

CANADA / JUDGMENT

Schachter v. Canada

[1992] 2 SCR 679

COURT

Supreme Court of Canada

DECIDED

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Schachter v. Canada

Collection

Supreme Court Judgments

Date

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Report

[1992] 2 SCR 679

Case number

21889

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley

On appeal from

Federal Court of Appeal

Subjects

Constitutional law

Notes

SCC Case Information: 21889

Decision Content

Schachter v. Canada, [1992] 2 S.C.R. 679

Her Majesty The Queen and Canada Employment
and Immigration Commission Appellants

v.

Shalom Schachter Respondent
and

Women's Legal Education and Action Fund Respondent
and

Attorney General for Ontario, Attorney General
of Quebec, Attorney General for New Brunswick,
Attorney General of British Columbia, Attorney
General for Saskatchewan, Attorney General for
Alberta, Attorney General of Newfoundland and
Minority Advocacy Rights Council Interveners

Indexed as: Schachter v. Canada

File No.: 21889.

1991: December 12; 1992: July 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.
on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Equality rights -- Remedies -- Underinclusive benefit --
Natural parents not given same benefits as adoptive parents under Unemployment Insurance Act,
1971 -- Whether or not s. 52(1) of Constitution Act, 1982 required court to declare offending
section of no force or effect -- Whether or not s. 24 of Charter enabled court to order natural
parents entitled to same benefits as adoptive parents -- Constitution Act, 1982, s. 52(1) -- Canadian
Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1) -- Unemployment Insurance Act, 1971, S.C.
1970-71-72, c. 48, s. 32.

Constitutional law -- Charter of Rights -- Enforcement -- Appropriate remedy -- Underinclusive
benefit -- Natural parents not given same benefits as adoptive parents under Unemployment
Insurance Act, 1971 -- Whether or not s. 52(1) of Constitution Act, 1982 required court to declare
offending section of no force or effect -- Whether or not s. 24 of Charter enabled court to order
natural parents entitled to same benefits as adoptive parents.

Respondent's spouse received 15 weeks of maternity benefits in 1985 under s. 30 of the Unemployment Insurance Act, 1971. Although respondent had intended to stay home with the newborn as soon as his spouse was able to return to work after the birth, he ultimately took three weeks off without pay. He had first applied for benefits under s. 30 in respect of the time he had to take off work, but, since s. 30 was limited to maternity benefits, modified his application to one under s. 32 for "paternity benefits". Section 32 provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues. The trial judge found a violation of s. 15 of the Canadian Charter of Rights and Freedoms in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1) of the Charter and extended the same benefits to natural parents as were granted to adoptive parents under s. 32. The violation of s. 15 was subsequently ceded by appellants. The Federal Court of Appeal upheld the trial judge's decision.

The impugned provision was since amended to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

The constitutional questions stated in this Court queried: (1) whether s. 52(1) of the Constitution Act, 1982 required that s. 32 of the Unemployment Insurance Act, 1971, given an unequal benefit contrary to s. 15(1) of the Charter, be declared of no force or effect, and (2) whether s. 24(1) of the Charter conferred on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32.

Held: The appeal should be allowed. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Per Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ.: Generally speaking, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define

carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down.

Section 52 of the Constitution Act, 1982 does not restrict the court to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 declares the law, and not the words expressing that law, to be of no force or effect to the extent of any inconsistency with the Constitution. The inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

The purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature. In some cases, of course, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. There reading in would not be appropriate. Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the Charter . Reading in therefore is a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter .

The first step in choosing a remedial course under s. 52 is to define the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination.

In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the Oakes test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a Charter right. Where the purpose of the legislation is itself unconstitutional, the legislation should almost always be struck down in its entirety.

Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, the objective will not be furthered by somehow upholding the legislation as it

stands. Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met.

Having determined the extent of the inconsistency, the means of dealing with it, whether by way of severance, reading in, or striking down legislation in its entirety, must be considered.

One important distinction exists between severing and reading in. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This is not always the case with reading in. In cases where the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis, the legislature and not the courts must fill in the gaps.

