issue not technically before it. In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358, the Court held that the unemployment insurance board of referees did not have the jurisdiction to deal with the *Charter* claim, meaning that the appeal to the Supreme Court of Canada did not technically engage the merits of the s. 15 challenge. The Court nonetheless found a *Charter* violation, *ibid.* at 38:

This is a case, however, that should be dealt with as economically and expeditiously as possible by all concerned. Under these circumstances, and especially considering that both parties have fully argued the constitutional point both before the Court of Appeal and this Court, it would seem appropriate for the Court to address the substantive issue here. I, therefore, propose to deal with that issue, namely, whether the former s. 31 of the *Unemployment Insurance Act, 1971* is inconsistent with s. 15 of the *Charter*.

that almost all governments potentially implicated by a decision on *Charter* application in this context were already before the Supreme Court of Canada; thus the setting was ripe to resolve the issue.²¹ It was especially apt that the Supreme Court of Canada finally resolved this question, since (as I am about to explain) its own previous decision in *Canada (A.G.) v. Hislop*²² had already indirectly settled it in favour of applying the *Charter*. Ravndahl deserved recognition of the benefit of this development, which took place subsequent to the filing of her statement of claim.

I am admittedly saying that the Supreme Court of Canada should have decided to respond to the *Charter* application question in *Ravndahl* because its answer would and should have been a positive one. Given the improper way in which the respondent government raised the retrospectivity question, it should not have been resolved in their favour. However, where the Court's own jurisprudence points against an argument, the party improperly raising it should not be granted an advantage—having the question go unanswered—due to that party's own lax procedure. The Supreme Court of Canada has previously said that a decision of whether to answer a question should be made on the assumption that either answer is possible,²³ but that seems disingenuous where the Court has control over the answer, and problems in answering the question arise only if the answer is the one the Court would not otherwise give.²⁴ The Court in *Ravndahl* could have asked the Saskatchewan government for submissions as to why the Supreme Court of Canada's decision in *Hislop* did not resolve the retrospectivity issue against Saskatchewan's argument.

The *Charter* application issue arises in *Ravndahl* because the remarriage that disentitled the plaintiff to a survivor's pension took place in 1984. If it were accurate to say that the claim involved applying the *Charter* to a discrete pre-*Charter* event, it entailed an invalid retrospective application of section 15, which only came into force in 1985. The Nova Scotia Court of Appeal had so ruled in a case comparable to *Ravndahl*, *Bauman v. Nova Scotia (A.G.)*.²⁵ Smith J.A., dissenting in *Ravndahl (C.A.)*, was obviously not bound by a decision of the Nova Scotia Court of Appeal, even one where leave to appeal to the Supreme Court of Canada was refused, but Smith J.A. was persuaded that *Bauman* reflected sufficient "complexity and subtlety of the

21. An additional constitutional question, providing an opportunity to the few non-participating attorneys-general for a belated intervention, could have been arranged.
22. 2007 SCC 10, [2007] 1 S.C.R. 429, 278 D.L.R. (4th) 385 [*Hislop*].
23. *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, 246 D.L.R. (4th) 193 [*Marriage Reference*]; *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 [*Borowski* cited to S.C.R.].
24. This is likely the case in both *Marriage Reference* and *Borowski*, *ibid*.
25. *Bauman v. Nova Scotia (A.G.)*, 2001 NSCA 51, 192 N.S.R. (2d) 236, 197 D.L.R. (4th) 644 [*Bauman*], leave to appeal to SCC refused, [2001] 2 S.C.R. vi, 202 D.L.R. (4th) vi.

issue²⁶ to warrant not deciding the issue on a pre-trial motion. However, *Bauman* pre-dates the Supreme Court of Canada's decision in *Hislop*.

The argument in *Hislop* did not actually involve any possible retroactive application of the *Charter*, but it did involve similar arguments about retroactive application of legislation.²⁷ The challenged legislation in *Hislop* was the *Modernization of Benefits and Obligations Act*,²⁸ which amended 68 pieces of federal legislation and extended benefits to same-sex couples.²⁹ The *Hislop* class, comprised of survivors whose same-sex partners had died since April 17, 1985, challenged the legislation for not going far enough. The Supreme Court of Canada found that this remedial legislation did not need to be fully retroactive, but did find two elements of the challenged provisions to be unconstitutional. The *MBOA* came into force on July 31, 2000, and, by virtue of subsection 72(2), did not allow Canada Pension Plan payments to same-sex survivors accruing before that date. Opposite-sex survivors, in contrast, could get up to twelve months arrears preceding their application, something not available to same-sex survivors until June 2001. The Supreme Court of Canada found this transitional provision to be a breach of section 15 not saved by section 1 and, applying a section 52 remedy, struck the provision.³⁰ Another provision of the *MBOA*, subsection 44(1.1), limited same-sex survivors' pensions to the survivors of contributors who died on or after January 1, 1998. The Supreme Court of Canada found subsection 44(1.1) to be a breach of section 15 not saved by section 1 and, applying a section 52 remedy, likewise struck the provision. It relied on its previous decision in *Benner v. Canada (Secretary of State)*³¹ as pertinent to the "basic conceptual

26. *Supra* note 9 at para. 68.

