Court file no.: 38585

IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant

and

G

Respondent

and

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CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO DIVISION
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Interveners

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(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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FACTUM OF THE RESPONDENT
(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

PART I – OVERVIEW AND FACTS

Overview

1. The respondent is a 58-year-old man with bipolar disorder. His first and only manic episode occurred in the wake of the terror attacks of September 11, 2001. During this episode, he was charged, *inter alia*, with two counts of sexual assault with respect to his then wife.

2. The respondent was found not criminally responsible by reason of mental disorder (NCRMD) on June 21, 2002. One year later, on July 29, 2003, he was granted an absolute discharge, meaning that the Ontario Review Board found him not to pose a significant threat to the safety of the public.[1]

3. Despite his NCRMD finding, his absolute discharge, committing no other offences (before or after the index offences), and maintaining perfect treatment compliance, *Christopher's Law* required the respondent to be registered as a sex offender and comply with the requirements of Ontario's sex offender registry, with no opportunity for removal, for the rest of his life.

4. The Ontario registry further required the respondent to attend a police station in person at least once per year, submit to photographs and the noting of distinguishing marks and notify the police of any changes in his residence, work or school information. Police could conduct random checks for compliance and any breach could result in charges and jail time. *Christopher's Law* provides for the collection and maintenance of a cumulative and permanent record[2] of 17 enumerated data points including all identifying information, addresses, telephone numbers,

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[1] *Criminal Code*, RSC 1985, c C-46, s. 672.54(a).
[2] O Reg 69/01 under *Christopher's Law*, s. 2(3).

vehicle descriptions, employers, workplaces, volunteer locations and work activities, schools, photographs, distinguishing features, offence particulars and verification efforts.[3]

5. In his application challenging *Christopher's Law* and the corresponding federal sex offender registry (*SOIRA*)[4] as it applied to persons found NCRMD who have been absolutely discharged by the Review Board, the respondent testified that the requirements of the registries were onerous, discriminatory and incompatible with his continuing recovery. He presented evidence from his longstanding psychiatrist, his former wife (the victim of the index offences) and an expert respecting the Review Board process.

6. The Ontario Court of Appeal found *Christopher's Law* to infringe the respondent's equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* by failing to take into consideration his individual circumstances and by failing to provide an "exit ramp" for his removal when such an opportunity is provided to those who have been convicted.

7. In this appeal, Ontario seeks to maintain the right to discriminate against persons found NCRMD because, as a group, persons found NCRMD are statistically more likely to re-offend than the general population. The respondent asks that he not be defined by the disability that gave rise to his index offences and that his own rehabilitation be considered no less relevant than that of non-NCRMD offenders who can be removed from the registry.

8. The respondent further seeks recognition, for himself and particularly for those persons found NCRMD who are less able to cope with the requirements and implications of sex offender registries, that registries can significantly impact liberty and security of the person interests

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[3] O Reg 69/01, s. 2(1).

[4] *Sex Offender Information Registration Act*, S.C. 2004, c. 10. The Ontario Court of Appeal's decision in the present case striking down portions of *SOIRA* has not been appealed.

protected by section 7 of the *Charter* and that *Christopher's Law* does so in manner that does not conform with fundamental justice.

9. These infringements of sections 7 and 15 cannot be saved by section 1 of the *Charter* as the individual circumstances of persons found NCRMD and discharged by the Review Board can be considered without measurably increasing risk to public safety.

10. With respect to remedies, the appellant's efforts to restrict courts from granting individual remedies to *Charter* litigants would eliminate the main incentive for litigants to come forward – to overcome a personal injustice. In the respondent's circumstances, a personal remedy was necessary to end the discriminatory impact of the law found by the court below.

Facts

11. The respondent accepts the facts set out at paragraphs 6 to 11, 13 to 15, 17 to 19, 21, 23(a), 23(e) to 23(k) and 24 of the appellant's factum.

12. The respondent disputes the facts set out in paragraphs 12 and 16 of the appellant's factum on the basis that they are under-inclusive with respect to the scope of permitted disclosure under *Christopher's Law*. Information from the registry may be disclosed to police forces within and outside of Canada[5] for crime prevention and law enforcement purposes that are not restricted to the investigation or prevention of sexual offences.[6] The information may then be used by a Chief of Police or a designate to make public disclosure of personal information under section 41(1.1) and (1.2) of the *Police Services Act*.[7]

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[5] *Christopher's Law (Sex Offender Registry),* 2000 SO 2000, c 1, s. 10(3).
[6] *Christopher's Law, supra,* s. 10(2) and 10(3).
[7] *Christopher's Law,* s. 10(2), *Police Services Act,* RSO 1990, c P.15, s. 41(1.1) and 41(1.2).

13. The respondent disputes the facts set out at paragraphs 20 and 22 of the appellant's factum to the extent that they are not sourced.

14. The respondent accepts paragraphs 23(b) and (d) of the appellant's factum but would add, from the same source as these paragraphs, Dr. Karl Hanson's statement that "among identified offenders, major mental illness has a weak relationship with criminal violent and sexual recidivism."[8]

15. At paragraph 23(c) of its factum, the appellant cites part of Dr. Hanson's answer to question 96 in his cross-examination, which should be read in conjunction with the balance of his answers at questions 95 to 97,[9] which read as follows:

> 95 Q. Now, the fact that someone has been convicted or found not criminally responsible for a sexual offence is just one factor in respect of -- that contributes to their future risk.
>
> A. That is correct.
>
> 96 Q. And it is, amongst the different factors we've discussed, not even necessarily the most important factor. We've talked about antisocial personality disorder, as an example.
>
> A. Judging the relative importance of factors is very difficult. It is an objective, easily measured, easily recorded and publicly available indicator and so it is often used, and it is as good and often better than other indicators. In the Static-99 assessment scheme, which is widely used and referenced, we use extra weight to identified offences because we believe that they are a very useful indicator. The basic point that I would say is no single indicator is, I guess, necessary or sufficient. I would not concur that it's not amongst the most important. In general, past history of behaviour is a good predictor of future behaviour.
>
> 97 Q. But a combination of many protective factors and the absence of other contributing factors could outweigh, in terms of their relative importance, the single factor of a past criminal conviction or finding of not criminally responsible for a sexual offence?
>
> A. Yes. I believe that to be true and hope that to be true.

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[8] Dr. Hanson affidavit sworn February 11, 2016 at para 22, **AR Vol. VI, Tab 6, p. 73.**

[9] Dr. Hanson cross-examination at page 42, line 9 to page 43, line 14, **AR Vol. XVII, Tab 1, pp. 42-43.**

16. The appellant declined to conduct a defence medical examination respecting the impact of the registries on the respondent or the respondent's risk of re-offending.[10] As a result of Ontario's procedural choice, no independent assessment of the respondent's personal risk of reoffending was before the application judge. The respondent's risk to the safety of the public was assessed in the context of his discharge by the Ontario Review Board in 2003, however.[11] In addition, Dr. Hanson acknowledged a number of actuarial factors that are protective against the risk of reoffending, all of which apply to the respondent:

> (a) the presence of bipolar disorder, the absence of a cluster B personality disorder and the absence of continuing substance abuse;[12]
>
> (b) the duration of remission of the mental illness that contributed to the original offence, the absence of prior or subsequent offences to the index offences and continuous compliance with a program of mental health treatment;[13]
>
> (c) the absence of paraphilic or deviant sexual interests[14] and that the victim of the index offences was a person known to the appellant;[15]
>
> (d) the absence of non-compliance with court orders[16] and the presence of a stable marriage[12] (the respondent had since remarried);[17] and
>
> (e) the respondent's age (the older the better).[18]

17. Although *Christopher's Law* treats persons who commit two or more offences far more harshly than those who commit a single offence, Dr. Hanson testified that the actuarial risk of a

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[10] Defence medical examination: Rule 33 of the *Rules of Civil Procedure,* RRO 1990, Reg 194.

[11] Ontario Review Board disposition dated August 20, 2003 and reasons for disposition dated October 24, 2003 **AR Vol. II, p. 59**

[12] Dr. Hanson exam at page 17, line 7 to page 18, line 25, **AR Vol. XVII, Tab 1, pp. 17-18.**

[13] Dr. Hanson exam at page 31, line 24 to page 33, line 25, **AR Vol. XVII, Tab 1, pp. 31-33.**

[14] Dr. Hanson exam at page 34, line 14 to page 35, line 13, **AR Vol. XVII, Tab 1, pp. 34-35.**

[15] Dr. Hanson exam at page 37, lines 16 to 25, **AR Vol. XVII, Tab 1, p. 37.**

[16] Dr. Hanson exam at page 53, line 15 to page 54, line 1, **AR Vol. XVII, Tab 1, pp. 53- 54.**

[17] Transcript of the cross-examination of the respondent ("Respondent's exam.") at page 20, lines 14 to 15, **AR Vol. XVIII, Tab 1, p. 20.**

[18] Dr. Hanson exam at page 54, lines 10 to 15, **AR Vol. XVII, Tab 1, p. 54.**

person found NCRMD in respect of multiple offences during the same acute episode is no different than that of a person found NCRMD in respect of a single offence.[19] Dr. Hanson otherwise asserted that the risk factors predicting recidivism of persons found NCRMD were the same as those of persons found guilty in respect of sexual offences.[20]

18. With respect to pardons, Dr. Hanson testified that any evidence that a pardon was a protective factor against re-offending was thin and insufficient to convince him one way or the other.[21] He added that persons granted a pardon continue to be at a higher risk of re-offending than the general population.[22]

19. The respondent also accepts paragraphs 2 through 25 of the reasons of the application judge[23] and relies upon the further facts set out below.

