THE POSSIBILITIES OF *SCHACHTER*: A RESPONSE TO PROFESSOR DUCLOS

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This article was submitted to Constitutional Forum Constitutionnel in response to an article by Professor Nitya Iyer, then Nitya Duclos, titled "A Remedy for the Nineties: Schachter v. R. and Haig & Birch v. Canada," which appeared in Volume 4, No. 1.

Since no legal analysis can exist entirely bereft of context, for Professor Duclos to call the reasoning in *Schachter v. Canada*[1] "decontextualized" can only mean that she believes that the discussion would have developed better in a different context.[2] Indeed, Professor Duclos specifically complains that the "issue of the appropriate remedy in *Schachter* itself" is left for the return to the discussion of the facts at the end of the decision.[3] Yet the Court did state its reason for analyzing the appropriateness of "reading in" as a technique under s. 52 of the *Charter* in a wider context than the context of the facts presented in *Schachter* itself.

Lamer C.J. begins his analysis by voicing "dissatisfaction" with the factual context presented to the Court.[4] The violation of s. 15 had been conceded, and no s. 1 argument was offered. Usually a court is only too happy to be relieved of the duty to hear futile argument. However, Lamer C.J. mentions doubts which "may or may not exist"[5] on the question of whether the *Charter* had been violated, and La Forest J. goes further by stating that he was "by no means sure" that a violation had been established.[6] Since an attempt is typically made to have the remedy fit the violation, these doubts would provide a reason to analyze remedial techniques in a more abstract manner than in a case where the violation is clear.

Media reports of the decision in *Schachter* invariably described the factors presented to guide the choice of technique under s. 52 as "complex," and no doubt there is some truth to that characterization. However, the persuasive force of the decision can be put relatively simply. La Forest J. sums up the decision in a few words early in his concurrence: "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."[7] In Lamer C.J.'s judgment, the facts of cases, though not the facts of *Schachter*, provide persuasive force. Most striking is the reference to *Nova Scotia (Attorney General)* v. *Phillips*[8] in which a court struck down a benefit given to single mothers rather than extending it to include single fathers as well. Lamer C.J. also points out the absurdity involved in making the style of drafting the conclusive determinator of which remedial techniques are available to the court.[9]

If the virtue of reading in is considered to be only common sense, then what is accomplished by the abstract discussion? One way of putting the discussion in context would be to examine it in light of the traditional arguments against a court's ability to read in. Those traditional arguments are that writing legislation and making appropriations from the Consolidated Revenue Fund are matters for legislatures, not the courts, and that reading in is therefore beyond the jurisdiction of the courts no matter what the circumstances. These are arguments of the highest abstraction, turning as they do on the proper roles of the legislature and the courts.

If one examines Lamer C.J.'s discussion in the context of these arguments, it appears that the discussion turns the arguments back upon themselves. Lamer C.J. begins by discussing generally the purpose of the commonplace technique of reading down, or severance. The idea behind the technique is said to be that only the offending portion of legislation should be declared inoperative by the courts, so that as much of the intention of the legislature as is constitutionally permissible may be given effect.[10] This is subject to the limitation that where reading down the legislation would fundamentally change its character, the Court should not assume that reading down would in fact protect legislative intent.[11] Thus, according to Lamer C.J., the whole point of the practice of reading down and the limitations on that practice is to keep the Court in its proper sphere and role.

The Chief Justice then argues that reading in has the same purposes as reading down, and is subject to the same limitations.[12] Making the argument in this way turns the traditional argument against reading in back on itself: instead of taking it outside its appropriate role, the technique of reading in is meant to minimize the interference of the Court in the legislative sphere. The argument based on appropriations from the Consolidated Revenue Fund is also turned into a criteria rather than a prohibition. The real question, argues Lamer C.J., is whether the inevitable budgetary implications of any remedial choice are sufficiently serious to raise doubts as to whether the Court would in fact be preserving legislative intent through the technique it proposes to apply.[13]

Thus, the "decontextualized" discussion in *Schachter* would seem to offer a basis for dealing with the traditional abstract arguments against reading in, if considered in the context of those arguments. However, Professor Duclos is not convinced that *Schachter* goes very far in providing a justification for

reading in. She argues that the criteria relating to respect for the intent of the legislature are paramount and invalidation is still seen by the Court as the better option. She says:[14]

> 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, remains that invalidation accomplishes this objective more successfully than extension.