27. *Supra* note 22 at para. 126.

28. S.C. 2000, c. 12 [*MBOA*].

29. The one thing withheld in the *MBOA* was recognition of same-sex marriage, which was ultimately incorporated into federal law in 2005 by the *Civil Marriage Act*, S.C. 2005, c. 33.

30. The Court explained at *supra* note 22 at para. 133:

Prior to the enactment of the *MBOA*, it is true that same-sex survivors had no right to the survivor's benefit. Striking down s. 72(2) admittedly alters the legal consequences of having been a survivor (a past situation) in the 12 months preceding July 2000, when the *MBOA* came into force. To the extent that this involves a retroactive change in the law, it flows necessarily from the fact that Parliament has included in the *CPP* a right to up to 12 months of arrears. It is clearly open to Parliament to legislate retroactively, which it has done in s. 72(1). The *Charter* simply requires that same-sex survivors receive equal treatment as their opposite-sex counterparts. To the extent that s. 72(2) withholds from same-sex survivors a right to arrears to which similarly situated opposite-sex survivors are entitled, it is of no force and effect.

31. [1997] 1 S.C.R. 358, 143 D.L.R. (4th) 577 [*Benner* cited to S.C.R.]. *Benner* involved a challenge to legislation that covered those born outside Canada prior to 1977. *Benner's* 1988 application for Canadian citizenship was denied because of conditions on applicants whose parent was a Canadian mother rather than a Canadian father. The Court held that this did not involve retrospective application of the *Charter*, because the challenge engaged his current status, not the event of his birth.

distinctions between retroactivity, retrospectivity and prospectivity.³² The Court in *Hislop* distinguished between the effective date of payment of pension benefits and the date on which the status of survivor was acquired:

The basis for the survivor's benefit is the continuing status of being a survivor. As Iacobucci J. observed in *Benner*, at para. 56, "the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit." There is, as such, no merit to the government's argument that striking down s. 44(1.1) would be tantamount to requiring retroactive remedies for *Charter* violations. The remedy for the class members in relation to s. 44(1.1) is prospective in that it entails granting equal benefit of the law, prospectively, to people who are survivors of same-sex partners.³³

It is noteworthy that this analysis does not involve any cut-off date for the acquisition of survivor status. Although the *Hislop* class did not include those whose same-sex partner died before April 17, 1985, the Court's analysis (even if technically *obiter*) covers them too. Moreover, so does its section 52 remedy. The section 52 remedy was simply to render subsection 44(1.1) of no force or effect in its entirety. It did not substitute April 17, 1985 for January 1, 1998 as a relevant date on which survivor status was acquired. I assume this was not mere inadvertence on the part of the Supreme Court of Canada. This is what makes the *Hislop* analysis applicable to *Ravndahl*, even though the *Hislop* claim itself was not parallel.

Justice Bateman, on behalf of the Nova Scotia Court of Appeal in *Bauman*, adopted the following analysis in concluding that circumstances parallel to *Ravndahl* involved an invalid retrospective application of the *Charter*:

The claimants are not "new applicants." This is not the "contemporary application of a law which happened to be passed before the *Charter* came into effect." In *Benner*, the *Citizenship Act* was enacted before the *Charter*, but its effect in denying Mr. Benner citizenship occurred after the *Charter* was in force. Here, ss. 76 and 61 of the *Workers' Compensation Act(s)*, had no continuing effect on the claimants. Upon a claimant's remarriage the pension terminated. These provisions had no post-*Charter* continuing operation, as regards the claimants. The "most significant relevant feature of this case" is the date that each claimant remarried, here, all pre-*Charter*. It was the event of remarriage that resulted in termination of the pension, not the status of being remarried. Had the claimants remarried and divorced or been widowed shortly thereafter, they were not eligible for reinstatement of the pension.³⁴

It is true that neither *Bauman* nor *Ravndahl* were "new applicants" whereas *Hislop* was. The workers' compensation context involves a disentitlement after previous

32. *Hislop*, *supra* note 22 at para. 126.

33. *Ibid.* at para. 129.

34. *Bauman*, *supra* note 25 at para. 36.

entitlement, rather than having always been disentitled to Canada Pension Plan benefits. Nonetheless, once it is acknowledged that the date of acquiring status and the date of statutory entitlement need not be the same, as *Hislop* establishes, it is hard to see that anything turns on being a “new applicant.” Prospective *Charter* application to statutory benefits hinges on on-going status, irrespective of the mechanism of statutory entitlement. Furthermore, Justice Bateman misidentified the relevant status for *Charter* application purposes. What matters is one’s status as a survivor, not as remarried. Although that difference might affect the merits of the section 15 analysis, the remarriage is not the event to which the *Charter* is being attached.

Accordingly, I conclude that the *Ravndahl* case does not involve retrospective application of the *Charter*. The Supreme Court of Canada so assumed without deciding, in order to get to the limitation point. I think it would have been better had the Court actually decided; in any event, the limitation issues need to be addressed.

