

A Plea for Conceptual Consistency in Constitutional Remedies

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Over the course of the past decade, the Supreme Court of Canada has considerably enlarged the range of remedial options available following a pronouncement that a legal rule enacted by the federal Parliament or one of the country's provincial legislatures is unconstitutional.

However, a cursory reading of recent judicial remarks on the subject reveals a state of significant confusion. In what manner may statutory interpretation be logically considered as part of a constitutional remedy? How is it possible to speak of "reading into" a legislative rule when in fact its reach is being limited? Or how is it possible to simultaneously impose both "reading in" and "reading down" as part of the same constitutional remedy?

The present text attempts to provide possible explanations for this noticeable disorder. It finds that confusion between statutory interpretation and the imposition of constitutional remedies, key words that are only approximately translated into French, and above all, the failure to distinguish between an unconstitutional rule and its material expression in the text of a legal provision, all play a role.

The text then proposes a formally rigorous method to be used in matters of constitutional remedies, consisting of conceptualizing the impugned legal rule, characterizing the constitutional problem, determining what remedial options are available, the criteria that should influence the choice among the options, and finally, the concrete expression of the remedy within the wording of the legislative provision.

Au cours de la dernière décennie, la Cour suprême du Canada a considérablement élargi la gamme des sanctions qui peuvent être imposées à l'occasion d'un prononcé d'inconstitutionnalité d'une règle de droit d'origine législative.

Une lecture superficielle de propos judiciaires récents sur cette question laisse cependant une impression de confusion importante. En quoi l'interprétation d'une loi peut-elle logiquement en constituer la sanction d'inconstitutionnalité? Comment peut-on parler d'interprétation large d'une disposition législative dont on limite la portée? Ou imposer à la fois l'interprétation large et l'interprétation atténuée comme sanctions d'une même inconstitutionnalité?

Le présent texte tente de cerner certaines pistes d'explication de ce désordre apparent, au nombre desquelles on retrouve une confusion entre l'interprétation d'une loi et l'imposition d'une sanction d'inconstitutionnalité, une traduction française approximative de certains termes clés, et, par dessus tout, l'absence de distinction entre

la sanction d'une règle de droit inconstitutionnelle et la mise en œuvre matérielle de cette sanction dans le texte de la disposition législative qui l'exprime.

Il propose une démarche formellement rigoureuse en matière de sanction d'inconstitutionnalité, qui distingue la conceptualisation de la règle de droit dont on conteste la constitutionnalité, la qualification du problème constitutionnel, la détermination des sanctions disponibles, la considération de critères de choix, et, enfin, l'expression concrète de la sanction dans le libellé de la disposition législative.

INTRODUCTION

More than twenty years following the enactment of the *Canadian Charter of Rights and Freedoms*¹ and over ten years after a landmark ruling on the issue,² the Canadian legal community continues to make efforts at systematizing its approach to constitutional remedies. From "reading down" to "reading in," or from the French *interprétation large* to *interprétation atténuée*,³ one still loses one's way.

In the present text, I attempt to illustrate certain important aspects of the confusion prevailing in the remedies discourse and to provide possible explanations to account for it. I then suggest an approach, with a view toward what I hope will be a conceptual clarification.

This text focuses on judicial methodology. It is now recognized that the potential effects of constitutional remedies imposed by the courts

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

2 *Schachter v. Canada*, [1992] 2 S.C.R. 679, 1992 CarswellNat 658, 1992 CarswellNat 1006 (S.C.C.) [hereinafter *Schachter*].

3 A francophone who decides to write a text about constitutional remedies as discussed by the Supreme Court of Canada faces a sizeable dilemma. She is aware that the concepts used to describe the matter are generally conceived of and written about in Shakespeare's tongue. They are then translated, often bringing about a distortion of the original thinking. In which language then should the subject be broached? Should one use the original English terms for concepts and thus have precise English terms scattered throughout a French text? To use the words from the French translation of rulings can only perpetuate the very state of confusion that one seeks to critique. To invent new terms is to risk increasing the confusion. In the original French and former version of this article, I chose a pragmatic approach to the problem: no definitive decision as to the choice of terms; to be the clearest possible, according to context. Herein, I proceed with a similar pragmatic approach, occasionally referring to French terms and their literal meaning to give the reader a clearer sense of the issues involved. The literal meaning of the French terms *interprétation large* and *interprétation atténuée* are perhaps captured best by the expressions "liberal interpretation" and "restrictive interpretation," respectively.

are not limited to rendering legislation⁴ inoperative. The courts may in fact modify impugned legislation. In this text, I take this judicial power for granted and do not discuss its legitimacy whatsoever. Once again, I argue only in favour of a greater degree of precision in methodology.

1- THE PERVADING CONCEPTUAL CONFUSION

The distinction between interpretation of an impugned statute and the imposition of remedies following a pronouncement of unconstitutionality is often obscured by remarks found in jurisprudence. Similarly, the explanation that is given for various constitutional remedies is sometimes quite confusing.

1.1 INTERPRETATION, OR CONSTITUTIONAL REMEDY?

It is the failure to distinguish the step of interpreting a statute from that of imposing a constitutional remedy under s. 52(1) of the *Constitution Act, 1982*⁵ that breeds much of the confusion prevailing in jurisprudential discussions of remedies.⁶

The pitfalls of using the same term to designate two different concepts are obvious. Unless one knows how to distinguish between the

4 This text does not concern itself with other types of legal rules, such as the rules of common law that are developed by the courts.

5 "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." *Constitution Act, 1982, supra*, n. 1 at s. 52(1).

6 This occasionally indiscriminate treatment of questions of interpretation and remedies, which is evident in jurisprudence, is also to be found in doctrine. For example, see Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed. (Scarborough, Ont.: Carswell, 1992-), who broaches what he calls "reading down" both in his discussion of interpretation of impugned legislation (at 15-24: "The 'reading down' doctrine requires that, wherever possible, a statute is to be interpreted as being within the power of the enacting legislative body. . . . Reading down is simply a canon of construction (or interpretation)") and in the chapter in his work on remedies for unconstitutional laws (at 37-16: "Reading down is the appropriate remedy when a statute will bear two interpretations, one of which would offend the *Charter of Rights* and the other which would not. In that case, a court will hold that the latter interpretation, which is normally the narrower one (hence *reading down*) is the correct one."). See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), who deals with what she calls "reading down" both as an interpretive tool and as a constitutional remedy, at 370, 372.

initial phase of judicial interpretation of a statutory provision and the modification which a judge later brings to such a text in the guise of a constitutional remedy, one cannot help but become lost among the concepts of "reading in" and "reading down," or the French *interprétation large* and *interprétation atténuée*.

After illustrating this confusion by way of certain judicial decisions (1.1.1.) and insisting on the essential conceptual distinction between interpretation and the imposition of constitutional remedies (1.1.2.), we will look at certain possible explanations that account for this detrimental confusion (1.1.3.).

1.1.1. CONFUSION

To begin with, certain judicial decisions seem to feed the confusion that exists between the initial phase of interpretation of an impugned statute and the presumably later phase of imposing a remedy in accordance with the principle of constitutional supremacy. Four examples will illustrate this matter.

In an *obiter dictum* in the *Osborne* case,⁷ the majority of the Supreme Court of Canada discussed the possibility of correcting a legislative provision judged to be unconstitutional in that its reach was too vast. After having concluded as to the existence of a freedom of expression violation, which was not justified as a reasonable limit according to s. 1 of the Charter, the Court questioned the possibility of "reading down" the faulty provision. Throughout this discussion, located under the heading "Remedy",⁸ it is extremely difficult to discern whether reference is being made to interpretation of the provision—a process which takes place prior to a determination of constitutionality—or rather to the remedial options available following a ruling of unconstitutionality. Moreover, on behalf of the Court, Justice Sopinka highlights what appears to him as the illusory nature of the distinction between these two phases, since as he writes, a decision as to the existence of a violation of rights, and its justification in certain cases, inevitably precedes any exercise of "reading down."⁹ "There is no reason," contends Sopinka J., "for the court to disguise the exercise of this power [to invalidate a law by virtue

7 *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 1991 CarswellNat 348, 1991 CarswellNat 830 (S.C.C.) [hereinafter *Osborne*].

8 *Ibid.*, at 101.

9 *Ibid.*, at 102.

of s. 52(1) of the *Constitution Act, 1982*] in the traditional garb of interpretation.”¹⁰

More recently, in *Little Sisters*,¹¹ when Justice Binnie writes for the majority that the legislation which imposes a reversal of the burden of proof in the context of duties¹² “is not to be construed and applied so as to place on an importer the onus to establish that goods are not obscene within the meaning of s. 163(8) of the *Criminal Code*,”¹³ one does not know at which stage of the analysis this comment is to be situated. It is only later in the ruling that one discovers that this statement about the necessary interpretation of the impugned statute is in fact based upon s. 52(1) of the *Constitution Act, 1982*.¹⁴

Similarly, when it is written in *Lucas*¹⁵ that “it is appropriate to read a criminal statute so that it conforms with Charter principles”¹⁶ and that “a historical review of the application of *mens rea* in the context of defamatory libel and the application of traditional principles of statutory interpretation lead inevitably to the conclusion that such an intention is indeed required and that s. 300 should be read accordingly,”¹⁷ it is in the context of the “minimum impairment” portion of the Charter’s test of reasonable limits.¹⁸ The interpretive exercise is thus brought into play at the stage of the s. 1 test, following a determination of an infringement of freedom of expression but before any eventual decision as to the existence of an appropriate constitutional remedy. In the case in point, it is a matter of interpretation in the traditional sense of the term, and not a form of judicially imposed constitutional remedy that is counter to the initial will of legislature.

10 *Ibid.*, at 104.

11 *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 CarswellBC 2442, 2000 CarswellBC 2452 (S.C.C.) [hereinafter *Little Sisters*].

12 *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 152(3).

13 *Little Sisters*, *supra*, n. 11 at 1181.

14 *Ibid.*, at 1203.

15 *R. v. Lucas*, [1998] 1 S.C.R. 439, 1998 CarswellSask 93, 1998 CarswellSask 94 (S.C.C.).

16 *Ibid.*, at 469.

17 *Ibid.*, at 467.

18 “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.” *Charter*, *supra*, n. 1 at s. 1.

Finally, a relatively unnoticed passage from *R. v. Campbell*¹⁹ also illustrates the ambiguity of recourse to interpretation in constitutional matters. It was decided in that passage that a provision of the Manitoban statute providing for the imposition of unpaid leave for civil servants must be considered as not applying to employees of the provincial court. This conclusion is deemed necessary to ensure respect of the principle of independence of the judiciary. The only paragraph of the ruling that is devoted to this question²⁰ refers to the limits of "reading down" within the meaning given to the phrase in the *Slaight Communications*²¹ decision, to the necessity that "the provision should be read as exempting provincial court staff from it" and to the fact that it would be the most appropriate "remedy" for the case in point. Here, "reading down" is understood in the latter sense of "remedy," as it is discussed in *Osborne*.²² Once again, the discussion as a whole leaves one unclear whether it is about interpretation of the impugned provision or rather about the possible details of a precise and well-defined constitutional remedy.

1.1.2. DISTINGUISHING STEPS: INTERPRETATION AND REMEDY²³

Interpretation of a statute and the imposition of a constitutional remedy are two distinct judicial acts that pertain to widely differing functions.

19 *R. v. Campbell*, (sub nom. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*) [1997] 3 S.C.R. 3, 1997 CarswellNat 3038, 1997 CarswellNat 3039 (S.C.C.), additional reasons at (sub nom. *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*) [1998] 1 S.C.R. 3, 1998 CarswellNat 79, 1998 CarswellNat 114 (S.C.C.).

20 *Ibid.*, at 152-153.

21 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) [hereinafter *Slaight Communications*]. The principle of interpretation compatible with Charter values was established in the case in the following terms: "Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect" (at 1077-1078).

22 *Osborne*, *supra*, n. 7.

23 This portion of the text draws largely from Danielle Pinard, "Le principe d'interprétation issu de la présomption de constitutionnalité et la Charte canadienne des droits et libertés" (1990) 35 McGill L.J. 305.

The search for and respect of legislative will or intent form the underlying principles of the judicial act of statutory interpretation. At the very least, these are the terms used to demonstrate the essential judicial deference to legislative choices. Our constitutional structure relies upon a theory of relative separation of powers, such that in the course of their regular activities, the courts will faithfully interpret and apply the choices of a different political body—the legislative power. The courts must give effect to a statutory provision which, when reasonably interpreted within the semantic limits of the terms used in the text of the law, should reflect the intention of legislature. Far be it from me to herein deny the unavoidable creativity that is inherent in any act of legal interpretation on the part of judges. Even assuming that the legislative message is clear and unequivocal in the minds of its drafters, the limits inherent in human language are such that this message will never be so perfectly expressed as to merely require its mechanical application. This is understood and accepted. I also accept that because in appearance at least it seems to conflict with the constitutional separation of powers, this judicial creativity which is inherent to any act of interpretation is often couched within an unconvincing rhetoric of feverish searching for and discovery of a clear and certain legislative intent embedded within the words of the law. Yet, despite the inevitable creativity present in any act of interpretation, it nevertheless remains that our constitutional structure requires that the judicial interpretation of laws be guided by an honest quest to give effect to the legislative intent revealed by the enacted text. This is the case, whether it is so in actual fact or at the very least, and in the worst-case scenario, merely at the level of discourse. Consequently, there are limits to what a judge can do by virtue of this act of interpretation.²⁴

24 In *Welsh v. United States*, 398 U.S. 333 (U.S. Cal., 1970), Justice Harland of the United States Supreme Court criticizes the rhetoric of recourse to a vocabulary of interpretation when in fact the act consists of denaturing a law in order to confirm its constitutional validity. The case in point consisted of a constitutional challenge on freedom of religion grounds of an American statute providing for an exemption from military service for religious reasons. The majority of the Court interpreted the idea of religious reasons as including moral reasons, despite the explicit terms of the statutory definition. Justice Harland writes, "Against this legislative history it is a remarkable feat of judicial surgery to remove. . .the theistic requirements of 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out any distinction between religiously acquired beliefs and those deriving from

Two recent decisions of the Supreme Court of Canada illustrate the potential controversy regarding the proper delineation of these limits. Indeed, in both *Canadian Foundation for Children, Youth & the Law*²⁵ and *Montreal (Ville)*,²⁶ where the Court ruled in favour of the constitutional validity of the challenged statute or by-law, dissenting judges were of the view that the validation had implicitly required an illegitimate prior judicial amendment by the majority of the Court. In *Canadian Foundation*, the majority held that s. 43 of the *Criminal Code* prescribed a constitutionally valid justification for the physical correction of children insofar as it was correctly interpreted as excluding certain categories of cases discussed by the Court. Dissenting judges wrote that “[s]uch an extensive ‘reading in exercise’²⁷ was inappropriate at the stage of interpretation, that the majority had rewritten the provision in order to validate it,²⁸ and that it had “read the section down to create a constitutionally valid provision.”²⁹ One finds a similar judicial dialogue (!)³⁰ in *Montreal (Ville)*, where Justice Binnie writes that the majority was only able to validate the impugned by-law because it had improperly amended it. He eloquently writes that the majority of the Court proceeded with an “impermissible judicial amendment”³¹ by resorting “to a combination of reading expressions ‘up’, reading expressions ‘down’, reading words ‘out’ and reading words ‘in’”.³²

These two cases certainly illustrate a constant controversy as to what constitutes the proper scope of legitimate statutory interpretation. More

‘essentially political, sociological, or philosophical views or a merely personal moral code.’” Discussed in David M. Bizar, “Remedying Underinclusive Entitlement Statutes: Lessons from a Contrast of the Canadian and U.S. Doctrines” (1992) 24 U. Miami Inter-Am. L. Rev. 121 at 131.

25 *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, (sub nom. *Canadian Foundation for Children v. Canada*) [2004] 1 S.C.R. 76, 2004 CarswellOnt 252, 2004 CarswellOnt 253 (S.C.C.) [hereinafter *Canadian Foundation*].