It would seem that Professor Duclos is right in concluding that the Chief Justice's overriding concern is to avoid excessive interference with the legislative function. In fact, his theoretical justification for the proposition that the courts may use the technique of reading in is that reading in is sometimes the better way to achieve that objective. The evidence for her claim that the decision retains a bias towards invalidation should therefore be examined carefully.

Professor Duclos notes that Lamer C.J. requires that the mode of extension be sufficiently precise before the technique may be used. Since this "remedial precision" criterion applies to extension and not invalidation, Professor Duclos argues that it "strongly favours invalidation."[15]

The remedial precision requirement flows from the structure of Lamer C.J.'s argument supporting the Court's jurisdiction to read in. When the Court reads down legislation, it identifies something in the legislation which is inconsistent with the Constitution which, if removed, would render the legislation constitutional. Reading in, he argues, is the same except that the inconsistency is something that was left out of the statute rather than something that was included. If the omission is then declared inoperative, the logical result is that what was omitted is now included.[16]

The problem which Lamer C.J. addresses with the remedial precision requirement is that to specify exactly what was wrongly omitted from legislation is not always a simple task. As Professor Duclos points out, it would have been a simple task in *Schachter* itself,[17] but in other cases it would not be. Lamer C.J.'s examples are *Hunter v. Southam*[18] and *Rockett v. Royal College of Dental Surgeons of Ontario*.[19] The Chief Justice points out that if it is possible to define the extent of the inconsistency with the Constitution in terms of what the statute excludes, then the absence of appropriate procedural safeguards in *Hunter* and the absence of exceptions for legitimate advertising in *Rockett* could conceivably have been declared inoperative, and the required safeguards and exceptions would then be made operative.[20] But what are the required safeguards or exceptions, he asks? Conceivably, such reasoning could allow the Court to put into place whatever scheme it happened to fancy. The requirement for remedial precision aims at avoiding this possibility.

The requirement has the additional consequence of drawing a box around some of the Court's more discouraging pronouncements in prior cases on the availability of reading in. In *Hunter* the Court said: "It should not fall to the courts to fill in the details that will render legislative lacunae constitutional."[21] In *Rockett* the Court said: "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."[22] Both these statements seem diametrically opposed to aspects of Lamer C.J.'s reasoning in *Schachter*. He deals with these statements by constructing a more limited principle consistent with the facts of those cases. In fact, what Lamer C.J. says these statements mean is worth some attention:[23]

> 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.

Professor Duclos suggests that the availability of more than one way to extend a statute is sufficient, on this analysis, to render reading in insufficiently precise.[24] However, Lamer C.J. says that reading in would be inappropriate where there is no natural manner of extension, not that it would be inappropriate where there is more than one conceivable response. Indeed Lamer C.J. acknowledges that where a court does use the technique of reading in, the legislature remains free to adopt whatever alternative response it desires.[25] Thus, if Professor Duclos were correct, reading in would never be appropriate.

Indeed, Professor Duclos is mistaken when she argues that Lamer C.J. rejected extension in *Schachter* because it was an insufficiently precise remedy.[26] The reasons Lamer C.J. states for rejecting extension in *Schachter* are that there was insufficient evidence concerning the intent of the statute to show that extension would do more to preserve Parliament's intention than invalidation, and that the budgetary implications of extension were sufficiently different from the budgetary implications Parliament had foreseen so as to amount to a fundamental change in the legislation.[27]

The requirement for remedial precision therefore would not seem to support a charge that Lamer C.J.'s judgment in *Schachter* retains a bias towards invalidation. However, Professor Duclos makes additional arguments for this conclusion:[28]

> 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.