20. The respondent's former wife did not wish for him to be charged when she contacted the police. Instead, she hoped the respondent would stay in hospital to get medical help and keep away from the family until he got better.[24]

21. The respondent's experience was that the registries forced him regularly to revisit the significant trauma and losses he experienced as a result of his manic episode in 2001.[25] He had been arrested in a psychotic state from a hospital psychiatric unit,[26] subjected to a body cavity

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[19] Dr. Hanson exam at page 41, line 24 to page 42, line 8, **AR Vol. XVII, Tab 1, pp. 41-42.**
[20] Dr. Hanson affidavit at para 22, **AR Vol. VI, Tab 6, p. 73.**
[21] Dr. Hanson exam at page 47, lines 2 to 22, **AR Vol. XVII, Tab 1, p. 47.**
[22] Dr. Hanson exam at page 48, lines 10 to 18, **AR Vol. XVII, Tab 1, p. 48.**
[23] Reasons of Lederer J. released November 22, 2017, ("SCJ reasons") at paras 2 to 25, **AR Vol. I, Tab 2, pp. 6-12.**
[24] Affidavit of the respondent's former wife sworn September 4, 2013 at paras 25 to 27, **AR Vol. II, p. 84.**
[25] Transcript of the cross-examination of Dr. Leslie Kiraly held October 28, 2016 ("Dr. Kiraly exam.") at page 52, line 26 to page 53, line 9, **AR Vol. XVIII, pp. 164-165.**
[26] Respondent's exam at page 70, lines 9 to 10, **AR Vol. XVIII, p. 70.**

search[27] and held at the Toronto West Detention Centre where he was threatened with assault by another prisoner.[28] Among the losses he experienced, he counted his first marriage, access to his children, his home, his employment, his friends, and his dignity and status in society.[29]

History of the application

22. This application was commenced May 23, 2014 with an order being obtained permitting the respondent to use a pseudonym and the non-disclosure of his family members' identities.[30]

23. The constitutionality of *Christopher's Law* had previously been considered by the Ontario Court of Appeal in *R. v. Dyck*.[31] In that case, the accused alleged, among other things, a breach of section 7 of the *Charter*. The court upheld the constitutionality of *Christopher's Law*, finding that while the law engaged the accused's section 7 liberty rights, the impact of the registry was modest and not overbroad or otherwise contrary to the principles of natural justice.

24. The respondent sought to distinguish *Dyck* on the grounds that, 1) it was decided without evidence respecting the impact of the registry on the accused;[32] 2) the accused in *Dyck* was convicted of sexual interference rather than being found NCRMD; 3) security of the person under section 7 was not raised in *Dyck*, nor was section 15;[33] and 4) Mr. Dyck's registration was for 10 years rather than for life.[34]

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[27] Respondent affidavit sworn March 11, 2014 at para 18, **AR Vol. II, p. 40.**
[28] Respondent's affidavit at para 18, **AR Vol. II, p. 40.**
[29] Appellant's affidavit at para 16, **AR Vol. II, p. 39.**
[30] Order of Master Dash dated May 23, 2014, **AR Vol. II, Tab 1, pp. 1-3.**
[31] *R v Dyck*, 2008 ONCA 309.
[32] The accused did not testify. He called an Elizabeth Fry Society representative on whether registries are a good use of public resources. Legislative history evidence was filed jointly. *Dyck, supra,* at paras 12-14.
[33] See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 45, respecting when the constitutional validity of a statute may be revisited.
[34] The defendant was convicted of a single count of sexual interference: *Dyck, supra,* at para 3.

25. The respondent also argued that the reasoning in *Dyck* had been overtaken by this Court's decision in *Bedford*. Specifically, in *Bedford*, this Court rejected a standard of "direct" causal connection[35] between the impugned statute and the consequences upon a claimant, instead adopting a "sufficient causal connection" test.[36] This Court in *Bedford* further cautioned against obscuring what is required at the section 7 stage of analysis and the section 1 stage of analysis and emphasized that the focus of section 7 is on the individual claimant.[37]

26. In *Dyck*, the Court of Appeal considered only the literal statutory requirements of *Christopher's Law*, likening it to any other interaction when seeking a government benefit.[38] The Court further balanced the burdens of compliance with *Christopher's Law* with the law's public protection objectives within the section 7 analysis.[39] The threshold for establishing overbreadth was further noted by the court in *Dyck* to be that of gross disproportionality.[40]

27. The application judge's decision dismissing the application was released November 22, 2017.[41] The application judge relied heavily on *Dyck*, citing it 25 times and concluding that the factual differences between the respondent's circumstances and those considered in *Dyck* "come to nothing", such that the "rationale and logic" in *Dyck* applied.[42]

28. The application judge considered the impacts of the legislation in isolation from the respondent's circumstances as a person with a mental disorder. After determining that the actual risk of disclosure of information from the registry was very low, he wrote,

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[35] *Bedford*, *supra*, at paras 74-77.
[36] *Bedford*, *supra*,at para 78.
[37] *Bedford*, *supra*, at para 124.
[38] *Dyck*, *supra*, at paras 109-110.
[39] *Dyck*, *supra*, at para 140.
[40] *Dyck*, *supra*, at paras 94-95 and footnote 5.
[41] SCJ Reasons, **AR Vol. I, Tab 2.**
[42] SCJ Reasons at paras 82 and 83, **AR Vol. I, Tab 2, p. 34.**

> To me, this vulnerability is not the product of state action but of the individual's own sense of concern arising out his or her own actions. The judge in *R. v. Ndhlovu* saw this differently. She differentiated a conviction (where an offender is not annually reminded of his conviction) from registration where being compelled to report annually increases the potential for "internal stigma." "Stigma" is a mark or sign of disgrace or discredit. Generally, "marks" and "signs" are factors perceived or noted by others. Presumably "internal stigma" is something we visit on ourselves. This reflects the impact reporting has on the individual. Strictly speaking this is not stigma. It is another way of identifying stress and anxiety felt by the individual. In this case stress and anxiety that comes from concern about the release of the information on the registry. I have already noted that it is difficult to see how any stress caused by compliance with the administrative processes for registering and reporting could rise to the serious level of deprivation that would engage by s. 7 of the *Charter of Rights and Freedoms* (see para. 63, above).[43]

29. With respect to section 15, the application judge relied upon the findings in his section 7 analysis to hold that the "modest impact" of the sex offender registries failed to cross the threshold of the disproportionate impact needed to establish discrimination.[44] He went on to write, in the alternative, that it was inappropriate to consider the mechanisms for removal from the registries available to those not found NCRMD:

> It does not matter that an absolute discharge has been granted by the Review Board. A pardon or record suspension signifies that a convict has been of good conduct and behaviour for an extended period of time following the completion of his punishment, and that the conviction should no longer reflect adversely on the character of the individual involved.[259] The moral blame associated with *mens rea* has been displaced by the rehabilitation of the convicted person. It would be inappropriate and wrong to apply concepts of punishment and bad character to those found to be not criminally responsible (NCR).[45]

30. Following the release of the application judge's decision, Chief Justice Strathy, for a five-judge panel of the Ontario Court of Appeal in *R v. Long*[46] released March 22, 2018, wrote that

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[43] SCJ Reasons at para 73, **AR Vol. I, Tab 2, p. 30.**

[44] SCJ Reasons at para 148, **AR Vol. I, Tab 2, p. 54.**

[45] SCJ Reasons at para 162, **AR Vol. I, Tab 2, p. 58.**

[46] *R v Long*, 2018 ONCA 282 ("*Long*"), leave to appeal refused, 2020 CanLII 231 (SCC).

the Court of Appeal's reasoning in *Dyck*, particularly in relation to the threshold for a finding of overbreadth, had been overtaken by *Bedford* and was no longer binding.[47]

31. On appeal from the application judge's decision, the Court of Appeal did not disturb his findings of fact or his conclusions respecting section 7. The Court of Appeal found, however, that *Christopher's Law* breached the respondent's right to equal treatment under section 15 of the *Charter*. The Court of Appeal further granted the respondent an individual remedy removing him from the registry while suspending its declaration of validity for one year.[48]

32. The appellant twice moved to stay the individual remedy granted to the respondent pending this appeal, first before the Court of Appeal[49] and secondly before this Court.[50] Both applications were dismissed.

