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**

Applicant for leave
(Respondent in the Court of Appeal)

and

**G**

Respondent
(Appellant in the Court of Appeal)

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## RESPONDENT'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
**(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)**

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The Attorney General of Ontario ("AGO") has applied for leave to appeal from the judgment of the Ontario Court of Appeal declaring *Christopher's Law (Sex Offender Registry), 2000*, S.O. 2000, c. 1 ("*Christopher's Law*") to be of no force or effect in respect of persons found not criminally responsible on account of mental disorder ("NCRMD") who have been discharged absolutely by a Review Board pursuant to Part XX.I of the *Criminal Code.*

2. Ontario also challenges the individual remedy granted to the respondent G., relieving him from further compliance with *Christopher's Law*.

3. The respondent submits that leave to appeal ought to be refused on the grounds that:

(a) the scope of the case is narrow, relating to a limited class of persons and, in the case of the personal remedy granted to G., a single individual;

(b) other factual situations will arise with a broader range of issues and a more complete record respecting the effectiveness of sex offender registries, which was not challenged in this case, and the impacts of those registries on all registrants;

(c) the Court of Appeal's decision is clear and has been accepted by the Attorney General of Canada in the case of the corresponding federal sex offender registry;

(d) the principles in *Swain*[1] and *Winko*[2] that inform the Court of Appeal's decision need not be revisited by the Supreme Court; and

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[1] *R. v. Swain*, [1991] 1 S.C.R. 933.

[2] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.

(e) the Legislature retains ultimate discretion respecting how it remedies the breach of section 15 found to exist in *Christopher's Law*.

## B. Facts

4. The respondent G. accepts the facts set out in paragraphs 6, 7, 13, 14 and 15 of the AGO's memorandum of argument.

5. The respondent G., a 56-year-old man with bipolar disorder, experienced his first manic episode in the wake of the terror attacks of September 11, 2001. As a result of incidents that occurred when acutely ill, he was charged with two counts of sexual assault as well as other offences in respect of his then wife.

6. On June 21, 2002, G. was found NCRMD with respect to the charges. On July 29, 2003, he was granted an absolute discharge by the Ontario Review Board on the basis that he no longer posed a significant threat to the safety of the public.

7. *Christopher's Law* was enacted by the Ontario Legislature in 2000 and established a registry of persons convicted or found NCRMD in respect of enumerated sexual offences. It requires registration, at least annual police station attendances and updating of name and residence information.[3] The regulation further requires registrants to provide, *inter alia*, past and present telephone numbers, vehicle information, employer and volunteer information, past and present educational attendance, details respecting sex offences and submit to the taking of photographs.[4] Police are authorized to verify information provided[5] and breaches can result in

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[3] *Christopher's Law (Sex Offender Registry)*, 2000, SO 2000, c. 1, s. 3 ["*Christopher's Law*"].

[4] Ontario Regulation 69/01 of *Christopher's Law* ["Regulation 69/01"], s. 2.

[5] *Christopher's Law*, *supra.*, s. 4(2).

charges and imprisonment.[6] The regime authorizes the Ministry to obtain information from other agencies for the purpose of adding it to the registry[7] and to release information for crime prevention and law enforcement purposes.[8]

8. Despite his absolute discharge, the absence of offences before or since the NCRMD finding, and vigilant treatment compliance, G. was required to register as a sex offender. Because he was found NCRMD in respect of more than one enumerated offence, he was required to comply with *Christopher's Law* for the rest of his life.

9. While affording no opportunity for G to be removed from the registry, *Christopher's Law* exempted persons who were conditionally or absolutely discharged under section 730(1) of the *Criminal Code* and provided for automatic removal from the registry of persons convicted of enumerated sex offences once they received a pardon or a record suspension.

***The proceedings below***

10. G. commenced this application in March 2014 challenging both *Christopher's Law* and similar provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA*"). G. gave evidence in the application, corroborated by his longstanding psychiatrist, his former wife (the complainant in the index offences) and an expert on the review board process, that the requirements of the registries are onerous and incompatible with his continuing recovery.

11. The application judge discounted much of G.'s evidence and found that the registries did not breach his rights under sections 7 or 15 of the *Charter*. The Court of Appeal (per Doherty,

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[6] *Ibid* at s. 11.

[7] Regulation 69/01, s. 6.

[8] *Christopher's Law*, *supra.*, s. 10.

van Rensburg and Hourigan JJ.A.) did not take issue with the application judge's findings of fact respecting the impact of the registries on G. or the rejection of G.'s section 7 arguments.

12. The Court of Appeal did reverse the application judge's findings in respect of the alleged breach of section 15 of the *Charter*.[9] It held unanimously that,

> the constitutional guarantee of substantive equality requires that those who have been found NCRMD in respect of designated offences and who have received an absolute discharge be afforded access to some form of individualized assessment as a precondition to their placement or maintenance on a sex offender registry. That is, there must be a process by which those persons can challenge the continued application of the sex offender registry legislation to them, having regard to their personal needs, capacities, and circumstances.[10]

13. *Christopher's Law* and *SOIRA* were declared to be of no force or effect in relation to persons who have been found not criminally responsible on account of mental disorder ("NCRMD") and who have been discharged absolutely in respect of the offence(s) giving rise to the obligation to comply with the registries by a review board pursuant to Part XX.I of the *Criminal Code.*[11]

14. While suspending this declaration for 12 months, the Court of Appeal ordered that G. be relieved from "any further compliance with the sex offender registries" and that his information be deleted from the registries.[12]

***The application for leave to appeal***

15. The Attorney General of Canada has not sought leave to appeal from the decision of the Court of Appeal declaring *SOIRA* to be unconstitutional and removing G. from *SOIRA*.

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[9] Reasons for decision of the Court of Appeal for Ontario dated April 4, 2019 ["Court of Appeal reasons"], at para. 7, **Application Record of Ontario, Tab 5.**

[10] *Ibid.* at para. 127, **Application Record of Ontario, Tab 5.**

[11] *Ibid.* at para. 157, **Application Record of Ontario, Tab 5.**

[12] *Ibid*.

16. On April 10, 2019, the AGO served notice of its application for leave to appeal. On April 17, 2019, it served a motion in the Court of Appeal pursuant to section 65.1 of the *Supreme Court Act* to stay the order removing G. from the Ontario registry pending the disposition of the application for leave to appeal. The motion for a stay was dismissed by Roberts J.A. for reasons released May 10, 2019.[13]

17. In dismissing Ontario's motion, Roberts J.A. wrote,

> [w]hile 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 investigations. Although I appreciate that it may be difficult to find this evidence, there is ample uncontroverted evidence that belies its existence.[14]
>
> 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.[15]
>
> 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. [16]

18. On June 3, 2019, Ontario served a further motion pursuant to section 65.1 of the *Supreme Court Act* for an order staying the constitutional exemption granted to the respondent until the application for leave to appeal is dismissed or until the appeal is disposed of. On June 14, 2019, Moldaver J. dismissed the motion, writing:

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[13] *G. v. The Attorney General for Ontario and The Attorney General of Canada*, reasons for decision of Roberts J.A. dismissing stay motion dated May 10, 2019 (unreported).

[14] *Ibid.* at para. 13.

[15] *Ibid.* at para. 14.

[16] *Ibid.* at para 15.

> First, I note that Justice Roberts of the Ontario Court of Appeal previously refused to grant a motion seeking the same relief now sought by the Attorney General of Ontario in this Court.
>
> In *Esmail v. Petro-Canada*, [1997] 2 S.C.R. 3, Sopinka J. observed that "[i]t is only in special circumstances that successive applications to a judge of the court appealed from and a judge of this Court should be permitted": p. 4. Having reviewed the record and the reasons of Roberts J.A., I see no special circumstances here that would warrant a re-examination by me of her decision.
>
> Second, and in any event, the Crown has not made out a tenable case for irreparable harm.
>
> The respondent's track record over the past 17 years has been exemplary, and it provides cogent evidence that there is little, if any, chance of him committing a sexual offence prior to the determination of the leave application, and if leave is granted, the disposition of the appeal. That being so, I see no apparent reason why he should be deprived of his s. 15(1) right under the Canadian Charter of Rights and Freedoms in the interim. In particular, I adopt the words of Doherty J.A. at para. 155 of his reasons in which he states: ". . . as I read this record, it is difficult to envision a constitutionally-compliant legislative scheme that would not result in [the respondent] being removed from the registries and exempted from the requirement of any further compliance with them": 2019 ONCA 264.
>
> Accordingly, the motion for a stay is dismissed without costs. [17]

## PART II – QUESTIONS IN ISSUE

19. The AGO has sought leave to appeal on the ground that the proposed appeal raises questions of public importance, namely,

> (a) Whether *Christopher's Law* infringes the right to equality without discrimination on the basis of mental disability under s. 15 of the *Charter* as 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) If so, whether the infringement is a reasonable limit that has been demonstrably justified in a free and democratic society; and
>
> (c) Whether the Court of Appeal for Ontario was correct to decline to follow this Court's decision in *R v Demers* and to grant individual relief to the claimant during the period of suspension of its declaration.