26 *Montreal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141, 2005 CarswellQue 9633, 2005 CarswellQue 9634 (S.C.C.) [hereinafter *Montreal (Ville)*].

27 *Canadian Foundation*, *supra*, n. 25 at para. 103, Binnie J.

28 *Ibid.*, at para. 139, Arbour J.

29 *Ibid.*, at para. 108, Deschamps J.

30 The theory of an institutional dialogue in Canadian constitutional law usually refers to a dialogue that may occur between parliaments and the courts. But one should not forget that there is another kind of interesting dialogue going on, this time, amongst the judges of the Supreme Court of Canada themselves.

31 *Montreal (Ville)*, *supra*, n. 26 at para. 110.

32 *Ibid.*

importantly, considering the context in which they unfold, these cases probably also shed some light on possible judicial strategies concerning the most suitable approach toward the protection of rights.³³

The nature of judicial review of the constitutionality of laws is an entirely different matter that contrasts with statutory interpretation. The supremacy of the Constitution has always lain at the heart of Canadian constitutional law, and this has increasingly become the case. If parliamentary sovereignty does exist, it may only be exercised within the limits established by the Constitution. The most obvious example of this is the division of legislative jurisdictions: the sovereignty of the federal Parliament and the provincial legislatures can only be exercised in a limited context—within the subject matters assigned to them by the Constitution. Since 1982, Canadian parliamentary sovereignty has been subjected to new limits: it may only be exercised within the limits of the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*. Surely, the precise definition of the content of these rights and freedoms does not flow indisputably from an analysis of the constitutional text, as studiously as the text may be analyzed. The considerable powers of assessment conferred upon judges in the interpretation of these vague constitutional norms escape no one. And it is regarding this definition of rights and liberties and the evaluation of the inconsistency between these and democratically enacted legal rules that we sometimes ask judges to intervene with restraint, deference and caution. However, in the end, following a conclusion as to the existence of a conflict between a parliamentary enactment and a constitutional rule—both interpreted by judges—it is the Constitution itself that foresees its own precedence, this time in terms that cannot be more explicit.³⁴ At this point, one is no longer limited to a desperate attempt to respect the legislative intent or to convince others that this is what one is doing—it is in some ways too late. At this stage of constitutional remedy, the rules of the constitutional game are no longer the same: parliamentary sovereignty must give way to constitutional supremacy. Here, judges no longer need to excuse what they are doing since they are fulfilling a clear mandate. To speak of “interpretation” of an impugned law when one is in fact at the stage of imposing a remedy following a conclusion of unconstitutionality amounts to rhetoric that is both unconvincing and useless. The imposition of such a remedy is explicitly and unequivocally dictated by s. 52(1) of the *Constitution Act, 1982*.

33 See discussion below, text following n. 36.

34 *Constitution Act, 1982*, *supra*, n. 1 at s. 52(1), text quoted at n. 5.

Statutory interpretation also differs from the judicial remedying of an unconstitutional statute on a methodological level. Statutory interpretation is a question of law.³⁵ It is a question for the judge to decide, after having heard submissions of the parties to the case, when necessary. It involves no burden of proof and no judicial duty to eventually hear and adjudicate on evidence. It is for the judge to decide, according to her best judgment. Judges have judicial notice of the meaning of law, or at least, that is how the working fiction goes.

Judicial granting of a remedy in the context of constitutional litigation unfolds on the basis of different considerations. It usually requires facts and therefore involves burdens of proof. The role of the parties is more important, and so is their responsibility. Of course, the judge still has to decide, but within more explicit and constrained limits. The burden of proving a violation of rights is imposed on the party alleging the violation, while the party arguing in favour of the reasonableness of the putative violation will need to provide a proper factual foundation for its assertions. It is within the context of these burdens of proof that the judicial decision concerning constitutional remedies must be made and justified.³⁶

Finally, judicial interpretation of statutes and the granting of constitutional remedies do not raise the same concerns about legitimacy. Since statutory interpretation is what judges do, their ordinary day-to-day work, it will usually not raise issues of legitimacy. One does not call into question the power of judges to interpret statutes. It is unques-

35 The distinction between questions of fact and questions of law has been denounced and criticized. Yet it exists and plays an important and useful functional role. See D. Pinard, "Le droit et le fait dans l'application des standards et la clause limitative de la *Charte canadienne des droits et libertés*" (1989) 30 C. de D. (Université Laval) 137.

36 For a discussion of the illusion of inevitability of judicial decisions rendered in a factual context of burdens of proof, see D. Pinard, "Constitutional Boundaries and Judicial Review – Some Thoughts on How the Court is Going About its Business: Desperately Seeking Coherence" (2004) 25 Sup. Ct. L. Rev. (Second Series) 213. The author writes: "[E]mphasis on facts could lead to a trend of jurisprudence that presents itself as passive. For this evidence rhetoric enables the Court to declare that a violation has or has not been established or that the reasonable nature of the infringement has or has not been demonstrated. It can thus distance itself from the decision, or even refuse to take responsibility for it: the Court does not *decide* the existence of an infringement on rights or the reasonableness of limits imposed by the state, but rather it merely *observes* those extraneous and pre-existing realities, in light of the evidence presented" (at 217).

tionably an institutional role that is theirs. They may be criticized for the way they do it—for not sufficiently relying on the wording of a provision, for example—but not for actually doing it. Rather, it is the judicial review of statutes on constitutional grounds, and the related granting of remedies, that fuels the debate about legitimacy. Although democratic values can make room for judicial interpretation of statutes, they may require some justification for their modification or striking down by a non-elected judiciary, a much more debatable and politically controversial aspect of judging. Judges are therefore watched, scrutinized, analyzed and criticized when they grant constitutional remedies. An attempt to sidestep this inconvenient scrutiny may underlie the considerably activist—to say the least—statutory interpretation that one finds in the majority judgments in *Canadian Foundation* and *Montreal (Ville)*. The judgments validate statutory enactments made by democratically elected representatives. At least on a formal level, they express a deference that in some quarters is often wished for. But they do so after having reconstructed those enactments at the statutory interpretation phase, when judges are the ones who set the rules and apply them. Extreme interpretation may become a field where judges can fulfill an important role in the protection of rights—as their intention seems to have been in *Canadian Foundation* and in *Montreal (Ville)*—without being subjected to the critical scrutiny usually associated with judicial crafting of constitutional remedies.

Interpretation of laws and the imposition of remedies in cases of unconstitutionality are therefore activities that are quite distinct. To use the very same terms to describe them both can only generate confusion.³⁷

Although it may not be the prime cause of the confusion, the *Schachter*³⁸ case, the landmark ruling on Charter remedies rendered by the Supreme Court of Canada in 1992, certainly bears considerable responsibility for the confusion permeating the jurisprudence about the differences between interpretation of a law and the constitutional remedies imposed for reasons connected to the *Canadian Charter of Rights and Freedoms*.

37 For a similar analysis, see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000) who writes at 370: “Interpretation to avoid invalidity as a technique to determine the probable intention of the legislature must be distinguished from certain other techniques whose goal is to correct, by way of actually rewriting the text, a recognized unconstitutional text.”

38 *Schachter*, *supra*, n. 2.

In *Schachter*, the Court affirms that under s. 52(1) of the *Constitution Act, 1982*, four options are available to a court following a ruling of unconstitutionality (therefore, including a determination as to the absence of a justification according to s. 1 of the Charter):³⁹ it can strike down a provision, strike it down but temporarily suspend the effects of the declaration of invalidity, or, writes the Court, it may apply the techniques of “reading down” (or severance) or of “reading in.” According to the Court, severance, or “reading down,” consists of declaring only the unconstitutional portion of the statute or provision to be of no force or effect and may be used when this unconstitutionality results from a wrongful inclusion.⁴⁰ “Reading in” consists of declaring inoperative only the wrongful exclusion of certain situations from the scope of the legislation, when this exclusion is the source of the unconstitutionality.⁴¹ The logical effect of “reading in” is therefore the extension of a statute’s reach.⁴²

After reminding the reader that severance or “reading down” is a common practice in constitutional matters, the Court attempts to demonstrate that “reading in” is its logical counterpart. Consequently, to treat these remedies differently would be arbitrary since the only possible distinction between them would be artificial and based upon the legislative drafting style.⁴³

In the Court’s view, “reading in” and severance both serve the same purpose. They allow the courts to ensure a respect for the role of legislature by preventing unjustified judicial intrusion into the legislative domain.⁴⁴ Furthermore, they may sometimes be more compatible with the goals of the Charter than would be a simple declaration of invalidity.⁴⁵

The Court specifies that severance and “reading in” should play a role only in the clearest of cases, and it draws up a number of criteria aimed at clarifying the choice of an appropriate measure or remedy.⁴⁶ “Reading in” and severance should not be used unless the cases to include or exclude can be defined with relative precision. Their use must not constitute an unjustified intrusion into the legislative domain, particularly regarding financial decisions. One must also question whether

39 *Ibid.*, at 695.

40 *Ibid.*, at 698.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*, at 700 ff.

45 *Ibid.*, at 701 ff.

46 *Ibid.*, at 705 ff.

the striking down of only the inconsistent portion has the effect of changing the meaning of the remaining portion to such an extent that it is improper to assume that legislature would have nevertheless enacted the statute in its newly excised state. Finally, the history and importance of the remaining portions may serve as indicators of the likeliness that legislature would have enacted the provisions even in the absence of the impugned inclusion or exclusion.

Regardless of the wisdom of judicial correction of unconstitutional laws,⁴⁷ it is *Schachter's* establishment of an association between the interpretation of a law and the constitutional remedy potentially imposed upon it that presents the problem of interest to us here. To use terminology associated with statutory interpretation⁴⁸ when the judicial act consists of adding or removing applications that otherwise would have been said to have been included or excluded according to the intentional will of Parliament, amounts to a complete misrepresentation of the concept.

Section 52(1) of the *Constitution Act, 1982* provides for the remedy of unconstitutionality: the legal rule that is inconsistent with a constitutional provision is to be of no force or effect, i.e., inoperative. The application of s. 52 presupposes the fulfillment of prior stages of analysis: first, interpretation of the impugned provision, thus seeking the legislative intent from which it originates; second, interpretation of the constitutional provision expressing the rule with which it is claimed the legislative provision is inconsistent; third, concluding as to the existence of an inconsistency; and fourth, evaluating that it is not a limit permitted by s. 1 of the Charter. Then, and only then, can the provision be declared inoperative, the remedy provided for by s. 52. It is misleading to claim that at this point one can *interpret* the impugned statute or provision in such a manner as to include or exclude certain applications. One may be adding or perhaps removing, but one is not interpreting—at least, not according to the accepted meaning of the term in Canadian law. In fact,

47 The appropriateness of judicial correction of unconstitutional laws, as opposed to a simple and straightforward declaration of their inoperative nature by virtue of s. 52(1) of the *Constitution Act, 1982*, is a question of political philosophy and is beyond the scope of the present text. The focus here is rather on judicial methodology in Charter matters.

48 In *Schachter*, the Court adopted an English terminology for remedies that had theretofore been specific to legislative interpretation. The same is true of the terminology adopted by the French translation of the ruling, with the additional complicating and obscuring factor that the French terms adopted expressly include the word *interprétation*.

one is acting in direct contravention of legislative will as manifested in the impugned text, since one has previously determined through correct interpretation that the law's constitutional defect was precisely the very exclusion or inclusion that one now seeks to remedy.⁴⁹

1.1.3. ACCOUNTING FOR THE CONFUSION

A number of competing factors have created this apparent confusion between interpretation of a law and the imposition of a remedy in cases of unconstitutionality, whether they be similarities between the execution of these activities and their results [A]), jurisprudence that is already filled with uncertainties [B]), or French versions of certain judicial opinions that seem to result from translations that are at best only approximate [C]).

A) *Similarities*

i) *Process*

Interpretation of laws and the imposition of constitutional remedies have in common the power to extend or restrict the meaning of a legislative provision, and to add or subtract from its words.

Interpretation

Even in its most traditional manifestation and outside of any constitutional litigation, the interpretation of laws has always permitted the restriction or extension of the primary and apparent meaning of a provision, and the addition or removal of terms from the statute's wording.

It is a given that recourse to a law's objectives for the purposes of interpretation will often lead to restricting⁵⁰ or expanding⁵¹ the superficially apparent meaning of its provisions.⁵²

49 In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 1998 CarswellAlta 210, 1998 CarswellAlta 211 (S.C.C.) [hereinafter *Vriend*], the Court recognizes the divide separating judicial review and the respect for legislative will in the following terms (at para. 166): "[B]y definition, Charter scrutiny will always involve some interference with the legislative will," and at para. 167: "Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent."

50 R. Sullivan, *supra*, n. 6 at 223.

51 *Ibid.*, at 225.

52 P.-A. Côté, *supra*, n. 37 at 395.

Similarly, although in theory much emphasis is placed upon a presumption of the appropriate wording of laws, this presumption against the addition or deletion of terms⁵³ is not immutable. It is conceivable that the correct interpretation of a provision would lead to the addition or removal of certain terms. In this manner, as Côté writes, “[I]f the judge makes additions in order to render the implicit explicit, he is not overreaching his authority.”⁵⁴ Furthermore, it is possible that the text contains redundancies and that certain terms used add nothing to the legislative message. Proper interpretation would then imply ignoring those terms deemed to be redundant. It should however be noted that here we are referring to the wording of the statute and not to the rule that it is meant to express. Indeed, depending on the style of drafting, the addition or removal of terms can have the effect of extending or restricting a statute’s reach.⁵⁵

Reading Down, or Conciliatory Interpretation: A Particular Interpretive Technique

The question of conciliatory or restrictive interpretation, known in English as “reading down”,⁵⁶ has traditionally been raised at the preliminary stage of interpretation of the impugned provision when one asks whether, based on the language used, the provision in question may be given an interpretation consistent with the Constitution. This interpretive principle obviously plays a role only in those cases where the legislative text allows for it. It in no way authorizes one to contradict clearly expressed legislative will.⁵⁷ As much as is reasonably possible, the prin-

53 *Ibid.*, at 275.

54 *Ibid.*, at 276.

55 See R. Sullivan, *supra*, n. 6 at 223.

56 In its use here, the expression “reading down” is to be understood in the sense it had prior to *Schachter*.

57 In *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 CarswellBC 851, 2002 CarswellBC 852 (S.C.C.) [hereinafter *Bell ExpressVu*], the Supreme Court of Canada recently recalled that “to the extent this Court has recognized a ‘Charter values’ interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations” (para. 62).

ciple advocates for interpreting an impugned statute in a manner that conforms to the Constitution. Theoretically, this principle comes into play at a stage that logically precedes any decision about the constitutionality of the law, as would all other principles of interpretation.⁵⁸ It is a law whose meaning and reach are determined, a law that is first interpreted and understood, that is then subjected to the constitutional test. In this initial phase then, the meaning of the impugned law will be determined according to the ordinary principles of legal interpretation: the meaning of the rules will be sought in light of the words used, the context and the objective pursued by legislature. In the course of this determination, results that are absurd, unreasonable and unconstitutional will be avoided to the extent permitted by textual constraints. The principle in question here is merely a particular manifestation of the more general principles of legal interpretation. Generally, "reading down" or conciliatory interpretation will be accomplished by interpreting a text of great reach in such a way as to exclude those applications of the law that would be unconstitutional.⁵⁹

In the context of constitutional litigation concerning the division of legislative powers, conciliatory interpretation essentially served to limit the reach of certain statutes so as to avoid intrusions into matters deriving from the powers of the other legislative authority. It is therefore not surprising that conciliatory interpretation has been connected with the idea of restricting a statute's reach, the traditional "reading down."

