A REMEDY FOR THE NINETIES:

Schachter v. *R.* and
Haig & Birch v. *Canada*

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On July 9, 1992, the Supreme Court of Canada released its long-awaited judgment in *Schachter*.[1] The case concerned a challenge to the unavailability of parental benefits for biological fathers under the *Unemployment Insurance Act*. It was widely anticipated to be the definitive statement on constitutional remedies, just as *Andrews*[2] was to equality rights and *Oakes*[3] was to the balancing requirement in s. 1 of the *Charter*.

This comment will examine the guidelines set out in *Schachter* for determining remedial issues in Charter cases. I will first review the remedies analysis in *Schachter* itself, suggesting that it should arouse concern on the part of disadvantaged groups seeking to use constitutional equality rights litigation to accomplish social change. Next, drawing upon the Ontario Court of Appeal's very recent decision in *Haig*,[4] I will argue that the remedies formula in *Schachter* is not controlling of remedial outcomes in future cases. In the *Haig* case, an invalidation remedy would have been at least as consistent with *Schachter* as was the extension remedy that the court ordered.[5] Finally, I wish to suggest that the *Schachter* formula actually preserves a bias in favour of invalidation over extension remedies. Although this bias does not preclude extension entirely, it does mean that extending social benefits through the courts in a post-*Schachter* world is not a predictable or reliable strategy.

I. THE BACKGROUND OF THE CASES

A. Schachter

After the birth of their second child, Marcia Gilbert returned to work and her partner, Shalom Schachter, remained at home to care for the baby. Schachter applied for "paternity benefits" under the *Unemployment Insurance Act* which, at the time, provided fifteen weeks of maternity benefits to biological mothers under s. 30 of the Act and fifteen weeks of parental benefits for adoptive parents under s. 32.[6] When his application was denied, Schachter appealed, arguing that the failure to provide parental benefits to biological fathers constituted discrimination under s. 15 of the *Charter*.

Strayer J. heard the case in Federal Court.[7] He found that s. 32 of the *Unemployment Insurance Act* discriminated as between adoptive and biological parents with respect to parental leave. He expressly held that the maternity benefits provided in s. 30 were not comparable to the benefits in s. 32. Maternity benefits addressed the physiological and psychological stresses on birth mothers of late pregnancy, birth, and the post-partum period. Both biological mothers and fathers were therefore denied parental leave benefits by virtue of s. 32. Strayer J. determined that the appropriate remedy in such a case of underinclusiveness was to extend the parental leave benefit to all parents, rather than to strike down the provision. The declaration of extension was stayed pending appeal. On appeal,[8] the Crown conceded the s. 15 violation, arguing only that Strayer J. lacked jurisdiction to award an extension remedy. The majority of the Court of Appeal, Mahoney J.A. dissenting, dismissed the appeal concluding that extension was constitutionally permissible and appropriate, but suspended the remedy pending appeal. The Crown appealed to the Supreme Court of Canada. In the interim, Parliament enacted a comprehensive package of amendments to the *Unemployment Insurance Act*.[9] Among them was a change to s. 32. Under the new provisions, all new parents, whether adoptive or biological, are entitled to ten weeks of parental leave. The maternity benefits in s. 30 remained unchanged.

B. Haig

Graham Haig launched an application for judicial review of the *Canadian Human Rights Act* ("*CHRA*") alleging that it violated his equality rights under s. 15 of the *Charter* because it did not provide him, a gay man, with protection against discrimination on the basis of sexual orientation. He joined in his action Joshua Birch, a captain in the Canadian Armed Forces, who was explicitly denied eligibility for promotions, postings or further military training because he is gay. Birch was unable to lay a discrimination complaint before the Canadian Human Rights Commission because the *CHRA* does not prohibit discrimination on the basis of sexual orientation.

McDonald J. heard the initial application. He found that the omission of sexual orientation from the prohibited grounds of discrimination in s. 3 of the *CHRA* violated s. 15 of the *Charter*. He declared s. 3 invalid and suspended operation of the declaration for six months or until the hearing of an appeal. The federal Attorney-General appealed the case to the Ontario Court of Appeal.