In determining whether reading in is appropriate, the question is not whether courts can make decisions that impact on budgetary policy but rather to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate. The court should consider whether the significance of the part which would remain is substantially changed when the offending part is excised. The problem with striking down only the inconsistent portion is that the significance of the remaining portion may change so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. The assumption that the legislature would have enacted the benefit is more often sound where the group to be added is smaller than the group originally benefitted. This assumption, however, is not necessarily safe when the group to be added is much larger than the group originally benefitted. This is not because of the numbers per se. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion.

It is sensible to consider the significance of the remaining portion when asking whether it is safe to assume that the legislature would have enacted the remaining portion. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended. A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity

to fill the void. The question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the Constitution Act, 1982 . Delayed declarations of nullity should not be seen as preferable to reading in cases where reading in is appropriate. The question whether to delay the application of a declaration of nullity should turn not on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public.

Where s. 52 is not engaged, a remedy under s. 24(1) of the Charter may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's Charter rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982 . Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52 , that will be the end of the matter. No retroactive s. 24 remedy will be available.

The right which was determined to be violated here is a positive right: the right to equal benefit of the law. This benefit was monetary and not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is to equalize the provision of that benefit if it is to be provided at all. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements.

Without a mandate based on a clear legislative objective, reading the excluded group into the legislation would be imprudent. A consideration of the benefit and size of the group and of the budgetary implications of such a course of action underlined this conclusion. The appropriate action was to declare the provision invalid and suspend that declaration to allow the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements. Significantly, Parliament did amend the impugned provision after this action was launched and the amendment was not the one that reading in would have imposed.

Per La Forest and L'Heureux-Dubé JJ.: The legislation concerned concededly violates the Canadian Charter of Rights and Freedoms and does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being the obvious intention of the legislature. There is a long tradition of reading down legislation and, where it substantially amounts to the same thing, reading in is possible. These devices, however, should only be employed in the clearest of cases. In light of Parliament's

subsequent action, there was no reason to declare the impugned legislation invalid and then suspend that declaration.

Further dimensions to the issue of reading in and reading down require qualifications to the propositions set down as guidelines by Lamer C.J. The process of reading down or reading in should not be closely tied with the checklist set forth in *R. v. Oakes* because that might encourage a mechanistic approach rather than an examination of more fundamental issues going well beyond the factual context.

Cases Cited

By Lamer C.J.

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Swain*, [1991] 1 S.C.R. 933; referred to: *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *R. v. Hebb* (1989), 69 C.R. (3d) 1; *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29; *Welsh v. United States*, 398 U.S. 333 (1970); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

By La Forest J.

Referred to: *R. v. Wong*, [1990] 3 S.C.R. 36; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1).

Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).

Criminal Code, R.S.C., 1985, c. C-46, s. 276.

Federal Court Rules, C.R.C., C. 663, Rule 341A [ad. SOR/79-57, s. 8].

Human Rights Code, 1981, S.O. 1981, c. 53, ss. 1, 19.

Lord's Day Act, R.S.C. 1970, c. L-13.

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30 [am. by S.C. 1980-81-82-83, c. 150, s. 4], 32(1) [am. by S.C. 1980-81-82-83, c. 150, s. 5].

Authors Cited

Caminker, Evan. "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 Yale L.J. 1185.

Duclos, Nitya and Kent Roach. "Constitutional Remedies as 'Constitutional Hints': A Comment on R. v. Schachter" (1991), 36 McGill L.J. 1.

Lajoie, Andrée. "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 McGill L.J. 1338.

Rogerson, Carol. "The Judicial Search for Appropriate Remedies Under the Charter : The Examples of Overbreadth and Vagueness". In R. Sharpe, ed., Charter Litigation. Toronto: Butterworths, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 129, 66 D.L.R. (4th) 635, 3 C.R.R. (2d) 337, 29 C.C.E.L. 113, 90 C.L.L.C. {PP} 14,005, 108 N.R. 123, dismissing an appeal from a judgment of Strayer J., [1988] 3 F.C. 515, 52 D.L.R. (4th) 525, 20 C.C.E.L. 301, 88 C.L.L.C. {PP} 14,021. Appeal allowed. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982 .

David Sgayias, Q.C., and Roslyn J. Levine, for the appellants.

Brian G. Morgan and Lawrence E. Ritchie, for the respondent Shalom Schachter.

