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Beetz J. made a superb contribution to the public law of Canada. His views were always thoughtful, balanced and properly respectful of the legislative and executive branches of government. It is a great shame that he was not able to participate longer in the Supreme Court of Canada's difficult task of fashioning the judicial role in the implementation of the Charter of Rights. One part of that task is the design of remedies in cases where a statute has been held to be inconsistent with the Charter of Rights. That is the topic of this paper.

I. THE PROHIBITION OF RECONSTRUCTION

Beetz J. addressed the issue of remedies in *Singh* v. *Minister of Employment and Immigration*[1]. In that case, the Supreme Court of Canada had held that the procedures of the Immigration Act for determining claims of refugee status were in violation of either the Canadian Bill of Rights (Beetz J.'s opinion) or the Charter of Rights (Wilson J.'s opinion). The parties to the case made some suggestions as to improvements in the procedures that would cure the constitutional deficiencies. It was submitted that the Court could simply order the requisite changes in the procedures. The Court decided instead to hold that the procedures were unconstitutional (or inoperative), and to leave to Parliament the role of designing new procedures.

Beetz J. articulated the Court's reasons for forbearance in his usual elegant style:

> *The points might be well taken if they were addressed to Parliament. There is probably more than one way to remedy the constitutional shortcomings of the* Immigration Act, 1976. *But it is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires it, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery.*[2]

The wisdom of these words was made clear by subsequent events: Parliament did in fact enact an entirely new scheme for determining claims of refugee status[3].

Since *Singh* was decided, the Supreme Court of Canada has continued to struggle with the difficult distinction between the "relatively crude surgery" that is within the Court's proper function and the "plastic or reconstructive

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1. [1985] 1 S.C.R. 177.

2. *Id.*, at 235 and 236.

3. S.C. 1986, c. 13.

surgery" that intrudes into the function of the legislative body[4]. Beetz J. would undoubtedly have approved of the Court's decision in *Rocket* v. *Royal College of Dental Surgeons*[5]. In that case, the Supreme Court of Canada held that a prohibition on advertising by dentists was a breach of freedom of expression and was not saved by section 1. The Court made clear that some restrictions on professional advertising would be saved by section 1, but it still struck the prohibition down in its entirety. McLachlin J. for the Court said that it was "for the legislators" to determine what kinds of advertising should be prohibited[6].

II. THE AVAILABILITY OF SEVERANCE

Singh and *Rocket* may be contrasted with *R.* v. *Hess*[7], in which the Supreme Court of Canada had to review the statutory rape provision of the Criminal Code. The provision made it an offence for a male person to have intercourse with a female person under 14 years of age, "whether or not he believes that she is fourteen years of age or more". The quoted language caused the offence to violate section 7, because it eliminated the requirement of mens rea for an essential element of the offence, namely, the age of the girl. The constitutional problem could be corrected by excising the quoted words. The rest of the section would make sense without the words, and the normal requirement of mens rea would apply if there was no longer any language eliminating the requirement. The Court accordingly excised the words[8]. The Court was here exercising the power of severance, which allows the striking out of unconstitutional words. No new words had to be inserted in order to import the requirement of mens rea. Nevertheless, the result was a significant change in the statutory provision. The alternative would have been to strike down the entire offence, which would mean that intercourse with a girl under fourteen would no longer be an offence, even for a man who was aware of the girl's age – at least until Parliament amended the *Criminal Code* to reintroduce the offence.

4. *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, decided before *Singh*, is another case where the Court refused to "read in" standards that would have made a statutory power (of search and seizure in this case) constitutional. Dickson J. wrote for the Court, which included Beetz J., and he asserted (at 169) that "it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements".

5. [1990] 2 S.C.R. 232.

6. *Id.*, at 252.

7. *R.* v. *Hess*, [1990] 2 S.C.R. 906.

8. *Id.*, at 934 per Wilson J. for majority, at 936 per Sopinka J. concurring.

Another example of severance is *Tétreault-Gadoury* v. *Canada*[9]. In that case, the Supreme Court of Canada held that it was a breach of section 15 of the Charter to restrict unemployment insurance benefits to persons under 65. The age-65 bar in the Act took the form of an exception to the general rules of entitlement. If the age-65 bar were excised from the Act, the normal rules of entitlement would operate without any limitation as to age. The Court therefore simply exercised its power of severance to remove the age-65 bar from the Act. The effect of this was to require payment of unemployment insurance benefits to persons over 65. This meant that the plaintiff became entitled to benefits, because she was a person over 65 who was otherwise qualified.