III. TO WHAT EXTENT, IF AT ALL, ARE CONSTITUTIONAL CLAIMS COVERED BY STATUTORY LIMITATION PERIODS?

The application of a limitation period can have one of two consequences. It can bar the action completely, as was the conclusion of Pritchard J. in *Ravndahl (Q.B.)*, or it can limit the extent of recovery, as was the case in the Supreme Court of Canada’s decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*.³⁵

Ravndahl’s counsel had initially argued that limitation periods simply do not apply at all to *Charter* claims. Pritchard J. rejected this argument and concluded that a statute of limitations of general application and reasonable length (here, six years) could properly bar a *Charter* claim. Pritchard J. treated *Ravndahl*’s entire claim as based on remedies pursuant to subsection 24(1) of the *Charter*.³⁶ Further, Pritchard J. distinguished the Ontario Court of Appeal’s decision in *Prete v. Ontario*,³⁷ which had refused to apply a limitation period to a *Charter* claim that involved a very short limitation period (six months) applicable only to actions against the Crown.³⁸ While none of the judges of the Saskatchewan Court of Appeal accepted the premise that a limitation period could not apply constitutionally, they differed as to its impact in this case.³⁹ *Ravndahl*’s argument that limitation periods could not apply to constitutional

35. 2007 SCC 1, [2007] 1 S.C.R. 3, 309 N.B.R. (2d) 255 [*Kingstreet*].

36. This was apparently the basis on which the case was argued before her, as indicated by Smith J.A., *supra* note 9 at para. 52.

37. (1993), 16 O.R. (3d) 161, 110 D.L.R. (4th) 94 (C.A.) [*Prete*].

38. *Supra* note 8 at paras. 14–15.

39. *Supra* note 9.

claims was abandoned before the Supreme Court of Canada in light of that Court's 2007 *Kingstreet* decision.⁴⁰

As noted above, the constitutional question stated in *Ravndahl* asked whether the limitation provision was "constitutionally inapplicable to the appellant's claims for personal relief, including damages, reinstatement and other monetary remedies. . . ."⁴¹ The majority of the Court of Appeal answered this question in the negative in relation to paragraphs (d) to (h) of the statement of claim and treated those paragraphs as claims for relief under section 24 of the *Charter*. Justice Smith, dissenting, rejected the premise that paragraphs (d) to (h) relied on section 24 of the *Charter*. The Supreme Court of Canada was not explicit on this point, but its reliance on *Kingstreet* appears to reflect its view that it does not matter. As *Kingstreet* was a non-*Charter* case, subsection 24(1) was irrelevant to it; however, the remedy of recovery of unconstitutionally collected taxes was still treated as a personal one, to which the limitations statute attached.

Kingstreet was a claim alleging an *ultra vires* tax, seeking recovery of taxes collected unconstitutionally. In the Supreme Court of Canada it was taken as given that the tax was an unconstitutional indirect tax. The bulk of the decision was directed to the principles surrounding recovery of unconstitutionally-collected taxes. The Court concluded that no principle of Crown immunity was applicable, and that the analysis should have been based on constitutional principles rather than an unjust enrichment framework: "The action for recovery of taxes is firmly grounded, as a public law remedy[,] in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law."⁴² The Court relied upon these constitutional principles to conclude that the government cannot rely on a defence of passing-on.⁴³ The Supreme Court of Canada's discussion of limitation periods in *Kingstreet* was very brief, something of an afterthought. A scant three paragraphs of Justice Bastarache's decision were devoted to the issue:

My view is that claims such as the present may be subject to an applicable limitation period. The New Brunswick *Limitation of Actions Act* provides that:

9[.] No other action shall be commenced but within six years after the cause of action arose. Section 9 was clearly intended to cover all other actions not specifically provided for in the legislation. There is no reason why modern restitutionary claims ought not to be subject to s. 9. I agree with Robertson J.A. that such a result does not run afoul of the principles developed by this Court in *Amax Potash*:

40. *Ravndahl*, *supra* note 2 at para. 17.

41. *Ibid.*

42. *Kingstreet*, *supra* note 35 at para. 40.

43. The New Brunswick Court of Appeal in *Kingstreet* had allowed a defence of passing-on, i.e. barring recovery of taxes paid where the business paying the taxes had passed the cost on to its customers. See *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2005 NBCA 56, 285 N.B.R. (2d) 201, 254 D.L.R. (4th) 715.

In my view, the reasoning adopted in *Amax Potash* has no application to cases in which the provinces are relying on a pre-existing statutory prescription period. There is a substantive difference between existing legislation that bars potential claims, unless brought within a fixed period, and legislation enacted for the specific purpose of barring restitutionary claims based on an invalid or unconstitutional tax. A prescription statute is adopted for purposes of providing a defendant with “peace of mind”; to be secure in the knowledge that he or she is no longer at risk from a stale claim accompanied by stale testimony. It is not adopted for the purpose of barring claims outright. A *Limitation of Actions Act* is valid legislation adopted for a valid purpose. It does not seek to achieve indirectly what cannot be achieved directly. [para. 42]

Finally, the point at which time will begin to run must be determined. The cause of action was complete at the moment the Province illegally received the payment. For this reason, the appellants can only recover the user charges paid during the six years preceding the filing date of their Notice of Application (May 25, 2001).⁴⁴

In *Ravndahl*, Chief Justice McLachlin described the Court’s holding in *Kingstreet* as establishing “that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.”⁴⁵ I agree that this is what *Kingstreet* stands for, but contend that the Court was a bit hasty in reaching this conclusion.