II. THE *SCHACHTER* FORMULA

Lamer C.J., writing for himself and Sopinka, Gonthier, Cory and McLachlin JJ., after some preliminary comments

about the history of the case before him, embarks upon a lengthy decontextualized and theoretical explication of the available remedies under ss. 52 and 24(1) of the *Charter*. The issue of the appropriate remedy in *Schachter* itself does not resurface until the end of the judgment, when Lamer C.J. briefly applies his "guidelines" to the facts of the case. Thus the structure of the judgment implies that its remedies analysis is generally applicable and that, once formulated, it can easily be applied to determine the correct remedy in numerous Charter cases.[10]

The first part of Lamer C.J.'s analysis identifies the available remedies. In particular, he asserts that "reading in" (or extension) is the logical corollary of the accepted remedial doctrine of "reading down" or severance: "the difference is the manner in which the extent of the inconsistency is defined"[11] and "[i]t would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently."[12] Thus, four[13] remedial options are available under s. 52:[14]

> 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.[15]

However, as quickly becomes clear, for the kinds of cases Lamer C.J. has in mind, the single, crucial remedial choice is really between striking down the legislation and reading down or in.

Two principles are identified which, in Lamer C.J.'s view, should govern the decision whether to invalidate or extend: "respect for the role of the legislature" which means that the court must avoid "undue intrusion into the legislative sphere,"[16] and "respect for the purposes of the Charter" which means that courts should be sensitive to situations in which the "deeper social purposes" of the Charter "encourage" a particular remedy over others.[17] Choice of remedy is a three step procedure, informed by these principles.

First, the Court must define with precision the extent to which the law is inconsistent with the *Charter*. The court's s.1 analysis will be determinative of this issue, and *Oakes*, for Lamer C.J. at least,[18] is still determinative of the s.1 analysis. Briefly, if the legislation fails either the "purpose" branch or the "rational connection" test for proportionality, a declaration of invalidity is the appropriate remedy. Only if the law founders on the "minimal impairment" or "effects" tests (the second and third elements of the proportionality branch) should the option of reading in or down be considered.

Second, if the inconsistency is of the kind that allows for remedial options, the court must decide whether reading in or down is more appropriate than striking.[19] Four criteria govern this determination:

1. whether an extension remedy can be defined with sufficient precision;[20]

2. whether extension would interfere with the legislative objective (which entails consideration of the substance of the objective, the means chosen to effect it and budgetary implications);

3. whether the significance of the remaining law would be substantially changed so that it cannot be assumed that the legislature would have enacted it (the size of the group seeking to be included in a benefit is relevant here); and,

4. whether the provision itself is sufficiently important for the court to preserve it (judged by the length of time it has been in force and/or whether it is "encouraged" by the *Charter*).

The third and final step arises only where it is concluded that extension is inappropriate. In cases where the court proposes to declare the law invalid it may go on to consider whether to suspend temporarily its declaration of invalidity. Lamer C.J. emphasizes that suspension is an unusual and serious step, not to be taken lightly.[21] The governing consideration should be "the effect of an immediate declaration on the public."[22]

III. THE OUTCOME IN *SCHACHTER*

The subtext of Lamer C.J.'s apparently neutral remedies formula is an overriding concern with avoiding excessive interference with the legislative function. His conviction, true to legal tradition and apparently unshaken by academic criticism,[23] remains that invalidation accomplishes this objective more successfully than extension. Although "respect for the role of the legislature" is only one of two guiding principles, and Lamer C.J. nowhere states that in cases of conflict it is primary,[24] three of his four criteria to determine whether extension is appropriate are directly concerned with minimizing interference with the legislature. Of these three, the first strongly favours invalidation, since according to Lamer C.J., doubts about remedial precision can arise only in cases of extension.[25] Even the fourth criterion is not exclusively concerned with furthering Charter values.[26] Moreover, extension is the only remedial option which must satisfy all of these criteria before it can be ordered. Invalidation is the default remedy and, importantly, Lamer C.J. does not require courts to consider whether striking down a law would "interfere" with the legislative objective. Extension is appropriate only when it is "safe" and it is the exceptional case where it will be so.[27]