Lamer C.J. does say that extension (be it by way of reading down or reading in) must meet all of the criteria he outlines.[29] However, this is not quite as onerous as it sounds, since the remaining criteria are really just different ways of asking the same question — whether extension would protect legislative intent better than invalidation. Lamer C.J.'s first criteria is whether extension would be a lesser interference with legislative intent than striking down.[30] Thus he does require courts to consider whether striking down a law would interfere with the legislative objective. Indeed, as Professor Duclos implies, it is obvious that striking down legislation interferes with legislative intent, so in that sense it is extension that is the default and invalidation that must be justified by some unusual circumstance. Lamer C.J. implies as much earlier in the judgment.[31]

The remaining criteria are merely pointers to what sort of circumstances can show that reading in or reading down would not protect legislative intent. Lamer C.J. argues that sometimes the state of affairs which would result from reading in or reading down was so specifically and unequivocally rejected by the legislature that the assumption that saving the underlying program in that manner would protect legislative intent is unsound. Lamer C.J. further argues that sometimes the consequences of reading in or reading down, budgetary or otherwise, would constitute such a fundamental change to the character of the legislation that it cannot be assumed that saving the underlying program in that way would protect legislative intent. But Lamer C.J. also requires a consideration of the importance of the underlying program, arguing that the more important it is the more sound is the assumption that saving it would protect legislative intent.[32] Thus, it is not as though the extension remedy must fulfill a host of unrelated criteria. It is really one question asked in a variety of ways.

Like the remedial precision requirement, the nature of the other tests which reading in must meet does not seem to support the charge that Lamer C.J.'s decision retains a bias towards invalidation. Instead, the various tests for when reading in is appropriate seem to be elaborations of Lamer C.J.'s central argument supporting the jurisdiction of the Court to read in.

But Professor Duclos is not convinced that the reading in technique as elaborated by Lamer C.J. will be of dependable benefit to equality-seeking groups. She notes that one of the reasons that Lamer C.J. thought reading in to be inappropriate on the facts of *Schachter* was that there was insufficient evidence of the legislative objective, and that the Court regretted the fact that there had been no s. 1 defence which might have provided such evidence. Professor Duclos argues that to make the remedial technique so dependent upon what kind of s. 1 defence the government offers, if any, gives the government a "disturbing degree of control over the remedial outcome in cases of underinclusion."[33]

However, if the court requires evidence as to legislative objective, it does not really matter what form that evidence takes or who provides it. While a s. 1 defence is the traditional arena in which such evidence has been explored, if it is relevant to the choice of remedial technique it can be tendered for that purpose, whether there is a s. 1 defence or not. Furthermore, there would seem to be no reason why the plaintiff could not put such evidence forward. While it is true that the government is in a better position to gather this sort of evidence, much of it would be in the public domain in any event, and it might be that the rest could be discovered.

Professor Duclos also expresses concern about the fact that the judgment allows a suspension of a declaration of invalidity in some circumstances. She points out that to suspend a declaration of invalidity is a "convenient" course for a court to adopt, since the plaintiff receives a symbolic victory, and the court can rest assured that the legislature has the final word in the matter.[34] Professor Duclos suggests that the Court should have recognized that an order extending legislation could also be suspended.