PART II – QUESTIONS AT ISSUE

33. The following questions are raised by the appellant in the appeal:

(a) Does *Christopher's Law* infringe the right to equality without discrimination on the basis of mental disability under *Charter* s. 15 because it requires persons found NCRMD for sexual offences who have received an absolute discharge from a review board to register and report under the sex offender registry without individualized exceptions?

(b) Does *Christopher's Law* infringe the right under *Charter* s. 7 not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice?

(c) If the answer to either of the previous questions is "yes", is the infringement a reasonable limit that has been demonstrably justified in a free and democratic society?

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[47] *Long* at para. 34.

[48] Reasons of the Court of Appeal released April 4, 2019 per Doherty, van Rensberg and Hourigan JJ.A. ("OCA reasons"), **AR Vol. I, Tab 4**.

[49] Roberts J.A. reasons dated May 10, 2019 **Respondent's record, Tab 1, page 1**

[50] Order of Moldaver J. on stay motion dated June 14, 2019, **AR Vol. II, pp. 33-35**.

(d) In the event that *Christopher's Law* is found to unjustifiably infringe the *Charter*, was the Court of Appeal correct to grant individual relief to the claimant G during the period of suspension of its declaration?

34. The respondent does not take issue with the questions as stated by the appellant. It would answer the first two questions in the affirmative, the third question in the negative and the last question in the affirmative.

PART III –ARGUMENT

Issue A: Did the Court of Appeal err in finding that *Christopher's Law* was discriminatory?

35. The Court of Appeal found that *Christopher's Law* breached the respondent's right to equal treatment under section 15 of the *Charter* by failing to meet the requirements of substantive equality through an individual assessment of risk and by failing to provide any mechanism for removal from the registry when such mechanisms are available to those not found NCRMD.[51]

36. The appellant argues that the Court of Appeal erred in holding that a process of individualized assessment was constitutionally required under section 15. In support of this position, it cites *Withler v. Canada (AG)*,[52] in which this Court upheld civil servant pension rules that reduced the supplementary death benefit for surviving spouses based on the civil servant's age at death. The Court found that perfect correspondence was not required provided that the lines drawn were generally appropriate[53] and that when all relevant factors were considered, the distinctions in the legislation did not perpetuate disadvantage, prejudice or stereotypes.[54]

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[51] OCA reasons at paras 122 and 126, **AR Vol. I, Tab 4, pp. 114-116.**

[52] *Withler v Canada (A.G.)*, 2011 SCC 12.

[53] *Withler* at para 71. See also *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 106.

[54] *Withler, supra,* at paras 79-81.

37. *Withler* and the cases of *Law v. Canada*[55] and *Gosselin v. Quebec*[56] also cited by the appellant are distinguishable as the treatment of persons found NCRMD by *Christopher's Law* does perpetuate disadvantage, prejudice and negative stereotypes in a way that pension or welfare benefits based on the anticipated needs of recipients at different ages do not.

38. The complete text of paragraph 106 from *Law v. Canada*, cited by the appellant at paragraph 43 of its factum as supporting the use of generalized statistics, recognizes this distinction. It reads,

> 106 Under these circumstances, the fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the Charter and being required to justify its position under s. 1. I emphasize, though, that under other circumstances a more precise correspondence will undoubtedly be required in order to comply with s. 15(1). In particular, a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society. (underlining added)[57]

39. In excluding those found NCRMD from any mechanism for removal under *Christopher's Law*, it is as though the Legislature presumed that there is no prospect for their rehabilitation, despite the fact that the risk factors for re-offending are otherwise the same as convicted criminals,[58] thus perpetuating disadvantage and negative stereotypes about individuals with mental illness.

[55] *Law v Canada, supra,*

[56] *Gosselin v Quebec (Attorney General),* 2002 SCC 84.

[57] *Law v Canada, supra,* at para 106.

[58] Dr. Hanson affidavit at para 22, **AR Vol. VI, Tab 6, p. 73**; SCJ reasons at para 162, **AR Vol. I, Tab 2, p. 58.**

40. The appellant further cites this Court's decision in *Nova Scotia (W.C.B.) v. Martin*[59] as recognizing that government benefits or services cannot be fully customized. The response of the tribunal and of this Court in that case, however, was to strike down the provision that eliminated individual assessments for workers making compensation claims for chronic pain.[60]

41. The appellant also cites *R. v. T.M.B.*,[61] a decision of Code J. of the Ontario Superior Court on appeal from summary conviction. That decision upheld the mandatory minimum sentence for sexual interference in section 151(b) of the *Criminal Code*, which was challenged on the basis of its adverse impact on Indigenous offenders. The appeal judge found the overall circumstances of Indigenous offenders who committed sexual offences against children required denunciatory and deterrent sentences,[62] that 14 days was the most lenient of mandatory minimum custodial sentences[63] and that exceptional cases would indeed be rare.[64]

42. In contrast, the need for lifelong registration of those found NCRMD in respect of two or more sexual offences under *Christopher's Law* lacks the same pressing justification. As this Court found in *Winko*,[65] it is an error to presume dangerousness or any particular degree of risk on the part of an individual by virtue of an NCRMD finding.[66] Nor can an elevated risk of re-offending by the NCRMD community in the aggregate justify treating each member as if they individually represent an increased risk in perpetuity[67] This is particularly so when the aggregate

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[59] *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54.
[60] *Nova Scotia v Martin*, *supra*, at para. 119.
[61] *R v T.M.B.*, 2013 ONSC 4019.
[62] *R v T.M.B.*, *supra*, at para 60.
[63] *R v T.M.B.*, *supra*, at para 25.
[64] *R v T.M.B.*, *supra*, at para 63.
[65] *Winko v B.C.*, [1999] 2 SCR 625.
[66] *Winko*, *supra*, at para 35.
[67] *R v Swain*, [1991] 1 SCR 933 at pages 1012-1013.

includes both individuals like the respondent and those released from maximum security forensic facilities and child molesters, who Dr. Hanson noted can have recidivism rates that are substantially higher.[68]

43. The appellant cites *Dyck* and the application judge's ruling[69] to argue that it is inappropriate to compare *Christopher's Law* to Part XX.1 of the *Criminal Code* as the consequences of registration under *Christopher's Law* are modest when compared to the restrictions of liberty of those subject to the jurisdiction of the Review Board. Conditions imposed by Review Boards, however are required to be the least onerous and least restrictive, consistent with ensuring the goals of public safety, the mental condition of the accused the reintegration of the accused into society and the other needs of the accused.[70] They are imposed not only for the purpose of public safety but for the rehabilitation, reintegration and other needs of the person found NCRMD. In contrast, *Christopher's Law* serves only the purposes of public safety and assisting in police investigations without any corresponding benefit for registrants.

44. The appellant further cites the Court of Appeal's reasons respecting whether there is a breach of section 7[71] to support its assertion that the interests affected by *Christopher's Law* do not require an individualized assessment under section 15. The interests that are protected under section 15, however, are different from those under section 7.

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[68] Dr. Hanson affidavit at paras 12 and 23 **AR Vol. VI, Tab 6, pp. 71 and 73.**

[69] Appellant's factum at paras 45-48.

[70] *Criminal Code*, *supra*, s. 672.54. While the words "necessary and appropriate" have replaced the "least onerous and least restrictive" terminology that used to appear in s. 672.54, the Ontario Court of Appeal has held that they mean the same thing. *Osawe (Re)*, 2015 ONCA 280 at para 45; and *Ranieri (Re)*, 2015 ONCA 444 at paras 19-21.

[71] Appellant's factum at para 48.

45. Section 15 provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination…" The nature and scope of interests protected by section 15 has been found to include being named on a statement of live birth,[72] recognition of spousal relationships[73] and voting rights in band elections,[74] as well as economic interests impacted by discriminatory laws.[75]

46. The availability of section 15 and the expectation of individualized assessments are by no means restricted to stages in the criminal law process[76] or circumstances where liberty or security of the person are engaged. That being said, the respondent disputes the appellant's characterization in paragraph 50 of its factum that *Christopher's Law* is not a further coercive state order when non-compliance is backed by the threat of charges and incarceration.[77]

47. At paragraph 51 of its factum, citing the reasons of the application judge, the appellant asserts that the rehabilitative purposes of discharges under section 730(1) of the *Criminal Code* and pardon and record suspensions are fundamentally incompatible with NCRMD status such that it would be inappropriate to treat persons found NCRMD in exact same way. Consider, however, that 1) the designation of NCRMD is temporal – it applies to the specific point in time the offence was committed and not to the accused's circumstances at the time of the designation;[78] 2) persons found NCRMD are indeed capable of rehabilitation, often to a higher

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[72] *Trociuk v British Columbia (A.G.)* 2003 SCC 34.
[73] *M v H*, [1999] 2 SCR 3.
[74] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.
[75] *Nova Scotia v Martin*, *supra.*
[76] Appellant's factum at para 50.
[77] *Christopher's Law*, *supra*, s. 11.
[78] *Criminal Code*, *supra*, s. 16(1).

degree than convicted offenders;[79] and 3) if anything, the moral blamelessness and historic disadvantage of persons found NCRMD would justify being treated better than convicted criminals under *Christopher's Law* and not in a demonstrably harsher manner of no exit ramp for life.