Mary A. Eberts and Jenifer Aitken, for the respondent Women's Legal Education and Action Fund.

Elizabeth Goldberg and Lori Sterling, for the intervener the Attorney General for Ontario.

Jean-Yves Bernard and Madeleine Aubé, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

George H. Copley, for the intervener the Attorney General of British Columbia.

Ross Macnab, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind, for the intervener the Attorney General for Alberta.

B. Gale Welsh, for the intervener the Attorney General of Newfoundland.

Emilio S. Binavince, for the intervener Minority Advocacy and Rights Council.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ. was delivered by

//Lamer C.J.//

Lamer C.J. --

Facts

The respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1985. The respondent intended to stay home with the newborn as soon after the birth as his wife was able to return to work. Ultimately, he took three weeks off work without pay.

Marcia Gilbert received fifteen weeks of maternity benefits under s. 30 of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, as am. by S.C. 1980-81-82-83, c. 150, s. 4. The respondent first applied for benefits under s. 30 in respect of the time he had to take off work, but ultimately modified an application under s. 32, as am. by S.C. 1980-81-82-83, c. 150, s. 5, for "paternity benefits". This is a section which provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues.

The matter proceeded before Strayer J. in the Federal Court, Trial Division. In written reasons, [1988] 3 F.C. 515, Strayer J. found a violation of s. 15 of the Canadian Charter of Rights and Freedoms in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s. 32.

The appellants appealed to the Federal Court of Appeal. In written reasons dated February 16, 1990, [1990] 2 F.C. 129, the Court upheld the Trial Division's decision, Mahoney J.A. dissenting. The appeal was dismissed.

On November 15, 1990, the appellants were granted leave to appeal to this Court.

It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

Relevant Statutory and Constitutional Provisions

The relevant provision of the Unemployment Insurance Act, 1971, reads as follows:

32. (1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

The relevant provisions of the Canadian Charter of Rights and Freedoms read as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
24. (1) 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.

The relevant provision of the Constitution Act, 1982 reads as follows:

52. (1) 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.

Judgments Below

Federal Court, Trial Division (Strayer J.)

Strayer J. held that s. 32 denied equal benefit of the law with discrimination on the basis of parental status, thereby infringing the s. 15 rights of the respondent. No s. 1 analysis was undertaken. Having decided that there was an infringement, Strayer J. went on to consider the appropriate remedy. In his view, at p. 543, two options were available:

I could either declare section 32 to be invalid in its present form, thus denying benefits to those already within it, or I could simply declare the entitlement of natural parents to benefits equal to those now provided to adoptive parents under section 32. Counsel for the plaintiff [respondent] and for the intervenor [LEAF] argued for the latter approach, while counsel for the defendants [appellants] argued that I must, if I concluded there was unequal benefit of the law, strike down the existing benefits in section 32.

Given that Strayer J. found s. 32 to be defective, not because it provided prohibited benefits but because it was "underinclusive", he did not consider it appropriate to deprive those persons already qualified under s. 32 of their benefits. Rather, he decided to make a declaration that other persons in similar circumstances were entitled to the same benefits, until such time as Parliament amended the legislation in a way which met the requirements of s. 15. Further, he ordered that the respondent's application for benefits be reconsidered on the basis that if, apart from his status as a natural parent, he met the requirements of the section, he was entitled to benefits. Pursuant to Rule 341A (Federal Court Rules, C.R.C., c. 663, am. SOR/79-57, s. 8), Strayer J. suspended the operation of his judgment pending appeal.

Court of Appeal (Heald J.A. for the majority)

Since the parties conceded at the outset that s. 15(1) of the Charter had been violated, the Court of Appeal dealt only with the jurisdiction of the trial judge to accord the remedy sought by the respondent.