The Court does, by implication, reject the proposition that an extension order could be suspended. Lamer C.J. argues that the sole reason for suspending an order should be the adverse effects an immediate declaration would have upon the public.[35] Extension would rarely, if ever, lead to such consequences. Therefore, the only reason to suspend an extension order would be to protect the courts from the charge that they were interfering with the legislative function. However, Lamer C.J. argues that a suspended order itself constitutes a kind of interference with the legislature, and does not promote Charter values as well as either reading in or invalidation, since either course immediately reconciles the statute with the *Charter*.[36]

The separation of the criteria for suspension from the question of intrusion into the legislative function also has a sharpening effect upon the kind of analysis a court will have to perform in the circumstances. Since the convenient way of dealing with the question of legislative intrusion is taken away, the Court must squarely face the two options open to it in these kinds of cases: invalidate the underlying program, or extend it in the way that would make it constitutional. Given these options, and given the basic criterion of protecting as much of the legislative intent as possible, it would seem likely that extension will not be an unusual choice. Indeed, as Professor Duclos discusses, the first case to apply *Schachter* did opt for extension.[37]

Nevertheless, Professor Duclos argues that the fact that extension is an uncertain remedy places equality-seeking groups in a difficult position. The possibility of extension is attractive, but since invalidation is also possible, the potential plaintiffs know that by litigating cases of underinclusion they risk attaining nothing more than a hollow victory that only threatens those who originally benefitted from the program in question, and throws

the plaintiffs back upon the legislative process that failed them in the first place.[38]

There is truth to these arguments. However, the dilemmas faced by those challenging underinclusive legislation could not have been eliminated no matter what course the Court had adopted. Had the Court issued a ringing endorsement of extension in the vast majority of circumstances, equality-seekers would still have been subject to the vicissitudes of the political process. Even when the Court orders extension, the Legislature may alter the underlying legislation as it wishes, within the boundaries set by the Constitution. Thus, in cases of underinclusion, no matter what remedial technique the Court adopts, all it can ultimately achieve is to force the Legislature to choose between its incompatible desires to benefit one group but not another. Given legislative inertia, extension does place the equality-seeking group in a better tactical position to face the vicissitudes of legislative choice, but it cannot provide a complete shield. And while invalidation is hardly the preference of equality-seekers, even it provides some small tactical assistance, since it may widen the field of potential allies in the attempt to influence legislative choice.

For these reasons, it is fair to say that *Schachter* is not everything that equality-seekers might have hoped for. However, it would seem that *Schachter* has more possibilities than Professor Duclos allows.

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Author's Note:
This article is not a reflection of the views of my current or former employers.

1. [1992] 2 S.C.R. 679.
2. Nitya Duclos, "A Remedy for the Nineties: *Schachter v. Canada* and *Haig & Birch v. Canada*" (1992) 4 Constitutional Forum 22 at 23.
3. *Ibid.*
4. *Supra* note 1 at 695.
5. *Ibid.*
6. *Ibid.* at 727.
7. *Ibid.* at 726-27.
8. (1986), 34 D.L.R. (4th) 633 (N.S.C.A.).
9. *Supra* note 1 at 698-99.
10. *Ibid.* at 696.
11. *Ibid.* at 697.
12. *Ibid.* at 700-702.
13. *Ibid.* at 709-10.
14. *Supra* note 2.
15. *Ibid.*
16. *Supra* note 1 at at 698.
17. *Supra* note 2 at 25.
18. [1984] 2 S.C.R. 145.
19. [1990] 2 S.C.R. 232.
20. *Supra* note 1 at 706.
21. *Supra* note 18 at 169.
22. *Supra* note 19 at 252.
23. *Supra* note 1 at 707.
24. *Supra* note 2 at 25.
25. *Supra* note 1 at 717. Professor Duclos also makes this point (at 26), but argues there that the Court did not mention this aspect of the matter.
26. *Supra* note 2 at 25.
27. *Supra* note 1 at 728.
28. *Supra* note 2 at 23.
29. *Supra* note 1 at 718.
30. *Ibid.*
31. *Ibid.* at 696.
32. *Ibid.* at 712-15.
33. *Supra* note 2 at 24.
34. *Ibid.*
35. *Supra* note 1 at 717.
36. *Ibid.* at 716-17.
37. *Supra* note 2 at 25.
38. *Ibid.* at 24.