Amax Potash Ltd. v. Saskatchewan,⁴⁶ distinguished in *Kingstreet*, was not a statute of limitations case. The contested provision in *Amax Potash* created an absolute bar, not a time-limited one, to suits against the Crown for actions taken pursuant to unconstitutional statutes, such as unconstitutionally collected taxes. Even before the express incorporation of constitutional supremacy in section 52 of the *Constitution Act, 1982*, the Supreme Court of Canada concluded that it was not acceptable for a government to be able to immunize itself against constitutional challenge. A very short limitation period, as in *Prete*, is problematic insofar as it makes the opportunity for constitutional challenge largely impractical. On the contrary, a reasonably long limitation period, such as the six-year standard length at issue in both *Kingstreet* and *Ravndahl*, is not in itself incompatible with the principle that an opportunity for constitutional challenge needs to be available. For a time-specific or time-limited constitutional issue, standard limitation periods do not raise general concerns; the situation becomes more complicated where the striking of an unconstitutional statute is involved.

44. *Kingstreet*, *supra* note 35 at paras. 59–61.

45. *Supra* note 2 at para. 17.

46. [1977] 2 S.C.R. 576, 71 D.L.R. (3d) 1 [*Amax Potash* cited to S.C.R.].

Recovery of unconstitutionally collected taxes was described by Chief Justice McLachlin as a “personal” remedy, reflecting the out-of-pocket impact on the claimant.⁴⁷ However, such effects on litigants are not unique. In the earlier part of his judgment in *Kingstreet*, Justice Bastarache rejected the need for a taxpayer to protest in order to recover unconstitutionally collected taxes, saying that “constitutional law should apply fairly and evenly, so that all similarly situated persons are treated the same.”⁴⁸ The application of a limitation period to limit recovery runs afoul of that principle in disadvantaging those who had not (initially at least) litigated, and whose limitation clock necessarily starts later.⁴⁹ Moreover, this analysis seems at odds with the very nature of a section 52 remedy. By definition, a statute of limitations is held against litigants only. A section 52 remedy, in contrast, is one against the statute. A statute declared to be of no force or effect to the extent of the inconsistency is not just ineffective against litigants. As a matter of enforcement, taxpayers may need to become litigants, but a section 52 analysis should impose an obligation on governments to comply with the constitution without litigation. How is a limitation period attached to litigation consistent with this analysis?

The effect of the application of the limitation period in *Kingstreet* is to impose a cap on the retroactivity of constitutional remedies. *Hislop* stands for the proposition that there can be limits on the retroactivity of constitutional remedies,⁵⁰ but it does so with a much more nuanced analysis, briefly summarized by the Court as follows:

A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies. Hence, we must now turn to what else must be considered once legal change has been established.

Although the list of such factors should not be considered as closed, some of them appear more clearly compelling. They may include reasonable or in good faith reliance by governments . . . or the fairness of the limitation of the retroactivity of the remedy to the litigants. Courts ought also consider whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources. . . .⁵¹

47. *Ravndahl*, *supra* note 2 at para. 17.

48. *Supra* note 35 at para. 56.

49. In particular contexts, this may not be of practical concern given the ability of the state to substitute the unconstitutional tax with a retroactive constitutional tax or levy. *Ibid.* at para. 27. However, depending on the nature of the unconstitutionality, it may not be possible to design a replacement tax/levy with a burden on individual taxpayers identical to that of the unconstitutional tax.

50. A full critique of the *Hislop* analysis of prospective versus retroactive remedies is beyond the scope of this comment. For general comments on *Hislop*, see Daniel Guttman, “*Hislop v. Canada: A Retroactive Look*” (2008) 42 *Sup. Ct. L. Rev.* 547; and 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) 66:1 *U.T. Fac. L. Rev.* 65.

51. *Hislop*, *supra* note 22 at paras. 99–100. Justice Bastarache, concurring in the result, did not agree that a substantial change in the law was a prerequisite to a purely prospective remedy.

In contrast, the application of a limitation period is a very blunt instrument for limiting retroactivity of remedies. Moreover, the fact that limitation periods of general application mostly have no constitutional implications should give one pause in automatically applying them to limit constitutional remedies, with ramifications for the rule of law.⁵²

None of these issues was addressed or even adverted to by the Supreme Court of Canada in either *Kingstreet* or *Ravndahl*. The application of the limitation period was assumed without serious consideration, and attention was paid instead to the question of when to start the limitation clock. I will therefore move to a consideration of that question, even though I have concerns about it actually arising.