[17] *Ontario (Attorney General) v. G*, 2019 SCC 36, at pages 1-2.

20. The respondent G. submits that other considerations, apart from the issues that the AGO seeks to raise, weigh against granting leave to appeal.

## PART III – STATEMENT OF ARGUMENT

### 1. Does the proposed appeal raise questions of public importance?

21. The test for leave to appeal in section 40(1) of the *Supreme Court Act*, provides that leave may be granted where,

> the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

22. In its gate-keeping function of determining applications for leave, the Court retains a broad discretion to consider questions such as whether the right issue is raised, whether this is the right record and whether now is an appropriate time.[18]

### A. The Court of Appeal did not err in finding that *Christopher's Law* was discriminatory

23. Contrary to the AGO's arguments, the decision of the Court of Appeal is consistent with this Court's equality jurisprudence. In *Winko v British Columbia (Forensic Psychiatric Institute)*, this Court acknowledged that NCRMD persons occupy a "special place in the criminal law" as a result of their lack of culpability for criminal acts and their experiences of "longstanding and deeply embedded social prejudices".[19]

24. In this context, the Court of Appeal correctly applied *Winko*, stating,

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[18] Cromwell, J., *'Leave to Appeal' and Interventions at the Supreme Court of Canada: A view from the Bench of Final Appeal* (February 2015), online: The Canadian Bar Association <https://scai-ipcs.ca/pdf/Cromwell-Leave%20to%20Appeal%20and%20Interventions.pdf> at p. 21.

[19] *Winko*, *supra*., at para. 30; also Court of Appeal reasons, at para. 128.

> after *Winko*, it is clear that s. 15 of the *Charter* demands an individualized assessment of NCRMD persons at both the adjudicative and disposition stages of a criminal proceeding. That individualized treatment, combined with the unique dispositions available to persons found NCRMD, seeks to overcome the stereotyping and prejudice that have marked the treatment of mentally ill offenders while at the same time maximizing the achievement of the twin goals of treatment and public protection.[20]

25. The AGO seeks to narrow the application of *Winko* to circumstances "where the state seeks to use the criminal law process to detain persons in psychiatric hospital and/or impose restrictive conditions on release".[21] However, this description mischaracterizes the regime in Part XX.1 of the *Criminal Code* that was upheld in *Winko*. The considerations to be made in a court or review board in fashioning a disposition go beyond the safety of the public to include "the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused".[22]

26. Further, while this Court in *Winko* upheld section 672.54 of the *Criminal Code* on the basis that it required the court or review board to engage in individualized assessments of persons found NCRMD,[23] the decision cannot be read to mean that individualized assessments are appropriate *only* in the context of detention and restrictive conditions.

27. The Court of Appeal was also correct in distinguishing its own decisions in *R v Dyck*[24] and *R v Long*[25] on the ground that while section 7 does not require an individualized risk assessment before a sex offender registry order can be made or maintained, section 15, as engaged in the current case, requires different considerations.[26] A separate system was designed

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[20] Court of Appeal reasons, at para. 131, **Application Record of Ontario, Tab 5.**

[21] Memorandum of Argument of the Applicant Attorney General of Ontario ("AGO memorandum"), at para 19.

[22] *Criminal Code of Canada*, RSC 1985, c. C-46, s. 672.54.

[23] *Winko*, *supra* note 2, at para. 47.

[24] *R. v. Dyck*, 2008 ONCA 309.

[25] *R. v. Long*, 2018 ONCA 282.

[26] Court of Appeal reasons, at paras. 132-133, **Application Record of Ontario, Tab 5.**

for persons found NCRMD as a recognition that they are not culpable and that sentencing principles cannot apply to them. However, under *Christopher's Law*, they go from

> being treated in an individualized manner that recognizes their mental disability, to being treated in the same generalized fashion as morally capable offenders, without any regard for their mental disability or their unique status in the eyes of the criminal law. This perpetuates rather than alleviates their systemic disadvantage.[27]

28. The AGO argues that it is inappropriate to compare persons found NCRMD to persons who receive a pardon or a record suspension or who have been discharged under section 730(1) under the *Criminal Code*. It asserts that the principles underlying pardons (that as a result of good conduct, a conviction should no longer reflect adversely on one's character), and section 730(1) discharges (that refraining from entering a conviction can be in the best interests of an accused and not contrary to the public interest) are incompatible with NCRMD status.[28]

29. While this argument stresses that the purpose of a separate scheme designed for persons found NCRMD is rehabilitative, denying persons found NCRMD access to any mechanism for exemption from a sex offender registry imposes a more onerous system on them than upon those convicted of designated offences. It also constitutes differential treatment of those found NCRMD because the "only one legally relevant distinction" between the two groups is that one suffered from a disability (specifically a mental disorder that rendered them incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong[29]) at the time of the offence.[30]

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[27] Court of Appeal reasons, at para. 134, **Application Record of Ontario, Tab 5.**

[28] AGO memorandum, at para. 21.

[29] *Criminal Code of Canada*, *supra*., s. 16(1).

[30] Court of Appeal reasons, at para. 115, **Application Record of Ontario, Tab 5.**

30. The AGO argues that the Court of Appeal erred in finding that some analogous process must be created to allow NCRMD persons with access to an exit ramp.[31] Doherty J.A. noted, however, that registration under *Christopher's Law* is "predicated on a statistical connection between the commission of a designated offence and the heightened risk of committing another designated offence"[32] that "exists for persons found NCRMD who have been absolutely discharged just as it exists for NCRMD persons who have not been discharged, and for persons convicted of designated offences".[33]

31. While mechanisms exist for persons discharged under section 730(1) of the *Criminal Code* or convicted of sexual offences and receiving a pardon or record suspension under section 4 of the *Criminal Records Act* to be exempt or removed from the registries, "no comparable 'exit ramps'" exist for persons found NCRMD.[34]

32. The AGO relies on the application judge's findings about the "'inherent risk in any judgment, even one an expert may make, concerning the future behaviour' of persons found NCRMD for sexual offences" to argue that an analogous process should not be provided.[35] This argument ignores the fact that this same risk exists for those convicted of designated offences who receive a pardon or a record suspension and are thus exempt from further compliance. As Doherty J.A. wrote, the absence of exit ramp reflect an

> assumption that persons who committed criminal acts while NCRMD do not change, but rather pose the same ongoing and indeterminate risk they posed at the time of the offence.

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[31] AGO memorandum, para. 21.

[32] Court of Appeal reasons, at para. 99, **Application Record of Ontario, Tab 5.**

[33] *Ibid*.

[34] Court of Appeal reasons, at para. 120, **Application Record of Ontario, Tab 5.**

[35] AGO memorandum, at para. 21.

> This assumption feeds into the stereotypical notion that persons found NCRMD are inherently and indefinitely dangerous.[36]

33. The AGO argues that leave to appeal should be granted so that this Court can clarify the circumstances in which an individualized assessment is required.[37] The Court of Appeal noted,

> there are several ways in which Parliament and the Ontario legislature could make the sex offender registry legislation compliant with s. 15(1) of the *Charter*. Those choices engage various policy considerations. There is also a need for a co-ordinated response by the two legislative bodies. The evaluation of those policy considerations and the mechanics of implementing a co-ordinated response are best left to Parliament and the Legislature.[38]

34. The Court of Appeal suspended the declaration of invalidity for twelve months to provide the Legislature with an opportunity to make *Christopher's Law* compliant with section 15. At this stage, it is indeed best left to the Legislature to determine the circumstances in which an individualized assessment is required. Any concerns that the AGO has raised in respect of the process or the test to be applied can be addressed in its legislation. Notably, no such clarification is being sought by the Attorney General of Canada, which must carry out the same task.

35. Arranging individualized assessments of persons found NCRMD who receive an absolute discharge would not cause a significant hardship to Ontario. Canada will be arranging them in any event. Moreover, those found guilty and/or convicted of sexual offences already receive individualized assessments by the court under section 730(1) of the *Criminal Code* or the Parole Board upon application for a pardon or record suspension so as to determine whether they must register or whether they may be removed.[39]

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[36] Court of Appeal reasons, at para. 122, **Application Record of Ontario, Tab 5.**

[37] AGO memorandum, at para. 23.