The preference for invalidation over extension emerges from the subtext when Lamer C.J. finally applies his remedies test to the facts in *Schachter*. While *dicta* earlier in the analysis might have created the impression that extension is a likely remedy in cases of underinclusive benefits,[28] this is

quickly dispelled. Early in his discussion, Lamer C.J. departs from his own analytical framework. Rather than leaving the question of suspension to the end of the analysis as he enjoined others to do,[29] he determines that the underinclusive nature of the benefit in *Schachter* requires that any declaration of invalidity be suspended so that the only issue "is *whether to go further* and read the excluded group into the legislation."[30] Invalidation (albeit temporarily suspended) is established as the norm and extension the exception in sharp contrast to earlier decontextualized pronouncements about the extraordinary nature of suspension. In fact, suspension of a declaration of invalidity is a very convenient outcome for a court in cases of underinclusiveness: the court awards the plaintiff a symbolic victory, while it comforts itself that, at least in theory, the final decision about the fate of the benefit will be made by the legislature.

Applying his analytical framework to determine whether extension is warranted, Lamer C.J. first attempts to characterize the legislative objective of the adoptive parents' benefit. Not surprisingly, he identifies several plausible objectives which can be taken from the text of s. 32.[31] On this basis, he concludes:

> 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.[32]

Equality-seeking groups should be warned that this allows the government a disturbing degree of control over the remedial outcome in cases of underinclusion. Lamer C.J.'s approach implies that where the *government* fails to adduce sufficient evidence under s. 1 to define the legislative objective precisely (and in a way that would justify extension), this may well preclude an extension remedy. In other words, the government may choose strategically to lose a case by not adducing s. 1 evidence. The law which violates the *Charter* will therefore not be saved under s. 1 but, because of lack of evidence justifying extension, the remedy will be to strike down the benefit and temporarily suspend operation of the judgment. A government which is unfriendly to social welfare legislation can thus erode such benefits by simply failing to act in time to constitutionalize the legislation rather than taking the much more politically unpalatable step of repealing the benefit directly.

Also noteworthy is Lamer C.J.'s reference to Parliament's subsequent amendments to the *Unemployment Insurance Act*. After parental leave was extended to biological parents by the Federal Court, the Conservative government embarked upon a major overhaul of the *Unemployment Insurance Act*. One of the amendments was to reduce the benefit period in s. 32 but to make it available to all new parents. Lamer C.J. considers this, "a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear." He finds it "significant" that Parliament's solution is "not the one that reading in would have imposed,"[33] which is additional evidence that reading in was inappropriate, and invalidation the correct remedy in this case. But what would have been the likely consequence if Strayer J. had selected the correct remedy in the first place? In amending the *Unemployment Insurance Act* with the express objective of reducing costs and implementing a self-financing scheme, would the Tories have chosen to extend 10 weeks of parental leave benefits to all parents? Or would they have quietly let adoptive parents' benefits lapse, relying on the relative political powerlessness[34] of this group?

While I have argued elsewhere that the progressiveness of the outcome of the lower court decisions in *Schachter*, particularly in light of the legislative response, is not obvious,[35] it is surely worrying that the remedy Lamer C.J. implicitly considers most appropriate in underinclusion cases is one which increases the vulnerability of groups which currently receive social benefits. In a time of fiscal restraint and a climate in which social welfare programs are rapidly being eroded, the outcome of *Schachter* makes me anxious. Suspension of a declaration of invalidity means that if the legislature does *not* act, the benefit will lapse. It leaves disadvantaged groups currently in receipt of benefits vulnerable to s. 15 challenges by other, likely less disadvantaged groups, particularly if the included group is small. Numbers are important: while the small size of the included group relative to the excluded group increases the likelihood of a temporarily suspended declaration of invalidity, it also increases the likelihood that the legislature will not act quickly to save the benefit. It also leaves disadvantaged groups who are excluded from benefits out in the cold, particularly if they are large and not "discrete." All they can accomplish in a s. 15 challenge is to threaten benefits received by others and they must then hope to be effective in the legislative process (when failure in this realm is likely what sent them to court in the first place). It might be argued that if *Schachter* is interpreted as preferring invalidation over extension of a benefit, the case may discourage future challenges to social welfare benefits by excluded groups (since they will not benefit materially from an invalidation remedy) and thus make those in receipt of such benefits feel more secure. Of course, if *Schachter* had strongly endorsed the use of extension remedies in such cases, those currently in receipt of benefits would be equally secure. The problem with *Schachter* is that it holds out the possibility of extension (thus encouraging Charter challenges on the ground of underinclusion) but makes it an exceptional remedy (thus jeopardizing existing benefits).

