LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINOR REPORT ON
SEVERANCE OF UNCONSTITUTIONAL ENACTMENTS

(LRC 105)

MAY 1989

May 8, 1989

Dear Mr. Attorney:

Re: Severance of Unconstitutional Enactments

When the law imposes limitations on the legislative competence of a sovereign body, questions of whether or not particular enactments have violated those limitations will always be present. In Canada, a variety of limitations has existed for many years, the most significant being the division of powers under the *Constitution Act, 1867*.[1] Recently, further limitations have been added. The most important of these are contained in the *Canadian Charter of Rights and Freedoms* set out in Part I of the *Constitution Act, 1982*. If an enactment of the Province is declared by the courts to be beyond the powers given to the provinces or to unjustifiably violate one of the freedoms protected by the *Charter* it will be of no effect.

The process of testing provincial legislation against constitutional requirements is a subtle one. An aspect of this subtlety comes into focus when some features of a questioned enactment suggest that it should be struck down on constitutional grounds, while other features are unquestionably valid. In such circumstances, three courses seem to be open to a court. The first two represent an all-or-nothing position. The enactment could either be sustained, or struck down, in its entirety. But, as a practical matter, not every enactment, or provision of an enactment, must necessarily fall if a portion of it is found to be invalid. Peripheral features of a legislative plan can often be removed without impairing the efficacy of the legislation as a whole. This suggests the third course which is to strike down part of the enactment only and to sustain the balance. To put it another way, the invalid portion is "severed" leaving the remainder intact.

Severance is a technique available to the courts to limit the consequences of holding an enactment to be invalid. When will this technique be employed? Professor Hogg observes:[2]

> [T]he question arises whether the court should "sever" the bad part, thereby preserving the good part, or whether the court should declare the entire statute to be bad. The rule which the courts have developed is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive"; in that event it may be assumed that the legislative body would not have enacted the remaining part by itself.[3]
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> The Privy Council and the Supreme Court of Canada have both been difficult to persuade that severance is appropriate. They have usually struck down the entire statute once an adverse conclusion has been reached as to the constitutionality of part. When one considers the large number of cases in which statutes have been held to be unconstitutional, the few cases in which severance has been ordered emphasize how rarely the occasion for its use has been held to arise ... Although the courts have not expressed themselves in these terms, there appears to be a presumption that a statute embodies a single statutory scheme of which all the parts are interdependent. In other words, there seems to be a presumption against severance.

We believe that in referring to a "presumption against severance," Professor Hogg somewhat overstates the position. There are many cases in which severance has occurred but this result attracts no attention because the question of severance was never put in issue. For example, in *Reference Re Motor*

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11. 30-31 Victoria, c. 3.

22. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), 326. Another technique available to the courts to avoid a holding that a legislature has exceeded its powers is that of "reading down." This is described *ibid*. at 327.

33. The test described is from *A.-G. Alta*. v. *A.-G. Can.*, [1947] A.C. 503, 518 (Alberta Bill of Rights Case).

Vehicle Act[4] a provision of that Act concerning drivers' licence suspensions was in issue as a possible violation of the *Charter*. So far as we are aware, at no stage of the proceedings was it ever suggested that the whole of the Act was in danger of being struck down because one section was arguably tainted. The propriety of severance was so obvious that no one even thought it necessary to comment on this question. Similarly, decisions holding particular provisions of the *Criminal Code* to be unconstitutional have not meant that every part of the Code ceased to function. Examples like these arise frequently and it cannot be said that the courts hesitate to employ severance when it is manifestly appropriate to do so.

Professor Hogg's comments are closer to the mark when an enactment embodies an integrated statutory scheme and the propriety of severance is not so clearcut. This creates an added dimension of difficulty for legislators and those who must advise them on constitutional matters. First, our experience under the *Charter* is limited and the courts are still in the process of articulating its application to provincial legislation. Whether or not a particular provision can lawfully be enacted by the province is no longer as predictable as it once was. Second, if the provision should, in some way, offend the *Charter*, the extent of the taint would be equally unpredictable given the uncertainty surrounding the use of severance by the courts.

Can the legislative process be made more certain in this regard? Professor Hogg suggests that the use of a "severance clause" might be beneficial:[5]

> A "severance clause" is a section of a statute that provides that, if any part of the statute is judicially held to be unconstitutional, the remainder of the Act is to continue to be effective. At the very least, such a clause should reverse the presumption against severance: instead of the presumption that the various parts of the statute are interdependent and inseverable, the presumption should be that the parts are independent and severable.