A. When Does the Limitation Clock Start?

There were two arguments made on behalf of the plaintiff in *Ravndahl* for the limitation clock not absolutely barring any aspect of her claim. One was that each amending legislation restarted the clock, such that the 2000 statement of claim was in time by reference to 1999 legislation. The Supreme Court of Canada summarily rejected this argument.⁵³ The Court was clearly right to do so. *Ravndahl*'s claim concerned under inclusiveness. When *Ravndahl*'s pension was initially terminated in 1984, there was no basis for constitutionally challenging it. When section 15 of the *Charter* came into force on April 17, 1985, it provided potential recourse against the legislation which was still in force and remained unchanged from when the pension was terminated. Subsequent amendments provided wider coverage, but not the coverage the plaintiff sought. None of the subsequent amendments changed the plaintiff's cause of action, and thus were not capable of restarting the limitation clock.

However, this conclusion left open the question of whether *Ravndahl* had a one-time cause of action that arose on April 17, 1985, and was thus well beyond the six-year clock, or a rolling one that first arose on April 17, 1985, but repeated every month that a pension cheque was not received. The latter would enable *Ravndahl*'s statement of claim, filed in 2000, to reach back to 1994.

52. See Pal, *supra* note 50 at 88–94. An example of a law of general application not applying in a constitutional context is *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, 146 D.L.R. (3d) 202 [Paul L'Anglais cited to S.C.R.]. Provisions of the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c.10 and *Canada Labour Code*, R.S.C. 1970, c. L-1 that conferred exclusive jurisdiction on the Federal Court were held not to preclude the inherent jurisdiction of provincial superior courts to deal with constitutional challenges. In effect, the *Federal Court Act* and *Canada Labour Code* were read down. This holding seems to have been narrowed to a residual jurisdiction in *Okwuobi v. Lester Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257 at para. 54, 250 D.L.R. (4th) 454, without reference to *Paul L'Anglais*: residual jurisdiction was likewise read in as an exception to statutory language conferring exclusive jurisdiction on an administrative tribunal.

53. *Ravndahl*, *supra* note 2 at para. 20.

The Supreme Court of Canada in *Ravndahl* rejected the rolling claim argument, relying on its analysis in *Hislop* to distinguish its decision in *Kingstreet*:

In *Kingstreet*, a new cause of action was said to arise each time a payment of tax was made under unconstitutional legislation. This case is distinguishable from the present case. As stated by this Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429:

Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done. . . . [para. 108]

The renewing cause of action argument cannot succeed as it assumes that the benefits which were terminated would have otherwise been paid.⁵⁴

The result was the dismissal of the “personal” aspects of *Ravndahl*’s claim, represented by paragraphs (d) to (h).

It is true that benefit claims under section 15 are more complex than unconstitutional tax claims because the former have the potential of being equalized up or down. However, that complexity goes to the remedy, not the right. If discrimination (not saved by section 1) is established, the cause of action is successful, even if the remedy does not ultimately deliver the benefit at the original level or at all. As noted above, *Hislop* enables the requisite status and the statutory entitlement to benefits to occur at different times, because of the possibility of restricting or withholding the retroactive effect of legislation when remedying unconstitutional discrimination. The same would apply to the continuation of a benefit at a lower rate when extended to a broader class. However, any such validation of the absence of fully retroactive remedies, as explained in *Hislop*, depends on an analysis of the underlying right. It cannot be presumed in advance, and cannot be used to stop the cause of action. Any absence of (full) retroactivity of the remedy does not limit the cause of action identifying the right. The cause of action in *Hislop* was a continuing one running from April 17, 1985, to the equal treatment of same-sex survivors under the *MBOA* in 2001, notwithstanding the result that benefits were only instated to 1999.

As Justice Bastarache, concurring in *Hislop*, put it: “A government has no more right to discriminate in the provision of benefits than it does to collect unconstitutionally levied taxes.”⁵⁵ It may well be that there is no absolute constitutional right to workers’ compensation of any sort, much less a constitutional right to a survivor’s

54. *Ibid.* at para. 22.

55. *Supra* note 22 at para. 163.

pension, but Ravndahl's claim is not a claim to an absolute constitutional right to a survivor's pension. Rather, it is a claim to non-discriminatory provision of survivors' pensions. The Saskatchewan legislature (theoretically) could have brought Ravndahl's cause of action to a close by abolishing workers' compensation, but it did not do so. If the section 15 claim on the merits is valid, the legislation has been unconstitutionally discriminating from April 17, 1985, onwards.

In *Canada (A.G.) v. Lameman*,⁵⁶ the Supreme Court of Canada granted summary judgment to the respondent for most of an Aboriginal rights claim as being statute-barred, but left in place the "claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*."⁵⁷ If an accounting is a continuing claim, so should be the on-going non-payment of pension benefits alleged to be discriminatory.⁵⁸

Applying *Kingstreet*, a rolling claim still engages the limitation clock by limiting recovery to the six years preceding the filing of the statement of claim; it does not bar the claim entirely, as was the conclusion of the majority of the Saskatchewan Court of Appeal and a unanimous Supreme Court of Canada in respect of paragraphs (d) to (h) of Ravndahl's statement of claim. In addition to the above reasons for characterizing Ravndahl's claim as a rolling one, doing so also avoids anomalies between analysis of subsection 24(1) of the *Charter* and section 52 of the *Constitution Act, 1982*, a point to which I will now turn.