In sum, read alone, *Schachter* sends a veiled warning to equality-seeking groups that going to court can be a dangerous strategy. The first major interpretation of the Supreme Court of Canada's judgment, however, turned out to be the Ontario Court of Appeal's decision in *Haig*.

IV. USING THE PRIMER: *SCHACHTER APPLIED IN HAIG*

Unlike *Schachter*, the appeal in *Haig* was not confined to the remedies issue. The federal Attorney-General conceded that sexual orientation is an analogous ground under s. 15 of the *Charter*,[36] but took the position that the failure to include sexual orientation as a prohibited ground of discrimination in s. 3 of the *CHRA* was not discriminatory. The Crown argued that since Parliament was not constitutionally required to enact the CHRA, it was free to use the statute to address some social problems and not others.[37] Krever J.A., writing for a unanimous court, has little difficulty rejecting this argument, on the basis that when the legislature chooses to provide a benefit it must do so in a non-discriminatory manner.[38] Since the Crown explicitly declined reliance on s. 1, a violation of s. 15 of the *Charter* was established.

In addressing the question of remedy, Krever J.A. acknowledges at the outset that the decision in *Schachter* must govern.[39] However, although the form of the judgment closely follows the analytical framework laid down in *Schachter*, its content diverges markedly from the underlying thrust of the Supreme Court ruling. Briefly, the emphasis on "respect for the role of the legislature" leading to a strong remedial preference in *Schachter* for temporary suspension of a declaration of invalidity is disregarded. Instead, Krever J.A. puts a quite different spin on the judgment by making the other guiding principle, "respect for the role of the Charter" (which translates into protection of existing benefits to disadvantaged groups), the primary guide in his remedial determination.

Like Lamer C.J., Krever J.A. quickly ascertains that the critical remedial choice is between temporary suspension of a declaration of invalidity and reading in.[40] However, in applying the criteria set out in *Schachter*, he departs from the spirit (although not the letter) of Lamer C.J.'s rules. This is most apparent in relation to the question of whether the remedy can be defined with sufficient precision. Krever J.A. finds that "the definition of the extent of the inconsistency is easily capable of being determined with precision."[41] All that is required is to add the words "sexual orientation" to s. 3 of the *CHRA*. But on this reasoning, arguably all that was required in *Schachter* was to add a few words to s. 32 of the *Unemployment Insurance Act*.[42] For Lamer C.J., an extension remedy was insufficiently precise for two reasons. First, the objective of the particular provision was not easy to discern (although the objective of the Act itself was)[43] and second, there were a number of ways to constitutionally "equalize" the benefit and Parliament itself chose a different course. A similar argument could apply, perhaps with even greater force, in *Haig*. While the objective of the *CHRA* in general - and at an appropriate level of abstraction - is relatively clear, the precise objective of s. 3, which lists some grounds of discrimination and not others,[44] arguably is not. Further, unlike *Schachter*, where it seems to me that the Court's options likely were restricted to extending the same 15 week benefit to biological parents or denying it to adoptive parents, conceivably there were more choices available in *Haig*. Some of the listed grounds in s. 3 are qualified and restricted in scope by other sections of the *CHRA*.[45] In light of the public controversy over extending spousal and family benefits to gay and lesbian couples and the political campaign to explicitly deny them such benefits, the Court's failure to advert to the possibility of partial coverage as a remedial option, and therefore to conclude that extension was insufficiently precise, runs contrary to the thrust of *Schachter*.