[38] Court of Appeal reasons, at para. 150, **Application Record of Ontario, Tab 5.**

[39] Court of Appeal reasons, at para. 112, **Application Record of Ontario, Tab 5.**

## B. The Court of Appeal did not err in finding that the discrimination was not justified under s. 1 of the *Charter*.

36. The AGO asserts that the Court of Appeal erred in holding that the violation of section 15 cannot be saved under section 1 of the *Charter*. Doherty J.A. held that the "object of the sex offender registry legislation can be met by a scheme which allows for carefully tailored, individualized exceptions or exemptions from the registration and reporting requirements".[40]

37. As noted above,[41] and by Justice Doherty, "in light of the existing exceptions and exemptions for convicted offenders, it simply cannot be said that the object of the legislation requires the mandatory registration and reporting of all persons found to have committed designated offences".[42] In addition, there is no explanation discernable from the legislation for the differential treatment of persons found NCRMD.

38. While this respondent concedes that the Legislature is not required to search out and adopt the least intrusive means of attaining its objective, in the present case, less intrusive means of achieving the same objective already exist and continue to be applied to persons found guilty and/or convicted of the same offences as persons found NCRMD. Furthermore, it is up to the Legislature to determine the manner in which individualized assessments occur.

39. The AGO argues that individualized risk assessments will not provide a less impairing alternative because there is no assessment that can establish with certainty that a person found NCRMD and granted an absolute discharge will not re-offend sexually.[43] However, the same inherent risk and uncertainty exists when a court grants a discharge to an offender pursuant to

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[40] Court of Appeal reasons, at para. 144, **Application Record of Ontario, Tab 5.**

[41] See paragraphs 28-32, above.

[42] Court of Appeal reasons, at para. 144, **Application Record of Ontario, Tab 5.**

[43] AGO memorandum, at para. 27.

section 730(1) of the *Criminal Code* exempting a person found guilty from the registry[44] or a record suspension to a person who has been convicted.[45]

40. Inherent risks are present in various other rehabilitative approaches adopted by the criminal justice system, such as probation, but the objective of rehabilitation has been deemed to be valuable despite the potential risks associated with it. Neither the Legislature nor the AGO has offered an explanation to justify why inherent risks are accepted in the context of those convicted of sexual offences but are denied to persons found NCRMD. As Doherty J.A. wrote, "there is no evidence that, while the objective of the legislation is consistent with exceptions and exemptions for persons found guilty, it is somehow undermined by comparable exceptions and exemptions for persons found NCRMD".[46]

41. The AGO has also argued that "in the absence of a reliable mechanism for determining the individual risk of sexual recidivism of NCRMD persons, it cannot be said that one is required by s. 1 of the *Charter*".[47] However, the lack of reliable mechanism to determine, with absolute certainty, that an individual is not at risk of sexual recidivism does not justify compromising the rights of all individuals. The criminal justice system relies on various agents, such as judges, parole boards and review boards, to assess potential risks to public safety as well as individual needs, capacities and circumstances of offenders to determine the appropriate course of action in a given case. Certainly, requiring these agents to determine potential risks with absolute certainty would be impracticable.

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[44] Court of Appeal reasons, at para. 106, **Application Record of Ontario, Tab 5.**
[45] *Criminal Records Act*, RSC 1985, c. C-47, s. 3; Court of Appeal reasons, at para. 108.
[46] Court of Appeal reasons, at para. 145, **Application Record of Ontario, Tab 5.**
[47] AGO memorandum, at para. 29.

42. Lastly, the objective of public safety can be achieved effectively if NCRMD persons who have received an absolute discharge are given *some opportunity* to address both their risk of reoffending and the potentially negative effects of the sex offender registries on their mental health and continued recovery. This would not require Ontario to conduct personalized risk assessments as a condition precedent to placing all persons found NCRMD on its offender registry.[48] It need only meet the requirement of section 15 of the *Charter* that the sub-group of those who have been absolutely discharged by the review board not be subjected to discrimination.

## C. The Court of Appeal did not err in granting an individual remedy during the period of the suspension of the declaration of invalidity

43. AGO argues that leave to appeal should be granted in the present case to clarify the circumstances in which an individual remedy can be granted in conjunction with a suspended declaration of invalidity. The Court of Appeal considered the issue of an individual remedy carefully, in conformity with the jurisprudence of this Court.

44. Using this Court's decision in *Schachter*[49] as a starting point, Doherty J.A. canvassed the development of individual remedies in *Charter* cases, writing,

> the Supreme Court of Canada's jurisprudence since *Demers* tells against reading that case as imposing an absolute ban on combining a suspended declaration of invalidity with a constitutional exemption under s. 24(1) of the *Charter* for the rights-claimant. Even 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.[50]

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[48] Court of Appeal reasons, at para. 137, **Application Record of Ontario, Tab 5.**

[49] *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[50] Court of Appeal reasons, at para. 153, **Application Record of Ontario, Tab 5.**

45. Justice Doherty cited the analysis of this Court's jurisprudence by Kent Roach that a "categorical rejection of all exemptions ignores those cases where individual litigants have effectively been exempted from a suspended declaration of invalidity". [51] Professor Roach notes 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 suspended declaration of invalidity by sacrificing individuals for the sake of giving Parliament an opportunity (that it may be unwilling to take) to craft a systemic response."[52]

46. As Professor Roach notes, "it is possible for courts both to enforce the *Charter* while engaging the legislature and giving it an opportunity to exercise its important role".[53] With respect to *R v Demers*[54] specifically, Roach suggests that the majority erred in stating that the court in *Schachter* imposed a rule precluding the combination of section 24(1) relief with s. 52(1) relief. In fact, the court in *Schachter* "contemplated that even damages under s. 24(1) could be of combined with a s. 52(1) declaration in some cases".[55]

47. Further, the strong dissent of Lebel J. in *Demers* points out that a rule depriving a court from combining s. 24(1) and 52(1) remedies

> could be used to unconstitutionally deprive someone of liberty during a suspended declaration of invalidity. On balance, the better position is that courts can craft exemptions from a suspended declaration of invalidity either as a separate s. 24(1) remedy or as an incident of its discretion under s. 52(1) in crafting the terms of the suspended declaration of invalidity.[56]

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[51] Kent Roach, *Constitutional Remedies in Canada* (Toronto, Ont: Thomson Reuters, 2013) (loose-leaf revision 32), ch. 14 at para. 14.1813. ["Kent Roach, *Constitutional Remedies in Canada*"]

[52] *Ibid*.

[53] *Ibid*.

[54] *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489.

[55] Kent Roach, *Constitutional Remedies in Canada*, at para. 14.940.

[56] *Ibid*.

48. Professor Roach notes various decisions of this Court since *Demers* in support of his conclusion that remedies under section 52(1) and 24(1) of the *Charter* can be combined, including *Martin v Nova Scotia (Workers' Compensation Board),*[57] in which the Court held that the postponement of the declaration of invalidity "does not affect the appellants' cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims."[58]

49. Further examples include *Corbiere v Canada (Minister of Indian & Northern Affairs)*, in which *Schachter* and *Rodriguez* were cited in support of the proposition that the remedy of constitutional exemption has been recognized to "protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended".[59] While declining to do so in the particular circumstances of that case, the Court in *Corbiere* 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 declaration is suspended".[60]

50. Individual remedies during the period of the suspension of the declaration of invalidity were not granted in *Carter v Canada (Attorney General),*[61] but only because one of the litigants had passed away and none of the remaining litigants sought a personal exemption.[62] The Court

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[57] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504.

[58] Kent Roach, *Constitutional Remedies in Canada*, at paras. 14.910-14.931; *Martin, supra*, at paras. 119-120. See also: *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472 where the court deemed the challenged zoning by-laws to be of no force and effect and suspended the declaration of invalidity for six months as well as acquitting the appellant of the charges against laid against him under the by-laws.

[59] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 22.

[60] *Ibid* at para. 122.

[61] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

[62] *Ibid* at para. 129.

opened the door, however, for applications to the provincial and territorial superior courts to consider exemption applications during the period of the suspension of the declaration.[63]

51. The Court of Appeal granted the respondent G. an individual exemption on the basis of reliable evidence. The court acknowledged that the respondent lived in the community under the terms of his conditional discharge until August 2003, when the Ontario Review Board ordered that he be absolutely discharged. Among other things, the Board found that it was likely that he would remain compliant with his treatment regime in the future, which has proved to be the case.[64] The record demonstrated that the respondent had not been under the authority of the ORB for 15 years and there was no suggestion that he had in that period engaged in criminal activity, "much less criminal activity involving sexual misconduct".[65] Thus, the court concluded that "by all accounts, he lives a law-abiding and productive life".[66] The court also noted that on this record, G. would appear to have been a very good candidate for a record suspension, had he been found guilty rather than NCRMD, and would benefit from the exemptions under the *Act*.[67]

52. The court acknowledged that

> at the very same time as the ORB released the appellant from the authority of the criminal law, *Christopher's Law* and *SOIRA* automatically imposed mandatory, lifelong sex offender registry orders on the appellant. Those orders, unlike all of the decisions made by the ORB, were imposed without any consideration of the effect they would have on the appellant's mental health and continued recovery. On this record, those orders had a negative impact on the appellant's mental health.[68]

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[63] *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13.