B. What is the Relationship Between Subsection 24(1) of the *Charter* and Section 52 of the *Constitution Act, 1982* in Benefits Cases?

Although the Supreme Court of Canada did not explicitly identify paragraphs (d) to (h) of Ravndahl's statement of claim as based on subsection 24(1) of the *Charter*, as the majority of the Court of Appeal did, it nonetheless appears to be implicit in Chief Justice McLachlin's analysis. The contrast between paragraphs (d) to (h) as personal remedies compared to paragraphs (a) to (c) as explicitly based on section 52 of the *Constitution Act, 1982* draws a distinction between subsection 24(1) and section 52. This distinction forms the basis for a different conclusion on the impact of the limitation period, enabling the section 52 claims to proceed to trial:

56. 2008 SCC 14, [2008] 1 S.C.R. 372, 429 A.R. 26.

57. *Ibid.* at para. 12.

58. In *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 550 U.S. 618, 127 S. Ct. 2162 (2007), the majority of the United States Supreme Court ruled that a statutory claim of sex discrimination in wages was not a rolling claim reviving, for limitations purposes, on each pay cheque. However, this ruling hinged largely on the statutory requirement of intentional discrimination, something not required for a s. 15 *Charter* claim. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.].

It will be for the trial judge to determine whether a declaration of invalidity should be granted, and if so, what remedies if any should be granted. Because the appellant's personal claims are statute-barred, any remedies flowing from s. 52 would not be personal remedies, but would be remedies from which the appellant, as an affected person, might benefit.

It is important to distinguish the appellant's personal, or *in personam*, remedies, brought by her as an individual, from an *in rem* remedy flowing from s. 52 that may extend a benefit to the appellant and all similarly affected persons.⁵⁹

This dichotomy between *in personam* and *in rem* remedies seems to treat subsection 24(1) and section 52 remedies as "watertight compartments," but that has not been the approach prior to *Ravndahl*.⁶⁰

In *Hislop*, the Supreme Court of Canada indicated that retroactive benefits arising from a section 15 *Charter* claim could arise under either subsection 24(1) or section 52: "Whether framed as a remedy under s. 52 or s. 24(1), it may be tantamount to a claim for compensatory damages flowing from the underinclusiveness of the legislation."⁶¹ Gerwing J.A., speaking for the majority in *Ravndahl (C.A.)*, said: "It would appear that the usual way to receive retroactive benefits would be a claim under s. 24 of the *Charter*."⁶² However, the Supreme Court of Canada's analysis in *Hislop* treated retroactive statutory remedies as primarily a section 52 issue. Moreover, in a non-*Charter* context, as in *Kingstreet*, section 52 is the only basis for retroactive statutory remedies. Justice Bastarache, concurring in *Hislop*, relied on section 52 as the basis for the "general norm of retroactivity."⁶³ The majority in *Hislop* also relied on section 52 as the underpinning of retroactive remedies:

Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418.

59. *Supra* note 2 at paras. 26–27.

60. Lord Atkin's "watertight compartments" metaphor in relation to the division of powers, expressed in *Canada (A.G.) v. Ontario (A.G.)* [1937] A.C. 326 at 354, 1 D.L.R. 673 (P.C.) has not been strictly followed in modern times. As Chief Justice Dickson explained in *Ontario Public Service Employees' Union v. Ontario (A.G.)* [1987] 2 S.C.R. 2 at 18, 41 D.L.R. (4th) 1[*OPSEU* cited to S.C.R.]:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.

This passage was recently reiterated in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 at para. 36, 281 D.L.R. (4th) 125.

61. *Supra* note 22 at para. 102.

62. *Supra* note 9 at para. 28.

63. *Supra* note 22 at para. 140; see generally *ibid.* at paras. 138–40.

This Court has applied in many cases the “declaratory approach” to constitutional remedies, which implies that s. 52(1) remedies are often given retroactive effect. See, for example, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 28, Gonthier J. On this view, s. 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority to enact an unconstitutional law. In the words of Professor Hogg, a declaration of constitutional invalidity “involves the nullification of the law from the outset” (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55–2 (emphasis added)). If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past.⁶⁴

I think there is a contradiction in these passages between the first paragraph, which treats section 52 retroactive remedies as applying only to the parties, and the second paragraph, which treats section 52 retroactive remedies as more broadly applicable.⁶⁵ It is the latter view that informs the overall analysis in *Hislop*.

Hislop indicates that a fairly elaborate analysis is necessary to determine whether section 52 remedies for an unconstitutional statute are properly only prospective, or should also be retroactive, in whole or in part. That analysis cannot be done without an understanding of the right to be remedied. Thus (leaving aside the limitation point) it is impossible on a pre-trial motion in *Ravndahl* to draw any conclusions on whether the alleged breach would give rise to retroactive remedies. The Supreme Court of Canada was right not to attempt even a preliminary analysis. It is astonishing nonetheless that the highest court did not even acknowledge the implications of *Hislop* for the trial judge.