In assessing the budgetary impact of the proposed remedy, which Krever J.A. acknowledges to be an important consideration in *Schachter*, the Ontario Court of Appeal takes a myopic view of the likely budgetary implications of the extension remedy that contrasts sharply with Lamer C.J.'s fears in *Schachter* about a "snowball effect" that would erode other social welfare programs.[46] *Schachter* itself is conveniently distinguished on the basis that reading in would have "directly affected the consolidated revenue fund" a factor that both Lamer C.J. and the majority of the Federal Court of Appeal did not regard as significant.[47] The budgetary implications of extending the coverage of the *CHRA* to sexual orientation discrimination are limited to the additional costs of "investigation, proceedings, and perhaps Commission staff." There is simply no mention of the allegedly enormous costs of extending family and spousal benefits to this group which would certainly affect all employers, including the federal government, in the federal sector. Yet these costs have been raised frequently by the federal government in both public and legal forums as a reason to deny coverage to lesbian and gay families.[48]

It is true that other criteria may favour extension in *Haig* to a greater extent than they did in *Schachter*. For example, with respect to the significance of the provision, it is uncontestable that human rights legislation is more "an integral part of our social fabric"[49] than is the provision of parental leave to adoptive parents.[50] And adding gays and lesbians to the group already protected by the *CHRA* is likely extending the benefit to a relatively smaller group than was the case in *Schachter*.[51] But beside these mitigating factors should be placed the fact that extension was apparently considered such an unlikely remedy that the Canadian Human Rights Commission did not itself suggest it.[52]

Thus, *Haig* conforms to the text of *Schachter* but delivers a very different message about the availability of extension remedies. The outcome of the case (at least at this moment) is a victory for gay and lesbian rights. Krever J.A. uses the very weak endorsement of extension remedies by the Supreme Court of Canada to achieve a result that more than ten years of lobbying failed to effect in the political forum. The way in which this is done makes clear that the court is rapping Parliament's knuckles. For example, Krever J.A. refers to the "commitment of successive Ministers of Justice ... to add sexual orientation to the list of prohibited grounds" in the *CHRA* as the reason why "it is surely safe to assume that

Parliament would [favour extension over invalidation]."[53] Significantly, the failure of successive governments to actually pass such legislation is ignored. It is surely gratifying to gay and lesbian rights activists who have been frustrated by empty rhetorical promises to find them fulfilled at last.

V. SECURING EXTENSION REMEDIES IN THE FUTURE

Haig is an excellent example of the allure of litigation for disempowered groups. What was not possible in the political domain appears to have been easily accomplished (in retrospect, at least) in the legal arena.[54] It looks like big wins in court are possible if you can just persuade a judge[55] of the justice of your cause and it also looks like courts might be more amenable to the arguments of oppressed groups than legislatures. Yet there remains the troubling case of *Schachter* and the lingering question of how to understand the two cases together.

While it is certainly good news for lesbian and gay rights activists that the Ontario Court of Appeal felt so strongly about the justice of the cause in *Haig* that it departed from the preference for invalidation established in *Schachter*, I do not think the case should be read as an invitation for oppressed groups to focus their reform efforts on the courts. In some ways, *Haig* was an unusually "easy" case. The substantive claim that it was discriminatory to exclude gays and lesbians from the protection of human rights legislation fit well within liberal principles. No "radical" or sophisticated equality argument was necessary here. Even on a very thin concept of equality the injustice of a formal denial to gays and lesbians of access to the human rights system, when it is conceded at the outset that sexual orientation is an analogous ground under s. 15 of the *Charter*, should be obvious. The federal Attorney-General cannot be relied upon to make equivalent concessions in other cases. Moreover, the facts supporting Joshua Birch's claim were very sympathetic and there was no direct budgetary consequence of any significance. With respect to remedy, although reading "sexual orientation" into the *CHRA* appears, at first blush, to be a radical remedy, on closer examination it becomes the preferable outcome. Because of the way in which the case and the challenged statute are framed, an invalidation remedy would jeopardize the whole of the *CHRA*. Although this could be mitigated by suspending operation of the declaration, any temporary stay would run a risk of Parliament not acting in a timely manner with potentially catastrophic consequences for human rights protection in the federal sector. On both of Lamer C.J.'s guiding principles, extension is preferable to invalidation: respect for the legislature would favour preserving such an important statute; respect for the *Charter* would dictate a similar result.

