



Chapter 8

The Use of the Blue Pencil – Partial Invalidity

Stephen Lloyd SC and Houda Younan

Litigants are usually not attracted, at least not initially, to an argument that an instrument is invalid in part. Challengers are generally happy to destroy a criticised instrument, leaving it a smouldering nullity. Defenders, generally, want to maintain the instrument in its pristine and untouched state, resisting the notion that anything in it is flawed.

In such instances, arguments that an instrument may be only partially invalid (or is still partially valid) are a species of wallflower for advocates. They are not approached until late in the evening.

For the defender, partial invalidity might be better than a complete loss. In some cases, the amount of the instrument that is preserved may make the challenge something of a pyrrhic victory.

For the challenger, partial invalidity may be sufficient to achieve the objects of the litigation. It may be enough that the instrument does not apply to the litigant. Indeed, there may even be instances where the challenger wants an outcome where an instrument is only partially invalid because the unobjectionable parts are in fact desirable for the litigant. In such cases, the litigation is usually posed as a challenge to only specified sections or clauses and the parties make submissions about the contested parts, neither party ever really addressing the possibility that the whole instrument may fall.

In circumstances where it is apparent that a court will conclude that at least part of an instrument is invalid, it may seem to be not in the defender's interest to argue against the severance of the invalid parts (thereby at least saving the balance of the instrument), but this is not necessarily the case. There may be a forensic advantage in contending that the scheme is either wholly valid or wholly invalid (which in some cases may make a court more reluctant to hold the whole scheme invalid). Politically, it may be desirable that, if the scheme is partially invalid, then it is wholly invalid because it will be easier to develop and enact a new scheme than to try to amend the instrument that has been judicially barbered.

We should pause to clarify what we mean by “partial invalidity”.

Invalidity is not like pregnancy. A woman is either pregnant or not: she cannot be partially pregnant. One does not say the woman's limbs are not pregnant. There is a unity to the person, giving the body only one possible character.

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