48. At paragraphs 53 to 55 of its factum, the appellant cites the fact that it is federal statutes (namely the *Criminal Code* and *Criminal Records Act*), which create the distinctions respecting who is eligible for a conditional or absolute discharge, a pardon or a record suspension, the appellant is entitled to rely on them as presumptively valid and is further required to defer to them out of the principle of comity.

49. These federalism arguments are of limited value. Ontario has made a deliberate decision to require persons found NCRMD in respect of sexual offences to register under *Christopher's Law* such that it must consider the needs and circumstances of this population. Importantly too, Canada was also a respondent before the Court of Appeal and has not appealed that court's ruling that *SOIRA* contravenes section 15. This means that the appellant is seeking to preserve a provincial legislative scheme that will be at even further variance with the requirements of the federal registry.

50. At paragraph 56 of its factum, the appellant notes first that discharges under section 730(1) of the *Criminal Code* are not available where the maximum sentence is 14 years or more or where there is a mandatory minimum sentence and second that discharges are rare in the case of sexual offences. Notably, none of the charges laid against the respondent in 2001 carried a

[79] Affidavit of Johann Brink sworn March 26, 2015 at para 42, **AR Vol. 2, pp. 146 to 147.**

mandatory minimum sentence or a maximum sentence of 14 years.[80] Further, there are certainly instances in which a discharge has been considered appropriate in respect of sexual offences.[81]

51. The appellant argues at paragraph 57 of its factum that the registration of those found NCRMD is not based on a stereotypical notion but is supported by statistical evidence that persons found NCRMD are at higher risk of re-offending than the general population and that the risk increases following an absolute discharge by the Review Board. This fails to explain why the Legislature is comfortable with allowing the removal from the registry of those who have received a record suspension despite their elevated risk.[82] Moreover, comparing individuals found NCRMD to the non-offending general population fails to allow for the range of circumstances in which the respondent and people like him can be found NCRMD, their range of responses to treatment, their prospects for rehabilitation following the index offences, and their progress through the Review Board process.[83] Even if there is elevated aggregate risk as against the non-offending general population, it cannot justify the legislative response of reinforcing disadvantage and stereotypes by treating all persons found NCRMD as indistinguishable from each other. Further, it cannot justify treating all persons found NCRMD worse than convicted offenders by withholding any way to ever escape the registry, no matter what.

52. At paragraphs 58 and 59 in its factum, the appellant points to the imprecision of professional judgment and of actuarial assessments in predicting risk, citing the Court of

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[80] Information sworn December 10, 2001, **AR Vol. 2, p. 50** *Criminal Code*, *supra*, sections 264(2)(b), 271 and 279(2) as they stood in 2002.

[81] See, for example, *R v Burton*, 2012 ONSC 5920, *R v Troutlake*, [2002] OJ No 5978 **Appellant's Book of Authorities, Tab 1**, *R v J (T.J.)*, 2012 BCPC 115, *R v Jayswal*, 2011 ONCJ 33 and *R v Umakanthan*, 2016 QCCQ 18206.

[82] See paragraph 18, above.

[83] Brink affidavit at paras 5, 8, 18 to 21 and 37, **AR Vol. 2, pp. 131-133, 137-139 and 144-145.**

Appeal's reasons at paragraph 96 and paragraph 70 in *R. v. Debidin*. The elimination of all risk, however, is an unattainable goal. The statistical arguments comparing persons found NCRMD to the non-offending general population could justify registering all men, regardless of their history of offences, as the vast majority of sex offences are committed by men[84] or registering all persons charged with a sexual offence even where the charge is withdrawn.[85]

53. The appellant's arguments fail to meaningfully rebut any aspect of Justice Doherty's reasons respecting the breach of the respondent's equality rights.[86] As such, "s. 15(1) requires that any NCRMD person who has received an absolute discharge must have the opportunity to demonstrate that the imposition of a sex offender registry order or the continuation of that order is not appropriate in the circumstances."[87]

Issue B: Is *Christopher's Law* consistent with the principles of fundamental justice?

Step 1: Is there an infringement of liberty or security of the person?

Infringement of liberty

54. The appellant conceded below that *Christopher's Law* interferes with the respondent's right to liberty but described the infringement as minor and modest.[88] The respondent takes issue with this characterization of the degree of the infringement of liberty for the following reasons:

> (a) the lifelong duration of registration and reporting requirements in the respondent's case prevent his traumatic memories in connection with the index offences from receding;
>
> (b) the nature and purpose of the registry, which is to monitor sex offenders, in contrast to the non-stigmatizing purposes cited by the appellant in which information is collected by governments for licensing and benefits;

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[84] Dr. Hanson exam at page 17, lines 1 to 6, **AR Vol. XVII, Tab 1, p. 17.**
[85] *R v McLaughlin*, 2014 ONSC 6537 at paras 147-148.
[86] OCA reasons at paras 102-137, **AR Vol. I, Tab 4, pp. 106-121.**
[87] OCA reasons at para 136, **AR Vol. I, Tab 4, p. 120.**
[88] SCJ reasons at para 41, **AR Vol. I, Tab 2, p. 16.**

> (c) the general language describing the broad circumstances under which information gathered under *Christopher's Law* may be shared;[89]
>
> (d) the registrant's need to be continuously mindful of the circumstances that require registry information to be updated; and
>
> (e) the threat of charges and significant penalties including incarceration for non-compliance with the registry requirements.

55. The application judge[90] as did the Court of Appeal in *Dyck*[91] cited fingerprint and DNA database orders, upheld by appellate courts, as involving comparably modest liberty intrusions. The life-long requirements of *Christopher's Law*, however, are readily distinguishable from the "once and done" submission of immutable biological markers. Moreover, fingerprints and DNA databanks have the ability conclusively to exclude suspects while *Christopher's Law* can potentially wrongfully implicate, contributing to the respondent's fear that he may be considered a suspect and be apprehended groundlessly if a sexual offence occurs in the vicinity of his home or workplace.[92]

56. The Alberta Court of Appeal in *Redhead* described the impact of *SOIRA* on registrants as considerable.[93] In the context of a challenge to *SOIRA* by an offender in his early 20's in *Ndhlovu*,[94] Justice Moen of the Alberta Court of Queen's Bench disagreed with the Ontario Court of Appeal's description of the impact of sex offender registries in *Dyck* as modest, writing,

> [52] With respect, I disagree with this characterization. I agree with the other cases cited above. In my view, the reporting requirements are significant. I recognize that *SOIRA* orders are not physically restrictive. I further acknowledge that viewed in isolation, the provision of information to the Registry is not particularly

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[89] See paragraph 12, above.

[90] SCJ reasons at para 56, **AR Vol. I, Tab 2, p. 21.**

[91] *Dyck, supra,* at para 123.

[92] Respondent's affidavit at para 48, **AR Vol. 2, p. 44.**

[93] *R v Redhead,* 2006 ABCA 84 at para 33.

[94] *R v Ndhlovu,* 2016 ABQB 595 (section 7), 2018 ABQB 277 (section 1). Note that an appeal heard October 30, 2019 is pending in the Alberta Court of Appeal.

> onerous. However, the cumulative effects of the reporting requirements under *SOIRA* orders are quite onerous, given the depth of information, the continuing obligation to report changes, the annual in-person reporting requirements, the consequences of breaching the order, compounded with the fact that each of these obligations lasts for life. Further, the offender is subject to random checks by the police.[95]

Infringement of security of the person

57. "Security of the person" under section 7 of the *Charter* embraces a broad entitlement to personal autonomy free from state interference[96] and state action that may worsen one's physical or psychological health[97] or safety.[98] This right is engaged when state action causes an individual severe psychological harm,[99] which need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[100]

58. The courts below rejected the respondent's assertion that *Christopher's Law* interfered with his security of the person interests. Specifically, the application judge refused to accept that the respondent's problems with being on the sex offender registries and subject to their reporting requirements and his concerns that he might be wrongly arrested for alleged non-compliance or should an offence occur in his community were caused by state action.[101] On the contrary, these concerns would not arise but for the respondent's registration.

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[95] *Ndhlovu*, 2016, *supra,* at para 52.