However, not all underinclusion cases (or even most of them) are going to be as easy. As illustrated by *Schachter*, cases involving more immediate and extensive fiscal consequences, cases where the provision in issue does not go to the heart of the statutory scheme, and cases where the equality violation is less glaring to the judicial mind, are all going to raise difficult questions about extension versus invalidation. For individuals and groups advancing equality claims in these kinds of cases, Lamer C.J.'s hierarchical ordering of remedies in *Schachter* is very discouraging and *Haig* may not be very helpful.[56] Although it does not prohibit the use of extension remedies outright, Lamer C.J.'s judgment in *Schachter* perpetuates the traditional judicial bias in favour of invalidation without supplying any sound justification for its preference. As *Haig* demonstrates, invalidation is no more necessarily deferential to the legislature than is extension, nor is it necessarily the superior promoter of Charter values. In fact, it is just not possible to specify *in the abstract* that any one remedy is going to be more likely to further general remedial principles like "respect for the legislature" or "respect for the *Charter*" or even a more traditional formulation like "least disruptive of the status quo." What the Chief Justice did not state in *Schachter*[57] is that the legislature is *always* free to alter any judicially-imposed Charter remedy (whether extension or invalidation or something else), as long as it remains within the bounds of the courts' interpretation of what is constitutionally required. Further, the operation of an extension remedy can be suspended just as much as a declaration of invalidity. Judicial confirmation of these propositions in *Schachter* would have gone a long way towards unseating invalidation as the usual remedy of choice.

In failing to establish extension and invalidation as equally viable options in all cases, and in its misguided attempt to "solve" all remedies problems with a decontextualized and purportedly comprehensive test which actually establishes a norm of invalidation, *Schachter* is a serious disappointment. While *Haig* confirms the promise in *Schachter* that extension will be ordered in some cases, it falls far short of assuring Charter litigants that winning on the merits will translate into a winning outcome. In fact, the debate over extension versus invalidation remedies is a particular instance of the larger and ongoing controversy over courts versus legislatures as the most appropriate forum in which to secure progressive social reform. While *Haig* suggests to me that, given the *Charter*, it might be useful to go to court sometimes, the overall message conveyed by *Schachter* and *Haig* together is that such litigation is always a very risky strategy. Groups and individuals seeking judicial orders other than invalidation in the post-*Schachter* world will still face an uphill and unpredictable battle.

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1. *Schachter* v. *Canada* (9 July 1992) (S.C.C.) [unreported] [hereinafter, *Schachter*]. Page numbers refer to the reasons of the Chief Justice unless otherwise noted.

2. *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143.

3. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

4. *Haig and Birch* v. *Canada (Minister of Justice)* (6 August 1992) (Ont. C.A.) [unreported] [hereinafter *Haig*]. The case concerned a s. 15 challenge by two gay men to the omission of "sexual orientation" as a ground of prohibited discrimination under s. 3 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.

5. I use the term "invalidation" to refer to situations where the court strikes down legislation, terminating the benefit in issue. By "extension" I mean to include all cases where the Court effectively extends the benefit in issue, whether by means of reading words into or out of the statute.

6. *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, as amended. Section 32 was enacted in S.C. 1980-81-82-83, c. 150, s. 5(1). The numbering of the relevant sections was subsequently changed so that in the 1985 consolidation (R.S.C. 1985, c. U-1) the maternity benefit is found in s. 18 and the adoptive parental leave benefit in s. 20. For convenience I will refer to the old section numbers which are used in the judgments.

7. *R.* v. *Schachter* (1988), 52 D.L.R. (4th) 525 (F.C.T.D.).

8. *R.* v. *Schachter* (1990), 66 D.L.R. (4th) 635 (Fed. C.A.).

9. S.C. 1990, c. 40.

10. In fact, Lamer C.J. conveniently summarizes his guidelines so as to facilitate their application: *Schachter* at 39.

11. *Schachter* at 14.