[64] Court of Appeal reasons, at para. 14, **Application Record of Ontario, Tab 5.**

[65] Court of Appeal reasons, at para. 12, **Application Record of Ontario, Tab 5.**

[66] *Ibid*.

[67] Court of Appeal reasons, at para. 125, **Application Record of Ontario, Tab 5.**

[68] Court of Appeal reasons, at para. 135, **Application Record of Ontario, Tab 5.**

It was only after weighing individual facts of the case and the purposes and objectives of the sex offender registries that the court ordered that the respondent need no longer comply with the registries.

**2. Other Considerations**

53. As noted above, other factors can weigh upon the decision respecting whether to grant leave to appeal.[69]

54. *Christopher's Law* is not a law of general application. The scope of the decision from which leave is sought is even narrower – applying only to persons found NCRMD in respect of enumerated sexual offences who have been absolutely discharged by the review board. The ruling does not apply to persons found NCRMD who remain subject to the review board or those who have been convicted of an enumerated offence.

55. Of note, Ontario is the only jurisdiction within Canada with its own sex offender registry, further narrowing the scope of the decision. Moreover, as Canada is not seeking leave to appeal from the Court of Appeal's decision, the effect of an appeal could be to create increased incongruity between the two offender registries, which will otherwise depend on the same assessment mechanisms (i.e. courts, review boards and parole boards) and enforcement mechanisms (police forces) for their administration.

56. Nor can the AGO point to conflicting decisions on the constitutional validity of the impugned provisions of *Christopher's Law*. The Court of Appeal itself was careful to frame the present decision within the context of its own decisions in *R v Dyck* and *R v Long*[70] which

[69] See paragraph 22, above.
[70] See paragraph 26, above.

uphold the registries as generally being constitutional. No other court had issued a decision that conflicts with that of the Court of Appeal for Ontario in the present appeal.

57. The respondent G. notes that a challenge to the constitutional validity of lifetime registration under *SOIRA* is pending in the Alberta Court of Appeal in *R v Ndhlovu*.[71] While much of the respondent G.'s evidence in the present case was discounted by the application judge, the factual findings of the trial judge in *Ndhlovu* with respect to the impact of the registry on a young accused and the implication of section 7 of the *Charter* may provide a better opportunity for this Court to consider sexual offender registries more broadly.

**PART IV – COSTS**

58. The respondent requests his costs of the application for leave to appeal pursuant to section 47 of the *Supreme Court Act*.

**PART V – ORDER SOUGHT**

59. The respondent G. seeks an order dismissing the application for leave to appeal, with costs or, if leave to appeal is granted, that the costs of the application for leave to appeal be reserved to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF JUNE, 2019.

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Marshall A. Swadron Joanna H. Weiss

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Arooba Shakeel

Counsel for the respondent

[71] *R. v. Ndhlovu*, 2016 ABQB 595; *R. v. Ndhlovu*, 2018 ABQB 277.

## PART VI – TABLE OF AUTHORITIES

| | **Legislation and Regulations** | **Paragraph Reference in Memorandum** |
|---|---|---|
| 1. | *Christopher's Law (Sex Offender Registry)*, 2000, SO 2000, c. 1<br><br>(English) s. 3, 4(2), 10, 11<br>(French) s. 3, 4(2), 10, 11 | 7 |
| 2. | O. Reg 69/01 under *Christopher's Law* (*Sex Offender Registry*), 2000<br><br>(English) s. 2, 6<br>(French) s. 2, 6 | 7 |
| 3. | *Criminal Code of Canada*, RSC 1985, c. C-46<br><br>(English) s. 16(1), 672.54<br>(French) s. 16(1), 672.54 | 25, 29 |
| 4. | *Criminal Records Act*, RSC 1985, c. C-47<br><br>(English) s. 3<br>(French) s. 3 | 39 |
| | **Cases** | |
| 5. | *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331. | 50 |
| 6. | *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13. | 50 |
| 7. | *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. | 49 |
| 8. | *G. v. The Attorney General for Ontario and The Attorney General of Canada*, reasons for decision of Roberts J.A. dismissing stay motion dated May 10, 2019 (unreported) | 16, 17 |
| 9. | *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 | 48 |

# COURT OF APPEAL FOR ONTARIO

DATE: 20190510
DOCKET: M50367 (C64762)

Roberts J.A. (In Chambers)

BETWEEN

G.

Applicant
(Appellant – Responding Party)

and

The Attorney General for Ontario and
The Attorney General for Canada

Respondents
(Respondents in appeal – Moving Party)

S. Zachary Green, for the moving party, The Attorney General for Ontario

Marshall Swadron and Joanna Weiss, for the responding party, G.

Roy Lee, for the respondent in appeal, The Attorney General for Canada

Heard: May 3, 2019

## REASONS FOR DECISION

[1] The Attorney General for Ontario ("AGO") moves for a stay of the provisions of the order of this court dated April 4, 2019, that declare certain provisions of the provincial and federal sex offender registry legislation as they

apply to G. to be of no force or effect, pending disposition of its application for leave to appeal to the Supreme Court of Canada.

[2] The AGO submits that it has satisfied all the criteria under *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311: there are serious issues to be tried; the public interest will suffer irreparable harm as a result of the deletion of G.'s information from the provincial sex offender registry; and the balance of convenience favours a stay.

[3] I am not persuaded that the public interest will suffer irreparable harm if the stay is not granted nor that the balance of convenience favours a stay. For the reasons that follow, the motion is dismissed.

**Factual background**

[4] On June 21, 2002, G. was found not criminally responsible on account of mental disorder ("NCRMD") in respect of two charges of sexual assault, forcible confinement and harassment against his former wife. On July 29, 2002, the Ontario Review Board granted G. a conditional discharge. On August 20, 2003, he was granted an absolute discharge.

[5] G. was a first-time offender. It is common ground that his actions were completely out of character and resulted from an acute mental disorder. He has been successfully treated and is entirely compliant with medication. He has

never re-offended nor been charged with any other offence. G. has never been approached by the police for any kind of criminal investigation.

[6] G. has been registered under the provincial *Christopher's Law* sex offender registry since approximately a year following his absolute discharge. On January 27, 2005, he was informed by the police that he had been placed on the federal Sex Offender Information Registry ("SOIRA"). He has been entirely compliant with the reporting and registration requirements under both registries. There is no evidence that the police have even communicated with him for the administrative purpose of ensuring his compliance with reporting and registration.

[7] G. brought an application before the Superior Court of Justice, submitting that various aspects of both legislative schemes violate his rights under ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*. His former wife supported him in his application. He sought redress on behalf of himself and all persons found not criminally responsible who have been absolutely discharged in respect of an offence giving rise to registration and reporting requirements under the provincial and federal sex offender legislation. G.'s application was dismissed on November 22, 2017.

[8] On April 4, 2019, this court allowed G.'s appeal from the dismissal of his application, finding the impugned provisions to be inconsistent with s. 15 of the *Charter* because they impose mandatory registration and reporting requirements

on persons found NCRMD who have received an absolute discharge, without any possibility for exemption. According to the court, section 15(1) requires some form of individualized assessment of the need for registration and reporting in respect of persons who have been found NCRMD and received an absolute discharge.

[9] The court ordered a declaration to issue that the provisions of *Christopher's Law* and *SOIRA* are of no force or effect to the extent that they impose mandatory registration and reporting requirements with no possibility of exemption on persons found NCRMD who have received an absolute discharge. The declaration of invalidity was suspended for 12 months. However, the suspension did not apply to G.: he was relieved from any further compliance with the provincial and federal sex offender registries, and entitled to an order deleting his information from those registries.

**(i) Serious issues to be tried**

[10] The threshold for showing a serious issue to be adjudicated is generally low. However, in assessing this criterion, the court must consider the merits of the proposed appeal not only in terms of this low threshold but also take into account the stringent leave requirements contained in s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, in particular, whether the proposed appeal

raises an issue of public importance. See: *Yaiguaje v. Chevron Corporation*, 2014 ONCA 40, at paras. 4-5.

[11] I am satisfied that the AGO has met this criterion. AGO's leave application raises arguable issues of public importance involving the constitutional validity of provisions of an important statute enacted to promote public safety. Moreover, the issues raised in the leave application concerning the interpretation of *R. v. Demers*, [2004] 2 S.C.R. 489, and the availability of a qualified declaration of suspended invalidity which exempts the individual before the court from its scope, are also matters of public importance.

**(ii) Irreparable harm**

[12] The AGO argues that irreparable harm would result to the public interest from the deletion of G.'s name and information from the provincial registry during the estimated four to six-month period until its leave application is determined. The provincial registry contains detailed information about G., including his current home and work addresses and the specifics of his offences, that serves as an invaluable tool to police in their investigations. This information allows the police to eliminate, as well as identify, relevant persons from their inquiries.