The decision in *Tétreault-Gadoury* caused a major change in the system of unemployment insurance. Yet La Forest J., who wrote the opinion of the Court, clearly had no information as to the cost of the Court's extension of the Act to persons over 65. On that point, he said that "there was no evidence put forth that the government could not afford to extend benefits to those over 65"[10]. Nor did La Forest J. discuss the relationship between unemployment insurance benefits and the public (and private) pension schemes that commence payment at age 65: should they be modified to take account of access to unemployment insurance benefits? It is only fair to note, however, that by the time the case reached the Supreme Court of Canada, Parliament had in fact amended the Act to remove the age-65 bar (although not with retroactive effect so as to benefit the plaintiff). The amendment of the Act must have encouraged the Court to order its remedy, which obviously would not have great practical significance.

III. THE AVAILABILITY OF READING IN

Although the remedy in *Tétreault-Gadoury* was a radical one, it did not involve adding new words to the *Unemployment Insurance Act*. The age-65 bar was simply deleted by the exercise of the Court's power of severance, leaving the plaintiff in a position to rely upon the general rules of entitlement[11]. A much more difficult problem was presented to the Supreme Court of Canada in *Schachter* v. *Canada*[12]. In that case, a claim was made by natural parents

9. *Tétreault-Gadoury* v. *Canada*, [1991] 2 S.C.R. 22. The opinion of La Forest J. was agreed to by all members of the Court. L'Heureux-Dubé added brief concurring reasons not germane to the section 15 issue.

10. *Id.*, at 46.

11. This was also the case in *Re Blainey*, (1986) 54 O.R. (2d) 513 (C.A.), where the Ontario Court of Appeal extended the coverage of the *Ontario Human Rights Code* to sex-segregated sports teams by striking down an exemption in the Code.

12. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679. The opinion of Lamer C.J. was agreed to by Sopinka, Gonthier and McLachlin JJ. La Forest J. wrote a short concurring opinion that was agreed to by L'Heureux-Dubé J.

to child care benefits that were conferred only on adoptive parents by the federal *Unemployment Insurance Act*. The Act treated adoptive parents more generously than natural parents, which was agreed on appeal to be a denial of equal benefit of the law in violation of section 15 of the Charter of Rights. But what was the remedy? There was no severable provision excluding natural parents from the child care benefits. The Act simply limited the benefits to adoptive parents. If that provision were excised, the perverse result would be to deny child care benefits to all adoptive parents.

In *Schachter*, the Supreme Court of Canada held that it possessed the power not only to sever language from a statute, but also to "read in" new language if that were necessary to remedy a constitutional defect. In principle, therefore, the defect in *Schachter* could be cured by "reading in" the class of natural parents to the statutory provision benefiting adoptive parents. Lamer C.J., speaking for a unanimous Court on this issue, explained that reading in would be a "legitimate remedy akin to severance"[13], despite the fact that it involved adding words to a statute that had never been enacted by Parliament. In other words, the remedy of extension was available to cure an under-inclusive statutory scheme even if new language had to be added to the statute in order to accommodate the unconstitutionally excluded class.

The Court in *Schachter* acknowledged that caution was called for in exercising the newly-assumed power of reading in. Reading in would be appropriate only in "the clearest of cases"[14], which seemed to mean cases where (1) the addition of the excluded class was consistent with the legislative objective, (2) there seemed to be little choice as to how to cure the constitutional defect, (3) the reading in would not involve a substantial change in the cost or nature of the legislative scheme, and (4) the alternative of striking down the under-inclusive provision would be an inferior remedy[15]. The Court concluded that the *Schachter* case was not an appropriate one for correction by reading in. The objective of the Act, in making special provision for adoptive parents, was not clear, and therefore it could not be assumed that the addition of natural parents to the provision would be consistent with the legislative objective. The reading in of natural parents (who are of course more numerous than adoptive parents) would cause a major increase in the scope and cost of the child care benefits legislated by Parliament. The Court concluded that "to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain"[16]. Instead, the Court held that the appropriate remedy was "to declare the provision invalid but to suspend that declaration to allow the legislative body in question to

13. *Id.*, at 702.

14. *Id.*, at 718 per Lamer C.J., at 727 per La Forest J.

15. *Id.*, at 718.