12. *Schachter* at 15.

13. In *Haig*, the court considers that there are five, not four, remedial options; severance and reading down are considered to be different remedies, at 9-10. Lamer C.J. treats severance as synonymous with reading down. In my view, this difference is largely semantic. I will avoid the term "severance" and use "extension" to refer to all situations where the remedy effectively extends the law to an excluded group, whether by reading words into or out of a statute.

14. This comment will not address the distinction between ss. 24(1) and 52. *Schachter* establishes that the Court's jurisdiction under s. 24(1) is limited to awarding "individual" remedies in cases where the Charter challenge concerns government action rather than legislation. Thus, ss. 52 and 24(1) will ordinarily provide mutually exclusive remedial options: *Schachter* at 43-44.

15. *Schachter* at 11.

16. *Schachter* at 17.

17. *Schachter* at 18.

18. In his concurring judgment, La Forest J. (writing for himself and McLachlin J.), explicitly took issue with Lamer C.J. on this point: "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] S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach..." *Schachter*, Reasons of La Forest J. at 5. See also *supra*, note 4.

19. *Schachter* at 24.

20. Oddly, remedial precision does not appear on Lamer C.J.'s own checklist: see *Schachter* at 40-42.

21. *Schachter* at 38.

22. *Ibid.*

23. For example, see Nitya Duclos & Kent Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*" (1991) 36 McGill L.J. 1 at 10-17; Dale Gibson, "Non-Destructive Charter Responses to Legislative Inequalities" (1989) 27 Alta. L. Rev 181; Andrew Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 J. Law & Soc. 151 at 160-1; Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the *Charter*: the Examples of Overbreadth and Vagueness" in Robert Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 233 at 239.

24. Indeed his failure even to advert to the obvious potential for conflict between the injunction to respect the role of the legislature and the injunction to respect the purposes of the *Charter* is disturbing.

25. *Schachter* at 24.

26. Lamer C.J. refers to two indicators of the significance of the remaining portion: its "long-standing nature" and whether it is "encouraged" by the Constitution, at 33-34. The latter is clearly derived from the second guiding principle. However, the former is best described as deference to the legislature's assessment of the provision's importance a dubious indicator.

27. For example, see *Schachter* at 18, 34 and 36. In his summary Lamer C.J. states: "Severance or reading in will be warranted only in the clearest of cases....", at 41.

28. For example, see the discussion of *A.G. Nova Scotia* v. *Phillips* (1987), 34 D.L.R. (4th) 633 (N.S.S.C. A.D.) where Lamer describes nullification of existing benefits challenged by an excluded group as "equality with a vengeance," *Schachter* at 19; see also the comparison of the availability of extension with temporary suspension of a declaration of invalidity, at 37-38.

29. "The final step is to determine whether the declaration of invalidity ... should be suspended," *Schachter* at 37, and "I would emphasize that the question whether to delay the effect of a declaration is an entirely separate question...", at 38.

30. *Schachter* at 46 (emphasis added).

31. In particular, it is not clear to Lamer C.J. whether the provision was intended to help parents care for newborns at home or to respond to "circumstances peculiar to adoptive parents," *Schachter* at 47.

32. *Ibid.*

33. *Schachter* at 48.

34. While adoptive parents as a group tend to have higher socioeconomic status than biological parents because of current adoption policy and practice, their effectiveness as a lobby group is offset by their small numbers relative to the group of non-adoptive parents.

35. Duclos & Roach, *supra*, note 23 at 7.

36. *Haig* at 5. This concession was consistent with the federal Attorney-General's position in other cases: similar concessions were made in *Veysey* v. *Correctional Services of Canada* (1990), 109 N.R. 300 at 304 (Fed. C.A.) and *Egan & Nesbitt* v. *Canada* (1991), 87 D.L.R. (4th) 320 at 330 (F.C.T.D.) and may reflect some discomfort within the Department of Justice with its position in gay rights cases.

37. *Haig* at 3 and 6.