[13] 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 investigations. Although I appreciate that it may be difficult to find this evidence, there is ample uncontroverted evidence that belies its existence.

[14] 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.

[15] 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.

**(iii) Balance of convenience**

[16] In my view, this factor favours G. A stay would leave G. without any immediate remedy for the infringement of his s. 15(1) *Charter* rights. Rather, he would have to wait for the outcome of the AGO's leave application and the legislative response by Parliament. Moreover, G.'s annual reporting requirements will oblige him to attend at a police station over the next few weeks. Those factors, combined with the remote unlikelihood of any harm to the public interest that I have just reviewed, tilt the balance in favour of G.

**Disposition**

[17] As a result, the motion for a stay is dismissed.

[18] As agreed, G. is entitled to his partial indemnity costs in the amount of $13,344.24.

L. B. Roberts JA

hold open the possibility of a constitutional exemption under s. 24(1) when it stressed that because "the remedial power of the court under s. 24(1) is broad", it did "not foreclose the possibility that, in some exceptional cases, a sentence reduction outside statutory limits may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender".[201] This part of *Nasogaluak* sits in tension to *R. v. Ferguson*,[202] where the court rejected the availability of constitutional exemptions as a s. 24(1) remedy and seemed to hold that the only remedy available with respect to a mandatory sentence was invalidation under s. 52(1). It is odd that the court did not reflect on *Ferguson* when it held open the possibility of a sentence reduction under s. 24(1) that goes below a statutory minimum. Elsewhere in the judgment the court noted *Ferguson* when it mentioned that "absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the Code".[203] Nevertheless, the recognition of the broad remedial powers of s. 24(1) is to be welcomed and is consistent with the court's statement in *Doucet-Boudreau*[204] that neither statutes or the common law can restrain the s. 24(1) remedial powers of a court of competent jurisdiction. Nevertheless, accused who face the increasing number of statutory minimums and seek a sentence below that minimum even for an unconstitutional police act as in *Nasogaluak* would be well advised to challenge the statutory minimum under s. 52(1) as well as under s. 24(1) given the clear statements in *Ferguson* about the need for s. 52(1) remedies in relation to mandatory sentences.

14.901 The British Columbia Court of Appeal reversed on the merits in the assisted suicide case of *Carter*. The Court of Appeal did, however, express a preference for constitutional exemption as "a more limited remedy"[204a] than a suspended declaration of invalidity. It was concerned that a suspended declaration of invalidity would put the vulnerable at risk should Parliament not be able to enact new legislation before the suspension of the declaration of invalidity expired.[204b] It reasoned that an exemption for non-vulnerable people would be less in conflict with Parliamentary intent than the crafting of

201 *Supra*, at para. 6. See also para. 64.

202 [2008] 1 S.C.R. 96, 228 C.C.C. (3d) 385.

203 *Supra*, at para. 45.

204 [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577, at paras. 51 and 105.

204a *Carter v. Canada (Attorney General)* (2013), 109 W.C.B. (2d) 451, 2013 BCCA 435 at para. 334 (B.C. C.A.), leave to appeal allowed 2014 CarswellBC 81 (S.C.C.).

204b The Court of Appeal stated: "We are not confident that a fully rounded, well balanced alternative policy, with comprehensive public support, would or could be developed in the time-frame of any of the suspensions of declaration of invalidity that have been issued hitherto. Striking down s. 241 would call for more than a top-down design of a broadly applicable system for assisted suicide. In that sense, the remedy of a suspended declaration of invalidity presents the spectre of a vacuum in the protection that s. 241 now provides, a danger that would not be present on a more limited remedy": *supra*, at para. 334. To some extent, similar skepticism about the ability of Parliament to legislate quickly on controversial issues may explain the use of robust reading down and reading in remedies in cases such as *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)* (2004), 180 C.C.C. (3d) 353, 234 D.L.R. (4th) 257 (S.C.C.).

exemptions from mandatory sentences apparently rejected in *Ferguson* though not in *Nasogaluak*. On appeal the Supreme Court employed a one-year suspended declaration of invalidity on the basis that:

> Parliament must be given the opportunity to craft an appropriate remedy. The concerns raised in *Ferguson* about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts.[204c]

It appears as if the federal government — in part because of delay and an ensuing federal election — will have difficulty enacting new legislation with proper consultation and deliberation during the one-year period of suspension, partially affirming some of the concerns of the Court of Appeal. It also appears likely that any federal legislation on the subject will involve some system of exemptions from an offence against assisted suicide. The court's continued hostility to constitutional exemptions seems to be based on the belief that Parliament, and not the courts, should craft the system for exemptions. The idea that Parliament should make policy choices that are not dictated by the Constitution is a well-established and sound principle that governs all s. 52 remedies. That said, its application in this context is somewhat different because the scope of the exemption will be determined not so much by Parliament's legitimate policy choices, but by the nature of the underlying s. 7 right. This suggests that whether by legislation or otherwise, courts will likely play an important role in determining when the constitution requires an exemption from any future offence prohibiting assisted suicide.

**(2) Section 24(1) Exemptions during a Suspended Declaration of Invalidity**

**14.910** Another area where constitutional exemptions could be justified is where they are used as a temporary remedy to exempt a successful Charter applicant or others similarly situated from a suspended declaration of invalidity. Such exemptions could be used to prevent irreparable harm during the period of a suspended declaration of invalidity. The use of such exemptions as a temporary remedy during this time would not run afoul of the court's concern in *Ferguson* about creating permanent uncertainty in laws. It would also not evade the courts' obligation to strike down unconstitutional laws under s. 52(1).

**14.920** The Supreme Court both before and after *Ferguson* has in fact exempted successful Charter applicants from a suspended declaration of invalidity[205] as well as from related uses of prospective rulings.[206] In the early cases of *R. v. Swain*[207] and *R. v. Bain*,[208] the court contemplated that courts would not be

[204c] *Carter v. Canada (Attorney General)* (2015), 320 C.C.C. (3d) 1, 2015 SCC 5 (S.C.C.) at para. 125.

[205] See *infra* ¶14.1790-¶14.1830.

[206] The Supreme Court exempted successful Charter applicants from prospective rulings in

powerless during a suspended declaration of invalidity to prevent abuses of an unconstitutional law. In *R. v. Guignard*,[209] the court exempted an accused from a six-month suspension to avoid the injustice of a conviction under an unconstitutional by-law. In *Martin v. Nova Scotia (Workers' Compensation Board)*[210] the court exempted some of the successful applicants from the period of the delay. In a case decided after *Ferguson*, the court in *Nguyen v. Quebec*,[211] provided a partial exemption for some of the applicants from a suspended declaration of invalidity in a minority language case. It will not be appropriate to exempt successful applicants from a suspended declaration of invalidity in every case. In some cases, such exemptions could undermine the purposes for the suspension and might be unfair to others. For example, in *Corbiere v. Canada*, the court did not exempt the successful applicant from an 18-month suspended declaration of invalidity. Nevertheless, Justice L'Heureux-Dubé contemplated that such an exemption could be ordered and indeed should be ordered except in exceptional cases where it would be fair not to order such an exemption.[212] Courts have a responsibility to minimize the injustice caused by their decision to suspend a declaration of invalidity.

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cases such as *R. v. Brydges*, [1990] 1 S.C.R. 190, 53 C.C.C. (3d) 330 and *R. v. Feeney*, [1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129, reconsideration / rehearing granted [1997] 2 S.C.R. 117. Indeed, Chief Justice Lamer stated in *R. v. Campbell*, [1998] 1 S.C.R. 3, (*sub nom.* Reference re Public Sector Pay Reduction Act (P.E.I.), s. 10) 155 D.L.R. (4th) 1, at para. 20, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)*, [1998] 2 S.C.R. 443, that "in the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of constitutionality".

207 [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481.

208 [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481.

209 *R. v. Guignard*, [2002] 1 S.C.R. 472, 209 D.L.R. (4th) 549.

210 [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385.

211 *Ha.-N. (H.) v. Quebec (Tribunal administratif)*, [2009] 3 S.C.R. 208, (*sub nom.* Nguyen v. Québec (Ministre de l'Education)) 311 D.L.R. (4th) 591.

212 She reasoned 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 declaration is suspended: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 20. In my opinion, however, this is one of the exceptional cases where immediate relief should not be given to those who brought the action. Professor Roach in *Constitutional Remedies in Canada* (looseleaf), at pp. 14-85 and 14-86, has identified two possible reasons for which, in general, the claimant in a particular case may have the right to an exemption from the suspension of the effect of the declaration of invalidity, and therefore an immediate remedy:' Corrective justice would suggest that the successful applicant has a right to remedy while regulatory or public law approaches would only be concerned with giving the applicants enough incentive to bring their case to court.' However, I do not believe that either of these considerations applies in the case at bar. What is at issue in this Court is not a remedy affecting band councils elected under the previous regime, but rather a declaration that will have the effect of changing future election rules. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of suspension expires or when the new legislation comes into effect. This both gives them a personal remedy, and gives applicants in analogous situations an incentive to bring their case forward.

*Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203, 173

14.930 A good use of an exemption during a period in which a declaration of invalidity was suspended is *Carter v. Canada (Attorney General)*.[213] In that case, an applicant was exempted from a delayed declaration of invalidity that the crime of assisted suicide was an unjustified violation of the equality rights of the disabled. Such an approach provides Parliament with the opportunity to consult and enact a new law regulating assisted suicide while ensuring that successful Charter applicants receive a tangible remedy and are protected from an unconstitutional law imposing irreparable harm on them during the period of the suspended declaration of invalidity. Prowse J.A. stressed the irreparable harm that the successful exempted litigant, the late Gloria Taylor, would suffer from the unconstitutional law in refusing to stay the exemption part of the remedy even while she granted the government's request of the stay of the declaration of invalidity pending appeal.[214] The B.C. Court of Appeal reversed on the merits but indicated that the use of an exemption to allow a non-vulnerable individual to have assistance in committing suicide might be less in tension with Parliamentary intent than to allow exemptions from mandatory sentences.[214a] It contemplated exemptions as a permanent

D.L.R. (4th) 1 at paras. 122-3, reconsideration / rehearing refused 2000 CarswellNat 2393 (S.C.C.). The author discloses he represented an intervener, Aboriginal Legal Services of Toronto, in this case which had argued for the applicants to be exempted from the suspended declaration of invalidity.

213 (2012), 287 C.C.C. (3d) 1, 2012 BCSC 886, additional reasons 2012 BCSC 1587, [2012] B.C.J. No. 2259 at para. 1400*ff*, reversed in part 2013 BCCA 435, 365 D.L.R. (4th) 351, leave to appeal allowed 2014 CarswellBC 81 (S.C.C.). Note that the dissenters in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 85 C.C.C. (3d) 15 contemplated a similar exemption from a one year suspended declaration of invalidity. Chief Justice Lamer stated that constitutional exemptions under s. 24(1) would be available during the period of temporary validity in order to ensure that people such as the applicant would not have their rights violated while Parliament was given time to devise a new constitutional law: *Rodriguez*, at p. 714. He was also prepared to devise and articulate guidelines for superior courts to apply in order to minimize the constitutional harms that would be caused by the unconstitutional legislation during the period of temporary validity. He stated "that the Court has jurisdiction under s. 52 to make the declaration subject to such conditions as it considers just and necessary to vitiate the impact of the violation during the period of the suspension": *Rodriguez*, at p. 713. To this end, he approved complex quasi-legislative guidelines devised by McEachern C.J. in the court below to govern who could claim exemptions from the law and the safeguards that should be imposed, even though he recognized that if such guidelines were read into the legislation on a permanent basis, they would be an impermissible invasion of the legislative function: *supra*, at p. 712. Following a purposive approach to the exercise of remedial discretion, he altered Chief Justice McEachern's interim guidelines to the extent that he feared that they would result in Charter violations during the transition period by for example always requiring the person being assisted to commit suicide perform the final act: *Rodriguez*, at p. 718. In her concurrence in the dissent, McLachlin J. stated that she was "not convinced that some of the conditions laid down by [Lamer C.J.C.'s] guidelines [were] essential" and that "[w]hat is required will vary from case to case" (at pp. 682-3). For arguments about the need for individual remedies under s. 24(1) to be ordered in conjunction with those formulated under s. 52(1), see Ghislain Otis, "Que reste-t-il de l'article 24 de la Charte Canadienne après l'affaire Schachter?" (1993), 72 Can. Bar Rev. 162.

214 *Carter v. Canada (Attorney General)* (2012), 103 W.C.B. (2d) 607, 2012 BCCA 336 ([In Chambers]) at para. 40*ff*.

remedy rather that one that would only operate during the period of a suspended declaration of invalidity and did not address the argument that exemptions are more easily justified during a period in which a declaration of invalidity is suspended.

14.931 On appeal, the Supreme Court affirmed that the assisted suicide offence violated the applicant's Charter rights, and suspended the declaration of invalidity to allow Parliament and the provincial legislatures "[t]o respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons".[214b] The court stated that the scope of its declaration "is intended to respond to the factual circumstances" of Gloria Taylor's case. Because she had passed away, the court "would not accede to the appellants' request to create a mechanism for exemptions during the period of suspended validity".[214c] In my view, this decision should not be read as precluding s. 24(1) exemptions during a period of suspended declarations. As suggested above, the harms to the rule of law, certainty and Parliament's role of crafting exemptions during a temporary period of suspension are much less when courts grant exemptions from periods of suspensions than allowing courts permanently to alter democratically enacted laws by the use of constitutional exemptions. Moreover, the consequences of not granting an exemption to a successful Charter application such as Gloria Taylor would be severe and harsh. It could undermine common expectations that courts should provide remedies to successful litigants and not simply trigger policy debates in Parliament.[214d]

14.932 A more difficult question is whether other litigants in other cases should be able to obtain an exemption during the suspended declaration of invalidity. Courts should anticipate such cases arising. One option would be simply to allow such cases to be decided by individual judges on their facts. This would advantage those who were able quickly to seek a judicial s. 24(1) remedy in the courts. Another option, more frequently used by South African than Canadian courts, would be for the court to craft guidelines to restrain the use of the unconstitutional law during the period of the suspension. Such guidelines would provide more general guidance to all those affected by the law including those who have to decide whether and how to enforce it during the period of the suspension. The fact that the Supreme Court crafted no such

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214a *Carter v. Canada (Attorney General)* (2013), 109 W.C.B. (2d) 451, 2013 BCCA 435 (B.C. C.A.) at para. 333.

214b *Carter v. Canada (Attorney General)* (2015), 320 C.C.C. (3d) 1, 2015 SCC 5 (S.C.C.) at para. 126.

214c *Ibid.*, at p. 131.

214d For a case approving the combination of remedies under ss. 24(1) and ss. 52(1), see *S. (P.) v. Ontario* (2014), 379 D.L.R. (4th) 191, 2014 ONCA 900 (Ont. C.A.) at para. 209. For arguments in favour of a two-track remedial approach that combines individual remedies under s. 24(1) with more deferential systemic remedies often involving suspended declaration of invalidity see Kent Roach, "Polycentricity and Queue Jumping in Public Law Remedies: A Two Track Approach" (2016), 65 U.T.L.J. (forthcoming and available from the author).

guidelines after either the *Bedford* prostitution case or the *Carter* assisted dying case suggests that the court may be reluctant to craft guidelines to govern the suspension that might be taken by some as providing a template for future legislation. In both cases, the court recognized that Parliament had a legitimate role in selecting among constitutionally compliant options.

14.933 The Supreme Court revisited the exemption issue in the *Carter* assisted dying case when it decided, when extending the suspended declaration of invalidity for an additional four months, that it would also allow exemptions during this time period. The exemptions would allow a Quebec law that provided its own (and more restrictive) criteria for physician assisted dying to operate. It would also allow individuals who satisfied the *Carter* criteria to obtain an exemption. Instead of providing guidelines to govern what happened during the suspended declaration of invalidity, the court indicated that its tailored declaration of invalidity in its original decision would apply. A number of courts subsequently interpreted and applied these criteria when devising exemptions during the extended period of suspension.[214e] The Quebec legislation was also allowed to function but the court noted that its decision in this regard should not be taken as indication that its more restrictive criteria were consistent with the Charter.[214f] This approach seems sensible in combining a recognition of the need for Parliamentary regulation of assisted dying but also in enforcing Charter rights to prevent a person's s. 7 Charter rights from being violated by the imposition of intolerable suffering while Parliament deliberated on a new law. This two-track approach, where the judiciary provides individual remedies while being more deferential on systemic issues, demonstrates that courts can simultan-eously enforce the Constitution and engage Parliament even though Dean Leckey has argued that these two objectives may sometimes be in tension.[214g]

14.934 Nevertheless, it is striking that four judges dissented from allowing exemptions from the extended suspension essentially on the same grounds as articulated in *R. v. Ferguson*[214h] about why suspended declarations are not appropriate. These grounds were that exemptions would create uncertainty, threaten the rule of law and subvert Parliament's intention.[214i] As suggested

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214e See, for example, *Canada (Attorney General) v. F. (E.)* (2016), 34 Alta. L.R. (6th) 1, 2016 ABCA 155 (Alta. C.A.); *Carter v. Canada (Attorney General)*, 2016 BCSC 1005, 2016 CarswellBC 1529 (B.C. S.C.); *A. (A.), Re* (2016), 265 A.C.W.S. (3d) 356, 2016 BCSC 570 (B.C. S.C.); *Patient v. Canada (Attorney General)* (2016), 396 D.L.R. (4th) 351, 2016 MBQB 63 (Man. Q.B.); *B. (A.), Re* (2016), 264 A.C.W.S. (3d) 244, 2016 ONSC 2188 (Ont. S.C.J.).