Thus, the reach of legislation formulated in general, abstract terms has sometimes been restricted so as to confine it within the limits of the constitutional powers of the enacting authority. More specifically, it consists of interpreting a statute formulated in general terms as applying only to situations that would fall within the jurisdiction of the parliament

58 Elsewhere, I have raised the subject of the theoretical nature of this official chronology requiring that legislative interpretation precede any determination of its constitutionality. See D. Pinard, *supra*, n. 23 at 317: "Bien sûr, cette conception est théorique et abstraite à l'excès, car le doute relatif à la constitutionnalité pré-existe évidemment à l'exercice interprétatif : l'interprétation conciliatrice est probablement faite dans le but même d'éviter d'avoir à en arriver à un jugement d'inconstitutionnalité." See also the following remarks of Justice Sopinka, writing on behalf of the Court in *Osborne*, *supra*, n. 7 at 102: "[I]n order to determine which interpretation is consistent with the Charter, it is necessary to determine what aspects of the statute's operation do not conform."

59 See D. Pinard, *supra*, n. 23 at 315-316.

that enacted the legislation. The classic example of this is the famous *McKay*⁶⁰ case, to which the Court curiously makes no reference whatsoever in *Schachter*. In *McKay*, provincial regulations regarding erecting signs were interpreted as not applying in the context of a federal election. In words that have since become the classic formulation, Justice Cartwright, writing for the majority, explained the principle of conciliatory interpretation in the following manner⁶¹:

... if an enactment whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted.

In constitutional litigation involving the infringement of rights and freedoms, where the style of legislative drafting so permits, the alleged constitutional problem may also be avoided by an honest effort at interpreting the impugned text. Initially, there were doubts as to the possibility of applying the principle of conciliatory interpretation or "reading down" in Charter matters.⁶² However, the importance of interpreting laws in such a manner as to conform to the Charter has since been

60 *McKay v. R.*, [1965] S.C.R. 798, 1965 CarswellOnt 73 (S.C.C.) [hereinafter *McKay*].

61 *Ibid.*, at 803-804.

62 For example, see Justice Beetz's famous *obiter* from *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*) [1987] 1 S.C.R. 110, 1987 CarswellMan 176, 1987 CarswellMan 272 (S.C.C.) at 125 [S.C.R.] [hereinafter *Metropolitan Stores*]:

Still another meaning of the 'presumption of constitutionality' is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the 'reading down' of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature. . . . The extent to which this rule of construction otherwise applies, if at all, in the field of the Charter is a matter of controversy. . . . I refrain from expressing any view on this question which also arises only when the merits are being considered.

confirmed. Thus, we find the following passage in the *Slaight Communications*⁶³ ruling:

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect.⁶⁴

Following a period of relative uncertainty, it is therefore now well-established that the principle of conciliatory interpretation does in fact apply regarding the *Canadian Charter of Rights and Freedoms* and that “[i]f a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted.”⁶⁵

63 *Slaight Communications, supra*, n. 21.

64 *Ibid.*, at 1077-1078.

65 *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 CarswellBC 82, 2001 CarswellBC 83 (S.C.C.), majority opinion, at para. 33 [hereinafter *Sharpe*]. Also see the remarks of the dissenting justices in *R. v. Lavallee, Rackel & Heintz*, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) [2002] 3 S.C.R. 209, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819 (S.C.C.) at para. 54-57; *Solski c. Québec (Procureure générale)*, (sub nom. *Solski (Tuteur de) c. Québec (Procureur général)*) [2005] 1 S.C.R. 201, 2005 CarswellQue 761, 2005 CarswellQue 762 (S.C.C.) at para. 36 [hereinafter *Solski*]. However, the constitutionally recognized power of parliaments to limit rights and freedoms renders the task of conciliatory interpretation somewhat more complex in Charter matters. A precise determination of the role that state justification of violations of rights and freedoms ought to play in interpretation is problematic. Since interpretation of the impugned provision theoretically precedes a determination of its constitutionality, should one consider the possibility of interpreting the provision as simply not violating any rights or freedoms, without any examination of the reasonable limits that can be placed on those rights and freedoms? (See Justice Bastarache’s opinion on behalf of the majority in *R. c. G. (B.)*, [1999] 2 S.C.R. 475, 1999 CarswellQue 1204, 1999 CarswellQue 1205 (S.C.C.) at para. 45, that “applying the presumption of validity, we must prefer the interpretation that does not make the provision of no force or effect—if that interpretation is at all plausible—even if justification under s. 1 would be possible.” This also seems to be the opinion of the Court in *Bell ExpressVu, supra*, n. 57 at para. 64. Similarly, see also, R. Sullivan *supra*, n. 6 at 371). Is it not preferable to question whether the provision can be interpreted as placing a reasonable—and thus constitutionally permitted—limit on rights and freedoms? (This would seem to be Justice Sopinka’s position in *Osborne* when he writes, “It is argued that the course of action taken by Walsh J. was less of an intrusion into the legislative sphere than the remedy employed by the Court of Appeal. This submission is based on the notion that reading down of the statute to conform with the Charter does not involve a determination of invalidity of

When permitted by the accepted modes of interpretation, one could conclude based upon the language used that: 1) Parliament did not wish to cover those cases likely to lead to unconstitutional results or 2) Parliament did not wish to exclude those cases whose exclusion would likely lead to unconstitutional results.

For example, an interpretation in line with Charter values could dictate limiting the reach of a text creating an offence or else extending a rule creating a defence or bestowing certain benefits. In either case, this could be done either by adding or ignoring certain terms. However, as it is a principle of *interpretation*, conciliatory interpretation can only operate in cases where it is plausibly and reasonably founded upon the text and context and where the interpretation can logically be attributed to legislature's intent.

Further, if one distinguishes the legislative rule from its wording or its textual form, restriction of the rule's reach, thought of in an abstract manner, can concretely be brought about just as well by the addition of limiting terms (e.g. "only if") as it can be by ignoring certain terms of the provision's wording.⁶⁶ The result of a restrictive interpretation of the

the impugned provisions. The fallacy in this reasoning is that, in order to determine which interpretation is consistent with the Charter, it is necessary to determine what aspects of the statute's operation do not conform. The latter determination is in essence an invalidation of the aspects of the statute that are found not to conform. This requires not only a finding that a Charter right or freedom is infringed *but that it is not justified under s. 1*. This so-called 'reading down' of a statutory provision operates to avoid a finding of unconstitutionality. In a Charter case, this means not only an infringement of a right or freedom but one that is, as well, not a reasonable limit prescribed by law and justified under s. 1." *supra*, n. 7 at 102. [Emphasis added]). Would the first possibility not risk emasculating s. 1 of the Charter and depriving parliaments of their constitutionally recognized power to reasonably limit rights and freedoms? It seems that it was partly this concern that led the Court to insist that conciliatory interpretation must only take place in cases where there is genuine ambiguity in the legislative provision. In fact, Justice Iacobucci, writing for a unanimous Court in *Bell ExpressVu*, at para. 64, expressed this fear that an abusive use of reading down could prevent government from "justify[ing] infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place." According to the second possibility, what would become of burdens of proof? If it is truly an interpretive exercise, could the courts carry out the deliberations required by s. 1 in the absence of any state-presented evidence, in what has elsewhere been criticized as an unacceptable "factual void"? Clearly, both possibilities present definite challenges.

66 Carol Rogerson, "The Judicial Search for Appropriate Remedies Under The *Charter*: The Examples of Overbreadth and Vagueness," in Robert J. Sharpe,

rule can therefore be attained by the addition of terms to its wording, just as it can by their removal.

However, one frequently confuses the effect that “reading down” has upon the reach of a rule and its impact upon the wording of the legislation.⁶⁷ This confusion is to be found in jurisprudence. This is the case with certain statements one finds in *Metropolitan Stores*,⁶⁸ where Justice Beetz remarks that a particularity of the conciliatory interpretation discussed in the *Southam*⁶⁹ case was that it “was a question of ‘reading in,’ not ‘reading down.’”⁷⁰ In *Southam*, the issue was the possibility of limiting the reach of a power to search provided for by law. Contrary to Justice Beetz’s affirmation, it was in fact a case of “reading down” in the traditional sense of the term, the sense it had prior to *Schachter*—a case of limiting the reach of a rule. What was particular about the case was that limiting the rule’s reach would have required establishing detailed parameters in order to ensure its constitutionality. These parameters might have consisted of diverse details, and their concrete expression would therefore have required the addition of provisions to the wording of the rule.

Certainly, concerns about the certainty and predictability of law have their place in discussions about the appropriateness of recourse to “reading down” as an interpretive technique. In effect, even where for other reasons it may be appropriate, “reading down” of a legislative provision should only be used in the case where, for example, it involves limiting the reach of terms in a way that can be clearly formulated with the help of categories that are relatively simple and well-defined. In this manner, it should never lead to interpretation of a rule as being valid “to an extent that does not violate the Constitution,” where each case would

ed., *Charter Litigation* (Toronto: Butterworths, 1987) 233 at 248: “Although *reading down* can be thought of as the *reading in* of a limitation or the *reading in* of an exemption, attention has not been directed to the ‘*reading in*’ aspect of the doctrine.”

67 Below, Section 2.1.1., on the importance and difficulty of distinguishing a legal rule from its textual format.

68 *Metropolitan Stores*, *supra*, n. 62.

69 *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, (sub nom. *Hunter v. Southam Inc.*) [1984] 2 S.C.R. 145, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) [hereinafter *Southam*].

70 *Metropolitan Stores*, *supra*, n. 62 at 125.

require a precise and individual evaluation of the constitutionality of the law's application.⁷¹

Imposing Remedies by Virtue of the Principle of Constitutional Supremacy

Section 52(1) of the *Constitution Act, 1982* provides that the Constitution renders any law inconsistent with it to be of no force or effect, to the extent of the inconsistency. By virtue of this principle of supremacy of the Constitution, a legal rule may simply be declared unconstitutional. However, the courts have developed remedies that are more refined and better suited to peripheral problems of constitutionality where the statute wrongly includes or excludes certain marginal cases. According to these more refined remedies, the courts may include within the statutory scope cases that were unconstitutionally excluded, or exclude those cases that Parliament wrongly included. In this manner, while the legal rule is consequently limited or extended, terms may be added or removed from its wording. In this case, the principle of constitutional supremacy is the basis for these remedies that are imposed in clear violation of legislative intent.

Thus, interpreting laws and imposing constitutional remedies may both equally lead to either the extension or limitation of a rule's reach and to the addition or ignoring of certain terms. It is this similarity in both processes that may lead one to confuse them.

ii) Ultimate Result

A similarity in effect also tends to obscure the difference between interpretation of a legal rule and the constitutional remedy that may be imposed upon such a rule. Both lead to the same concrete result. Whether a legal rule is interpreted as not applying to certain cases or whether a court chooses to restrict the legislatively intended reach of that rule by virtue of the principle of constitutional supremacy, in both instances the legal rule will not apply to the litigious cases.⁷² However, despite a

71 For a discussion of the inconveniences of conciliatory interpretation that requires a precise evaluation in each of its applications, see C. Rogerson, *supra*, n. 66 at 266.

72 Similarly, see *R. v. Canadian Pacific Ltd.*, (sub nom. *Ontario v. Canadian Pacific Ltd.*) [1995] 2 S.C.R. 1031, 1995 CarswellOnt 968, 1995 CarswellOnt 532 (S.C.C.), Lamer J. at para. 15: "It is important to note, however, that the

convergence in concrete results, the reasoning, founding principles and conditions of these two routes remain distinct.⁷³

B) Division of Powers Litigation

When examined more closely, it becomes clear that litigation based on federalism issues was no less replete with these ambiguities in the distinction between statutory interpretation and the constitutional remedies imposed, as the case may be.

The judicial determination of the validity, divisibility or operative nature of legislation does not seem to be filled with this confusion between remedy and interpretation.⁷⁴ However, the situation seems different when it comes to determining the constitutional applicability of statutes.

One does occasionally find judicial rulings in the context of division of powers that are marked by this imprecision, in cases where legislation is valid according to its pith and substance but contains a peripheral or marginal constitutional problem, in that certain applications of the law are problematic.

In this context, it is also important to distinguish the phases: first, the interpretation of the law, then, an eventual declaration of unconstitutionality—in this case, limited to certain instances of the law's application.

In principle, one must first question whether the law, correctly interpreted, truly causes the invoked constitutional problems. An example of this would be the direct application of a provincial law to an essential element of a federal undertaking.⁷⁵ It is at this stage that the presumption of constitutionality would come into play, as would the interpretive principle that favours the constitutional validity of a law out of respect

process of invoking the presumption of constitutionality so as to arrive at an interpretation different from that that would ordinarily result from applying the rules of statutory construction leads to essentially the same result as would be reached by adopting the ordinary interpretation, holding that the legislation is unconstitutional, and 'reading it down' as a remedy under s. 52 of the *Constitution Act, 1982*."

73 *Contra: ibid.*, Lamer J.

74 Below, Section 1.2., for a discussion of another confusion that exists, this time among remedies themselves.

75 On this question, see *e.g. Irwin Toy Ltd. c. Québec (Procureur général)*, (sub nom. *Irwin Toy Ltd. v. Québec (Attorney General)*) [1989] 1 S.C.R. 927, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.).

for the fiction of legislative intent presumably expressed in the text of the law.

One therefore presumes that the legislature wished to limit its operations to those matters that fall within its constitutional jurisdiction.

In doing so, problematic applications of the law are dismissed from the start since the court considers that the law, correctly interpreted, does not affect those cases.

In this manner, Justice Beetz writes in *Québec (Commission de la santé & de la sécurité du travail) v. Bell Canada*,⁷⁶ “[T]here is serious reason to doubt that the Quebec legislator thought the Act would apply to federal undertakings or intended that it should”⁷⁷ and “[t]he limited scope of the Act. . . is consistent with the presumption that the legislator did not intend to give a statute unconstitutional effect by regulating the management of federal undertakings.”⁷⁸

If, on the contrary, the court arrives at the conclusion that the law, correctly interpreted, was meant to apply to all these cases, the principle of constitutional supremacy authorizes a declaration of unconstitutionality. At this point, the ruling of unconstitutionality aims only at those areas of application that are forbidden by the division of powers. In these cases, one speaks of a valid law that is constitutionally inapplicable to certain cases.

As *Bell Canada*⁷⁹ reminds us, “[T]his exclusivity [in division of powers] suffices. . . to remove federal undertakings from the scope of a [provincial] statute of the same type.”⁸⁰ In this case, the conclusion reached is that certain “sections of [the provincial Act]. . . are [not] constitutionally applicable to Bell Canada.”⁸¹

Case law resulting from division of powers litigation does however reveal certain ambiguities.⁸² In this regard, one sometimes finds that

76 *Québec (Commission de la santé & de la sécurité du travail) v. Bell Canada*, (sub nom. *Bell Can. v. Québec (Comm. de la santé & de la sécurité du travail)*) [1988] 1 S.C.R. 749, 1988 CarswellQue 100, 1988 CarswellQue 136 (S.C.C.) [hereinafter *Bell Canada*].

77 *Ibid.*, at 815.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.* “Such provincial legislation is inapplicable to federal undertakings when it has the effect of regulating matters which fall within the primary jurisdiction of Parliament. . . . [T]he Act encroaches on a field that falls within the exclusive jurisdiction of Parliament and is, for this reason, not applicable to federal undertakings. . . .” (at paras. 219, 306).

81 *Ibid.*

82 On this issue, see D. Pinard, *supra*, n. 23 at 319 ff.

even within the same opinion, judges' remarks may oscillate between a discussion of the presumed legislative intent not to touch matters deriving from the other jurisdiction and a discussion of the obligation of judges to declare unconstitutional those applications of the law that would otherwise have been desired by legislature.⁸³

The fact that regarding the very same constitutional problem, one finds reference to a provincial statute:⁸⁴

- that should be read down⁸⁵ [terminology used in interpretation],
- as a remedy⁸⁶ [terminology used regarding constitutional remedies],
- in such a way as to be declared inapplicable⁸⁷ [terminology relating to constitutional applicability of certain provisions],

83 See *Bell Canada*, *supra*, n. 76. This same confusion between interpretation and remedy is also found in other types of constitutional cases. For example, see *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) regarding a provision of the *Young Offenders Act* that contravened powers of the superior courts protected by s. 96 of the *Constitution Act, 1867*, where reference is made to both the necessity of "reading down" and the partly inoperative character of the rule. See Justice Beetz's opinion, writing for the majority at para. 43 that a section of the *Young Offenders Act* is "is unconstitutional to the extent that it purports to confer exclusive jurisdiction on the youth court. . . . The section should be read down. . . . As read down, the section is inoperative to deprive the superior court of its jurisdiction to convict the appellant of contempt in this case."