16. *Id.*, at 723 per Lamer C.J.; La Forest J. agreed.

weigh all the relevant factors in amending the legislation to meet constitutional requirements"[17].

Since the Supreme Court of Canada in *Schachter* did not actually order the remedy of reading in, the Court's endorsement of the remedy as a legitimate option of judicial review was an obiter dictum. However, Lamer C.J. for the majority discoursed at some length on the issue, and La Forest J., while not committing himself to all of Lamer C.J.'s discussion, expressly agreed that reading in was a possible remedy. The availability of reading in must therefore be regarded as a considered ruling by a unanimous Court. There is still no instance of reading in by the Supreme Court of Canada, but, since the ruling in *Schachter*, the remedy has been ordered by the Ontario Court of Appeal in a case involving discrimination against homosexuals.

In *Haig* v. *Canada*[18], the Ontario Court of Appeal held that the *Canadian Human Rights Act*'s prohibition of discrimination in employment was unconstitutional because it did not include sexual orientation as a ground of discrimination. The case had been brought by a plaintiff who had been discharged from the armed forces by reason of his homosexuality. He complained that, while the *Canadian Human Rights Act* afforded protection against discrimination based on "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted", it did not cover discrimination based on sexual orientation. The Court agreed that the failure to include sexual orientation was a denial of the plaintiff's equality rights under section 15 of the Charter of Rights. The plaintiff therefore succeeded in his claim that the *Canadian Human Rights Act* was constitutionally under-inclusive in excluding homosexuals from its protection. But what was the appropriate remedy? The Court, in an opinion written by Krever J.A., held that this was a case for reading in. The Court ordered that the Act was to be "interpreted, applied and administered as though it contained 'sexual orientation' as a prohibited ground of discrimination"[19].

In *Haig*, Krever J.A. gave a number of reasons for reading sexual orientation into the *Canadian Human Rights Act*. He said that this addition to the Act would be consistent with the objective of the Act and "would be less intrusive than the total destruction of the objective that would result from

17. *Id.*, at 723 and 724 per Lamer C.J.; La Forest J. agreed. In fact, by the time the appeal reached the Supreme Court of Canada, Parliament had amended the legislation so as to equalize (but reduce) the child care benefits available to natural and adoptive parents. In these circumstances, said Lamer C.J. (at 725), there was "no need for a declaration of invalidity or a suspension thereof". The Court therefore granted no remedy at all to the unfortunate plaintiff, despite his success on the substantive issue of equality rights. However, the Court did order the Crown to pay his costs.

18. (1992) 9 O.R. (3d) 495 (C.A.). The opinion of the Court was written by Krever J.A.

19. *Id.*, at 508.

striking the provision down"[20].The Court did not have evidence of the estimated cost to government of extending the protection of the *Canadian Human Rights Act* to persons who complain of discrimination because of their sexual orientation, but Krever J.A. thought that it was "safe to assume that it cannot be so great as substantially to change the nature of the legislative scheme created by the Act"[21]. In this case, unlike *Schachter*, the class to be added was much smaller than the class originally benefited. Krever J.A. concluded that it was "inconceivable" that "Parliament would have preferred no human rights Act over one that included sexual orientation as a prohibited ground of discrimination"[22]. All these reasons suggested that reading in was the appropriate remedy.

The decision in *Haig* was not appealed by the Crown to the Supreme Court of Canada. Once reading in is admitted as a legitimate tool of judicial review, as *Schachter* has ruled, *Haig* does seem to be an appropriate case for the remedy. It should be noticed, however, that the remedy is a good deal more radical than Krever J.A. acknowledged. The Court's reasoning would apply with equal force to *all* grounds of discrimination that are analogous to those listed in section 15 of the Charter of Rights. We know, for example, that "citizenship" is an analogous ground[23], and other grounds will in due course be recognized by courts. Thus, the Court's decision to read into the Act the added ground of sexual orientation has the potential to extend the scope of the Act in ways that are difficult to predict.

IV. SEVERANCE AND READING IN AS MODES OF AMENDMENT

It is trite to notice that the Charter of Rights has expanded the role of the courts in Canada. Not only has the Charter added new grounds of judicial review of legislation that were not available before 1982, it has also led to new judicial remedies in cases where statutes have been found to be in conflict with the Charter. The development described in this paper is the amendment of statutes by the courts in order to bring the statutes into conformity with the Charter. By amendment, I do not mean the *interpretation* of statutes, not even the artificial interpretations, sometimes described as "reading down", which are employed by the courts to bring statutes into conformity with the Constitution[24]. By amendment, I mean the deliberate deletion of words from

20. *Id.*, at 506.