[96] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*") at para 49**.**

[97] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 ("*Chaoulli*").

[98] *Bedford, supra,* at para. 62.

[99] *New Brunswick (Minister of Health and Community Services) v G. (J.),* [1999] 3 SCR 46, ("*G. (J.)*") at para 59; *Blencoe* at para 58; *Winnipeg Child and Family Services v K.L.W.*, [2000] 2 SCR 519 at paras 85-87; *Chaoulli* at paras 111-124.

[100] *G. (J.), supra,* at para 60.

[101] SCJ reasons at paras 49 to 52, **AR Vol. I, Tab 2, p. 19-20.**

59. Instead, the application judge attributed any indirect harm to other causes such as the respondent's commission of the index offences and the resulting NCRMD findings, which were publicly accessible,[102] finding it inconceivable that the stress, anxiety and stigma the respondent experienced could be attributable to *Christopher's Law*.[103] In doing so, the application judge relied on the findings in *Dyck* that the impact of the Ontario registry are modest, without serious consideration of the factors that distinguished the cases.[104]

60. As asserted by the appellant,[105] the effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a similarly situated person of reasonable sensibility.[106] It is in this respect, however, that the respondent submits the courts below erred. In deliberately applying *Christopher's Law* to persons found NCRMD, the Legislature was required to contemplate the impact upon the psychological integrity of a person who has been found to be not criminally responsible by reason of mental disorder. As such, the harm to be considered is that which could be caused to similarly situated persons, i.e. persons who at least at one point in time and perhaps chronically, have had significantly diminished mental capacity.

61. The present circumstances can be distinguished from those in *New Brunswick v. G. (J.)*[107] or the adoption information disclosure cases identified at paragraph 65 of the appellant's factum[108] as those cases involved regimes that were of general application that were not directed

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[102] SCJ reasons at para 51, **AR Vol. I, Tab 2, p. 19.**
[103] SCJ reasons at para 63, **AR Vol. I, Tab 2, p. 25.**
[104] See para 24, above.
[105] Appellant's factum at para 65.
[106] *G. (J.), supra*, at paras 59-60.
[107] *G. (J.), supra.*
[108] *Marchand v Ontario* (2006), 81 OR (3d) 172 at para 118 (SCJ), aff'd 2007 ONCA 787; *Cheskes v Ontario (Attorney General) (*2007), 87 OR (3d) 581 at para 93 (SCJ).

at persons with a disability. This is not to say that sex offender registries cannot be applied to persons found NCRMD, only that they must be applied in accordance with principles of fundamental justice. That is, having regard to how sex offender registries are applied to persons with a disability.

62. The application judge went to significant lengths to discount the harm experienced by the respondent personally, noting that he had been able to maintain employment and positive relationships, had not experienced relapses of the untreated mania and alcohol use that had precipitated the index offences or otherwise been hospitalized.[109] The application judge relied on his assessment of the respondent's subsequent health to conclude that there was no basis on which to distinguish the impact of *Christopher's Law* upon the respondent from that experienced by the non-mentally disordered convicted criminal in *Dyck*.[110] The Court of Appeal held that the application judge was entitled to reach this conclusion.[111]

63. Even if this Court finds that the respondent's individual security of the person is not infringed, this Court and those below should still consider the reasonable hypothetical how the sex offender registry effects a person more cognitively impaired or more ill than the respondent. The impact of sex offender registries on persons with more pronounced psychiatric and intellectual disabilities was identified in the evidence of Dr. Brink, who wrote,

> Moreover, any barrier to full recovery and community reintegration presents a risk of decompensation. This would be emphasised in patients with lower functional and/or impaired cognitive capacity, where coping skills are limited, reliance on the support from therapeutically oriented staff is heightened, and where any additional stress, including the need for reporting or additional direction, may render the person unstable.[112]

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[109] SCJ reasons at para 59, **AR Vol. I, Tab 2, p. 23.**
[110] SCJ reasons at paras 82 and 83, **AR Vol. I, Tab 2, p. 34.**
[111] OCA reasons at para 62, **AR Vol. I, Tab 4, pp. 91-92.**
[112] Dr. Brink affidavit at para 38, **AR Vol. II, p. 145**.

64. Particularly in constitutional litigation reaching the highest courts, there is significant merit in considering how the sex offender registries might impact individuals found NCRMD who are more unwell than the respondent or who have a persistent and debilitating intellectual disability. The prospect of a person in this population launching and maintaining a constitutional challenge to *Christopher's Law* is slim.

65. Indeed, state-imposed intrusions that may appear to be modest to someone without a mental health condition can become significant, debilitating, traumatizing, and ultimately destabilizing for someone with a mental condition.[113] Similarly, registry requirements that may be accepted as justifiable by a convicted non-mentally disordered sex offender may be perceived as confusing, unjust and even punitive by a person with a major mental disorder who was too ill at the time of the index offence to appreciate the nature of their actions.[114]

66. The application judge made no mention of the vigilance the respondent must exercise in order to avoid relapse of his illness and the experiences that led him to approach situations in particular ways to avoid risks that could exacerbate his symptoms.[115] The respondent's 'choice'[116] to comply with the registries in a more onerous manner to be certain that he would not be suspected or charged with non-compliance was not, in any real sense, a choice at all. It was how he, as a person found NCRMD, coped.[117]

67. The registries themselves created such severe consequences for non-compliance that the respondent engaged in more onerous risk-averse behaviours, attending at the police station in

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[113] Dr. Brink, *supra*.
[114] Dr. Brink affidavit at paras 35-36 **AR, Vol. II, p. 144.**
[115] Respondent's exam at page 18, line 24 to page 30, line 3. **AR, Vol. 18, pp.18 to 30**
[116] *Bedford, supra,* at paras 79-92.
[117] Respondent's exam at page 51, line 7 to page 52, line 10**. AR, Vol. 18, pp. 51 - 52**

person more frequently due to his fear he would otherwise be accused of non-compliance. The reporting and penalty provisions thus caused the respondent to experience greater harm[118] and "aggravated the risk" that he would suffer from serious psychological harm.[119]

68. While even a modest infringement of liberty meets the threshold for step 2 in the section 7 analysis to be conducted, the respondent submits that the courts below erred in failing to hold that the impact of *Christopher's Law* upon a mentally disordered accused could in some cases rise to the level of significant infringements upon liberty and security of the person.

Step 2: The principles of fundamental justice

69. As cited above, this Court in *Bedford* clarified that arbitrariness, overbreadth, and gross disproportionality are three distinct principles of fundamental justice and that the task at the second stage of section 7 is to compare the rights infringement caused by the law with its objective.[120] It bears repeating that "[t]he question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad or arbitrary effect on one person is sufficient to establish a breach of s. 7."[121]

The purpose of the registry

70. The purposes of *Christopher's Law* are set out in the *Act*. The application judge summarized the purposes as "protecting the public from sexual offences and providing the police with rapid access to information to locate known sex offenders."[122]

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[118] *Bedford*, *supra*, at paras 85-86.
[119] *Bedford*, *supra*, at paras 88-89.
[120] *Bedford*, *supra*, at paras 98 and 123.
[121] *Bedford*, *supra*, at para 123.
[122] SCJ reasons at para 92, **AR Vol. I, Tab 2, p. 37.**

Arbitrariness

71. Arbitrariness asks whether there is a direct connection between the purposes of the law and the impugned effect on the individual: does the effect on the appellant bear some relation to the registry's purposes?[123] A law that imposes limits on life, liberty, or security of the person in a way that bears no relation to its objective arbitrarily impinges on those interests.[124]

72. The application judge wrote that *Christopher's Law* is not arbitrary on the basis that there is a rational connection between the purposes of the statute and the creation of the registry.[125] He did not review the principles of fundamental justice in the manner prescribed by this Court in *Bedford* and the cases that follow.[126] The Court of Appeal considered this issue to be subsumed in its earlier decision in *R. v. Long.*[127]

73. Legislation that seeks to protect the public can still be arbitrary if it infringes on one person's life, liberty, or security of the person in a way that bears no relation to the goal of protecting the public.[128] The respondent asserts that *Christopher's Law* imposed limits on his liberty and security of the person in ways that bore no relation to the government objective of protecting the public from sexual offenders and providing the police with rapid access to information to locate known sex offenders.

74. Rather, the respondent was stereotyped on the basis of being a member of a class of persons found NCRMD, some of whom may pose a risk and some of whom do not, without any

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[123] *Bedford*, *supra,* at para 111.
[124] *Ibid.*
[125] SCJ reasons at paras 92 to 93, **AR Vol. I, Tab 2, pp. 37-38.**
[126] *Bedford*, *supra*; *Carter v Canada (Attorney General)*, 2015 SCC 5.
[127] OCA reasons at paras 87 to 101, **AR Vol. I, Tab 4, pp. 101-106.**
[128] *Bedford*, *supra,* at para 111.

process to determine who might pose a risk and who might not. Even if *Christopher's Law* imposes a burden only on the respondent's liberty, it fails the test of arbitrariness because it imposes a blanket requirement of registration for life with no means of measuring whether the respondent poses a risk to public safety. Further, *Christopher's Law* is also arbitrary as it provides exemptions and a means of removal from the registry for non-mentally disordered offenders while providing no exit ramp to the respondent because he was found NCRMD.