84 *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.), which discusses the constitutional problems raised by the application of certain provincial legal rules in the context of bankruptcy.

85 *Ibid.*, at para. 3: "Consistent with the presumption of constitutionality, it is my opinion that s. 133 should be read down to the extent of the conflict. . ." and at para. 81: "Consistent with the presumption of constitutionality – that the enacting body is presumed to have intended to enact provisions which do not transgress the limits of its constitutional powers – the provincial law should be read down to the extent of the conflict. In other words, it should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body."

86 *Ibid.* The heading preceding para. 81 reads as follows: "(c) The Appropriate Remedy: Is Section 133 Inapplicable or Inoperative?"

87 *Ibid.*, at para. 3: "[S.] 133 is inapplicable in bankruptcy"; at para. 81: "[T]he impugned legislation must be declared inapplicable rather than inoperable in bankruptcy."

- because it conflicts with a federal law⁸⁸ [while one usually refers to the inoperative character of a provincial statute that is valid and applicable, but in operational conflict with a valid and applicable federal statute]

illustrates the conceptual imprecision sometimes found in division of powers litigation regarding interpretation of the impugned law, the imposition of a constitutional remedy, and the distinction between constitutional remedies themselves.⁸⁹

C) *The French Translation of Judgments*

Finally, one must question the role of the French translation of certain Supreme Court decisions in maintaining this confusion between interpretation and remedy.

Unfortunately, to this day, there is nothing that explicitly provides an official status to the translation of Supreme Court rulings (nor of any other court for that matter). The Supreme Court of Canada may render its decisions in English or French.⁹⁰ There does only seem to be a statutory obligation to simultaneously provide the public with rulings in both official languages when the point of law in dispute is of interest or importance to the public or when the arguments and proceedings were bilingual.⁹¹ Nevertheless, above and beyond any such precise instruction in positive law, perhaps by virtue of superior principles such as the principle of accessibility that is inherent in the idea of the rule of law, one should be entitled to count on the fact that the English and French versions of Supreme Court of Canada rulings convey the same message. In many cases, it makes sense to presume that the Canadian francophone legal community will only consider the French version of a decision, to

88 *Ibid.*, at para. 81: "However, as bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict (*Tennant v. Union Bank* (1893), [1894] A.C. 31, 1893 CarswellOnt 35 (Ont. P.C.); *Crown Grain Co. v. Day*, [1908] A.C. 504, 1908 CarswellMan 158 (Manitoba P.C.)) and it becomes inapplicable to that extent."

89 Below, Section 1.2.

90 *Constitution Act, 1867*, 30 & 31 Vict., U.K., c. 3, s. 133.

91 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 20.

the same extent that the anglophone community will rely on the English version of the same decision.

In fact, it is the French version of *Schachter* that uses terminology directly drawn from statutory interpretation (*interprétation large* and *interprétation atténuée*) to refer to remedies available in cases of unconstitutionality. Compared with the impression of a relatively passive discovery given by the rhetorical use of the term *interprétation*, the terms “reading in” and “reading down” in the original English text, though also associated with statutory interpretation, are at least better at allowing the idea of judicial *intervention* through the addition or removal of applications to show through.

The expression *interprétation atténuée*, already had a particular meaning in jurisprudence and doctrine: it was an interpretative principle that derived from the presumption of constitutionality.⁹² *Schachter* gives it a new meaning as a remedy that applies when certain applications of a law are held to be unconstitutional. Since the earlier meaning continues to exist after *Schachter*, there are now two types of *interprétation atténuée*: one that plays a role in the initial stage of true interpretation of an impugned statute, and the other which comes into play at the end of the process, as a constitutional remedy. *Sharpe*⁹³ illustrates these two stages well. In the initial portion of her opinion, where she is interested in the correct interpretation of the impugned provision, Justice McLachlin first refers to the principle of interpretation that favours the constitutional validity of laws.⁹⁴ It is only once it is determined that, correctly interpreted, the provision still involves certain unreasonable limitations of freedom of expression that she then, from the perspective of remedies, takes up the possibility of *interprétation atténuée*, within the meaning given to the expression in *Schachter*.⁹⁵

Furthermore, in a number of the Court's recent decisions, one finds what seems to be a new translation of the term “reading down” as a constitutional remedy in *Schachter*'s sense. In fact, *interprétation atténuée* seems to be in the process of becoming *interprétation atténuante*.⁹⁶

92 Above, Section 1.1.2.

93 *Sharpe, supra*, n. 65.

94 *Ibid.*, at para. 33.

95 *Ibid.* It is only at this last stage of remedies analysis that Justice McLachlin uses the term “reading down.”

96 For examples of the use of the new French phrase *interprétation atténuante* to refer to a constitutional remedy in *Schachter*'s sense, see *Little Sisters, supra*, n. 11 at para. 214, 252; *Sharpe, supra*, n. 65 at para. 114; *K Mart Canada Ltd. v. U.F.C.W., Local 1518*, (sub nom. *U.F.C.W., Local 1518 v.*

Although originality and variety may have their place in the world of law, consistency in the use of terms nevertheless remains an essential quality.

As for the expression *interprétation large*, it too had a well-established meaning in the realm of interpretation of laws that was widespread and not limited to the constitutional context. For example, federal and Quebec Interpretation Acts suggest that every enactment should be given an interpretation “la plus large qui soit compatible avec son objet,”⁹⁷ should receive “une *interprétation large* et libérale qui assure l’accomplissement de son objet.”⁹⁸ *Schachter* gives a new meaning to this expression, which now refers to the remedy that consists of adding applications that were unconstitutionally excluded from the law’s reach.

It is interesting to retrace the possible sources of the confusion of terms established by the French version of *Schachter* in earlier jurisprudence, since it is possible that *Schachter* retained something that earlier cases did not actually affirm.

That is, it is possible for the original context in which certain statements in judicial decisions were made to be forgotten, while the statement itself is retained as a statement of principle. This is the case with certain remarks made by Justice Dickson in *Southam*⁹⁹ about the respective roles of judges and parliaments regarding the constitutional consistency of legislative rules. While Justice Dickson writes: “It should not fall to the courts to fill in the details that will render legislative lacunae constitutional,”¹⁰⁰ one must remember that he does so as part of a discussion about the limits inherent in the interpretation of impugned leg-

KMart Canada Ltd.) [1999] 2 S.C.R. 1083, 1999 CarswellBC 1909, 1999 CarswellBC 1910 (S.C.C.) at para. 8 [hereinafter *K Mart Canada*]; and *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 CarswellNat 3225, 2002 CarswellNat 3226 (S.C.C.) at para. 60. What is even more distressing is the very recent use of the same new French phrase to refer to the traditional statutory interpretation technique known as “reading down.” See the French text of the Supreme Court judgment in *Solski*, *supra*, n. 65—a case in which the Court interpreted a provision of the Quebec *Charter of French Language* to conform with the *Canadian Charter of Rights and Freedoms* and was therefore able to conclude that the legislative provision, “properly interpreted” (para. 61), was constitutional—where one reads at para. 36: “Le fait de donner à l’art. 73 une interprétation atténuante pour qu’il reste dans le champ des mesures autorisées par l’art. 23 de la Charte canadienne. . .est justifié. . .”

97 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12 [emphasis added].

98 *Interpretation Act*, R.S.Q., c. I-16, s. 41 [emphasis added].

99 *Southam*, *supra*, n. 69.

100 *Ibid.*, at 169.

isolation. By saying so, he is responding to the claim that the Court should interpret the latter as including criteria that are actually absent from the text but that are constitutionally required, an argument which raises an analogy to the “reading down” done in *McKay*.¹⁰¹ It is therefore as part of a discussion about the limits of judicial creativity in the interpretation of laws that he refers to the impossibility of using interpretation to resolve something flagrantly unconstitutional—in this case, the absence of precise legislative parameters.¹⁰² However, he is in no way making a statement about the leeway available in delineating constitutional remedies imposed by virtue of s. 52(1) of the *Constitution Act, 1982*. Thus, although Justice Dickson has used the terms “reading into” and “*ajout au moyen d'une interprétation large*” in the context of a Charter litigation in 1984, it is regarding the *interpretation* of impugned legislation, in the traditional sense of the term. One cannot make use of his words

101 *McKay, supra*, n. 60. These are the pertinent remarks from *Southam* (at 168):
The appellants submit that even if subss. 10(1) and 10(3) do not specify a standard consistent with s. 8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the *Charter*, but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *McKay v. R.*, [1965] S.C.R. 798, in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be ‘read down’ so as not to apply to election signs.

102 *Southam, supra*, n. 69 at 168-169:

In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants’ submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. 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. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the *Charter*. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold subss. 10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

to justify the use of a new vocabulary to designate the remedies available through s. 52(1) of the *Constitutional Act, 1982*.

Similarly, certain remarks by Justice Beetz in *Metropolitan Stores*¹⁰³ should also be placed in their original context. Recalling the interpretive rule resulting from the presumption of constitutionality in division of powers matters, according to which "an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution,"¹⁰⁴ Justice Beetz notes that in *Southam*,¹⁰⁵ the Court refused to make use of this sort of interpretation in the context of a Charter case. He mentions concisely that in the latter affair, it was a case of "reading in" (*interprétation large*) and not "reading down" (*interprétation atténuée*). He concludes that it is not necessary for him to express an opinion as to the applicability to Charter matters of this principle of interpreting laws in such a way as to maintain their constitutionality. In this case, the contrast between *interprétation large* and *interprétation atténuée*, perhaps expressed here for the first time in constitutional litigation, is connected to the realm of interpretation and not to that of remedies.

1.2 DISTINCTIONS BETWEEN CONSTITUTIONAL REMEDIES

The confusion between the stage of interpretation of impugned legislation and that of the imposition of a constitutional remedy does not fully explain the current jurisprudential inconsistencies regarding remedies.

Numerous imprecisions mark the judicial discussion of remedial options available following a ruling of unconstitutionality.

Herein, we are interested in the remedies of "reading in," "reading down," and divisibility, which pertain to the infringement of rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. An additional confusion is generated among these remedies by a lack of distinction between the legal rule and its literal formulation. In effect, the discussion would be greatly clarified by treating the constitutional remedy of the legal rule distinctly from the ulterior and secondary issue of the necessary modification to its textual medium.

103 *Metropolitan Stores, supra*, n. 62.

104 *Ibid.*, at 125

105 *Southam, supra*, n. 69.

The following sections deal with the identification of characteristics that distinguish “reading down” from “reading in” (1.2.1.) and those that distinguish “reading down” from divisibility (1.2.2.).

1.2.1. READING DOWN AND READING IN

The initial development of the distinction between “reading down” and “reading in” [A]) and later jurisprudence dealing with constitutional remedies [B]) are marked by a fundamental confusion.

A) *Establishing the Distinction: The Principle and the Inconsistencies*

Whereas reference to the contrast between “reading in” and “reading down” predates *Schachter*,¹⁰⁶ it is this latter case that officially established the use of these terms to refer to constitutional remedies.

The conceptual boundaries of “reading down” and “reading in” are rather vague.

According to the Court in *Schachter*, “reading down” essentially consists of declaring only that part of a statute or provision that violates the Constitution to be of no force or effect¹⁰⁷ in cases where the constitutional inconsistency results from what the statute wrongly includes.¹⁰⁸ As for “reading in,” the Court writes that it consists of extending the reach of a statute in cases where the inconsistency results from what the statute wrongly excludes.¹⁰⁹ In principle, the concepts used refer to the impugned rules, to the scope of the legal rules in question, rather than to their wording or drafting style. “Reading down” and “reading in” respectively refer to the limiting or extending of the rule’s reach, regardless of the drafting style of the provision that expresses the rule (i.e. whether it is formulated in general and abstract terms or whether it is an expressly stated wrongful inclusion or exclusion). The Court explicitly, and correctly, rejects the formalistic approach that would have one treat constitutional defects according to the style of legislative drafting used.¹¹⁰ With great pertinence, it reminds us that s. 52(1) of the *Consti-*

106 Above, text accompanying n. 103, for an analysis of *Metropolitan Stores*, *supra*, n. 62, which refers to *Southam*, *supra*, n. 69, but regarding questions of interpretation rather than constitutional remedies.

107 *Schachter*, *supra*, n. 2 at 696.

108 *Ibid.*, at 698.

109 *Ibid.*

110 *Ibid.*

tutional Act, 1982 prescribes that it is the law which is of no force or effect, to the extent of the inconsistency, and not the words used to express the law.¹¹¹

Consequently, the inconsistency, just like the remedy, must be determined in a substantive manner, regarding the content of the impugned law or legal rule(s), rather than in a literal manner focusing on the legislative text alone. Using this approach requires great precision in identifying and conceptualizing the impugned legal rule above and beyond its formal wording. This precision is all the more necessary since the terms “reading down” and “reading in” may be understood in the simpler and more immediately accessible sense of adding or subtracting terms from the legislation’s verbal formula.¹¹² It is tempting to remain at this literal level of understanding, focussed on a processing of the legislator’s particular use of words, as it leaves one with a deceptive impression of certainty, precision and lesser interventionism than does the judicial treatment of abstract legal rules.

Worse still, there is a risk of indiscriminately using the literal or substantive meaning of the terms “reading down” and “reading in”—or even making use of both meanings at once—leading one to occasionally compare the incomparable.¹¹³

Where a provision’s unconstitutionality results from that which it wrongly excludes, the corrective measure can therefore be the “reading in” of whatever was wrongly excluded, regardless of the drafting style used, and even if rather than adding words to the law, the eventual effect of the exercise is in fact the removal of words from the text of the law. For example, this would be the case of an expressly stated exclusion. In the same manner, when a wrongful inclusion is the source of unconstitutionality, the remedy may consist of “reading down” the impugned law, even if the concrete effect of the measure is to add words to the text (for example, the addition of conditions or exceptions whose effects are to limit the application of the legal rule).

111 *Ibid.*, at 699.

112 For example, Hogg writes that “*Reading in*. . . involves adding new words to a statute to remove a constitutional defect,” P. Hogg, *supra*, n. 6 at 37-12, note 51. Similarly, see also at 37-3.

113 See *e.g.* Peter Hogg, who writes, “*Reading in*, which involves adding new words to a statute to remove a constitutional defect, should not be confused with *reading down*, which involves giving a narrow interpretation to a statute in order to avoid a constitutional defect,” P. Hogg, *supra*, n. 6 at 37-12, note 57. Is this not a case of him comparing literal *reading in* with substantive *reading down*?

However, this substantive approach has not been used with all the consistency required, even in its original formulation in *Schachter*. For example, regarding *R. v. Swain*,¹¹⁴ a case in which the Court pronounced the unconstitutionality of provisions of the *Criminal Code* providing for the automatic detention at the lieutenant governor's pleasure of a person acquitted by reason of insanity because they violated one's liberty and contravened the principles of fundamental justice, Justice Lamer writes, "I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood. . . ."¹¹⁵ If one conceives of it according to the conceptual tools given by the Court, the possibility discussed in *Swain* seems to be that of "reading down," since its effect would be to exclude the problematic applications of the legal rule, even if it is to be achieved through the addition of words outlining criteria for its application. The discussion of *R. v. Hebb*¹¹⁶ also seems to be marked by the same confusion. There, the constitutional problem consisted of the legislative provision only allowing the court to examine whether an accused had the means to pay a fine before being incarcerated for non-payment in the case where the accused was between the ages of 18 and 22. In *Schachter*, Justice Lamer describes the problem presented in *Hebb* in these words: "The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision."¹¹⁷ It should be mentioned that the Court seems to indiscriminately use the expressions "severance" and "reading down." However, on a conceptual level, the *Hebb* case is an issue of "reading in" and not "reading down." In effect, the constitutional problem was the exclusion of a certain group. What is therefore called for is the "reading in" of this group, which may require the removal of certain terms from the legislative provision. Later on in the opinion, still regarding *Hebb*, one finds a more appropriate reference to the possibility of "expansion of the provision."¹¹⁸

The confusion between the substantive and the literal "reading down" and "reading in" is not without consequence. The Court asserts that one of the distinctions between both types of remedies consists of the fact that "reading down" can be used with greater precision than

114 *R. v. Swain*, [1991] 1 S.C.R. 933, 1991 CarswellOnt 93, 1991 CarswellOnt 1016 (S.C.C.).