21. *Id.*, at 507.

22. *Id.*, at 508.

23. This was decided in *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143.

24. Reading down is described in Peter W. HOGG, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, sec. 15.7.

a statute or the deliberate addition of words to a statute. Both these techniques are new to Canadian constitutional law.

It is true that the technique of severance has a long pre-Charter history in Canada. When a court finds that a statute is unconstitutional in part only, and the court takes the view that the remainder can survive independently of the bad part, then a court will sever the bad part by holding only that part to be invalid, leaving the remainder in force[25]. Severance, as traditionally employed, is not designed to alter the meaning or effect of the remainder of the statute that survives. The remainder of the statute survives on its own merits, because in the form that it was enacted it was from the beginning consistent with the Constitution (and separable from the unconstitutional part). What is new about the use of severance in *Hess*[26] and *Tétreault-Gadoury*[27] is that in both those cases words were deleted from a statutory provision that were integral to the operation of the provision. The rest of the provision could survive only because it had been altered by the court's deletion of the severed words. The provision was invalid in the language in which it was enacted by Parliament, and could be upheld only after the court had amended it.

In *Hess*, Parliament had created the offence of statutory rape as one of absolute liability, in which the accused's ignorance of the girl's true age was no defence. The Supreme Court of Canada used the technique of severance to amend the offence from one of absolute liability to one of mens rea. In that new form, which was never enacted by Parliament, the offence could be upheld. The same analysis holds in *Tétreault-Gadoury*: the deletion by the Court of the age-65 bar to unemployment insurance benefits was a deliberate amendment to the unemployment insurance scheme that had been enacted by Parliament. Only after the judicial amendment had been made could the scheme be upheld.

Once it is accepted that severance is available to extend the reach of a statute to make the statute conform to the Charter of Rights, it is only a short step to reading in. If severance allows the court to delete something improperly included in a statute, it seems only appropriate to allow a court to add something improperly excluded from a statute. As Lamer C.J. commented in *Schachter*[28], it seems wrong that the "style of drafting" of a statute should be "the single critical factor in the determination of a remedy"[29]. This line of reasoning leads inexorably to *Haig*, where the constitutional deficiency lay not in what the statute included, but in what the statute excluded. The Court

25. Severance is described in P.W. HOGG, *id.*, sec. 15.6.

26. *Supra*, note 7.

27. *Supra*, note 9.

28. *Supra*, note 12.

29. [1992] 2 S.C.R. 689, at 698.

corrected the deficiency by reading in the new ground of sexual orientation that Parliament had deliberately excluded from the Act[30].

V. ALTERNATIVES TO SEVERANCE AND READING IN

Are the courts wrong in directly amending statutes to make them conform to the Charter of Rights? To be sure, direct judicial amendment is a serious intrusion by the courts on the functions of the legislative branch. However, as Lamer C.J. pointed out in *Schachter*, the alternative of striking down the unconstitutional legislative scheme is also very intrusive. This is illustrated by *Nova Scotia* v. *Phillips*[31]. In that case, the Nova Scotia Court of Appeal held that a welfare benefit that was available only to single mothers was in breach of section 15, because it should be available to single fathers as well. Being unwilling to extend the statutory provision by reading in the excluded group of single fathers, the Court was driven to nullify the provision, which denied the benefit to single mothers. This restored equality, but it was obviously an ironic and harsh result ("equality with a vengeance")[32]. Moreover, nullification is also a serious intrusion on the role of the Legislature, because such a decision forces the Legislature to act promptly to restore the nullified benefits, as well as to correct the constitutional defect.

A variant on the remedy of striking down an unconstitutional statute is to declare the statute unconstitutional, but suspend the declaration of invalidity for a stipulated period of time. This was done by the Supreme Court of Canada in *R.* v. *Swain*[33], where the Court struck down the provisions of the Criminal Code that required the detention in a psychiatric facility of persons acquitted on the ground of insanity. The Criminal Code provisions were held to be contrary to sections 7 and 9 of the Charter. The Court suspended the effect of the declaration of invalidity, holding that there was to be a six-month "period of temporary validity" so that judges would not be compelled to release into the community all insanity acquittees[34].