75. Moreover, if it is reasonable to contemplate that one person placed on the registry after being found NCRMD and absolutely discharged is at very low risk of offending, the test of arbitrariness is met. Dr. Hanson's actuarial evidence that, as a group, such persons are at higher risk of re-offending than the non-offending general population in no way limits this possibility.

Overbreadth

76. Overbreadth contemplates a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. It considers whether there is no rational connection between the purposes of the law and some of its impacts. An overbroad law will be rational in some cases, but overreach in its effects in others. As *Bedford* directs,

> …the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.[129]

77. The application judge blended his discussion of overbreadth with his discussion of arbitrariness (contrary to the direction in *Bedford*) and found that Dr. Hanson's actuarial evidence respecting the aggregate re-offence risk of persons found NCR was a complete answer

[129] *Bedford*, *supra*, at paras 112-113.

to the complaint.[130] Rather, reliance upon generalized statistics respecting the actuarial risk of an entire group opens the door to overbreadth, particularly when it is, in fact, possible to assess the relative risk of individuals within that group as Dr. Hanson testified.[131] This was part of the mischief identified in *Swain*[132] and addressed in Part XX.1 of the *Code*.[133]

78. The appellant, at paragraph 66 of its factum, misstates the respondent's position in this regard. The respondent does not assert that persons who are absolutely discharged by the Review Board, for that reason, pose no risk.[134] The respondent's position is simply that it cannot be assumed, by reason of the NCRMD finding alone, that elevated risk is present. No amount of actuarial evidence respecting the elevated risk posed by the NCRMD population in the aggregate can establish otherwise.

79. The appellant's position at paragraph 67 of its factum that there is no constitutional requirement of an individualized risk assessment cites examples that are not analogous to the registration of persons found NCRMD. Restricting ownership of pit bull terriers not all of which will bite,[135] drunk drivers, not all of whom will crash or unpasteurized milk, not all of which will sicken,[136] impact voluntary potentially dangerous activities. They are inapt when applied to persons who did not choose the mental illnesses that resulted in their index offences. A more apt analogy would be to the Ontario Court of Appeal's decision in *Thompson*,[137] in which

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[130] SCJ reasons at paras 100-110, **AR Vol. I, Tab 2, pp. 39-42.**
[131] Dr. Hanson exam at p. 30, lines 1 to 20, **AR Vol. XVII, Tab 1, p. 30.**
[132] *R v Swain* at pp. 1012 to 1013.
[133] *Criminal Code*, *supra*, Part XX.1.
[134] The test applied by the Review Board in section 672.54(a) is whether the accused person is a significant threat to the safety of the public.
[135] *Cochrane v Ontario (Attorney General)*, 2008 ONCA 718.
[136] *R v Schmidt*, 2014 ONCA 188.
[137] *Thompson v Ontario (Attorney General)*, 2016 ONCA 676.

individualized assessments were found to be a prerequisite to the liberty and security of the person restrictions inherent in community treatment orders.

Gross disproportionality

80. Gross disproportionality targets laws that may be rationally connected to the objective but have ***effects*** that are so disproportionate that they cannot be supported. Gross disproportionality applies in extreme cases where "the seriousness of the deprivation is totally out of sync with the objective of the measure."[138] In *Bedford*, McLachlin C.J. wrote:

> 121. Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:
>
> > In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7.
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> 122. Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.[139]

81. The lifetime registration and reporting obligation of the respondent upon being found NCRMD in respect of more than one enumerated offence without any opportunity to be removed meets this threshold. Dr. Johann Brink also noted the particularly harsh impact on lower functioning persons and/or persons with impaired cognitive capacity.[140]

82. Lifetime registration without any chance of removal under *Christopher's Law* can be contrasted with the opportunity under *SOIRA* to be removed through its exemption and

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[138] *Bedford, supra,* at para 120; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 133; *R v Malmo-Levine*, 2003 SCC 74 at paras 159-160 and 169.

[139] *Bedford, supra,* at paras 121-122.

[140] See paragraph 63, above.

termination provisions.[141] In fact, the language of *SOIRA*'s termination provisions admit to the existence of circumstances in which registration would in fact be grossly disproportionate.[142] For example, section 490.016(1) of the *Criminal Code* provides:

> 490.016(1) The court shall make a termination order if it is satisfied that the person has established that the impact on them of continuing the obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

83. In fashioning a lifelong registry under *Christopher's Law* that has no means of removal for those found NCRMD in respect of more than one enumerated offence, the Legislature ought to have contemplated, as Parliament did, circumstances in which the impact would be grossly disproportionate.

Issue C: Did the Court of Appeal err in finding that any infringement of the *Charter* was not justified under s. 1?

84. Section 1 provides that the rights protected are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[143] The appellant bears the burden of proof to show that, as applied to persons found NCRMD who have been absolutely discharged by the Review Board, the registries:

> …have a sufficiently important objective "and that the means chosen are proportional to that object[ive]" (*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331, at para. 94). A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Carter*, at para. 94). The proportionality inquiry

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[141] Pending amendment, one could seek an exemption within the first year or wait 5, 10 or 20 years depending on the duration of registration or until one received a pardon, *Criminal Code*, *supra*, s. 490.026.

[142] *Criminal Code*, *supra*, s. 490.016(1), 490.023(1) and 490.027(1).

[143] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 1.

> is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups" (*Oakes*, at p. 139).[144]

Importance of Objective and Rational Connection

85. The respondent conceded below that the objective of the registry stated in *Christopher's Act*[145] is sufficiently important to merit scrutiny of the measures adopted and that establishing a sex offender registry is, in theory, rationally connected to this objective.[146]

Minimal Impairment

86. *Christopher's Law* fails the minimal impairment aspect of the proportionality analysis, which requires that a limit be "reasonably tailored to its objective"[147] when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner".[148] *Christopher's Law* is applied to everyone found NCRMD in respect of enumerated offences without regard to the impact on the individual or that individual's actual risk to the public. Even if absolutely discharged persons found NCRMD have a statistically higher risk of re-offending than the general population, aggregate statistics cannot justify this blanket infringement of the rights of each and every one of them. Administrative expediency does not justify a section 7 infringement. As Chief Justice McLachlin wrote in *R. v. Safarzadeh-Markhali*,

> The Crown says the law casts the net broadly because targeting all offenders with a criminal record is a more practical option than attempting to identify only offenders who pose a risk to public safety and security. But practicality is no answer to a charge of overbreadth under s. 7: *Bedford*, at para. 113.[149]

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[144] *R v K.R.J.*, 2016 SCC 31 at para 58.
[145] *Christopher's Act*, *supra*, preamble.
[146] *Carter*, *supra*, at para 99.
[147] *Carter*, *supra*, at para 102.
[148] *R v K.R.J.*, *supra*, at para 70.
[149] *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 53. See also para 65.

87. Questions of registration and termination could easily be addressed by the court or the Review Board within Part XX.1 of the *Code* where the Crown and the NCRMD accused are represented and the tools of structured professional judgment and actuarial assessments are regularly employed.[150] Another judicial or administrative process could equally measure a person's likelihood to re-offend while balancing this risk against the constitutional deprivations the registry represents.

Proportionality of Effects

88. At this stage, the impacts of *Christopher's Law* on the individual are measured against the benefits to society achieved by the law.[151] Here too, the appellant must fail. The registry imposes a substantial burden on the respondent, regularly revisiting upon him the indignities he experienced due to a single acute manic episode, yet it is indifferent to the rehabilitative efforts he undertakes to maintain successful remission. Rather than benefitting society, when a registry collects and maintains data respecting persons at very low risk, it wastes law enforcement resources and dilutes otherwise useful information with too many people in the system.

89. The appellant's argument at paragraph 75 of its factum that the less intrusive means chosen must be equally effective mistakenly assumes that conducting risk assessments of persons found NCRMD would somehow weaken the integrity of Ontario's sex offender registry. On the contrary, it could strengthen it. In any event, such an argument cannot find favour when the Legislature has exempted persons discharged under section 730(1) of the *Criminal Code* and those granted a pardon or a record suspension from the registry despite their elevated risk.

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[150] Dr. Brink affidavit at paras 11 to 16, **AR Vol. II, pp. 134-137**; Dr. Brink's supplementary affidavit sworn on April 21, 2016 at para 7, **AR Vol. 3, Tab 5, pp. 119-120.**

[151] *Carter*, *supra*, at para 122.