Heald J.A. noted at the outset that the appellants had conceded that, had the Trial Division had the jurisdiction to grant the remedy it did, the order was "just and appropriate in the circumstances". Heald J.A. determined that the trial judge did have the jurisdiction to grant a remedy under s. 24(1) of the Charter. He did not accept the appellants' argument that the only option which was open to the trial judge in the circumstances was to strike down the impugned provision pursuant to s. 52 of the Constitution Act, 1982. He found, at p. 137, the distinction made by the trial judge between legislation which "is unconstitutional because of what it provides and legislation which is unconstitutional because of what it omits" to be an apt one. He held that here it was permissible to have recourse to s. 24 because the impugned provision was unconstitutional solely because it was not sufficiently broad in scope. "It is the omission in this case that is unconstitutional, not the legislation itself." Therefore, in his opinion, s. 52 was not engaged.

Heald J.A. further considered the "interface" between ss. 24 and 52 when a violation of s. 15 has been found. He held, at p. 142, that:

A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to subsection 15(1). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the Trial Judge attempted to do in the decision a quo.

Heald J.A. was of the view that, as the consequences of a declaration that the legislation was inoperative would be to deprive adoptive parents of the benefits granted to them by s. 32 of the Unemployment Insurance Act, 1971, this would be as much an amendment of legislation as the remedy granted by the trial judge. Heald J.A. concluded that where legislation is "underinclusive", positive relief is both warranted and constitutionally permitted through the vehicle of s. 24.

Heald J.A. was not persuaded that the jurisprudence supported the appellants' contention that the order was an appropriation of public funds for a purpose not authorized by Parliament.

Heald J.A. dismissed the appeal, upholding the judgment of the trial judge. He suspended the operation of that judgment pending appeal.

Mahoney J.A. (dissenting)

Mahoney J.A. held that the remedy granted by the trial judge was outside his jurisdiction because he had in effect amended the legislation where, by virtue of the Constitution, the sole power to legislate is reserved to Parliament.

With regard to the issue of the appropriation of funds, Mahoney J.A. was of the view that the remedy fashioned by the trial judge amounted to an appropriation of money by a court which is not permitted by the provisions of the preamble to the Constitution Act, 1867 . He concluded, at p. 164:

Even if the power of a court to legislate by way of a subsection 24(1) remedy were found to exist in circumstances which do not entail the appropriation of public monies, no such power can be found to exist where the remedy appropriates monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. A purposive approach to remedies under subsection 24(1) cannot take a court that far.

In my opinion, the appellants are correct: the Constitution of Canada does not permit the remedy crafted by the learned Trial Judge. Having found that section 32 of the Unemployment Insurance Act, 1971 was inconsistent with a provision of the Constitution of Canada, the learned Trial Judge was bound to find it to be of no force and effect. Had that finding been made, the absence of any conflict between subsections 24(1) and 52(1) would be apparent. There is no offending legislation and, therefore, no subsection 24(1) remedy called for.

In my opinion, subsection 52(1) does not provide a "remedy" in any real sense of that word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.

Mahoney J.A. would have allowed the appeal and issued a declaration pursuant to s. 52(1) that s. 32 of the Unemployment Insurance Act, 1971, was of no force or effect by reason of its inconsistency with the Charter . He could see no compelling reason to order a stay of execution of that judgment to permit remedial legislative action.

Issues

By order dated March 14, 1991 the following constitutional questions were stated by the Chief Justice:

1. Is the Federal Court Trial Division, having found that s. 32 of the Unemployment Insurance Act, 1971 (subsequently s. 20 of the Unemployment Insurance Act, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the Constitution Act, 1982 to declare that s. 32 is of no force and effect?

2. Does s. 24(1) of the Charter confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

Analysis

I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

I. Reading in as a Remedial Option under Section 52

A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

A.The Doctrine of Severance

The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.

Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter : The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the Charter than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is not so of violations of the Charter where the offending portion tends to be more limited.

Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

B. Reading In as akin to Severance

This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at p. 388:

As stated previously, once a person has demonstrated that a particular law infringes his or her Charter rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's Charter right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states : (1) A benefits; or (2) Everyone benefits except B.

The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.

Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

There is nothing in s. 52 of the Constitution Act, 1982 to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

This Court implicitly recognized that the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms in *Andrews v. Law Society of British Columbia*, supra. In *Andrews* the statute (Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42) dictated that only Canadian citizens could become lawyers in the following words:

42. The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court

(a) a Canadian citizen with respect to whom they are satisfied that he

The Court found that the exclusion of non-citizens violated the right to equality. Instead of striking down the entire section so that everyone would be equally prevented from becoming a lawyer, only the requirement of Canadian citizenship was declared inoperative. However, the section does not make any sense if the words "a Canadian citizen" are deleted and there is, in fact, no way of simply deleting words that would make the section conform to the requirements of the Charter. Instead of focusing on these verbal formulae, the Court nullified the substantive citizenship requirement which could be said to amount to extending the statute to cover non-Canadians. Thus, *Andrews* is already an example of a case in which the extent of the inconsistency was defined conceptually without being limited to the manner in which the statute was drafted.

C.The Purposes of Reading In and Severance

(i) Respect for the Role of the Legislature

The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

(ii) Respect for the Purposes of the Charter

Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the Charter. The absolute unavailability of reading in would mean that the standards developed under the Charter would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the Charter. This point has been made well by Duclos' and Roach's article "Constitutional Remedies as 'Constitutional Hints': A Comment on R. v. Schachter" (1991), 36 McGill L.J. 1, and by Caminker's article "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 Yale L.J. 1185. Their argument is that even in situations where the standards of the Charter allow for more than one remedial response, the purposes of the Charter may encourage one kind of response more strongly than another.

This is best illustrated by the case of *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of the Charter since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that the Charter would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see Caminker, at p. 1186). Yet the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the Charter and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the Charter.

Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter .

II.Choice of Remedial Options under Section 52

A.Defining the Extent of the Inconsistency

The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination. In this case, as noted earlier, this Court is hampered by the lack of an opportunity to assess the nature of the violation and the absence of s. 1 evidence.

It is useful at this point to set out the two stage s. 1 test developed by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103:

- (1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?
- (2) Are the measures chosen to serve that objective proportional to it, that is:
 - (a) Are the measures rationally connected to the objective?
 - (b) Do the measures impair as little as possible the right and freedom in question? and,
 - (c) Are the effects of the measures proportional to the objective identified above?
- (i) The Purpose Test

In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the Oakes test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a Charter right. Although it predates Oakes, *supra*, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, provides a clear example. There Dickson C.J. found that the purpose of the Lord's Day Act, R.S.C. 1970, c. L-13, was itself inimical to the values of a free and democratic society. The case stands as authority for the proposition that, where the purpose of the legislation is itself unconstitutional, the legislation should be struck down in its entirety. Indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely.

- (ii) The Rational Connection Test

Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test.

This Court's decision in *Andrews*, supra, can be taken to support this position. Again, this Court held there that the citizenship requirement for admission to the British Columbia bar violated the equality guarantee enshrined in s. 15 of the Charter . While the citizenship requirement was held to have a valid purpose (the objectives argued were that lawyers be familiar with Canadian institutions and customs and that they display a commitment to them), the Court determined that the requirement did not meet the proportionality test. The majority on this issue concluded that the means were probably not rationally connected to the objectives put forward, in that citizenship does not ensure familiarity with or commitment to Canadian society and, conversely, non-citizenship does not necessarily point to a lack of familiarity or commitment. The requirement was struck down.

It is logical that in most such cases the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, then the objective will not be furthered by somehow upholding the legislation as it stands.

(iii) The Minimal Impairment/Effects Test

Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect. According to the logic outlined above, such an inconsistency could be declared inoperative with the result that the statute was extended by way of reading in.

Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met. The choice of remedy will be guided by the following considerations.

B. Deciding whether Severance or Reading In is Appropriate

Having determined what the extent of the inconsistency is, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

(i) Remedial Precision

While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In *Hunter*, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand Charter scrutiny. In such a circumstance, it would theoretically be possible to characterize the "extent of the inconsistency" as the absence of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because this would have required establishing a new scheme, the details of which would have been up to the Court to determine.

Hunter has been applied recently by Justice McLachlin in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. The issue in that case was the prohibition of advertising by the members of a professional association, with certain exceptions. McLachlin J. found that the regulation of advertising violated the Charter and extended too far to be justified under s. 1. However, some prohibition of advertising would be justifiable if additional exceptions were added. The question then arose whether the Court ought to supply those additional exemptions itself, or simply strike down the prohibition.