Severance clauses are particularly common in the United States. There it is not unusual for a court to hold that an enactment is invalid for constitutional reasons and severance is seen as one way of minimizing the dislocation that can be caused by such a decision.[6] Severance clauses are little used in Canada but they are not wholly unheard of.[7]

We believe that with the coming of the Charter there is a need for British Columbia statutes expressly to address the issue of severance. One way of doing so would be the wider and more frequent use of severance clauses in individual statutes. While this approach seems to have found favour in the United States, we see two objections to it. First, if used selectively, it gives the appearance that the legislature itself has less than full confidence in its constitutional position with respect to those enactments declared to be severable. A severance clause might be seen as an invitation to would-be litigants to attack the enactment and as an invitation to the courts to vitiate it more readily than they might if the clause were omitted.

A second objection concerns those enactments which are not expressly declared to be severable. Would the courts be less ready to hold their provisions to be severable? It is not difficult to foresee an

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44. [1985] 2 S.C.R. 486.

55. Hogg, *supra*, n. 2 at 327.

66. The following is typical of an American severance clause:
If any provision of this Act or the application thereof to any person or circumstance is held invalid, the validity of the remainder of this Act and of the application of such provision t other persons and circumstances shall not be affected thereby.
16 USCS s. 1439 (Marine Sanctuaries).

77. The *Natural Products Marketing Act, 1934* , S.C. 1934, c. 57, s. 26 provided:

> If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or *ultra vires*, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained.

Ironically, the Privy Council refused to give effect to the severance clause and the entire statute was struck down. *See A.-G.B.C.* v. *A.-G. Can.,* [1937] A.C. 377.

argument that the legislature, having declared statute X to be severable while remaining silent with respect to statute Y, must be taken to have intended that statute Y should not be severable. Whether or not such an argument is consistent with the established rules respecting the interpretation of statutes, it has a certain logic which might well play a subconscious role.

These objections can be met only if every enactment is the subject of a declaration that constitutionally invalid portions of it are severable.[8] But, the addition of a boiler-plate severability provision to every provincial statute is not only an extremely untidy solution; it is also a disproportionate response to the problem. A more rational way must be found to achieve the desired position.

We believe that this more rational way lies in adding a general statement to the I*nterpretation Act*[9] respecting the severability of provincial enactments. This measure would be consistent with the way courts tend to characterize severance. As Professor Hogg points out:[10]

> To give some effect to a severance clause seems sound, since the clause indicates the legislative intent with respect to severance, and the courts have always claimed that the inquiry into severability is an inquiry into legislative intent.

The function of the *Interpretation Act* is, of course, to assist the courts and others in discovering legislative intent.

An omnibus severance provision might be framed in the following fashion:

> Unless an enactment otherwise provides, where any portion of it, or its application to any person or in any circumstance, is held to be invalid, the invalidity does not affect
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> (a) the remainder of the enactment, or
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> (b) other applications of the enactment
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> which can be given effect, consistent with the scheme of the enactment, without the invalid portion or application.

A provision along these lines would not change the law, in the sense that the ability of judges to employ severance where it ought to be used would be neither limited nor enlarged. What it would accomplish would be to focus attention on severance as an option to be borne in mind in all cases in which a provincial enactment may be ultra vires. It would also stake out very clearly a "default position" concerning the intent of the provincial legislature.

The worst thing which might occur would be that a court would sever a tainted provision, leaving in force something which the legislature, had it considered the issue, would not have enacted in isolation. If that should occur, the legislature can easily repeal the portion which the court leaves in place. This strikes us as less mischievous than to have an entire enactment struck down when a portion of it might usefully have been retained.

We recommend the addition of an omnibus severance provision to the *Interpretation Act*. Set out above is one way in which it might be drafted but other approaches are possible as well. The general

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88. Unless, of course, the express policy of the enactment is that it is *not* severable or the provisions of the legislation are so integrated that the valid portion of it cannot function without the invalid portion.

99. R.S.B.C. 1979, c. 206.

1010. *Supra*, n. 5.

policy is clear and we are content that this matter be left with Legislative Counsel.

This letter is to be taken as a Minor Report (LRC 105) of the Law Reform Commission recommending a change in the law as herein set out. This recommendation was approved by the Commission at a meeting on May 4, 1989.

Yours sincerely,

Arthur L. Close
Chairman