214f *Carter v. Canada (Attorney General)* (2016), 331 C.C.C. (3d) 289, 2016 SCC 4 (S.C.C.) at para. 4.

214g Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015).

214h (2008), 228 C.C.C. (3d) 385, [2008] 1 S.C.R. 96 (S.C.C.).

214i McLachlin C.J., Cromwell, Moldaver and Brown JJ. stated at para. 125:

> We are not persuaded that the appellants have established a case for a constitutional exemption. In the unanimous judgment on the merits, the court held that this was not an appropriate case to create a mechanism for exemptions during the period of suspended

above, such an absolutist approach against exemptions could leave people, including potentially the lead applicants in a successful Charter case, without an effective remedy simply in order to give the legislature an opportunity to enact a law. The majority's approach demonstrates that courts do not have to make such a hard choice between deferring to the legislature and exercising their traditional function in providing remedies. The minority's approach also ignores important differences between using exemptions as a permanent remedy to cure constitutional defects (something which could potentially create uncertainty and challenge Parliament's intent) and using exemptions as a time-limited remedy to mitigate the effects of the judicially created remedy of a suspended declaration of invalidity. In other words, any damage that case-by-case exemptions would cause to certainty, the rule of law and Parliamentary intent would only persist for the duration of the suspended declaration of invalidity and could be justified by the desire to allow Parliament to exercise its policymaking responsibilities. Once that suspension expired, the court's ultimate remedy – in this case a tailored or limited declaration of invalidity – would take effect. This, as well as the ability to authorize exemptions during a suspension, distinguishes the suspended declaration of invalidity from an unenforceable declaration of invalidity used under the UK's and some Australian bills of rights.

Although the Supreme Court has frequently exempted successful applicants from a suspended declaration of invalidity, there is one case which suggests that courts cannot provide such exemptions. In *R. v. Demers*,[215] the majority of the court held that a "rule" articulated in *Schachter* precluded the combining of s. 24(1) relief with s. 52(1) relief. This approach mistakes *Schachter* as imposing such a "rule" whereas the court in that case contemplated that even damages under s. 24(1) could be of combined with a s. 52(1) declaration in some cases.[216] The majority of the court in *Demers* seemed to assume that courts would be powerless to order s. 24(1) remedies until the period of suspended declarations of invalidity expired.[217] Such an approach could have harsh and undesirable results. Indeed, as LeBel J. 14.940

invalidity. The court wrote that doing so "would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts". These considerations, in our view, continue to be compelling.

*Carter v. Canada (Attorney General)* (2016), 331 C.C.C. (3d) 289, 394 D.L.R. (4th) 1, 2016 SCC 4 (S.C.C.) at para. 12.

215 [2004] 2 S.C.R. 489, 185 C.C.C. (3d) 257.

216 See *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, 209 D.L.R. (4th) 564 discussed *supra* ¶11.370.

217 The majority stated, *supra*, at para. 63:

> Although the rule in *Schachter*, *supra*, precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies, it does not stop courts from awarding *prospective* remedies under s. 24(1) in conjunction with s. 52 remedies. Therefore, if Parliament does not amend the invalid legislation within one year, those accused who do not pose a significant threat to the safety of the public can ask for a stay of proceedings as an individual remedy under s. 24(1) of the *Charter*. This will quash the criminal charge and liberate them from what will remain of the impugned regime.

pointed out in a strong dissent, such a rule could be used to unconstitutionally deprive someone of liberty during a suspended declaration of invalidity.[218] On balance, the better position is that courts can craft exemptions from a suspended declaration of invalidity either as a separate s. 24(1) remedy or as an incident of its discretion under s. 52(1) in crafting the terms of the suspended declaration of invalidity. A case that demonstrates the mischief that a mechanical reading of *Demers* could cause is a decision holding that a refugee in need of medical treatment could not receive that treatment until a four-month suspended declaration of invalidity ceased to apply.[218a] In that case, the trial judge found that there were exceptional circumstances to justify departing from the rule against combining remedies under ss. 52 and 24[218b] but nevertheless held that the ill refugee from Afghanistan should not be declared eligible to receive treatment until the short period of suspended invalidity expired. The short period of suspended validity may well have been an attempt to minimize the inequities of denying the successful Charter applicant immediate access to medical treatment. It is submitted that the better course would have been to have exempted the applicant so that the refugee could immediately receive the medically required treatment and to have suspended the declaration of invalidity for a longer period that is more realistic given the time it takes to research and enact new legislation.

### (3) Reading down as a Functional Alternative

14.950 Reading down a potentially overbroad law may be an attractive alternative both to constitutional exemptions which are suspect after *Ferguson* and a declaration of invalidity which may strike down a law that is perfectly valid in many of its applications.[219] In *Victoria (City) v. Adams*,[220] the trial judge refused to order a constitutional exemption as a permanent remedy for homeless people but declared that a by-law against tenting in city parks would be unconstitutional as applied to the homeless.[221] The British Columbia Court of Appeal upheld this tailored and creative use of reading down the by-law with some fine tuning of the court's language. It also emphasized that the by-law was constitutional in most of its applications, again underlining the functional similarity between the reading down remedy and the use of constitutional exemptions to provide relief in exceptional

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218 He also argued that such an approach "is at odds with the general rule of this Court to provide a successful applicant with immediate relief despite a prospective remedy": *supra*, at para. 102. He also would have stayed proceedings under s. 24(1) for "all permanently unfit accused who do not pose a significant threat to public safety" within 30 days of the judgment noting that "there is no sound policy reason" for the majority's approach to allow the unconstitutional law to apply to such people during the one year suspended declaration of invalidity: *supra*, at para. 107.

218a *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, at para. 1115.

218b *Ibid.*, at para. 1114.

219 *Esquega v. Canada (Attorney General)*, [2009] 1 F.C.R. 448, 77 Admin. L.R. (4th) 167.

220 (2008), 299 D.L.R. (4th) 193, 2008 BCSC 1363.

221 *Supra*, at para. 237.

the court suspended its declaration that the assisted suicide offence was unconstitutional for a period of 12 months. In that case, it did not have to deal with exemptions because the two lead plaintiffs had unfortunately passed away by the time the court made its decision.[418b] In early 2016, the court accepted that the government had satisfied the high burden of justifying an extension of the suspension for another four months, given that Parliament had been dissolved for four months. The majority of the court concluded:

> In agreeing that more time is needed, we do not at the same time see any need to unfairly prolong the suffering of those who meet the clear criteria we set out in *Carter*. An exemption can mitigate the severe harm that may be occasioned to those adults who have a grievous, intolerable and irremediable medical condition by making a remedy available now pending Parliament's response. The prejudice to the rights flowing from the four-month extension outweighs countervailing considerations . . . We would, as a result, grant the request for an exemption so that those who wish to seek assistance from a physician in accordance with the criteria set out in para. 127 of our reasons in *Carter*, may apply to the superior court of their jurisdiction for relief during the extended period of suspension. Requiring judicial authorization during that interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.[418c]

This approach effectively combines a recognition of the need for Parliament to regulate assisted dying with a determination to provide effective judicial remedies during the suspension to ensure that persons did not suffer intolerably in circumstances that would violate their s. 7 Charter rights. Hopefully such a two-track approach to remedies would have been ordered in the original judgment had the lead applicants not already passed away. In other words, a two-track approach combines effective individual remedies tailored to the facts of the case and the requirements of the Charter with a more deferential approach that provides the legislature with an opportunity to craft a more general and systemic approach.

At the same time, four judges dissented and would have not allowed exemptions during the extended period for the suspended declaration of invalidity. McLachlin C.J., Cromwell, Moldaver and Brown JJ. stated: 14.1812

> In the unanimous judgment on the merits, the Court held that this was not an appropriate case to create a mechanism for exemptions during the period of suspended invalidity. The Court wrote that doing so "would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts": para. 125. These considerations, in our view, continue to be compelling.[418d]

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related litigation, the Quebec Court of Appeal held that the assisted suicide offence was no longer valid federal legislation for purposes of applying federal paramountcy over provincial legislation after the Supreme Court's first *Carter* decision striking down the offence subject to a 12-month suspension: *Québec (Procureure générale) c. D'Amico*, 2015 QCCA 2138 (C.A. Que.).

418b *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 320 C.C.C. (3d) 1 (S.C.C.).

418c *Carter v. Canada (Attorney General)*, [2016] 1 S.C.R. 13, 331 C.C.C. (3d) 289 (S.C.C.) at para. 6.

This approach, however, elides the differences between exemptions as a permanent remedy and exemptions as a temporary remedy that mitigates the harsh effects of a suspended declaration of invalidity in depriving litigants of an effective remedy.