90. At paragraph 76 in its factum, the appellant cites the application judge's observation that one can never be certain who will re-offend. Certainty cannot be the standard against which means of determining risk is to be measured. There is no certainty that those who have never offended before will not offend. Nor is there certainty that those who are registered under *Christopher's Law* are less likely to offend than they would be in the absence of a registry.

91. Courts and review boards in particular have significant experience with relative assessments, relying on both structured professional judgment and actuarial assessments.[152] As the passage from Dr. Hanson cited at paragraph 77 of the appellant's factum makes plain, no assessment of risk is absolute.

92. The appellant's argument at paragraphs 83 to 85 of its factum that *Christopher's Law* is less intrusive than DNA data bank orders and therefore can have less stringent procedural requirements is disputed. DNA data bank orders collect information on a single occasion.[153] In contrast to *Christopher's Law*, it requires no ongoing participation by the accused.[154] That a DNA data bank order upon conviction, discharge or NCRMD finding is discretionary further reflects that Parliament considered such a decision appropriately left to trial judges based on factors that necessarily involve an assessment of risk.[155]

93. Arguments that society is safest when the police have the most information possible ultimately describe a surveillance state, which is fundamentally at odds with the free and democratic society contemplated by section 1 of the *Charter*.[156]

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[152] Brink affidavit at paras 11-21, **AR Vol. 2, pp. 134 to 139.**
[153] *Criminal Code*, *supra*, s. 487.051.
[154] See paragraph 55, above.
[155] *Criminal Code*, *supra*, s. 487.051(2) and (3).
[156] Appellant's factum at paras 79 to 81.

Issue D: Did the Court of Appeal err in granting an individual remedy during the period of the suspension of the declaration of invalidity?

94. The Court of Appeal did not err in granting an individual constitutional remedy to the respondent during the period of the suspension of the declaration of invalidity.

95. The appellant asserts that the Court of Appeal's decision to grant an individual remedy is functionally identical to it having granted a constitutional exemption and creates uncertainty in the face of, and contrary to, precedents like *Demers* and *Schachter*.[157]

96. *Schachter* spoke of the risk of giving a declaration of invalidity retroactive effect.[158] In *Demers*, this Court noted that the statement in *Schachter* precluding the "courts from granting a s. 24(1) individual remedy during the period of suspended invalidity"[159] was generally applied in cases seeking damages or benefits retroactively.[160] While not granting the appellant in that case an immediate individual remedy, the majority of this Court in *Demers* in fact granted qualifying accused persons a stay of proceedings if Parliament had not cured the regime's constitutional defects within twelve months.[161]

97. Justice Lebel's strong dissent in *Demers* points out that a rule depriving a court from combining sections 24(1) and 52(1) remedies could be used to unconstitutionally deprive someone of liberty during a suspended declaration of invalidity.[162] Rather, courts should be able to craft exemptions from a suspended declaration of invalidity either as a separate section 24(1)

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[157] Appellant's factum at para 87.
[158] *Schachter v Canada*, [1992] 2 SCR 679 at para 92.
[159] *R v Demers,* 2004 SCC 46 at para 62.
[160] *Ibid.*
[161] *Demers, supra,* at para 66.
[162] See LeBel J. dissent in *Demers, supra,* at paras 97 to 108.

remedy or as an incident of its discretion under section 52(1) when crafting the terms of the suspended declaration of invalidity.[163]

98. Contrary to the submission at paragraph 90 of the appellant's factum, Doherty J.A. did not decline to follow *Demers*.[164] Rather, the Court of Appeal correctly concluded that this Court's jurisprudence since *Demers* tells against reading that case as imposing an absolute ban on combining a suspended declaration of invalidity with an individual constitutional exemption under section 24(1) of the *Charter* for the rights-claimant. Further,

> . . . [e]ven if that combination were somehow unavailable, *Demers* says nothing about the power of the court to issue a qualified declaration of suspended invalidity which exempts the individual before the court from its scope. The court should be able to fashion a meaningful remedy for the rights-claimant.[165]

99. Indeed, remedies under sections 52(1) and 24(1) have been granted by this Court since *Schachter* and *Demers*.[166] Relying on *Demers,* this Court in *Ferguson* acknowledged that,

> The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46 . . . When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function primarily as a remedy for unconstitutional government acts.[167]

100. In *Corbiere,* this Court noted that "in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the

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[163] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto, Ont: Thomson Reuters Canada, 2013) (loose-leaf updated October 2019, release no. 34), ch. 14 at para 14.940 ("Roach, *Constitutional Remedies in Canada*"). **Appellant's Book of Authorities, Tab 2.**

[164] Appellant's factum at para 90, and OCA reasons at para 153, **AR Vol. I, Tab 4, p. 126.**

[165] OCA reasons at para 153, **AR Vol. I, Tab 4, p. 126.**

[166] *Martin, supra,* at paras 118-120; *R v Guignard,* 2002 SCC 14 at paras 34-35.

[167] *R v Ferguson*, 2008 SCC 6 at para 63.

declaration is suspended".[168] In *Carter*, this Court did not initially grant a constitutional exemption because none of the remaining litigants sought one.[169] After the Attorney General of Canada moved to extend the suspension of the declaration of constitutional invalidity, however, the majority of this Court made provision for applications to be made to the provincial and territorial superior courts to consider individual exemption applications. Quebec also requested and received an exemption.[170]

101. Citing *Carter*, the appellant asserts at paragraph 93 of its factum that granting a qualified declaration of suspended invalidity which exempts particular individuals creates uncertainty, undermines the rule of law and usurps the legitimate role of the legislature in responding to constitutional decisions of the courts. The respondent's removal from the registry in no way prevents the Legislature from enacting new legislation, however. On the contrary, it maintains the incentive for constitutional litigants to come forward[171] and ensures that that the Court is able to fashion effective and meaningful remedies.[172]

102. Professor Roach opines that forcing litigants to choose between an individual remedy and a systemic one would

> erode the traditional commitments of courts in ensuring effective and meaningful remedies. It would create a false and unnecessary choice between suspending a declaration of invalidity to give Parliament an opportunity to act or providing litigants with the effective remedy. In the long run, such an approach would also discredit the

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[168] *Corbiere v Canada, supra,* at paras 122 and 124; See also Roach, *Constitutional Remedies in Canada, supra,* at paras 14.1790-14.1832, **Appellant's Book of Authorities, Tab 2**.

[169] *Carter, supra,* at paras 125 and 129.

[170] *Carter v. Canada (Attorney General),* 2016 SCC 4 at paras 3 to 7; see also Roach, *Constitutional Remedies in Canada, supra,* at paras 14.1811 to 14.1820, **Appellant's Book of Authorities, Tab 2**.

[171] Roach, *Constitutional Remedies in Canada* at para 14.1820, **Appellant's Book of Authorities, Tab 2.**

[172] Roach, *Constitutional Remedies in Canada* at para 14.1813**, Appellant's Book of Authorities, Tab 2.**

> suspended declaration of invalidity by sacrificing individuals for the sake of giving Parliament an opportunity (one that it may be unwilling to take) to craft a systemic response.[173]

Courts should be able to enforce the *Charter* while also "engaging the legislature and giving it an opportunity to exercise its important role".[174]

103. The appellant's submission at paragraph 93 of its factum that the Court of Appeal's decision excludes the respondent from an otherwise mandatory scheme applicable to everyone, overlooks the exemptions built into *Christopher's Law*, namely discharges under s. 730(1) of the *Criminal Code* and pardons and record suspensions available only to persons not found NCRMD. Indeed, if Ontario intends to remedy the discrimination finding by removing these exemptions (as paragraph 55 of its factum suggests), the need of an individual remedy takes on even greater importance.