115 *Schachter*, *supra*, n. 2 at 708.

116 *R. v. Hebb* (1989), 69 C.R. (3d) 1, 1989 CarswellINS 20 (N.S. T.D.).

117 *Schachter*, *supra*, n. 2 at 713.

118 *Ibid.*, at 713.

“reading in.” Consequently, the former is often more appropriate than the latter. The Court writes:

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.¹¹⁹

It is possible that the precision attributed to “reading down” holds true only for the literal “reading down,” the removal of terms from the wording of the legislative provision. In effect, the unconstitutionality that is crystallized in certain words of the legislative provision is easily identifiable, and its eventual correction through their removal is quite readily obvious.

However, the textual crystallization of an unconstitutionality may just as easily result from an underinclusive scope expressed by exclusions or by clearly outlined conditions for application, as it can from overinclusive legislation, as manifested in expressly provided cases to which the legislation applies.

These are questions of style and drafting which, according to the Court, should not determine the remedial options available.

In fact, on a substantive level, the use of the true “reading down” and “reading in” advocated by the Court presents virtually the same problems of imprecision. When an unconstitutionality results from the inclusion or exclusion of certain applications of the legal rule, regardless of the drafting style of the legislative provisions which provide for these cases, it is possible that the same imprecision is inherent in the wrongly included cases as it is in those wrongly excluded. According to the Court, the test should be that “the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution.”¹²⁰

Thus, although the Court seems to officially lean toward a substantive approach to the mechanisms of “reading down” and “reading in,” the distinction to be made between them will sometimes exist only in their textual or literal sense.

119 *Ibid.*, at 705.

120 *Ibid.*

The substantive approach seems preferable. Recognizing the distinction between a legal rule and its material expression in the legal text is essential.¹²¹ The Constitution provides for its own precedence over all laws or legal rules. It is laws or legal rules that create the rights and obligations that then may risk being contrary to the Constitution. It is in their regard that constitutional remedies are imposed. The concrete expression of the remedy in the wording of the provision is merely the remedy's secondary consequence.

B) Uncertainties and Inconsistencies: The Consequences

In large part, the failure to distinguish between the abstract impugned legal rule and its textual format, its concrete formulation, explains the confusion marking the judicial discussion about the remedies of "reading in" and "reading down." In *Schachter*, the Court suggested retaining an approach consisting of conceptualizing the legal rule, identifying the precise aspects of the latter that create a constitutional problem, and where applicable, examining the remedy of including or excluding certain of its applications. This seems to be the most appropriate and precise method available and devotes the proper attention to the substantive unconstitutionality of the rule, rather than to its formulation in written form.

However, this is an intellectually difficult exercise, and the Court, even in *Schachter*, fails to approach the subject with the requisite precision.

Post-*Schachter* jurisprudence is also often marked by the confusion between the addition or removal of words and the addition or removal of instances in which the rule itself, abstracted from its textual format, does apply.

Justice Lamer's remarks in *Rodriguez*,¹²² which have the support of the other dissenting judges on this point, maintain this confusion between a substantive approach and a literal approach to the notions of "reading down" and "reading in." After having concluded as to the unconstitutionality of the legislative provisions criminalizing assisted suicide, Justice Lamer questions the pertinence of recourse to "reading down" and

121 On this issue, see Part 2 of the present text.

122 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) [hereinafter *Rodriguez*].

“reading in,”¹²³ as if both questions could simultaneously be asked regarding the same unconstitutional rule.¹²⁴ His approach can be explained by the fact that Justice Lamer in this case is dealing with the literal level of “reading down” and “reading in.” According to him, the former is impossible in this case because the prohibition is formulated in general terms¹²⁵ and “there is no part of the provision which can be read down or severed in order to render it constitutional.”¹²⁶ The latter is equally inadequate in this case, “given the range of alternative schemes from which the Court would have to choose.”¹²⁷ This last remark pertains to the criterion of precision, which may influence the choice among remedial options. The difficulty has more to do with the diversity of cases which one could exclude from the criminal prohibition in the case in point (substantive “reading down”) than with the choice of words with which to express them.

Similarly, in a dissenting opinion rendered in *Egan*,¹²⁸ Justice Iacobucci would have acquiesced to the “appellants’ request to both read in and read out,”¹²⁹ which consisted of deleting the words “of the opposite sex” and adding the words “or as an analogous relationship” to the statutory definition of “spouse” for the purposes of the *Old Age Security Act*. This simultaneous use of what is referred to as “reading down” and “reading in” is only possible in this case because the discussion is situated at the literal level—it consists of the removal and addition of words to the formal expression of the rule. In fact, simultaneous recourse to substantive “reading down” and “reading in,” as both a limitation and an extension of the scope of a legal rule, is logically impossible. “Reading down” and “reading in” may be harmoniously combined only if both are used in their literal sense, which is the case of Justice Iacobucci’s opinion in *Egan*, or if one is used in its substantive sense while the other

123 *Ibid.*, at 569. The terms “*interprétation large*” and “*interprétation atténuée*” are used in the French translation of the ruling.

124 *Ibid.*: “This is not an appropriate case for either of the remedies of reading down or reading in.”

125 *Ibid.* The text refers to the “blanket nature of the prohibition.”

126 *Ibid.*, at 569-570.

127 *Ibid.*, at 570.

128 *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 CarswellNat 6, 1995 CarswellNat 703 (S.C.C.) [hereinafter *Egan*]. Justices Cory and Iacobucci jointly write a dissenting opinion in which they nevertheless identify the individual authorship of their respective portions of the text. Herein, we are referring to the portion of the joint dissenting opinion that carries Justice Iacobucci’s signature.

129 *Ibid.*, at para. 223.

is used in its literal sense.¹³⁰ When conceived of abstractly in relation to the content of the legal rule rather than to its material expression, the constitutional problem likely consists of a wrongful exclusion *or* inclusion. One can only add *or* remove cases to which the law applies, but it will rarely be proper to have simultaneous recourse to both mechanisms. Furthermore, elsewhere in his opinion in *Egan*, Justice Iacobucci refers to the constitutional remedy he would have imposed as “reading in,” in the sense of *Schachter*.¹³¹ In effect, it consists of extending the scope of the rule (in this case, the right to a spouse’s allocation by virtue of the *Old Age Security Act*) by the inclusion of the cases unconstitutionally excluded—in this case, the remedy was materially brought about by the addition and removal of terms. One therefore finds that in this opinion, the terms “reading in” and “reading down” are used in two distinct senses: one, proposed by *Schachter*, refers to the content of the rule, and the other more superficial one has to do with its wording.

The *Corbiere*¹³² case also partakes in this confusion regarding the use of remedies. In this case, the Court was charged with determining the constitutionality of a legal rule that imposed a requirement of residency on a reserve as a condition for one’s right to vote in band chief

130 For example, in a partially dissenting opinion written in *R. v. Mills*, [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056 (S.C.C.), Justice Lamer writes at para. 15: “I believe that a combination of *reading down* the sections and *reading in* new language is the most appropriate way to vindicate the Charter rights at play. . . .” This original English version is clearer than the French: “J’estime qu’un mélange d’interprétation atténuée et d’interprétation large des dispositions est la meilleure façon d’assurer la protection des droits garantis par la *Charte* qui sont en jeu.” Here, “reading down” is used in its substantive sense, referring to limiting the reach of the legal rule. “Reading in” is used in its textual or literal sense, referring to the addition of terms to the wording of the rule (in the case in point: “unless the record is in the possession or control of the prosecutor in the proceedings, in which case this paragraph does not apply”). Limiting terms are therefore added to the material formulation of the rule in order to express the limitation of its reach.

131 *Egan*, *supra*, n. 128 at para. 220: “The granting of the appellants’ request for remedy is consonant with the principles of ‘reading in’ developed by this Court in *Schachter*.”

132 *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203, 1999 CarswellNat 663, 1999 CarswellNat 664 (S.C.C.), reconsideration refused (2000), 2000 CarswellNat 2393, 2000 CarswellNat 2394 (S.C.C.) [hereinafter *Corbiere v. Canada*].

elections.¹³³ On a substantive level, one could have expected a discussion about the legal rule relating to the right to vote during band chief elections, about the constitutional problem created by the exclusion of the category of non-resident persons, and the inclusion of this category of persons as the eventual constitutional remedy available by virtue of the principle of constitutional supremacy. Yet, remarkably, and contrary to the express prescriptions of *Schachter*, even the constitutional question in this case is formulated as relating to the words of the provision rather than to the legal rule which they express: "Do the words 'and is ordinarily resident on the reserve' . . . contravene . . . the *Canadian Charter of Rights and Freedoms*. . .?"¹³⁴ The conclusion of the Court's ruling is to recognize that the "the words [are] inconsistent with s. 15(1)"¹³⁵ and to strike out those words¹³⁶ deemed unconstitutional.¹³⁷ What of the Court's eloquent phrasing in *Schachter* that "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"¹³⁸ At first glance, it may seem more acceptable to declare words of exclusion expressly used by the legislator to be null and void than it is to call a pronouncement of unconstitutionality what it truly is—the extension of the rule's reach. In this ruling—which is unanimous on this point—the expressions "reading in" or *interprétation large*, are never used to refer to the pronounced conclusion. For distinct reasons,¹³⁹ certain judges do in fact discuss the technique of "reading in" or *interprétation large*, yet it is in regard to a different remedy, which would have been "to 'read in' to the *Indian Act* voting rights for non-residents so that they would be voters for certain purposes but not others,"¹⁴⁰ a remedy which they refuse to apply to this

133 The impugned provision read as follows: "A member of a band who . . . is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band. . .", *Indian Act*, R.S.C. 1985, c. I-5, s. 77(1).

134 *Corbiere v. Canada*, *supra*, n. 132 at para. 43.

135 *Ibid.*, at para. 23. The majority opinion: "We would declare the words 'and is ordinarily resident on the reserve' . . . to be inconsistent with s. 15(1). . ."

136 *Ibid.*, at para. 24: "We would therefore . . . modify the remedy by striking out the words 'and is ordinarily resident on the reserve' . . ."

137 Implementation of the Court's declaration of invalidity is suspended for 18 months.

138 *Schachter*, *supra*, n. 2 at 699.

139 *Corbiere v. Canada*, *supra*, n. 132 at para. 25 ff, Justice l'Heureux-Dubé's opinion, supported by Gonthier, Iacobucci and Binnie JJ.

140 *Ibid.*, at para. 115.

case. The four judges who express their opinions on this matter consider that such an inclusion would have involved choosing among options and developing criteria, both of which are "not an appropriate role for the Court in this case."¹⁴¹ However, it is important to note that although the remedy chosen simply involved the removal of the residency requirement, this addition which the Court did in fact go on to make is actually much more global, drastic, and of greater quantitative importance than the alternative. However, the remedy is not named as such and since it is concretely achieved by declaring the words used by legislature to be inoperative, it creates no new categories, nor does it invent a detailed constitutionally valid solution. According to the expressions used by Justice Beetz in *Singh*,¹⁴² it is a case of crude surgery, but not plastic or re-constructive surgery.¹⁴³ *Corbiere* is a paradigmatic case of substantive "reading in," as prescribed by *Schachter*. And yet this expression is never used in the case to describe what is being done. Rather, some judges use the expression to describe the very judicial exercise by which they seem proud to refuse to proceed, an exercise that is described as an abusive intrusion into parliamentary autonomy.

*Sharpe*¹⁴⁴ also illustrates this lack of consistency in the classification of remedies. Dealing with a challenge to the constitutionality of the criminal prohibition of possession of juvenile pornography, the majority of the Court declared the constitutional validity of the rule except with regard to two areas of application, which it ruled were violations of freedom of expression that were not justifiable under s. 1 of the Charter. The case seems to be the perfect example of a rule whose unconstitutionality derives from its overinclusive nature and whose constitutional remedy could be the "reading down" of these problematic categories alone. However, although the Court claims to act on the authority of *Schachter*, it describes the remedy it imposes as "reading in an exclusion."¹⁴⁵ It uses the vocabulary of "reading in" to describe the exclusion of certain cases in which it applies, thereby limiting the reach of the rule. Certainly, there is an addition of words to the provision here. It is

141 *Ibid.*

142 *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 1985 CarswellNat 152, 1985 CarswellNat 663 (S.C.C.) [hereinafter *Singh*].

143 *Ibid.*, at 236: "If the Constitution requires it, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery."

144 *Sharpe*, *supra*, n. 65.

145 *Ibid.*, at para. 114.

“reading in” in the literal sense, in the sense of adding words, but it is a “reading down” of the rule’s reach.¹⁴⁶

Similarly, some dissenting judges in *Canadian Foundation*, while agreeing that the majority’s extreme reconstruction of the impugned *Criminal Code* provision was not legally legitimate, qualified the remedy that might have been suitable for the overly broad justification of physical correction of children in different ways. Indeed, Justice Deschamps discussed the possibility of a remedy of “reading down”¹⁴⁷, while Justice Binnie referred to what he considered to be the “extensive ‘reading in’ exercise”¹⁴⁸ undertaken by the majority. Both justices were referring to the possibility of granting the remedy of narrowing the scope of the provision—a substantive “reading down.” Justice Binnie’s use of the phrase “reading in” can only make sense at a literal level, in that the remedy would have required the drafting of exceptions in the statutory provision, therefore the addition, or “reading in,” of words.

It should, however, be noted that occasionally the addition of cases in which the rule applies and the addition of terms can go together. This was the case in *Vriend*,¹⁴⁹ where the extension of an anti-discrimination statute required the addition of sexual orientation to the list of forbidden grounds of discrimination. It was therefore a case of both substantive and literal “reading in.” However, one should not use terminology that only sporadically makes sense, depending on the hazards of legislative drafting style.

146 *Ibid.*: “[T]he appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1. . . .” Paragraph 115 adds, “To assess the appropriateness of *reading in* as a remedy, we must identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance.”

147 *Canadian Foundation*, *supra*, n. 25 at para. 243.

148 *Ibid.*, at para. 103.

149 *Vriend*, *supra*, n. 49.

1.2.2. SEVERANCE AND READING DOWN

Throughout *Schachter*, the expressions “reading down” and severance¹⁵⁰ seem to be used as if they were synonymous.¹⁵¹

However, one must question whether these two expressions might in fact refer to remedies that are actually quite distinct.

While the concept of severance is known traditionally in Canadian constitutional law as referring to the possibility of limiting a pronouncement of constitutional invalidity to a single legal rule rather than to the entirety of the law in which it is found, the “reading down” developed by *Schachter* serves to narrow the reach of a statute, or a legal rule it includes, to limit the pronouncement of unconstitutionality to those applications that are unconstitutional. In fact, the only area of convergence between these two remedies is their restrained nature: severance allows for pronouncements of unconstitutionality limited to certain legal rules; “reading down” permits pronouncements of unconstitutionality limited to certain applications of a statute or a legal rule. The former strikes down a legal rule; it does not modify it or its wording, or the rest of the law.

150 The translation of *Schachter* correctly uses the French term “*dissociation*” for severance. One also finds use of the term “*divisibilité*” in certain currents of francophone doctrine to refer to the possibility of declaring a provision of law unconstitutional, rather than the law in its entirety. See e.g. Henri Brun and Guy Tremblay, *Droit Constitutionnel*, 4th ed. (Cowansville: Éditions Yvon Blais, 2002) at 200 ff. One also finds the term “*divisibilité*” in jurisprudence. See, for example, Justice Beetz’s remarks on behalf of the Court in *Bell Canada*, *supra*, n. 76.