If a *Hislop* analysis were to conclude that retroactive section 52 remedies would ordinarily be available with respect to the Saskatchewan workers' compensation legislation (subject to a six-year cap as per *Kingstreet*), does the conclusion that subsection 24(1) remedies are statute-barred have any effect on the s. 52 analysis? Does an *in rem* section 52 retroactive remedy enable an end-run around the statute-barred *in personam* subsection 24(1) remedy, or would that be an improper example of doing indirectly what is not permissible directly?⁶⁶ Remarkably, the Supreme Court of Canada did not even pose this question, though it is possible that it oblique-

64. *Ibid.* at paras. 82–83 [emphasis in original].

65. Justice Bastarache, concurring, makes the same points as in the latter paragraph. *Ibid.* at para. 138. It should be noted that the passage from Justice Gonthier from *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385 [*Martin*], relied on by both Justice Bastarache and the majority in *Hislop*, is not in the remedies part of the *Martin* judgment. Rather, it is in the section explaining why the administrative tribunal has the jurisdiction to consider the *Charter* challenge to the legislation. I will comment below on the significance of *Martin* for remedies.

66. *Amax Potash*, *supra* note 46 at 590.

ly answered it, without any analysis. After drawing the *in personam/in rem* distinction, the Court's only elaboration was to quote from a factum before it:

As stated in the factum of the intervener the Attorney General of Ontario:

Where legislation is found to be unconstitutionally underinclusive, the prospective remedial option chosen by the court might extend the benefit at issue through severance or reading in, or it might suspend the operation of the declaration of invalidity to allow the government to determine whether to cancel, modify, or extend the benefit at issue. If the unconstitutional underinclusive benefit is extended to include the [appellant's] *Charter* claimant[t] group, whether through the court's s. 52(1) declaration or through government's response to the court's s. 52(1) declaration, the [appellant], like any otherwise eligible person [in the claimant group], reaps the benefit of the s. 52(1) declaration, even if the claimant does not obtain a personalized remedy from the court. [para. 45]⁶⁷

Does the reference here to "prospective" remedies mean that the Supreme Court of Canada has precluded retroactive remedies in *Ravndahl*? If so, it is a very obscure way of saying so. It cannot be right that the trial judge and parties in this and other cases are meant to read that much between the lines.

It is noteworthy that the above quoted passage from the Ontario Attorney General's factum treats a suspended declaration of invalidity as a prospective remedy. There is a remarkable amount of confusion on this point. Sujit Choudhry and Kent Roach contend the contrary: "With respect to delayed declarations of invalidity, the judgment still has fully retroactive effect, covering the time period *including* the period of the suspension."⁶⁸ Justice Bastarache, concurring in *Hislop*, properly noted that "the question of whether to deny a retroactive remedy is different from deciding whether to grant a suspended declaration of invalidity; the same considerations do not apply to both."⁶⁹ However, Bastarache J. further noted that, in benefits cases, a suspended declaration of invalidity "implicitly included the ability to limit the retroactive effect of any remedial legislation."⁷⁰ This is because of the possibility of equalizing down in extending the benefits to a previously unconstitutionally excluded class of recipients. A purely prospective remedy need not be suspended, but a suspended declaration of invalidity contemplates the denial of retroactive relief.

Consider the situation in *Schachter v. Canada*.⁷¹ Fifteen weeks of unemployment insurance benefits had been made available to adoptive parents, but not to natural

67. *Supra* note 2 at para. 27 [emphasis added].

68. Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 *Sup. Ct. L. Rev.* 205 at 217 [emphasis in original]. Choudhry and Roach acknowledge, however, that most legislative responses to suspended declarations of invalidity adopt purely prospective remedies. *Ibid.* at 257–66.

69. *Supra* note 22 at para. 161.

70. *Ibid.* at para. 164.

71. [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 [*Schachter* cited to S.C.R.].

parents (fathers) such as *Schachter*. In the Supreme Court of Canada, a section 15 breach was conceded; thus, the Court's analysis concerned remedies. The Court concluded that it would have granted a suspended declaration of invalidity ordinarily, to ensure that prior recipients were not disentitled, and to allow Parliament the opportunity to redesign the benefit. The Court did not suspend the declaration, however, because, during the appeal process, Parliament had already responded by providing ten weeks of benefits to both adoptive and natural parents. This was a prospective adjustment only, and gave nothing to *Schachter*, which, the Court assumed, also would have been the effect of a suspended declaration of invalidity. The non-retroactive effect of the remedy in *Schachter* is important in understanding the effect on the original beneficiaries. A fully retroactive remedy in *Schachter* would have required those who had initially received fifteen weeks of benefits to pay back five weeks' worth to reach the equalized-down point. Such clawing back is not within the realm of reality. If the benefit is to be readjusted by the legislature in response to a determination of unconstitutional underinclusiveness, a permissible limit on retroactivity is inherent.