14.1813 As discussed above, the court has in *R. v. Ferguson*[418e] rejected permanent exemptions on the basis that they create uncertainty, undermine the rule of law and subvert Parliament's intent. The references in the original 2015 *Carter* judgment were responsive to comments by the British Columbia Court of Appeal that the court might want to reconsider its position against constitutional exemptions as a permanent remedy in the assisted dying context. The majority's decision to allow individual exemptions during the suspended declaration of invalidity provides no permanent alteration of Parliamentary intent given the court's recognition that Parliament can enact new legislation while responding to the recognized danger that suspended declarations of invalidity can leave people without remedies. It is also difficult to see how it creates uncertainty or offends the rule of law given the majority's reliance on the original *Carter* judgment interpreting s. 7 of the Charter. During the extended period of the suspended declaration of invalidity, courts from coast to coast were able to apply the criteria in *Carter* to requests for exemptions.[418f] Even if some uncertainty or alteration of Parliament's (unconstitutional) regime is caused, it will only last for the period of the suspension, whereafter the court's tailored declaration of invalidity took effect. The minority's categorical rejection of all exemptions ignores those cases where individual litigants have effectively been exempted from a suspended declaration of invalidity. Moreover, it suggests that the minority might even have denied the lead applicants an effective remedy had they survived to the time of the Supreme Court's judgment. Such a harsh approach is not necessary and it 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 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. The majority's approach is much more consistent with the court's commitment to effective remedies. Moreover, it demonstrates that it is possible for courts both to enforce the Charter while engaging the legislature and giving it an opportunity to exercise its important role.

[418d] *Ibid.*, at para. 12.

[418e] [2008] 1 S.C.R. 96, 228 C.C.C. (3d) 385 (S.C.C.).

[418f] See, for example, *Canada (Attorney General) v. F. (E.)*, 2016 ABCA 155, 2016 CarswellAlta 895 (Alta. C.A.); *Carter v. Canada (Attorney General)*, 2016 BCSC 1005, 2016 CarswellBC 1529 (B.C. S.C.); *A. (A.), Re* (2016), 265 A.C.W.S. (3d) 356, 2016 BCSC 570 (B.C. S.C.); *Patient v. Canada (Attorney General)* (2016), 396 D.L.R. (4th) 351, 2016 MBQB 63 (Man. Q.B.); *B. (A.), Re* (2016), 264 A.C.W.S. (3d) 244, 2016 ONSC 2188 (Ont. S.C.J.).

Other courts have continued to exempt successful Charter applicants from the period of suspension.[419] Although such exemptions create some horizontal inequities among similarly situated litigants, they do provide appropriate incentives from those who litigate their Charter claims. 14.1820

An exemption from a suspended declaration of invalidity does not have to have an all-or-nothing character. It can be shaped to prevent irreparable harm in particular cases. In *Nguyen v. Quebec*,[420] the Supreme Court used a suspended declaration of invalidity in a minority language case, but indicated that the files of the successful applicants should be forwarded to the Minister. In one case, this would result in the applicant being declared immediately eligible for minority language education.[421] This case demonstrates the ability of suspended declarations of invalidity to both defer to the ability of legislatures to craft a range of constitutionally acceptable new laws, and the possibility of crafting exemptions from the suspension to achieve an appropriate balance between providing some immediate remedy and providing the legislature with an opportunity to act before the declaration of invalidity takes effect. 14.1830

### (5) Cases where applicants were not exempted

An exemption from the period of suspension will not, however, be appropriate and just in every case. In *Trociuk v. British Columbia (Attorney General)*,[422] the court suspended a declaration of invalidity for 12 months in recognition that an immediate declaration of invalidity could cause harm to mothers who did not want the fathers of their children registered on their birth 14.1840

[419] *Hodge v. Canada (Minister of Human Resources Development)* (2002), 214 D.L.R. (4th) 632, [2003] 1 F.C. 271, reversed [2004] 3 S.C.R. 357, 244 D.L.R. (4th) 257 at para. 62 (C.A.), citing this work for the proposition that "the general rule established by the Supreme Court is that successful Charter applicants should be exempted from the period of delay". Cournoyer J.A has concluded: "*Doucet-Boudreau*, *Demers* and *Ferguson* allow this Court to grant the respondents an additional, effective remedy based on subsection 24(1) even if it suspends the effect of the declaration of section 230.1's invalidity. This remedy must be prospective, fair and reasonable, which means that it must be consistent with the nature of the violated constitutional right and the context in which the violation occurred": *R. c. Gagnon* (2015), 481 N.R. 244, 2015 CMAC 2 (Can. Ct. Martial App. Ct.) at para. 261, leave to appeal allowed 2016 CarswellNat 830 (S.C.C.). In the end it held that the appropriate remedy was to adjourn an appeal during a 12-month suspended declaration of invalidity: *supra*, at para. 278. A Métis applicant was exempted from a 10-month suspended declaration of invalidity after a judge found that the exclusion of Métis children from child protection legislation that applied to other litigants was discriminatory. The trial judge had ruled that extending the existing legislation to Métis by reading in was not an appropriate remedy. The trial judge noted that without an exemption and individual remedy, the successful applicant would receive only a "pyrrhic victory" without any "personal redress for the constitutional violation": *Catholic Children's Aid Society of Hamilton v. H. (G.)* (2016), [2017] 1 C.N.L.R. 47, 2016 ONSC 6287 (Ont. S.C.J.) at para. 107. The judge also contemplated (para. 112) that other similarly situated persons might obtain remedies during the suspension period in their own proceedings.

[420] *Ha.-N. (H.) v. Quebec (Tribunal administratif)*, [2009] 3 S.C.R. 208, (*sub nom.* Nguyen v. Québec (Ministre de l'Education)) 311 D.L.R. (4th) 591 at para. 46.

[421] *Supra*, at para. 47.

[422] [2003] 1 S.C.R. 835, 226 D.L.R. (4th) 1, at para. 3.

certificates. The court refused to exempt the successful Charter applicant from the delay in recognition that the interests of the mother and the children should be considered before the father was included on the birth certificate, even though the existing law was an unjustified violation of the father's equality rights. As in *Corbiere v. Canada*[423] the court examined the particular facts of the case before concluding than an exemption for a suspended declaration of invalidity was not warranted.

14.1850 The court took a more categorical and problematic approach in *R. v. Demers*.[424] In that case the Supreme Court refused to exempt a successful Charter applicant from a 12-month suspended declaration of invalidity after it found that a provision relating to the detention of those unfit to stand trial was an unjustified violation of the Charter. The accused, who was found unfit to stand trial for sexual assault and suffered from Down Syndrome, effectively requested an exemption from the suspension by asking for a stay of proceedings. The court found that a stay of proceedings as a s. 24(1) remedy could not be combined with the s. 52(1) remedy of a suspended declaration of invalidity. In the result, the court extended restrictions on combining s. 24(1) and s. 52(1) remedies to criminal cases, even though, as suggested in Chapter 11, these restrictions were first articulated in cases dealing with pecuniary liability and as a means to provide the government with some good faith immunity from dangers.[425] The court concluded that the combination of a s. 24(1) and a s. 52 remedy was not appropriate because the government had not "acted in bad faith or abused its powers".[426] It then indicated that the rule against combining the remedies did not apply to prospective s. 24(1) remedies and that a stay of proceedings could be awarded in appropriate cases when the 12-month suspended declaration of invalidity expired.

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423 *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1, reconsideration / rehearing refused 2000 CarswellNat 2393 (S.C.C.).

424 [2004] 2 S.C.R. 489, 185 C.C.C. (3d) 257. The majority of the Alberta Court of Appeal refused exemptions from a suspended declaration of invalidity on the basis that they could undermine the suspension, would strain judicial resources and that particular consequences in the case – namely allowing an administrative licence suspension to take effect – were not severe. In a strong dissent, Bielby J.A. argued that allowing limited exemptions "would not create a risk of lawlessness or pose a danger to the public. It would not create an unregulated state" and that refusal to consider exemptions would impose harm on drivers that would not be compensated: *Sahaluk v. Alberta (Transportation Safety Board)* (2017), 38 C.R. (7th) 243, 2017 ABCA 233 (Alta. C.A.) at paras. 21, 24. In a subsequent case, a judge stayed the application of the regime during the period of a suspension, concluding that there was "an arguable case" that another person rather than the litigant in the original case could be exempted from the suspended declaration of invalidity; that an immediate licence suspension would cause irreparable harm through job loss and that the balance of convenience favoured granting a stay: *Laverick v. Alberta (Transportation Safety Board)* (2018), 2018 ABQB 57 (Alta. Q.B.) at para. 20.

425 *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1; *Guimond v. Québec (Procureur général)* (1996), 110 C.C.C. (3d) 223, [1996] 3 S.C.R. 347; *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, 209 D.L.R. (4th) 564 discussed *supra*, ¶11.370-11.390.

426 *R. v. Demers*, *supra*, footnote 424, at para. 62.