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30. When Parliament amended the *Canadian Human Rights Act* in 1983 to add "family status" to the forbidden grounds of discrimination, Parliament decided not to follow a recommendation of the Canadian Human Rights Commission that sexual orientation also be added as a forbidden ground of discrimination: see *Attorney-General for Canada* v. *Mossop*, [1993] 1 S.C.R. 554, at 580 per Lamer C.J.

31. (1986) 34 D.L.R. (4th) 633 (N.S.C.A.).

32. *Schachter* v. *Canada*, *supra*, note 12, at 702 per Lamer C.J., quoting the argument by the intervener, LEAF. The welfare benefits were in fact extended to men by a regulation enacted under the Nova Scotia Act, and nobody missed a cheque: Michael MANDEL, *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Wall & Thompson, 1989, at pp. 263 and 264.

33. [1991] 1 S.C.R. 933.

34. *Id.*, at 1021 and at 1037.

In *R.* v. *Bain*[35], the majority of the Supreme Court of Canada struck down the Criminal Code provisions that allowed the Crown prosecutor, but not the accused, to "stand by" prospective jurors. The provisions were held to be contrary to the guarantee of a fair trial in section 11(d) of the Charter, because they gave the Crown more influence than the accused in the selection of the jury. In this case too, the declaration of invalidity was suspended for six months in order to "provide an opportunity for Parliament to remedy the situation if it considers it appropriate to do so"[36]. It will be recalled from the earlier discussion that in *Schachter* v. *Canada*[37], the case of the under-inclusive child care benefits, the Court also held that the appropriate remedy was a declaration of invalidity suspended for enough time to allow the Parliament to enact an amendment to the Act.

The attraction of the suspended declaration of invalidity is that it avoids the disruptive effects of the immediate retroactive nullification of a statutory programme, which is the normal consequence of a declaration of invalidity. However, the making of a suspended declaration of invalidity is close to a legislative function. To be sure, the court does not directly amend the unconstitutional statute, as the court does when it exercises its powers of severance and reading in. However, the court takes upon itself the power to maintain in force for a temporary period a statute that is unconstitutional. Obviously, a time limit has to be applied to such an extraordinary state of affairs. In *Swain* and *Bain*, the time limit, after which the period of temporary validity expired, was six months. Six months is a very short time for the government to prepare, and the Parliament to enact, replacement provisions that would conform to the Charter of Rights. (In *Schachter*, replacement provisions had in fact been enacted by the time the Supreme Court of Canada rendered its decision, and so no period of time had to be stipulated.) These time limits have the effect of imposing on the competent legislative body a deadline to which it must conform on pain of the declaration of invalidity taking effect. Obviously, this is a major interference by the judicial branch of government with the agenda, priorities and procedures of the legislative branch.

35. [1992] 1 S.C.R. 91.

36. *Id.*, at 104 and at 165.

37. *Supra*, note 12.

CONCLUSION

There is no escape from the conclusion that judicial review under the Charter of Rights casts upon the courts the power and the duty to play a role in the legislative process. In the case of a statute that enacts a desirable benefit programme, but does so in a way that excludes a group with an equality-based right to be included, even a simple declaration of invalidity imposes on the competent legislative body a moral and political duty to act promptly to restore the invalidated benefits, as well as to add the excluded group. A declaration of invalidity that is suspended in operation for a temporary period has the practical effect of imposing a deadline on the remedial legislative process, because the entire legislative scheme will fall to the ground if it has not been repaired by the expiry of the stipulated period of temporary validity. It follows that the direct judicial amendment of statutes, either by severance or by reading in, to add a group of beneficiaries who have a constitutional right to be included, must be regarded as a possible remedy that is not necessarily more intrusive than the alternatives.

One way or another, a group that has been unconstitutionally excluded from a legislated programme has to be added. In cases like *Tétreault-Gadoury* and *Haig*, where severance or reading in effects the necessary repair in a straightforward fashion that seems consistent with the legislative objective, and that does not significantly alter the legislative scheme, there is much to be said for the direct judicial amendment of the statute by severance or reading in. Although severance does take away words that the legislative body enacted, and reading in adds words that the legislative body did not enact, these radical results need not be other than temporary. It is always open to the competent legislative body to enact a new legislative scheme – in compliance with constitutional requirements, needless to say – if the legislators are not content with the scheme as amended by the court. In this sense, the democratic legislative process retains the last word.