Schachter said that a suspended declaration of invalidity under section 52 should not ordinarily be coupled with a subsection 24(1) remedy,⁷² a point reiterated in *Hislop*: “[T]o allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court’s decision to grant a suspended declaration of invalidity.”⁷³ Yet this assumption is inconsistent with what the Supreme Court of Canada had done in *Martin*, without acknowledging the departure from *Schachter*. In *Martin*, after granting a suspended declaration of invalidity under section 52, the Court nonetheless restored the benefits to Martin that the unconstitutional provisions had nullified: “This postponement, of course, does not affect the appellants’ cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims.”⁷⁴

The personal remedy to Martin was not specifically identified as a subsection 24(1) remedy, but it was clearly distinguished from the section 52 remedy. Since the section 52 remedy was suspended, a retroactive remedy to Martin was inconsistent with the section 52 declaration.⁷⁵ Subsection 24(1) was essentially used to exempt

72. *Ibid.* at 720.

73. *Supra* note 22 at para. 92.

74. *Supra* note 65 at para. 120.

75. In the end, however, Nova Scotia fashioned a retroactive reinstatement of benefits for chronic pain back to 1985. See *Chronic Pain Regulations*, made under Sections 184 and 184A of the *Workers’ Compensation Act*, S.N.S. 1994, c. 10, O.I.C. 2004–299 (July 22, 2004, effective April 2, 2004), N.S. Reg. 187/2004, s. 4:

A worker is entitled to an assessment to determine eligibility for benefits and services under these regulations if the medical evidence establishes that on or after April 17, 1985, the worker had chronic pain that was casually connected to an original compensable injury.

Martin from the section 52 remedy.⁷⁶ In spite of what was said in *Schachter* and *Hislop*, this was treated as routine in *Martin*.⁷⁷

A suspended declaration of invalidity is an example of where the section 52 and subsection 24(1) remedies can diverge. It provides a way of analytically separating the *in personam* and *in rem* remedies. In the context of *Ravndahl*, the statute-barred status of the *in personam* remedy would point to following *Schachter* rather than *Martin*. Thus, if the remedial analysis otherwise points to a suspended declaration of invalidity, there can be coherence between the statute-barred status of the subsection 24(1) remedy alongside the availability of a prospective section 52 remedy. However, what if the remedial analysis does not otherwise point to a suspended declaration of invalidity? What if a *Hislop* analysis points to a fully retroactive immediate section 52 remedy?

On a rolling conception of the right in *Ravndahl*, the starting point for both subsection 24(1) and section 52 remedies is a six-year cap on retroactivity. Within that parameter, available options are equally open for subsection 24(1) and section 52 remedies. Yet, on the Supreme Court of Canada's finding of the cause of action as complete on April 17, 1985, there is potential discordance. By referring only to prospective remedies in *Ravndahl*, citing the Ontario Attorney General's argument, is the Supreme Court of Canada suggesting that the section 52 remedy must be suspended where the *in personam* remedy is statute-barred, even where a suspension would not otherwise be warranted? Again, it requires a great deal of reading between the lines to reach this conclusion. By not fully exploring the relationship between subsection 24(1) and section 52 in benefits cases, the Supreme Court of Canada in *Ravndahl* has made an already muddled aspect of the law even more confusing.

One thing does seem clear in distinguishing the judgment of first instance from the appellate consideration in *Ravndahl*. At first instance, *Ravndahl*'s claim, considered only on the basis of subsection 24(1), was completely dismissed, leaving no room for any remedy. The appellate distinction between subsection 24(1) and section 52 means that *Ravndahl* can expect at least a prospective section 52 remedy if successful in the section 15 claim. Whether any element of retroactivity is possible is, however, very unclear from the Supreme Court of Canada's decision.

76. Dianne Pothier, "Martin and Laseur: Workers' Compensation under Charter Scrutiny" (2004) 11 C.L.E.L.J. 139 at 159.

77. *Ibid.* Although providing benefits to litigants in conjunction with a general suspension of the declaration of invalidity gives an advantage to litigants, I think this is justified as an incentive to bear the burdens of constitutional litigation. For a similar view, see Choudhry & Roach, *supra* note 68 at 222, 246–48.

IV. CONCLUSION

The Supreme Court of Canada's decision in *Ravndahl* is very short—29 paragraphs. The turn-around time, by Supreme Court of Canada standards, was also very quick—argued on December 17, 2008, the judgment was released on January 29, 2009. The Court treated it as a simple case. As discussed in this comment, in my assessment, *Ravndahl* was anything but a simple case.

The fact that the case arose as a pre-trial motion precluded a full assessment of all the issues it raises. Nevertheless, even within the constraints of a pre-trial motion, the Supreme Court of Canada missed some opportunities. It avoided the *Charter* application issue that it could have helpfully resolved. On the limitation points that the case officially engaged, it gave quick answers that avoided even acknowledging underlying complexities. Ultimately, the Supreme Court of Canada's decision in *Ravndahl* raised more questions than it answered about the impact of statutes of limitations on constitutional law.