McLachlin J. noted, at p. 253, that the drafting of rules which would allow only legitimate advertising would be a difficult and complex endeavour that did not flow with precision from the requirements of the Charter :

I am conscious of the difficulties involved in drafting prohibitions on advertising which will catch misleading, deceptive and unprofessional advertising while permitting legitimate advertising.

Since the exemptions could not be defined with sufficient precision, the section itself had to be struck down (at p. 252):

Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.

These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

(ii) Interference with the Legislative Objective

The primary importance of legislative objective quickly emerges from decisions of this Court wherein the possibility of reading down or in has been considered and determined inappropriate.

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104, Justice Sopinka emphasized that it is necessary in fashioning a remedy for a Charter violation to both "apply the measures which will best vindicate the values expressed in the Charter" and "refrain from intruding into the legislative sphere beyond what is necessary". He determined that reading down was not appropriate in that case but concluded, at p. 104: "Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature."

The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. This objective may, as suggested above, be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s. 1 analysis, the failure of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.

In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, this Court struck down s. 276, the rape shield provision, of the Criminal Code, R.S.C., 1985, c. C-46. The majority of the Court held that it violated the accused's Charter right to a fair trial. The provision failed the Oakes test because of its overbreadth. It could not meet the minimal impairment element of the proportionality test. In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption, but concluded that neither technique was appropriate in the case before her. McLachlin J. arrived at this conclusion because to take either approach would necessitate importing an element into the provision -- judicial discretion -- that the legislature specifically chose to exclude. She stated, at p. 628: "Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption". Without question, the same is true of extension by way of reading in.

This Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the Criminal Code, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the Charter in that it deprived the

appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. The respondent in this case pointed out that this Court's decision in *Tétraault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, wherein an exclusion under the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, based on age was found to contravene the Charter, necessarily led to an expenditure of government funds in that persons previously not entitled to benefits were thereafter free to apply for them. It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures (see Lajoie, "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 McGill L.J. 1338, at pp. 1344-45). In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

(iii) The Change in Significance of the Remaining Portion

Another way of asking whether to read in or sever would be an illegitimate intrusion into the legislative sphere is to ask whether the significance of the part which would remain is substantially changed when the offending part is excised. For instance, in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, this Court found that certain statutory requirements respecting the use of the French language were unconstitutional because they were more stringent than necessary. By way of exception, the statute provided for less stringent requirements in certain circumstances. These less stringent requirements were not in themselves unconstitutional, and it would therefore have been possible to sever them and in that way to implement as much of the legislative intent as possible. However, the Court noted that to do so would really turn the legislative scheme on its head. The exceptions were meant to allow more lenient treatment of persons in certain situations, but if they were upheld while the main provisions were struck down, they would have precisely the opposite effect of dealing more

stringently with those persons. This led to the conclusion, at p. 816, that the exceptions were "necessarily connected" to the offending provision, so that even though the exceptions were not themselves impermissible, they must be struck down as well:

A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

This built on the comments of Dickson C.J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80, where he observed that the prohibition of abortions must fall with the procedural exceptions which violated the Charter, since merely to eliminate the exceptions would be to re-draft a comprehensive code:

Having found that this "comprehensive code" infringes the Charter, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.

In both these cases, the significance of the non-offending provision was so markedly changed in the absence of the offending provision that the assumption that the legislature would have passed it was unsafe. The problem with striking down only the inconsistent portion is that the significance of the remaining portion changes so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. For instance, in *Knodel*, supra, Rowles J. extended the provision of benefits to spouses to include same-sex spouses. She considered this course to be far less intrusive to the intention of the legislature than striking down the benefits to heterosexual spouses since the group to be added was much smaller than the group already benefitted (at p. 391):

In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.

In *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, supra, this Court decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. This is also a case in which the group to be added was much smaller than the group already benefitted.

Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers per se. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked

change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions. *R. v. Hebb* (1989), 69 C.R. (3d) 1 (N.S.T.D.), is an example of this.

(iv) The Significance of the Remaining Portion

Other cases have focused on the significance or long-standing nature of the remaining portion. This sort of analysis is most apparent in *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29 (S.C.). The court examined the various versions of the relevant provision which had been in force in the province from the time of Confederation to the present, and noted that the permissible portion had been invariably present. This helped the court to come to the conclusion that it was safe to assume that the legislature would have enacted the permissible portion without the impermissible portion (at pp. 33-35).

