

*"Federal Finances," continued from page 61.*

### CHALLENGES AND THREATS

The biggest threats and the greatest challenges facing the Liberals as they take office are to accelerate the momentum of economic growth and

three goals simultaneously. It will continually be walking a tightrope between fiscal responsibility and social and economic responsibility. There is little that the government can do about external factors, other than to argue more forcefully for cooperation among the G-7 to stimu-

Federal Budget Deficit Projection, 1993-94 to 1998-99

Fiscal Years	\$ billions					
	'93-'94	'94-'95	'95-'96	'96-'97	'97-'98	'98-'99
<i>Scenario 1</i>						
Program Spending: Grows Annually in Line with Nominal GDP (5.6%)						
Deficit	38.2	41.2	44.3	47.8	51.4	55.4
(% of GDP)	(5.3)	(5.5)	(5.6)	(5.7)	(5.8)	(5.9)
Program Spending: Zero Real Growth (2% per year)						
Deficit	38.2	36.8	34.6	31.9	28.5	24.4
(% of GDP)	(5.3)	(4.9)	(4.4)	(3.8)	(3.2)	(2.6)
<i>Scenario 2</i>						
Program Spending: Zero Real Growth						
Deficit	38.2	40.2	42.0	41.6	41.0	40.1
(% of GDP)	(5.3)	(5.4)	(5.4)	(5.1)	(4.8)	(4.5)
Program Spending: Spending Freeze (0% per year)						
Deficit	38.2	37.6	36.4	32.9	28.8	24.1
(% of GDP)	(5.3)	(5.0)	(4.7)	(4.0)	(3.4)	(2.7)

to restore the confidence of taxpayers in the fairness and integrity of the tax system. The combination of slow economic growth and tax avoidance will force the Liberals to jettison either their deficit goal or their economic and social goals and will most likely result in a massive defeat for the party in the next federal election.

Furthermore, the Liberals have to avoid any escalation in interest rates. A renewed attack on inflation by the Bank of Canada would push the economy back into a recession and push up nominal and real interest rates to tragically high levels—tragic for the economy and Canadian citizens. As well, for every 1 percentage point that interest rates exceed the current levels, the federal government deficit would increase by between \$6 and \$8 billion.

The Liberal government will not have much latitude in pursuing the

late the world economy and resolve needless trade disputes.

However, the Liberal government cannot afford to allow the Bank of Canada to follow its own whims and in the process sabotage the efforts of the government to remain on the tightrope. This means that John Crow cannot be reappointed when his contract expires at the end of January and that his replacement should be an individual with excellent credentials in the domestic and international financial communities, so as to prevent any short-lived attack on the Canadian dollar, and one who will show more sympathy for the unemployed and be more sensitive to the high costs of a vigorous deflationary policy.

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## LEGAL REPORT

### JUDICIAL AMENDMENT OF STATUTES TO CONFORM TO THE CHARTER OF RIGHTS

by Peter W. Hogg

It is trite to observe that the *Charter of Rights and Freedoms* has expanded the role of the courts in Canada. Not only has the Charter added new grounds of judicial review of legislation that were not available before 1982, it has also led to new judicial remedies in cases where statutes have been found to be in conflict with the Charter.

It had always been assumed that courts lacked the power to add new words to a statute. The direct amendment of a statute could be accomplished only by Parliament or the legislature itself. In *Schachter v. Canada* (1992), however, the Supreme Court of Canada said that the court could add words to a statute if that were the best way to cure a constitutional defect. The court described this technique as "reading in," and said that it was a "legitimate remedy."

Reading in was not actually ordered in *Schachter*, but the remedy has now been ordered by the Ontario Court of Appeal in *Haig v. Canada* (1992). Haig had been discharged from the armed forces by reason of his homosexuality. He could not obtain a remedy under the *Canadian Human Rights Act* because the Act, although affording protection against many grounds of

discrimination, did not cover discrimination on the basis of sexual orientation. The Ontario Court of Appeal held that the Act's failure to include sexual orientation was a denial of Haig's equality rights under section 15 of the Charter.

In *Haig*, the Ontario Court of Appeal held that this was a case for reading in. The court ordered that the words "sexual orientation" should be read into the list of prohibited grounds of discrimination in the Act. Once the Act had been amended in this fashion, Haig would be able to complain to the Canadian Human Rights Commission and obtain a remedy for his dismissal.

The decision in *Haig* will stand because the attorney general of Canada elected not to seek leave to appeal to the Supreme Court of Canada.

It is tempting to condemn the reading in by the *Haig* court as an invasion of Parliament's legislative process. It is that, of course, but what is the alternative? The orthodox solution would be to strike down the unconstitutional statutory provision. But that would have destroyed *all* of the protections against discrimination in employment, and would have done nothing directly for Haig. That is why Krever J.A., for the court, said that reading in "would be less intrusive than the total destruction of the objective that would result from striking the provision down."

Another solution that has occasionally been adopted by the Supreme Court of Canada is to declare an unconstitutional provision to be invalid, but to suspend the declaration of invalidity for a temporary period of time to give Parliament the opportunity to amend it into conformity with the constitution. This was done, for example, in *R. v. Swain* (1991), where the court struck down (for lack of appropriate procedural

protections) the *Criminal Code* provision for the automatic detention in a psychiatric facility of persons acquitted of criminal offences on the ground of insanity. To avoid releasing all insanity acquittees, many of whom would likely be a danger to the community, the court suspended its declaration of invalidity for a period of six months. This enabled Parliament to enact a new provision that repaired the constitutional defects of its predecessor.

The attraction of the suspended declaration of invalidity is that it avoids the disruptive effects of the immediate nullification of a statutory program. However, it is also very intrusive of the legislative function. To be sure, the court does not directly amend the unconstitutional statute. But the court does assume the radical power of maintaining in force a statute that is unconstitutional. And the court also, in effect, imposes a deadline on the competent legislative body, which must enact a new law in time to stop the declaration of invalidity from taking effect.

Coming back to *Haig*, there is no escape from the conclusion that, one way or another, the unconstitutional exclusion of homosexuals from the protection of the *Canadian Human Rights Act* had to be repaired. In *Haig*, that repair was effected by the court itself in a straightforward fashion that did not significantly alter the legislative scheme. Although the court added words that Parliament had not enacted, this radical result need not be other than temporary. If Parliament is not content with the court's solution, Parliament can enact a new scheme — in compliance with constitutional requirements, needless to say. In this sense, the democratic legislative process retains the last word.

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## CW UPDATE

### THE MONTH IN REVIEW

by Michael Rutherford and  
Jonathan Batty

#### CHRÉTIEN AND CABINET SWORN IN

Jean Chrétien was sworn in as Canada's 20th prime minister on November 4 at Rideau Hall in Ottawa. Also sworn in were the following 22 members of the new Liberal Cabinet:

- **David Anderson**, Minister of National Revenue (B.C.)
- **Lloyd Axworthy**, Human Resources Minister and Western Development Minister (Manitoba)
- **David Collenette**, Defence Minister (Ontario)
- **Sheila Copps**, Deputy Prime Minister and Environment Minister (Ontario)
- **David Dingwall**, Public Works and Atlantic Opportunities Minister (N.S.)
- **Michel Dupuy**, Heritage Minister (Quebec)
- **Art Eggleton**, Treasury Board President and Infrastructure Minister (Ontario)
- **Joyce Fairbairn**, Senate Leader (Alberta)
- **Ralph Goodale**, Minister of Agriculture (Sask.)
- **Herb Gray**, House Leader and Solicitor-General (Ontario)

*Continued, see "Month in Review" on page 64.*