

Canadian partners would never consent to such a major restructuring of the relationship. With these words, the game was over. Robert Bourassa's bluff had been called once and for all.

The August deal will be a tough sell in Quebec. Considering that citizens are tired and that the agreement will be supported by the machinery of two governments, it is quite possible that the "Yes" side will triumph. Canadian federalists would thus have obtained their peace, until the next election in Quebec when the Liberal Party of Robert Bourassa will seek, once again, the trust of the people.

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LEGAL REPORT

EXPANDING THE CHARTER ARSENAL: READING JUDGE-MADE PROVISIONS INTO LEGISLATION

by Jamie Cameron

Should an unelected judiciary read new provisions into democratically enacted legislation that does not comply with the Charter? Courtwatchers have waited for an answer since August 30, 1988, when Justice Strayer of the Federal Court, Trial Division, extended unemployment benefits intended for adoptive parents to natural fathers.

SCHACTER V. CANADA: THE TEST CASE

Mr. Schacter invoked section 15's guarantee of equality to challenge section 32 of the *Unemployment Insurance Act*, which at the time, granted unemployment benefits to adoptive parents but not natural fathers. At the Supreme Court of Canada, the government conceded that section 32 violated section 15's guarantee of equality, and appealed only on the issue of remedy.

On July 9, 1992, the court held that the Constitution authorizes the courts to add judge-made provisions to legislation. In doing so, Chief Justice Lamer stated that there is no difference, in principle, between reading provisions out of legislation and reading judge-made provisions in.

The question, in the Chief Justice's view, was not "whether courts can make decisions that impact on budgetary policy", rather it was "to what degree they can appropriately do so." Mr. Schacter was denied relief because the court concluded,

in the circumstances, that unemployment benefits intended for adoptive parents should not be extended to natural fathers.

Schacter rests on an assumption that any distinction between reading in and reading out, or severance, is arbitrary. How then should "reading in" be seen alongside the remedial choices the court has made in other contexts?

REMEDIAL CHOICE AND INSTITUTIONAL CONSEQUENCES

In the past the court has not hesitated to strike down legislation found inconsistent with the Charter. *Hunter v. Southam* declared that "[i]t should not fall to the courts to fill in the details that will render legislative lacunae constitutional." *R. v. Big M Drug Mart* stated that legislation that violates the Charter is *per se* invalid — regardless whether the provision is unconstitutional vis-à-vis the claimant.

An outcry followed the court's decision last year to invalidate Criminal Code provisions that prohibited any examination of sexual experience in sexual offence cases. The statutory framework was struck down in *R. v. Seaboyer* because the exceptions to the general rule of prohibition were incomplete.

Because of its all-or-nothing consequences, invalidating legislation can be a more aggressive remedy than curing its defects through interpretation. Striking section 32 down would have negated unemployment benefits for adoptive parents, without providing Mr. Schacter a remedy.

And, as *R. v. Askov* demonstrates, Charter decisions that do not invalidate legislation can have enormous implications. There, a decision that appeared to establish an absolute six to eight month timeline for hearing criminal charges caused extraordinary social and financial upheaval: as governments scrambled to com-

mit new resources, tens of thousands of charges were stayed.

Enforcing the Charter has institutional consequences in a variety of contexts. What the courts must decide is whether enforcement should take priority over other objectives, including the institutional consequences of doing so. The Supreme Court of Canada had made enforcing the Charter its priority long before *Schacter* was decided.

EXPANDING THE ARSENAL

What then does "reading in" imply for institutional relations? Despite endorsing it, Chief Justice Lamer acknowledged that choice of remedy acquires a new dimension when an unelected judiciary reads new provisions into democratically

enacted legislation. He indicated that such a step should therefore be taken only in the clearest of cases.

Will the courts accept the Chief Justice's invitation to rewrite legislation, or will "reading in" be regarded as an exceptional remedy, available only in narrow circumstances? It all depends on how the judiciary assesses the relative importance of enforcing the Charter and preserving equilibrium between the legislatures and the courts.

Where reading in is perceived as intrusive of legislative function, the remedial issue can be pre-empted by a finding that the Charter has not been violated. It is doubtful that a violation would have been found in *Schacter*, had the issue been open to the court.

Yet *Schacter* has already been followed: in *Haig v. Canada*, the Ontario Court of Appeal granted a declaration adding "sexual orientation" to section 3 of the Canadian *Human Rights Code*, as one of its prohibited grounds of discrimination.

Reading in expands the arsenal of remedial tools the Supreme Court of Canada has employed to enforce the Charter. *Schacter* is consistent with a jurisprudence that seeks the attainment of that objective at the expense of democratic authority. Until the judiciary's powers are challenged, that trend can be expected to continue.

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CW UPDATE

THE MONTH IN REVIEW

by David Johnson

FALL REFERENDUM ON NATIONAL UNITY DEAL

The national unity deal agreed to on August 22 in Ottawa will be put to a non-binding national referendum on October 26. Although the exact wording of the question has not yet been unveiled, it will probably consist of a single question asking whether voters approve of the entire reform package. Where provincial referenda are mandated by law, as in Quebec, Alberta, and British Columbia, the referendum will be conducted under provincial auspices; in all other areas, the new federal referendum legislation will operate. Though no referendum result can legally bind the provincial legislatures, the results of this vote

will undoubtedly be politically binding on the premiers and the prime minister.

For details of the national unity agreement, please see the overview by David Johnson on page 19 of this issue.

NAFTA AGREEMENT IN PRINCIPLE

On August 12, trade representatives for the governments of Canada, the United States, and Mexico agreed in principle to a North American free trade agreement (NAFTA). If the agreement receives legislative ratification, North America will become the world's richest trading bloc, bringing together 360 million persons into a U.S.\$6.6 trillion common market. The agreement builds on the Canada-U.S. Free Trade Agreement by calling for the general elimination of most tariffs between the countries over the next 10 to 15 years.

Canada currently exports slightly more than Cdn.\$500 million in goods to Mexico. Auto parts, newsprint, steel, and wheat constitute the bulk

of these goods. Canada currently imports some Cdn.\$2.6 billion in goods from Mexico. Cars, auto parts, computers, and crude petroleum constitute the bulk of this trade.

For analysis on the process of ratification and the impact that this agreement might have on Canada, see the articles by David Johnson and David Leyton-Brown beginning on page of this issue.

EQUALITY PARTY'S CLAIM REJECTED

On July 30, Mr. Justice Pierre Michaud of the Quebec Superior Court rejected a Charter challenge brought by the Equality Party against Quebec's referendum legislation. The court ruled that legislative provisions compelling all campaign participants to group together under one of two competing umbrella committees, with each committee subject to rigorous expenditure restrictions, infringed on freedoms of association and expression. The court held, however, that such infringements were reasonable and demon-