38. Curiously, Krever J.A. does not even acknowledge the jurisprudential support for the federal Attorney General's argument in *McKinney* v. *University of Guelph* (1991), 76 D.L. R. (4th) 545 (S.C.C.). One of the issues in that case was whether s. 9(1)(a) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53 contravened s. 15 of the *Charter* by restricting the *Code*'s protection against age discrimination in employment to persons 18 or older and under 65. Writing for the majority on this point, La Forest J. held that although the provision violated s. 15, it was saved under s. 1 of the *Charter*. He then added (at 675-6):

> The *Charter* ... was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. ... Not, I repeat, that the courts should stand idly by in the face of a breach of human rights in the *Code* itself, as occurred in *Blainey*. But, generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.

Although La Forest J.'s comments occurred in the context of a s. 1 analysis and could have been distinguished on this basis, it is surprising to find no mention of the case in Krever J.A.'s reasons.

39. *Haig* at 1 and 9.

40. *Haig* at 10.

41. *Haig* at 11.

42. For example, the italicized words could have been added to s. 32(1):

> Notwithstanding section 14 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 birth of his or her child or* 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.

43. *Schachter* at 47.

44. For example, political belief is protected under the Yukon Territory *Human Rights Act*, S.Y. 1987, c. 3, s. 6(j) but is not a protected ground under the *CHRA*. On the other hand, family status is a protected ground under the *CHRA* but is not listed in the B.C. *Human Rights Act*, S.B.C. 1984, c. 22.

45. The most obvious example is age. For example, s. 15(b) of the *CHRA* limits protection against employment discrimination on the basis of age to those who fall between minimum and maximum age limits which are set by regulation.

46. "If this Court were to dictate that the same benefits that were 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." *Schachter* at 48.

47. In the Supreme Court, see *Schachter* at 29-30; see also Lamer C.J.'s implicit finding that extension of the benefit to the excluded group would have been the appropriate remedy in *Phillips* at 19; in the Court of Appeal, see *R.* v. *Schachter*, *supra*, note 8 at 651-2.

48. See *supra*, note 46. One explanation for this difference lies in the public/private distinction: the court only takes cognizance of "public" costs appropriations from the Consolidated Revenue Fund in *Schachter* and costs incurred in administering the Act in *Haig*. "Private" costs to employers in *Haig* are invisible.

49. *Haig* at 13.

50. The difference in the specificity of the two provisions arises because the challenge in *Haig* was directed at the heart of the *CHRA* whereas *Schachter* focused on only one of many benefits conferred by the *Unemployment Insurance Act*.

51. Although the Court's assumption about the size of the group to be added in *Haig* may have been influenced by false assumptions about human sexuality.

52. *Haig* at 3.

53. *Haig* at 12.

54. Although it is important to remember the enormous effort on a variety of fronts and over a considerable period of time that laid the groundwork for such a case. For example, the Canadian Human Rights Commission itself first recommended adding sexual orientation to s. 3 of the *CHRA* in 1979 and has pressed for this amendment ever since. Public opinion in Canada, as measured by various indicators, has been favourably disposed to protection from discrimination on the basis of sexual orientation for at least the last six years: Philip Girard, "Sexual Orientation as a Human Rights Issue in Canada 1969-1985" in Boyle *et al*, eds., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 276. Even with increasing public support, however, adding protection against discrimination on the basis of sexual orientation to human rights codes has been very controversial. See, for example, David Rayside, "Gay Rights and Family Values: The Passage of Bill 7 in Ontario" (1980) 26 Studies in Political Economy 109. These, among other efforts were instrumental to the success in *Haig*.

55. Or, a majority of judges at a sufficiently high level of court. As of this date, it remains to be seen whether the Attorney General will appeal the decision in *Haig*.

56. As a remedies case, *Haig* does provide another favourable precedent for gay rights litigation although, as I have implied, it may be more useful in the more "principle-oriented" cases, like extending the protection of other human rights statutes to gays and lesbians than in the more "materially-oriented" cases, like securing spousal and family benefits. For an analogous analysis of feminist litigation, see Judy Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989) 3 Canadian Journal of Women and the Law 246.

57. Nor, for that matter, did the Ontario Court of Appeal in *Haig*.