104. Further, the Court of Appeal had cogent reasons for its decision to provide an individual remedy for the respondent.[175] The respondent was absolutely discharged by the Ontario Review Board in August 2003. Among other things, the Board found that it was likely that he would remain compliant with his treatment regime in the future,[176] which has proved to be the case.[177]

105. The Court of Appeal recognized that "[t]he potentially adverse consequences of the application of the sex offender registry provisions to persons found NCRMD who have received an absolute discharge is apparent on the facts of this case."[178]

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[173] Roach, *Constitutional Remedies in Canada* at para 14.1813**, Appellant's Book of Authorities, Tab 2.**

[174] *Ibid.*

[175] OCA reasons at paras 151, 153, 155-156, **AR Vol. I, Tab 4, pp. 125-128.**

[176] SCJ reasons at para 17, **AR Vol. I, Tab 2, p. 9.**

[177] SCJ reasons at para 59, **AR Vol. I, Tab 2, p. 23.**

[178] OCA Reasons at para 135, **AR Vol. I, Tab 4, p. 120.**

106. The Court of Appeal went on to note that based on the record, the respondent would appear to have been a very good candidate for a record suspension had he been found guilty rather than NCRMD, and would have therefore been able to benefit from the exemptions under *Christopher's Law*.[179]

107. Ultimately, Doherty J.A. concluded, "it is difficult to envision a constitutionally-compliant legislative scheme that would not result in the appellant being removed from the registries and exempted from the requirement of any further compliance with them".[180]

108. The respondent's situation was not comparable to that in *Demers* where this Court declined to grant an immediate remedy for the claimant during the period of suspension of the declaration of invalidity because there had not been a psychiatric evaluation.[181] On the contrary, the respondent had been absolutely discharged by the Ontario Review Board,[182] an outcome that was not available to a person continuously found unfit to stand trial at the time that the *Demers* case was brought forward.[183]

109. The issue of harm being caused to the integrity of Ontario's sex offender registry if the respondent were to be removed from it, was addressed in the appellant's motion to stay the Court of Appeal's order in which Roberts J.A. concluded,

> While there is unquestionably a public interest in effective police investigations, I am not persuaded that, without a stay, it will suffer irreparable harm in the circumstances of this case. The deletion of G.'s information does not affect the remaining thousands of registrations on the provincial sex offender registry. There is no evidence that the police have ever had recourse to G.'s registered information in order to advance their

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[179] OCA reasons at para 125, **AR Vol. I, Tab 4, p. 115.**
[180] OCA reasons at para 155, **AR Vol. I, Tab 4, p. 127.**
[181] *Demers, supra*, at para 65.
[182] See paragraph 2, above.
[183] *Demers, supra*, at para 13.

> investigations. Although I appreciate that it may be difficult to find this evidence, there is ample uncontroverted evidence that belies its existence.[184]
>
> First, in the many years G. has been registered, the police have never communicated with him concerning an investigation. Moreover, in the almost 17 years since the commission of the criminal actions giving rise to his registration on the provincial sex offender registry, G. has not committed nor been charged with any offences, and has been entirely compliant with his reporting and registration requirements. Finally, there is no question that G.'s actions were isolated, totally out of character, and a direct product of his acute mental disorder, which is being effectively treated. His former wife is supportive of him. By all accounts, he is a high-functioning, contributing member of the community.[185]
>
> It is therefore highly unlikely that the public interest will be affected in any way by the deletion of G.'s information from the provincial sex offender registry during the next few months pending the disposition of the AGO's leave application.[186]

110. Moldaver J. for this Court found that the appellant had not made out a tenable case for irreparable harm[187] and further adopted Doherty J.A.'s wording at paragraph 155 of the Court of Appeal's reasons.[188]

111. The appellant also takes issue at paragraph 96 of its factum with the fact that the respondent was granted an individual remedy without a current expert forensic risk assessment being undertaken and that the only witness in the proceedings who had assessed the respondent was his treating psychiatrist of 15 years who was not an expert in forensic assessment. As noted above, the appellant had full opportunity, if it wished, to conduct an independent risk assessment of the respondent yet chose not to do so.[189] The appellant's strategic litigation choice cannot be

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[184] Reasons of Roberts J.A. on stay motion at para 13, **Respondents' Record, Tab 1, pp. 5-6.**
[185] *Ibid* at para 14, **Respondents' Record, Tab 1, p. 6.**
[186] *Ibid* at para 15, **Respondents' Record, Tab 1, p. 6.**
[187] Order of Moldaver J. on stay motion, *supra*, **AR Vol. II, pp. 34-35**.
[188] *Ibid* at p. 35.
[189] See paragraph 16, above.

raised as a bar to a constitutional remedy when there was no burden on the respondent to prove his degree of risk.

112. The appellant argues at paragraph 98 of its factum that the Court of Appeal was incorrect in its statement that section 9.1 of *Christopher's Law* provides for an automatic deletion from the registry if one receives a pardon or record suspension in respect of all the offences that led to one's placement on registry. In fact, before the amendment to the *Criminal Records Act*, in 2012,[190] which drew a distinction between pardons and record suspensions, and the corresponding amendment of *Christopher's Law*,[191] which occurred nine years after the respondent's registration, this statement was true.

113. Even with the legislative change, it remains the case that no records are retained in respect of persons granted a free pardon and, of course, those who are never placed on the registry in the first place following a discharge under section 730(1) of the *Criminal Code*.

[190] *Safe Streets and Communities Act*, SC 2012, c 1, s. 108-134.
[191] *Christopher's Law (Sex Offender Registry) Amendment Act*, 2011, SO 2011, c 8 - Bill 163.

PART IV – COSTS

113. The respondent submits that as an unfunded constitutional litigant, the costs awards below ought not to be disturbed. He further seeks his costs of the appeal in any event of the result in recognition of the social value of constitutional litigation and the significant effort required to bring such matters forward.[194]

PART V - ORDER SOUGHT

114. G. asks that the appeal be dismissed with costs of the appeal and of the application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

Marshall A. Swadron

Joanna H. Weiss

Arooba Shakeel

Of counsel for the respondent

[194] *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371 at paras 27-30; *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* (1996), 134 DLR (4th) 286 (B.C.S.C.), aff'd [2000] 2 SCR 1120 at para 161.

SCHEDULE A

Table of Authorities

	Cases	**Paragraph Referenced in Factum**
1.	*R v Dyck*, 2008 ONCA 309	23-27, 30, 43, 55-56, 59, 62
2.	*Canada (Attorney General) v Bedford*, 2013 SCC 72	24-25, 30, 57, 66, 67, 69, 71-73, 76-77, 80, 86
3.	*R v Long*, 2018 ONCA 282	30, 34, 72
4.	*R v Long*, 2020 CanLII 231 (SCC)	30
5.	*Withler v Canada (A.G.)*, 2011 SCC 12	36-37
6.	*Law v Canada (Minister of Employment and Immigration)*,[1999] 1 SCR 497	36-38
7.	*Gosselin v Quebec (Attorney General)*, 2002 SCC 84	37
8.	*Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54	40, 45, 99
9.	*R v T.M.B.*, 2013 ONSC 4019	41
10.	*Winko v B.C.*, [1999] 2 SCR 625	42
11.	*R v Swain*, [1991] 1 SCR 933	42, 77
12.	*Osawe (Re)*, 2015 ONCA 280	43
13.	*Ranieri (Re)*, 2015 ONCA 444	43
14.	*Trociuk v British Columbia (A.G.)* 2003 SCC 34	45
15.	*M v H*, [1999] 2 SCR 3	45
16.	*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203	45, 100

39.	*Schachter v Canada*, [1992] 2 SCR 679	95-96, 99
40.	*R v Demers*, 2004 SCC 46	95-99, 108
41.	*R v Guignard*, 2002 SCC 14	99
42.	*R v Ferguson*, 2008 SCC 6	99
43.	*Carter v. Canada (Attorney General)*, 2016 SCC 4	100
44.	*British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371	114
45.	*Little Sisters Book & Art Emporium v Canada (Minister of Justice)* (1996), 134 DLR (4th) 286 (B.C.S.C.), aff'd [2000] 2 SCR 1120	114

SCHEDULE B

Statutes and Regulations

	Statute/Regulation	**Paragraph Referenced in Factum**
1.	*Criminal Code*, RSC 1985, c C-46 (English) ss. 16(1), 487.051, 487.051(2), 487.051(3), 490.016(1), 490.023(1), 490.026, 490.027(1), 672.54, 672.53(a), Part XX.1 (French) ss. 16(1), 487.051, 487.051(2), 487.051(3), 490.016(1), 490.023(1), 490.026, 490.027(1), 672.54, 672.53(a), Part XX.1	43, 47, 77, 82, 92
2.	O. Reg 69/01 under *Christopher's Law* (English) ss. 2(3), 2(1) (French) ss. 2(3), 2(1)	4
3.	*Sex Offender Information Registration Act*, SC 2004, C 10 (English), (French)	4
4.	*Christopher's Law (Sex Offender Registry)*, 2000 SO 2000, c 1 (English) ss. 10(2), 10(3), 11 (French) ss. 10(2), 10(3), 11	12, 46
5.	*Police Services Act*, RSO 1990, c P.15 (English) ss. 41(1.1), 41(1.2) (French) ss. 41(1.1), 41(1.2)	12
6.	*Rules of Civil Procedure*, RRO 1990, Reg 194 (English) s. 33 (French) s. 33	10
7.	*Criminal Code*, RSC 1985, s C-46 (provisions as they stood in 2002)	50

	(English) ss. 264(2)(b), 271, 279(2) (French) ss. 264(2)(b), 271, 279(2)	
8.	*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (English) s. 1 (French) s. 1	84
9.	*Safe Streets and Communities Act*, SC 2012, c 1 (English) ss. 108-134 (French) ss. 108-134	112
10.	*Christopher's Law (Sex Offender Registry) Amendment Act*, 2011, SO 2011, c 8 – Bill 163 (English) (French)	112