151 *Schachter*, *supra*, n. 2. In fact, “reading in” is occasionally compared with “reading down” (e.g., at 695, 707, 720) and at other times, with severance (e.g., at 698, 700, 701, 702, 705, 710, 715, 717, 718, 725), with no apparent reason to justify the choice of terminology. Furthermore, the Court writes, “The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or ‘reading down’” (at 696). Here, in both the English and French versions of the ruling, reference is made to *the* doctrine—in the singular—of “severance” or “reading down”. (However, it should be noted that in a separate opinion supported by Justice l’Heureux-Dubé, Justice LaForest seems to avoid the term “severance” and only contrasts “reading in” with “reading down”).

Severance

In Canadian constitutional law, the issue of severance is generally raised with regard to the survival of the rest of the law when one (or a number) of the legal rules it contains, as expressed by some of its provisions, is declared constitutionally invalid.¹⁵² Severance is discussed at the stage where the extent of the pronouncement of constitutional invalidity is being decided.

It is not a question of modifying the legal rule or its scope,¹⁵³ or of changing its textual form. When one speaks of severance, the legal rule has been declared invalid—one is questioning the impact of this limited unconstitutionality on the rest of the law.

Once again, it is essential to distinguish the legal rule from its textual form. The question of severance relates to the possibility of the survival of the law independently from the rule judged to be constitutionally invalid. If severance involves the wording of the law in some way, it is only because in cases where severance is applied, the effect of declaring the unconstitutionality of the legal rule alone is fictitiously likened to the deletion of the provision expressing the rule. However traditionally, the principle of severance was not used to modify the text of a particular legislative provision, for example by removing certain terms in such a way as to transform the rule which they express.

The question said to be considered before applying severance is a hypothetical one: if aware of the unconstitutionality of certain provisions of the text, would legislature nevertheless have desired that the rest of the law survive? In other words, would it have enacted the legislation in its excised form?¹⁵⁴

152 *Ibid.*, at 696: "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."

153 Regarding constitutional jurisprudence based upon the division of powers, Rogerson writes: "Severance will only be appropriate when the text of the statute is such that the invalidity can be confined to a particular section or subsection which is clearly separable from the remainder of the statute. It does not allow courts to distinguish between valid and invalid applications which are both authorized by the same section." C. Rogerson, *supra*, n. 66 at 246.

154 *Schachter*, *supra*, n. 2 at 697. This should in fact consist of questioning whether the remaining provisions conform to legislative policy, rather than questioning the supposed initial legislative intent at the moment when the integral text was enacted. Any such intent could only be fictitiously attributed to legislature. At best, legislature intended to enact the text it enacted. As

In determining the effects of a ruling of unconstitutionality in constitutional litigation dealing with the division of legislative powers, the courts seem to have generally maintained the indivisibility of the impugned legislation. As Justice Lamer aptly notes in *Schachter*, this should not surprise anyone, considering the fact that “[i]n 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.”¹⁵⁵ In general, a law which is invalid in its pith and substance will be declared unconstitutional in its entirety.

In constitutional litigation based upon the infringement of rights and freedoms, the issues are different. It is possible that the constitutional problem is in fact quite limited. Effectively, the violation of rights and freedoms may often be the result of only one legal rule contained in a law.¹⁵⁶ It is therefore probable that rulings of unconstitutionality limited to certain “severed” or “dissociated” legal rules will be more common in Charter matters than they were in the context of division of powers.

Reading Down

In other respects, a law or legal rule may be intrinsically valid, yet certain of its applications may be inconsistent with the Constitution. In such cases, it is not the substance of the legal rule that is the cause of the problem but rather only some of its applications that are constitutionally forbidden.

In cases involving the division of powers, this issue is often expressed as relating to constitutional applicability. For example, one questions the applicability of certain provincial laws or provisions that are otherwise valid, to matters deriving from the authority of the federal Parliament.

Schachter attempts to clarify the law applicable in this regard in Charter matters. When a constitutional problem results from only certain applications of a law (or from a single legal rule), a constitutional remedy available may in some cases be what the Court calls “reading down.” In applying this remedy, the court charged with ensuring judicial review

Bizar writes, “Courts should face the fact that the legislature enacted what it enacted, . . . the legislature intended to enact only what it enacted. It could intend nothing more.” D. Bizar, *supra*, n. 24 at 144-145, 157.

155 *Schachter, supra*, n. 2 at 696.

156 *Ibid.*

pronounces the unconstitutionality of only those problematic applications, while the law continues to operate in respect of all its other valid applications.

Depending on the legislative drafting style, this modification of the law or provision's reach by a court acting in virtue of the principle of constitutional supremacy enshrined in s. 52(1) of the *Constitution Act, 1982* may require a material correction of the legislation's text, involving the addition or removal of terms. This correction is merely secondary to the constitutional remedy, the remedy's concrete expression in a textual format. In this manner, it is possible that the restriction of a rule's reach, its "reading down," may require the removal of terms from the wording of the legislative provision expressing the rule, as is the case when an unconstitutional application is explicitly expressed.¹⁵⁷

* * * * *

The confusion between the legal rule and its literal formulation, between the judicial modification of the former and that of the latter, also partially explains the inconsistencies in the way *Schachter* and certain doctrinal commentaries that followed it treat severance and "reading down."

If it was possible to write in *Schachter* that adding applications to a legal rule which legislature unconstitutionally excluded ("reading in") is the logical counterpart of severance,¹⁵⁸ it is only to the extent where one superficially involves an addition while the other involves a deletion. In reality, however, "reading in" involves the addition of applications to a legal rule, modifies its reach and therefore modifies the legal rule itself. In contrast, although severance can be said to modify a law by removing a provision, it does not modify the content of the legal rules enacted by Parliament.

Moreover, a similar confusion of matters may be the basis for Peter Hogg's comparison of the traditional notion of severance, involving no modification of the rest of the law,¹⁵⁹ and what he characterizes as the

157 See, for example, *R. v. Hall*, [2002] 3 S.C.R. 309, 2002 CarswellOnt 3259, 2002 CarswellOnt 3260 (S.C.C.), where a majority of the Court declared the unconstitutionality of one explicitly provided ground for the judicial denial of interim release (bail).

158 *Schachter*, *supra*, n. 2 at 698: "[E]xtension by way of *reading in* is closely akin to the practice of severance."

159 P. Hogg, *supra*, n. 6 at 37-10.1: "Severance, as traditionally employed, is not designed to alter the meaning or effect of the remainder of the statute that survives."

new use of severance, which according to him brings about a modification of the rest of the law and is essential to its validity.¹⁶⁰ According to Hogg, this new form of severance, which permits one to assure the validity of the remaining portion of the enactment, consists of the removal of certain choice words from a legislative provision. However, this exercise has nothing to do with severance in its traditional sense, which we have already seen has to do with the possibility of the independent survival of a law from which a constitutionally invalid provision has been excised. Rather, this new severance of which Hogg speaks, seems to be the result, the material correction of a legislative provision when it has already been ruled that some of its applications or exclusions are unconstitutional, that “reading down” or “reading in” are the appropriate constitutional remedy, and that since these exclusions or inclusions are explicitly stated, the concrete result of “reading in” or “down” requires the removal of these explicit provisions.¹⁶¹

2- A PROPOSAL AIMED AT A CONCEPTUAL CLARIFICATION

Numerous issues of political philosophy feed the debate about judicially imposed constitutional remedies. The purpose of the present text

160 *Ibid.*, at 37-11: “What is new about the use of severance in these *Charter* cases is that in each case words were deleted from a statutory provision that were integral to the operation of the provision. The remainder of the provision could survive only because it had been altered by the court’s deletion of the severed words. The provision was invalid in the language in which it was enacted by Parliament, and could be upheld only after the court had amended it.”

161 This is how Hogg presents *R. v. Nguyen*, [1990] 2 S.C.R. 906, 1990 CarswellMan 223, 1990 CarswellMan 437 (S.C.C.) and *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22, 1991 CarswellNat 346, 1991 CarswellNat 829 (S.C.C.) as examples of severance (P. Hogg, *supra*, n. 6 at 37-10/11), when in fact these cases consisted of limiting the scope of a criminal offence and extending the reach of unemployment insurance benefits, respectively. In both cases, implementation of the constitutional remedy required a material correction: the removal of certain terms from the wording of the relevant provisions. Similarly, in *R. v. Hall*, *supra*, n. 157, the remedy consisted of limiting the rule’s reach and this limitation therefore required the excision of certain terms from the legislative provision. Justice McLachlin held that the unconstitutional phrase could be “severed” (para. 44), and those in dissent referred to what she had done as “read[ing] down to sever simply the unconstitutional portion of the provision” (para. 87).

is more simply methodological. It suggests an analytical approach that is more precise and in keeping with established legal concepts than that which currently prevails in jurisprudence. It argues in favour of more rigorous, intelligible, and hopefully more transparent—and therefore, accountable—judicial processes.

To begin with, distinguishing between the stage of interpretation of impugned legislation and the imposition of constitutional remedies would considerably illuminate the remedies discourse. The process involved with each act is different: each follows distinct guiding principles and each should therefore have its own appropriate and respective terminology. Interpretation of legislation is one thing; the process of judicial inclusion or exclusion contrary to legislative intent but in accordance with the principle of constitutional supremacy is another. One cannot force words to express both everything and their opposite.¹⁶²

Further, an analysis of the distinction between the legal rule and its wording in textual format would clarify the handling of constitutional remedies. This section of the text is devoted to this last issue. We shall first (2.1) discuss the necessity of extracting the legal rule (2.1.1.), correctly characterizing the nature of the constitutional problem (2.1.2.) and conceptualizing the possible remedies (2.1.3.). After touching upon the issue of reaching a decision and the criteria that should influence the choice (2.2.1.), we shall then focus on the process of establishing the material form of the remedy (2.2.2.).

2.1 EXTRACT, DESCRIBE AND CONCEPTUALIZE

A clarification of the discourse on remedies will come about through an abstraction of the impugned legal rule (2.1.1.), a description of the constitutional problem (2.1.2.), and the conceptualization of the remedies available (2.1.3.).

162 That is, unless one is Humpty Dumpty in *Alice Through the Looking Glass*. “Lewis Carroll said it all in *Alice Through the Looking Glass*: ‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean – neither more or less.’ – ‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’” Margaret Ritchie, “*Alice Through the Statutes*” (1975) 21 McGill L.J. 685 at 707.

2.1.1. BEYOND THE WRITTEN FORM: EXTRACTING THE LEGAL RULE

The only consistent approach to constitutional remedies appears to be one that focuses on the content of legal rules rather than on their textual formulation.¹⁶³ As *Schachter* reminds us, the Constitution renders laws (or legal rules) “of no force or effect,” it does not address the fate of the words that express those legal rules.¹⁶⁴

The first stage of analysis must therefore be a conceptualization of the legal rule at the heart of the constitutional litigation.¹⁶⁵

Every legal rule must be consistent with the requirements of the Constitution. Constitutional litigation is essentially about a conflict of rules and not a conflict of words. It is the legal rule that risks being declared wholly or partially unconstitutional. Regardless of the drafting style of the written formula expressing the rule, attention must be focused on the rule itself. The words used in a legislative provision are inoffensive in and of themselves. It is only the legal rule that they express that creates rights and obligations and that can therefore be problematic.¹⁶⁶ The word “dog” does not bite. A constitutional question that is judicially formulated in regard to certain words would appear to have succumbed to the trap of confusing the rule and its literal expression.¹⁶⁷

163 On the distinction between the legal rule and the wording expressing it, see especially Christophe Grzegorzczuk and Thomasz Studnicki, “Les rapports entre la norme et la disposition légale” in *Archives de philosophie du droit*, nouv. sér. 19, *Le langage du droit* (Paris: Sirey, 1974) 243, and P.-A. Côté, *supra*, n. 37 at 248, who refers to Riccardo Guastini, “Interprétation et description des normes,” in Paul Amselek, ed., *Interprétation et Droit* (Brussels: Bruylant; Aix-en-Provence: Presses universitaires d’ Aix-en-Provence, 1995) at 89, and to William Twining and David Miers, *How to do Things with Rules*, 2nd ed. (London: Wendenfield and Nicolson, 1982).

164 *Schachter*, *supra*, n. 2 at 699.

165 *Ibid.* In *Schachter*, the Court reminds the reader that “the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms. . . .” In fact, the tone of the ruling leads one to conclude this is not only an option—the extent of an inconsistency *must* be determined in regard to the content of the rule rather than its form.

166 P.-A. Côté, *supra*, n. 37 at 248: “[T]he role of the statutory interpreter is to arrive at the meaning of the legal rule and not simply the literal meaning of the text. What is of interest to the interpreter is the content or meaning of the rule or norm, which is established necessarily by considering the text, as well as numerous other factors.”

167 As we have already seen, in *Corbiere v. Canada*, *supra*, n. 132 at para. 43, (text accompanying note 134), the constitutional question was formulated as:

It is absolutely essential to distinguish the legal rule from its material formulation in the legislative text.¹⁶⁸

An analysis centred upon drafting style, concerned with the effects of the judicial decision upon the wording of the rule and which at times will require either the addition or deletion of words, will only be superficial and deceptive. This level of analysis creates its own scale of values, which gives the impression that the removal of words is less serious than adding words. The removal of words in the first case is formally constrained by the parameters of the initial legislative drafting, while the second case of adding words leaves the matter to the unlimited arbitrariness of the imagination. Yet, when one focuses on the content of the legal rule expressed, the very fact of adding or removing terms is not necessarily a reliable indicator of the relative importance of the modification being made.¹⁶⁹ Furthermore, the addition and removal of terms are often two sides of the same coin. Thus, the removal of terms

“Do the words ‘and is ordinarily resident on the reserve’ contained in s. 77(1) of the *Indian Act*, R.S.C. 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms* with respect only to members of the Batchewana Indian Band?” Similarly, in *R. v. Hall*, *supra*, n. 157 at para. 22, the majority of the Court writes that certain words of a text of law are unconstitutional: “Section 52 of the *Constitution Act, 1982*, provides that a law is void to the extent it is inconsistent with the *Charter*. It follows that this phrase fails” [emphasis added].

168 Other authors have called attention to the importance of this distinction between the legal rule and the text expressing it. See, for example, R. Guastini *supra*, n. 163 at 95: “[I]l n’y a pas de correspondance biunivoque entre la disposition légale et la norme.”; C. Grzegorzczuk and T. Studnicki, *supra*, n. 163 at 247: “Nous proposons de faire une distinction entre un énoncé normatif . . . et la norme elle-même. La disposition légale, étant une forme d’énoncé normatif, doit être au même titre séparée conceptuellement de la norme.”; W. Twining and D. Miers, *supra*, n. 163 at 137-148: “In handling rules it can be important to realize that the substance of the rule and the syntax of its formulation are different matters. . . . We talk quite naturally of reading, drafting, breaking or writing down a rule. . . . [S]ometimes we may fall into the trap of confusing the rule with its physical expression.”

169 See, for example, *Corbiere v. Canada*, *supra*, n. 132 at para. 115, where the Court refused to develop a remedy which would have had the effect “that they would be voters for certain purposes but not others,” because “[t]his would involve considerable detailed changes to the legislative scheme.” Nevertheless, the Court chose to declare the invalidity of the words “and is ordinarily resident on the reserve” that restricted the legislative granting of the right to vote, with the effect of bringing about a substantively greater change, but which only involved a limited interference with the text of the law.

specifying certain applications and the addition of terms limiting certain applications may have the same effect of limiting the original reach of a rule.