This consideration was also highlighted by Harlan J. in *Welsh v. United States*, 398 U.S. 333 (1970), at p. 366:

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.

It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision. Earlier I referred to the articles by Duclos and Roach, and Caminker, which point out that the Constitution may encourage particular kinds of remedies even if it does not directly mandate them. This aspect of remedial choice was specifically relied on in *R. v. Hebb*, *supra*. In that case the court considered a provision which required the court to consider the means of accused to pay a fine before incarceration upon default. This provision only applied to persons aged 18 to 22. The court found that this constituted discrimination on the basis of age. The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision.

The court observed that either course, severance or nullification, would interfere with the intention of Parliament to some extent. That is, severance would expand the protection of the provision to a group Parliament had not intended to benefit by it, and nullification would remove protection from the group Parliament had intended to have it. The court, at p. 21, then found it important that the protection in question was "constitutionally encouraged," and thought that this was a good reason to favour expansion of the provision rather than nullification:

To sever the age-related phrase provides protection to persons of all ages who are charged with a crime, in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.

It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged--that is, judicial consideration before incarceration--as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove that protection completely.

This reasoning is sensible given our knowledge of how legislatures act generally. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

This factor may have been important in a case which dealt specifically with human rights statutes. In *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), the statute (Human Rights Code, 1981, S.O. 1981, c. 53) provided, in s. 1, a right to equal treatment without discrimination on the basis of, inter alia, sex. Section 19, however, provided that s. 1 was not violated when athletic activities were restricted on the basis of sex. The court found that s. 19 violated the guarantee of equality under the Charter. It was argued by the Hockey Association that s. 19 was not severable from s. 1, since it could not be assumed that the legislature would have passed s. 1 without s. 19. It was said that this meant that s. 19 should not be struck down, even though it violated the Charter. In fact, if it were true that s. 19 was inextricably linked to s. 1, then the result would be not that s. 19 was saved, but rather that s. 1 would be lost, even though there was nothing impermissible about it, considered in isolation. However, it is clear that it is safe to assume that the legislature would have passed the general prohibition on discrimination even if it could not limit its application in the area of athletics.

(v) Conclusion

It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of the Charter are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

C. Whether to Temporarily Suspend the Declaration of Invalidity

Having identified the extent of the inconsistency, and having determined whether that inconsistency should be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down. The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended.

A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the Constitution Act, 1982 . While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52 .

A delayed declaration is a serious matter from the point of view of the enforcement of the Charter . A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter .

Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

D.Summary

It is valuable to summarize the above propositions with respect to the operation of s. 52 of the Constitution Act, 1982 before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the Charter. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

(i) The Extent of the Inconsistency

The extent of the inconsistency should be defined:

A. broadly where the legislation in question fails the first branch of the Oakes test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a Charter right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety;

B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the Oakes test in that the means used to achieve that purpose are held not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or,

C. flexibly where the legislation fails the second or third element of the proportionality branch of the Oakes test.

(ii) Severance/Reading In

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

(iii) Temporarily Suspending the Declaration of Invalidity

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

III. Section 24(1)

A. Section 24(1) Alone

Where s. 52 of the Constitution Act, 1982 is not engaged, a remedy under s. 24(1) of the Charter may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's Charter rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1) .

B. Section 24(1) in Conjunction with Section 52

An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

IV. Remedial Options Appropriate to this Case

A. The Nature of the Right Involved

The right which was determined to be violated here is a positive right: the right to equal benefit of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd. Certainly the intrusion into the legislative sphere of extending a constitutionally guaranteed benefit is warranted when the benefit was itself guaranteed by the legislature through constitutional amendment.

Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.

The benefit with which we are concerned here is a monetary benefit for parents under the Unemployment Insurance Act, 1971, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to

bring the provision into line with constitutional requirements. All of the intervening provincial Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of the appellants. The question which remains is whether this is a case in which it is appropriate to go further and read the excluded group into the legislation. This question must be answered with reference to the specific legislation under consideration.