This failure to distinguish between the rule and its literal expression and between judicial modification of the legal rule and the necessary adjustment of the textual medium that serves as a vehicle for its expression may, for example, form the basis for Hogg's statement that the constitutional problem presented by *Schachter* was much more difficult than the one raised in *Tétreault-Gadoury*.¹⁷⁰ In fact, the constitutional problem in each case was of the same nature. Both involved the exclusion of a category of persons from the benefit of certain legislative advantages. In the first case, this category of persons consisted of biological fathers who were ineligible for unemployment insurance benefits for parental leave, while in the second case, it was persons over the age of 65 excluded from the regular regime of benefits. Both cases were distinguishable only by the legislative drafting style—in *Tétreault-Gadoury* it was an explicit exclusion, while in *Schachter* it was a logically necessary deduction. Although the correction required in *Tétreault-Gadoury* was technically simpler,¹⁷¹ the relative importance of the substantive modification required as a constitutional remedy was quite similar in both cases.¹⁷² Here, one recognizes the trap that *Schachter* warned about when it suggested that one should avoid having the form of legislative drafting style alone determine which remedial options are available.¹⁷³ Applied to this case, it would more precisely suggest to avoid allowing the drafting style alone determine whether the constitutional problem is more or less "difficult."

Still, one should not minimize the difficulty in conceptualizing the legal rule, of carrying out the necessary abstraction from the legislative text.¹⁷⁴ An abstract formulation is required. It is an arduous exercise in

170 P. Hogg, *supra*, n. 6 at 37-12, writes, "A much more difficult problem was presented to the Supreme Court of Canada in *Schachter*. . . ."

171 *Ibid.*, at 37-11/12: "The age-65 bar was simply deleted by the exercise of the Court's power of severance, leaving the plaintiff in a position to rely upon the general rules of entitlement."

172 It should however be noted that, as the Court remarks in *Schachter*, *supra*, n. 2 at 723, the financial repercussions of including biological fathers would have been much greater than those connected with the inclusion of persons over the age of 65 in *Tétreault-Gadoury v. Canada*, *supra*, n. 161.

173 *Schachter*, *supra*, n. 2 at 698.

174 P.-A. Côté, *supra*, n. 37 at 90, refers to the importance of "avoid[ing] confusing the text of law and the legal rule which the text expresses." Gottlieb highlights the necessary exercise of formulating the rule, in the following

which one proceeds intuitively and unconsciously, even in the best of cases. Although the functioning of other normative systems facilitates the abstract apprehension of rules¹⁷⁵ (for example, one generally does not confuse rules of politeness with their occasional transcription into a disciplinary note), the legal world often identifies a statutory legal rule with the section of law that expresses it.¹⁷⁶ In actual fact, the identification of the legal rule with its material expression appears to be a phenomenon that is particular to statutory law and does not occur in the case of common law rules.¹⁷⁷ It is the official and definitive status of the verbal formulation formally enacted by a parliament that favours this excessive importance accorded to the text, feeding the confusion between the rule and its literal expression. Consequently, the slide between a discussion of the rule and a discussion of the legal text is an easy one to make.¹⁷⁸

terms: "Normative utterances need not, therefore, be completely formulated. The crucial question about such an utterance, from a functional viewpoint, is whether it lends itself to a *restatement* in normative form" [emphasis in original], in Gidon Gottlieb, *The Logic of Choice* (New York: MacMillan Company, 1968) at 40, cited in Twining and Miers, *supra*, n. 163 at 138.

- 175 Twining lists the various levels of expression in which rules may be found: "First, there are rules expressed in fixed verbal form and rules not expressed in fixed verbal form. Some, such as statutory rules, are expressed in a particular form of words which has official status, so that it is not open to interpreters to change the wording. . . . Other rules. . . may have been expressed differently at different times, may have been only partly articulated or may never have been expressed in words at all." Twining, *supra*, n. 163 at 143.
- 176 On the subject of this confusion between the rule and its material expression, see especially, Guastini: "Or, dans le langage commun des juristes, le terme « norme » est habituellement employé pour se référer soit aux textes (ou bien à des parties de textes : des énoncés) du discours législatif, soit au contenu de sens de ces textes. (. . .) les juristes ne distinguent pas entre les textes normatifs et leur contenu de sens." R. Guastini, *supra*, n. 163 at 94. Also see Côté: "The way in which jurists discuss the law frequently confuses the legal rule and the text which is its formal foundation." P.-A. Côté, *supra*, n. 37 at 247.
- 177 Common law rules developed by the courts do not generate this sort of confusion between the rule and its formal format. A court's statement of a common law rule is not ascribed the same hallowed status as the formalism of a statutory enactment.
- 178 For example, see the following statement from *Schachter*, *supra*, n. 2 at 696: "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 the doctrine of severance or 'reading down.'" The statement speaks of the flexible nature of the language of s. 52, whereas

Thus, the legal rule is therefore distinct from the text that expresses it.¹⁷⁹ It is possible for a single legislative provision to express more than one rule or for a single legal rule to find its textual expression in more than one provision, such that a legislative provision expresses only one aspect of the rule.¹⁸⁰ Furthermore, certain legislative provisions express no rule at all.¹⁸¹

In this way, a legislative definition on its own does not create any legal rule:¹⁸² it neither creates a right nor an obligation and therefore cannot in and of itself give rise to an unconstitutional result. It is only in conceptualizing a legal rule expressed elsewhere in the statute in light of the applicable legislative definition that one can then conclude as to the existence of an inconsistency between this overinclusive or underinclusive rule and certain constitutional requirements. It is therefore surprising to find certain judicial decisions that are presented as discussions of the constitutionality of a legislative definition.¹⁸³

it is actually the rule itself, the rule of constitutional supremacy, that displays this characteristic. On this same particular aspect of the confusion between a *constitutional* rule and its literal formulation in the constitutional text, I have previously written that the judicial use of a phrase such as a “non-literal infringement” of constitutional rights (as found in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 CarswellOnt 2462, 2003 CarswellOnt 2463 (S.C.C.) at para. 178) “suggests that there must be something wrong in the way we think about these issues”: D. Pinard, “Desperately Seeking,” *supra*, n. 36 at 231. In the context of the case, the phrase “non-literal infringement” of the right to vote probably meant an infringement of an aspect of the right that was outside of the strict literal meaning of “voting,” and that covered the required conditions to exercise one’s right to play a meaningful role in the electoral process.

179 “Ils [les juristes] croient qu’il y a correspondance parfaite entre les énoncés du législateur et les normes : à chaque énoncé législatif correspond une norme, et chaque norme est exprimée par un énoncé législatif. En d’autres termes, les juristes ne distinguent pas entre les mots et le sens des mots.” R. Guastini, *supra*, n. 163 at 94.

180 “[I]l n’y a pas de correspondance biunivoque entre la disposition légale et la norme. . . . Il est faux de croire qu’il y a une norme – et une seule norme – pour chaque disposition. Et il n’y a pas non plus une, et une seule, disposition pour chaque norme.” R. Guastini, *supra*, n. 163 at 95. “Not all texts contain legal rules. . . . At times, more than one provision is required to construct a rule.” P.-A. Côté, *supra*, n. 37 at 248.

181 R. Guastini, *supra*, n. 163 at 96.

182 *Ibid.*; P.-A. Côté, *supra*, n. 37, at 248.

183 See *e.g. R. v. Butler*, [1992] 1 S.C.R. 452, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.), reconsideration refused [1993] 2 W.W.R. lxi (S.C.C.), in which several passages lead one to believe that the subject under

In conceptualizing the impugned legal rule, it is an essential but difficult step to decide what level of generality is required. The details of this process will depend upon the particulars of each case and cannot be subjected to any standard form.¹⁸⁴

For example, the appropriate perspective may be difficult to establish in criminal matters. Should one be limited to examining the constitutionality of a rule creating a form of defence that is too narrowly defined,¹⁸⁵ or should one rather attach the defence to the context of a particular offence in which it may be used?

An adequate conceptualization of the legal rule subject to constitutional review remains the first and essential step in harmonizing the subsequent question of constitutional remedies. It contains the key to a clear understanding of the issue of constitutional remedies.

2.1.2. DESCRIBING THE CONSTITUTIONAL PROBLEM

Once the legal rule that is the subject of constitutional litigation has been conceptualized, one must then establish “the extent of the inconsistency,” as *Schachter* explains.

It is necessary to identify the problem and determine the ways in which the legal rule is inconsistent with constitutional requirements. When doing so, one must maintain a certain distance from the wording

discussion in the case is the constitutional validity of the *definition* of pornography. Similarly, see *M. v. H.*, [1999] 2 S.C.R. 3, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349 (S.C.C.), reconsideration refused (2000), 2000 CarswellOnt 1913, 2000 CarswellOnt 1914 (S.C.C.), where the Court concludes that the definition of the term “spouse” is unconstitutional; and see *K Mart Canada*, *supra*, n. 96 at para. 80: “I find that the definition of ‘picketing’ at s. 1(1) of the *Labour Relations Code* infringes s. 2(b) of the *Charter* and cannot be saved under s. 1. The definition of ‘picketing’ is declared to be of no force or effect by reason of s. 52 of the *Constitution Act, 1982*.” Finally, one reads in *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 CarswellNat 3695, 2004 CarswellNat 3696 (S.C.C.) at para. 44: “[S.] 2(1) defines the requisite common law relationship in terms of cohabitation. In the absence of any demonstration that this definition itself runs afoul of s. 15(1), we are not at liberty to ignore it.”

184 “[S]ome of the most difficult choices in interpretation relate to choosing an appropriate level of generality.” Twining, *supra*, n. 163 at 142.

185 See, for example, *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 CarswellOnt 1238, 2001 CarswellOnt 1239 (S.C.C.), which discusses the constitutionality of a defence of compulsion recognized by the *Criminal Code*, without referring to its application in the context of a particular offence.

of the provision that expresses the rule so as to avoid the pitfalls of a purely textual approach.

In this regard, few conceptual problems will be presented by the remedy for an absolute and total unconstitutionality resulting from legal rules that are clearly unconstitutional in their essence.¹⁸⁶

The real difficulties are created by cases where the constitutional inconsistencies are the result of peripheral applications or exclusions from the reach of the legal rule.

It is possible for the constitutional problem to result from the legal rule having too broad a scope.

This could be the case of:

- the offence of having sexual relations with a female under the age of 14, regardless of what knowledge one has about the age of this woman;¹⁸⁷
- the complete criminalization of possession of child pornography, regardless of the conditions of its production and possession;¹⁸⁸
- the reversal of the burden of proof in procedures undertaken according to the regulations of the *Duties Act* (i.e. imposed upon the importer), including the case of alleged obscene material;¹⁸⁹
- the granting of too broad a power to frisk, search and seize;¹⁹⁰
- the prohibition of picketing, when the definition of such an activity includes the distribution of leaflets on the premises of secondary works;¹⁹¹
- the prohibition of assisted suicide, which has the effect of preventing the suicide of persons who are physically unable to carry out the act themselves.¹⁹²

186 Herein, I have intentionally disregarded other important problems that belong to a different realm of concerns, such as the question of the temporal effects of a declaration of unconstitutionality, which can vary from retroactivity to deferral (suspension).

187 Rule discussed in *R. v. Nguyen*, *supra*, n. 161.

188 Rule discussed in *Sharpe*, *supra*, n. 65, where the problem of the rule's excessive reach is described in the following terms (para. 75): "[T]he law may catch some material that particularly engages the value of self-fulfilment and poses little or no risk of harm to children."

189 Rule discussed in *Little Sisters*, *supra*, n. 11.

190 Rule discussed in *Southam*, *supra*, n. 69.

191 Rule discussed in *K Mart Canada*, *supra*, n. 96.

192 Rule discussed in *Rodriguez*, *supra*, n. 122.

In contrast, the inconsistency with constitutional requirements may result from the legal rule having a reach that is too limited.

For example, it is possible to contest the legislative recognition¹⁹³ of:

- regular unemployment insurance benefits that exclude persons over the age of 65;¹⁹⁴
- parental leave that excludes biological fathers;¹⁹⁵
- insurance benefits that exclude unmarried spouses;¹⁹⁶
- spousal pensions that do not recognize homosexual partners;¹⁹⁷
- a right to vote that is limited to residents of Indian reserves;¹⁹⁸
- a defence of compulsion by threat, in criminal matters, that is limited by the requirements of immediacy and presence;¹⁹⁹
- a right to protection from discrimination based upon a list of grounds that does not include sexual orientation.²⁰⁰

2.1.3. CONCEPTUALIZING POSSIBLE REMEDIES

Once the unconstitutionality is understood with regard to the content of the legal rule, the appropriate remedy must also be conceptualized with regard to the legal rule, regardless of its literal formulation.²⁰¹ The

193 Judicial interpretation of the *Charter*, *supra*, n. 1, is founded upon a premise of liberalism, such that in theory it only allows one to challenge the actions of the state, as opposed to its complete inaction. Although one can challenge a legal rule on the basis of its underinclusive reach, paradoxically, it is impossible to challenge the absence of a legal rule.

194 Rule discussed in *Tétreault-Gadoury v. Canada*, *supra*, n. 161.

195 Rule discussed in *Schachter*, *supra*, n. 2.

196 Rule discussed in *Miron v. Trudel*, [1995] 2 S.C.R. 418, 1995 CarswellOnt 93, 1995 CarswellOnt 526 (S.C.C.).

197 Rule discussed in *Egan*, *supra*, n. 128.

198 Rule discussed in *Corbiere v. Canada*, *supra*, n. 132.

199 Rule discussed in *R. v. Ruzic*, *supra*, n. 185.

200 Rule discussed in *Vriend*, *supra*, n. 49.

201 Similarly, see Evan H. Caminker, "A Norm-Based Remedial Model for Underinclusive Statutes," (1986) 95 Yale L.J. 1185, who writes at 1186, n. 3: "[A] court's choice between extension and nullification is not constrained by the particular manner in which a statutory text prescribes unequal treatment. Court-ordered relief often coincides with a 'rewording' rather than 'deletion' of an offending clause, eg., extending benefits granted by statute to 'males'

effects of the remedy upon the drafting and words of the provision that express the rule are merely technical and secondary consequences and should only be considered as such. They are not criteria to be considered prior to a determination of the appropriate remedy.

Unfortunately, in its current state, jurisprudence often treats the question of the remedy and the details of its material implementation indiscriminately.

This is the case when one speaks of "reading in," in the sense of *Schachter*, to refer to limiting the scope of a criminal prohibition by adding exceptions. This confuses the constitutional remedy imposed—limiting the scope of the legal rule—and the concrete, material manner in which the remedy is implemented—the creation of exceptions, expressed by the addition of provisions to the legislative text.²⁰²

The Options

By virtue of s. 52(1) of the *Constitution Act, 1982*, the remedial options available when constitutionally guaranteed rights and freedoms are violated consist of a pure and simple declaration of unconstitutionality, or the extension or limitation of the legal rule's reach.²⁰³

Canadian constitutional law is well familiar with the plain and simple declaration of unconstitutionality. It is a drastic remedy, a "crude surgery,"²⁰⁴ clearly provided for by the principle of supremacy of the Constitution.

By contrast, the extension and limitation of a statute's reach involves a "modification" of the legal rule, an intervention that is traditionally left to the author's discretion—to Parliament.

As expressed in Canadian constitutional law, the principle of constitutional supremacy renders those laws that are inconsistent with the Constitution "of no force or effect," but only to the extent of the incon-

to all persons." Caminker refers to Deborah Beers, "Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative" (1975-1976) 12 *Colum. J. L. & Soc. Probs.* 115, who had written ten years earlier (at 121): "The fact that certain words must be added or substituted rather than subtracted should not be a conceptual stumbling block for those who consider extension to be an appropriate remedy."

202 See *Sharpe, supra*, n. 65.

203 All of these remedies may be deferred, i.e., accompanied by what is known as a suspension.

204 The expression is Justice Beetz's, from *Singh, supra*, n. 142 at 235-236. See the complete citation reproduced in n. 143.

sistency. As explained in *Schachter*, the declaration of inconsistency and the rendering of a mere wrongful exclusion or inclusion to be of no force or effect has the logical effect of including or excluding those cases that were initially treated unconstitutionally by legislature.

Yet, one must note that inclusion and exclusion are merely remedies that are available—they are by no means obligatory. Even in cases of a mere wrongful inclusion or exclusion, a court may choose to simply declare the unqualified unconstitutionality of the legal rule.²⁰⁵ This can be done with or without temporally suspending the effects of the ruling and, apparently, without the court having to justify itself.²⁰⁶

Limiting the Scope of a Rule – Exclusion by Virtue of s. 52(1) of the Constitution Act, 1982

A remedy limited to certain applications of a rule held to be unconstitutionally included by legislature leads to an exclusion of these cases by way of judicial pronouncement on the basis of s. 52(1) of the *Constitution Act, 1982*.

In this manner, one can:

- exclude those cases where the accused did not know a woman was under 14 years old from the offence of having sexual relations with a female under 14 years of age;²⁰⁷

205 For examples of such choices, see *K Mart Canada, supra*, n. 96, *R. v. Heywood*, [1994] 3 S.C.R. 761, 1994 CarswellBC 592, 1994 CarswellBC 1247 (S.C.C.), and *M. v. H., supra*, n. 183.

206 For example, in *K Mart Canada, supra*, n. 96 at para. 79, where the excessive scope of a picketing prohibition was at issue, the Court devotes only one paragraph of its ruling to the question of remedies: “Following the principles of constitutional remedies stated in the case of *Schachter v. Canada*, [1992] 2 S.C.R. 679, I would strike down the definition of “picketing” at s. 1 of the Code and suspend the declaration of invalidity for six months in order to allow the legislature to amend the provision to make it conform with the constitutional guarantee of freedom of expression as discussed in these reasons.” Apparently, no justification is deemed necessary.

207 The remedy imposed in *R. v. Nguyen, supra*, n. 161 at 934, where one finds in the majority opinion “that it is appropriate to issue a declaration to the effect that the words in s. 146(1) ‘whether or not he believes that she is fourteen years of age or more’ are of no force and effect.” In the case in point, the rule’s reach is limited by removing terms from the wording of the legislative provision.

- exclude “(1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use” from the reach of the criminal possession of child pornography;²¹⁸
- exclude the case of alleged obscene material from the reach of a regulation reversing the burden of proof in the context of duties;²⁰⁹
- limit the granting to police of too broad a power to frisk, search and seize;²¹⁰
- limit the definition of picketing within the framework of a legislative prohibition of picketing;²¹¹
- exclude the case of persons physically unable to commit suicide from the prohibition of assisting suicide.²¹²

Extending the Scope of a Rule—Inclusion by Virtue of s. 52(1) of the *Constitution Act, 1982*

A remedy limited to legislature’s unconstitutional exclusions leads to the inclusion of these cases by judicial pronouncement on the basis of s. 52(1) of the *Constitution Act, 1982*.

In this manner one can:

208 The remedy imposed by a majority of the Court in *Sharpe, supra*, n. 65 at para. 129, by the addition of text providing exceptions.

209 The remedy imposed in *Little Sisters, supra*, n. 11.

210 This was not the remedy imposed in *Southam, supra*, n. 69 at 169, where a straight declaration of the impugned provisions’ unconstitutionality was pronounced, since “[i]t should not fall to the courts to fill in the details that will render legislative lacunae constitutional.”

211 This was not the remedy imposed in *K Mart Canada, supra*, n. 96. Rather, the definition of picketing was simply declared unconstitutional.

212 This was not what was done in *Rodriguez, supra*, n. 122. A majority of the Court pronounced the constitutional validity of criminalizing assisted suicide. Justice Lamer, in dissent, would have declared the provision unconstitutional, suspended the effects of the declaration for one year, and established a system of constitutional exemptions for the period of the suspension.

- include persons over the age of 65 as beneficiaries of regular unemployment insurance benefits;²¹³
- include biological fathers in a parental leave program;²¹⁴
- include unmarried spouses in an insurance benefit plan;²¹⁵
- include homosexual partners in a spousal pension plan;²¹⁶
- extend the right to vote to members of a band that do not live on reserve land;²¹⁷
- extend the scope of a defence of compulsion by threat in criminal matters beyond the requirements of immediacy and presence;²¹⁸
- expand the right to protection against discrimination by adding sexual orientation as a forbidden ground of discrimination.²¹⁹

2.2. DECIDE AND FORMULATE

After identifying the impugned legal rule, describing the constitutional problem and considering which remedies are available, it is then a matter of deciding which constitutional remedy to impose (2.2.1.) and, where appropriate, to formulate the textual correction required to express the remedy (2.2.2.).

213 This is what was done in *Tétreault-Gadoury v. Canada*, *supra*, n. 161. By declaring the unconstitutionality of the legal provision that created a specific regime for persons over 65, such persons were consequently subjected to the regular regime.

214 The Court did not proceed to make this inclusion in *Shachter*, *supra*, n. 2. It would have opted for a suspended pronouncement of unconstitutionality. However, since Parliament had already modified its law during judicial proceedings so as to respect the right to equality, the Court found that no further remedy was required.

215 This was the remedy imposed by a majority of the Court in *Miron v. Trudel*, *supra*, n. 196 at 510, which speaks of “retroactively reading in”.

216 No remedy was imposed in *Egan*, *supra*, n. 128, since a majority of the Court did not find that the legislative provisions were unconstitutional. The four dissenting justices in the case would have included homosexual couples in the definition of “spouse,” but would have suspended the remedy for one year.

217 The Court did in fact make this extension in *Corbiere v. Canada*, *supra*, n. 132.

218 In *R. v. Ruzic*, *supra*, n. 185, the Court invalidated the requirements of immediacy and presence. See *e.g.* at para. 101.

219 This was the remedy imposed by the Court in *Vriend*, *supra*, n. 49.

2.2.1. DECIDING: SELECTION CRITERIA

Once a conclusion of unconstitutionality has been formulated, the discussion of criteria that should guide judges in their choice of appropriate remedy is substantial and is beyond the scope of the present text, which is methodological.

Among other considerations, the judicial determination of appropriate remedy should be influenced by concerns about content, substance, and what is just and reasonable. It should ignore characteristics of the drafting style of the provisions expressing the legal rule at the heart of the constitutional ruling. Technical or material considerations should only become relevant at the following stage of formulating the chosen remedy.

A discussion of the selection criteria involves taking into account theoretical considerations about the foundations of parliamentary democracy, the relationship between the diverse branches of the state in regard to collective life choices, and the legitimacy of judicial review, including the legitimate parameters that should guide the exercise. It is at this point that the trendy metaphor of a dialogue between the courts and parliaments with regard to enforcing the *Canadian Charter of Rights and Freedoms* comes into play.²²⁰

As the purpose of the present text is limited to advocating for a certain conceptual consistency in method, it will be sufficient to briefly call attention to certain selection criteria that have been used in jurisprudence in developing constitutional remedies.

The principal justification in support of imposing the more nuanced remedies of extending or limiting the scope of a legal rule is that it is preferable to allow legislative rules to function to as great an extent as possible when they can do so within the limits of the Constitution. Generally, marginal unconstitutionality does not require an absolute pronouncement of the rule's unconstitutionality.

The availability of multiple options in extending or limiting a rule's reach may advocate in favour of a global ruling of unconstitutionality. In these cases, the courts generally consider that parliaments are the

220 For recent jurisprudential discussions of this dialogue "metaphor," see *Bell ExpressVu Ltd. Partnership v. Rex*, *supra*, n. 57, *R. v. Hall*, *supra*, n. 157, and *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 CarswellNat 2883, 2002 CarswellNat 2884 (S.C.C.).

better institutional forum in which to make such choices.²²¹ Conversely, the presence of only one plausible corrective measure may favour a judicial modification of the rule.

The precision and simplicity with which a constitutional version of the rule can be conceived, its controversial nature and its costs will also be considered.

In general, these criteria are often implicit, vague and the object of subjective evaluation and unpredictable *ad hoc* use.

However, once the choice is made, for whatever reasons, whether real or merely asserted, the remedies of extending or limiting the scope of the legal rule may necessitate their material formulation.

2.2.2. FORMULATING: THE MATERIAL CORRECTION

Following the choice of an appropriate remedy, one must proceed to a material adjustment of the legislative provisions involved so as to express the changes brought to the legal rule by the declaration of unconstitutionality.²²²

What is involved here is simply the concrete expression, the verbal formulation, of the constitutional remedy that was judged to be appropriate. Whereas criteria of political timeliness and policy play a role in determining the choice of remedy, the development of the textual expression of that remedy should be guided only by considerations of intelligibility. One is now at the "how" stage rather than the "what" stage.

Depending on the initial drafting style, a range of options is available. One may deprive certain words of effect or add other words to the legislative provision. One may add exceptions or limit the reach of

221 For example, see Justice Lamer's comments in *Rodriguez, supra*, n. 122; *Schachter, supra*, n. 2 at 705. Also see *Vriend, supra*, n. 49 at para. 155; *Corbiere v. Canada, supra*, n. 132 at para. 115.

222 Only parliaments possess the constitutional power to confer an official value to the particular formulation in which legal rules are expressed. Earlier in this text, we referred to the extreme importance accorded to the *text* of statutes. Although judges have always had the power to create law, such as in the development of common law rules, the wording of these rules has always been of secondary importance. Constitutional remedies are somewhat exceptional since in their involving the judicial correction of legal rules enacted by legislature they result in a corrected rule in which the original legislative language with its official character sits alongside the more informal judicial correction.

certain general expressions. One may remove certain words at the same time as adding others.

In this manner, one can produce the extension of underinclusive legislation by the removal of certain words²²³ or by the addition of certain other words.²²⁴

Case law has occasionally recognized the distinction between the constitutional remedy and the particulars of its material formulation.

This is the case in *Laba*,²²⁵ where after having concluded as to the appropriateness of the remedy of limiting the scope of an offence²²⁶ by extending the exculpatory possibilities provided for by the law,²²⁷ Justice Sopinka writes for the majority: "Once the criteria to which I have referred above are satisfied, the technique employed to reach the result of the application of those criteria is more in the nature of mechanics than substance. . . [T]he same end result could be achieved by other techniques."²²⁸

Unfortunately, the constitutional remedy of a legal rule is more often confused with the particulars of its material formulation.

In the same *Laba* case, asserting that the appropriate remedy involved "striking down and reading in"²²⁹ amounts to confusing the remedy (in this case, limiting the reach of the offence by extending the possibility of exoneration) with its particular formulation (the removal

223 In *Tétreault-Gadoury v. Canada*, *supra*, n. 161, the Court pronounced the unconstitutionality of the legal provision creating a special regime for persons 65 and over, thus replacing the latter within the scope of the general unemployment insurance regime. Peter Hogg describes this case as an example of a "remedy of extension," brought about by "striking out the words that make the statutory scheme under-inclusive," P. Hogg, *supra*, n. 6 at 37-10.2, or by "severing words from the statute," *ibid.* at 37-14.

224 In *Miron v. Trudel*, *supra*, n. 196, a majority of the Court extended the legislative definition of spouse so as to extend the benefits of automobile insurance to unmarried couples. In *Vriend*, *supra*, n. 49, sexual orientation was added to the list of forbidden grounds of discrimination provided for in Alberta's *Individual's Rights Protection Act*, and in doing so expanded the protections against discrimination. Hogg describes these cases as examples of the "remedy of extension" brought about by "read[ing] in new words into the statute," P. Hogg, *supra*, n. 6 at 37-14.

225 *R. v. Laba*, [1994] 3 S.C.R. 965, 1994 CarswellOnt 113, 1994 CarswellOnt 1169 (S.C.C.) [hereinafter *Laba*].

226 The offence in question was the commerce of stolen ore containing precious metals.

227 That is, reducing the burden of proof to a simple evidential burden.

228 *Laba*, *supra*, n. 225 at para. 98.

229 *Ibid.*

of the terms “unless he establishes”²³⁰ and the addition of “in the absence of evidence raising a reasonable doubt”²³¹).

In *Sharpe*, “reading in an exclusion”²³² was not the “appropriate remedy” but rather the specific formulation of the chosen remedy—the limitation of the scope of the legal rule that created the overly broad criminal offence of possession of child pornography.

In *R. v. Nguyen*,²³³ the offence in question was judged to be too broad since it excluded the possibility of raising a particular constitutionally guaranteed defence. The remedy of limiting the scope of the offence was achieved by declaring the words “whether or not he believes that she is fourteen years of age or more” to be of no force or effect.

In *Little Sisters*,²³⁴ the method used to bring about the remedy of limiting a rule with too broad a reach was to declare “that s. 152(3) of the *Customs Act* is not to be construed and applied so as to place on an importer the onus to establish that goods are *not* obscene”.²³⁵

Sexual orientation was added to the law’s list of forbidden grounds of discrimination as the means to implement the remedy of widening a rule judged to be too limited in *Vriend*.²³⁶ In this case, although it was correctly stated that “the reading in of sexual orientation into the offending sections”²³⁷ was necessary, this was because the addition of terms coincided in this case with the extension of the rule’s reach. Purely by chance, because of the particular formulation of the rule, the substantive and the literal “reading in” agreed.

The partial striking down of the requirements of immediacy and presence in a defence of compulsion was the means chosen to extend the scope of this defence in *Ruzic*.²³⁸

In *Corbiere*, the invalidation (or “striking out”²³⁹) of the words “and is ordinarily resident on the reserve” allowed for the remedy by including the category of persons unconstitutionally excluded from the legislative granting of a right to vote that was judged too restrictive. This is the

230 *Ibid.*, at para. 95.

231 *Ibid.*

232 *Sharpe, supra*, n. 65 at para. 114.

233 *R. v. Nguyen, supra*, n. 161.

234 *Little Sisters, supra*, n. 11.

235 *Ibid.*, at para. 159 [emphasis in original].

236 *Vriend, supra*, n. 49.

237 *Ibid.*, at para. 147.

238 *R. v. Ruzic, supra*, n. 185.

239 *Corbiere v. Canada, supra*, n. 132 at para. 24.

case even though the Court seems to have avoided naming this judicial intervention of inclusion.

Justice Iacobucci, dissenting in the *Egan* case, would have deleted the words "of the opposite sex" and added "or as an analogous relationship" to the initial legislative provision in order to enlarge the overly limited legislative recognition of a right to a spousal pension.²⁴⁰

The imposition of a constitutional remedy is a serious act. The material transcription of this constitutional remedy is merely a secondary consequence of the act. It certainly requires clarity and precision and is determined by the initial drafting style of the legislative provision expressing the legal rule. However, it is not an issue that is pertinent to the debate about the legitimacy of constitutional review, as the latter is generally understood as a debate about substantive issues.

CONCLUSION

The internal coherence of law and its intelligibility are inherently valuable.

The legal community has long been interested in the necessary clarity of laws. In this regard, imprecision may in and of itself justify a pronouncement of the unconstitutionality of the law affected.

The time has come to apply this same level of concern to the production of law by the judiciary.

Jurisprudence rendered in constitutional matters is inevitably complex because it deals with abstract notions with uncertain definitional limits. It navigates in waters where it would be useless to attempt to separate out the good from the bad and the true from the false.

One can therefore wish for no more clarity than that which the subject-matter would permit. Nor can one require unanimity, which is otherwise quite rare, in an area where ideological orientation inevitably transcends simple doctrinal consistency.

However, one is justified in hoping for a minimal level of consistency in the wording and use of the tools of the trade. The interpretation of legislation is not the same as the imposition of a constitutional remedy by virtue of the principle of constitutional supremacy. One should not

240 *Egan, supra*, n. 128 at para. 223. The confusion between the remedy and its possible concrete manifestations is present here, as well. Although Justice Iacobucci describes the constitutional remedy he favours as "reading in" in *Schachter*'s sense, he simultaneously finds in favour of the appellants' request "to both read in and read out."

confuse the impugned legal rule with its expression in the legislative provision. The extension and limitation of a legal rule's reach, imposed as constitutional remedies, differ from the later and technical expression of these remedies in the text of law formulating the legal rule.

Adherence to this simple clarification would already be a welcome step toward a greater intelligibility in constitutional jurisprudence. But intelligibility has a price: it allows for transparency, and therefore, accountability. Some may sometimes not wish for it.