B.The Context of the Unemployment Insurance Act, 1971

It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in *Tétreault-Gadoury*, *supra*, at p. 41:

... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

It is, however, not as simple to discern the objective of the particular provision. It is not clear on the text of the provision alone that the purpose of it is to extend benefits to parents of newborns caring for them at home, a purpose which reading in the excluded group would further. Indeed, on the express language of the provision, one could quickly conclude that the benefits were only intended to be conferred on adoptive parents and that natural parents were deliberately excluded. One could postulate that the provision was specifically aimed at responding to circumstances peculiar to adoptive parents. Certainly this possibility cannot be ruled out on the basis of the text of the provision alone, and we have not been provided with the further assistance of a s. 1 argument here or in the courts below.

Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in *Tétreault-Gadoury*, *supra*. There, the budgetary implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow

the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

The Constitutional Questions

Following from the above analysis, I would answer the constitutional questions as follows:

1. Is the Federal Court Trial Division, having found that s. 32 of the Unemployment Insurance Act, 1971 (subsequently s. 20 of the Unemployment Insurance Act, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the Constitution Act, 1982 to declare that s. 32 is of no force and effect?

The answer to question one is, in the present circumstances, yes, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. This is not to say that s. 52 does not provide the flexibility to stop short of striking out an unconstitutional provision in its entirety. Given the appropriate circumstances, a court may choose the options of severance or reading in by which to bring the provision in line with the Charter. These options should be exercised only in the clearest of cases, keeping in mind the principles articulated above relating to the nature of the right and the specific context of the legislation.

2. Does s. 24(1) of the Charter confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

The answer to question two is no. Section 24(1) provides an individual remedy for actions taken under a law which violate an individual's Charter rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Disposition

In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the Unemployment Insurance Act, 1971 (subsequently s. 20 of the Unemployment Insurance Act, 1985) be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

Further, this is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

//La Forest J.//

La Forest J. -- I have had the benefit of reading the reasons of the Chief Justice and I agree with his proposed disposition and answers to the constitutional questions. I take this approach on the simple basis that the legislation concerned concededly violates the Canadian Charter of Rights and Freedoms and that it does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being obviously intended by the legislature in any event. As the Chief Justice points out, there is a long tradition of reading down legislation, and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation. I also agree that there is little point in light of Parliament's subsequent action to declare the impugned legislation invalid and then suspend that declaration.

That is sufficient to dispose of the case, and I find it unnecessary to elaborate further. In limiting my reasons in this way, however, I would not wish it to be thought that I fundamentally disagree with what the Chief Justice has to say regarding the means for assessing when the techniques of reading down or reading in should be adopted. Indeed, I find his reasons very helpful in this regard. Rather I take this narrow approach because the unsatisfactory manner in which this case has been presented to us makes it necessary to respond to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.

To begin with, I am by no means sure there was a violation of the Charter in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the monies intended to meet the problem Parliament may have had in contemplation. This Court has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time. But the manner in which the case was presented requires us to assume constitutional invalidity in the absence of any evidence as to context, which I would have thought was essential to a consideration of the extent of inconsistency with the Charter .

Ordinarily, a case is dealt with in light of facts that define the scope of the Court's pronouncement. Here we are forced to deal with the tests for reading down or reading in in a manner that may give the impression that they are of universal application. But it must be underlined that the case is one involving a scheme of social assistance which may dictate a quite different approach from that which one would follow in other areas. Thus this Court has repeatedly stated in cases like *R. v. Wong*, [1990] 3 S.C.R. 36, for example, that it was not the business of the courts to invent schemes that had the effect of increasing police powers (at pp. 56-57). The rationale for this was not so much the complexity of possible schemes (as the Chief Justice appears to suggest at one stage), but rather that this could distract the courts from their fundamental duty under the Charter to protect the rights guaranteed to the individual.

The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

I have added these comments to underline that there are further dimensions (and I have mentioned only a few) to the issue of reading in and reading down that will require qualifications to the propositions set down by the Chief Justice. I note that he has wisely indicated that these propositions are intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context.

Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in *R. v. Oakes*, [1986] 1 S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues, such as those to which I have referred above, issues that go well beyond the factual context.

Appeal allowed, with costs to the respondent. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982 .

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