



SUPREME COURT OF CANADA

CITATION: Ontario (Attorney General) v. G,
2020 SCC 38

APPEAL HEARD: February 20, 2020
JUDGMENT RENDERED: November 20, 2020
DOCKET: 38585

BETWEEN:

Attorney General of Ontario
Appellant

and

G
Respondent

- and -

**Attorney General of Canada, Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association, David Asper Centre for Constitutional
Rights, Empowerment Council and Canadian Mental Health Association,
Ontario**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 184)

Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Martin
and Kasirer JJ. concurring)

CONCURRING REASONS:
(paras. 185 to 217)

Rowe J.

**JOINT REASONS DISSENTING IN
PART:**
(paras. 218 to 294)

Côté and Brown JJ.

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ONTARIO (A.G.) v. G

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to equality — Discrimination based on mental or physical disability — Ontario's sex offender registry regime requiring that individuals either convicted or found not criminally responsible on account of mental disorder ("NCRMD") of sexual offences have their personal information added to registry and report to police station at least once a year to keep information up to date — Opportunities for exemption from requirements available to individuals found guilty of sexual offences but not to those found NCRMD who have been granted absolute discharge — Whether provincial sex offender registry regime infringes right to equality of such NCRMD individuals — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c. 1.

Constitutional law — Remedy — Declaration of invalidity — Suspension of declaration of invalidity — Individual exemption from suspension — Applicant seeking declaration that Ontario's sex offender registry regime infringes right to equality of NCRMD individuals who have been granted absolute discharge — Court of Appeal granting declaration of invalidity, suspending declaration for 12 months and exempting applicant from suspension — Proper approach to determining remedy for unconstitutional legislation — Canadian Charter of Rights and Freedoms, s. 24(1) — Constitution Act, 1982, s. 52(1).

In Ontario, *Christopher's Law* requires those who are either convicted or found not criminally responsible on account of mental disorder ("NCRMD") of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. Registrants must continue to report in person at least once a year and every time certain information changes. Registrants must comply for 10 years if the maximum sentence for the sexual offence they committed is 10 years or less, or for life, if the maximum sentence is greater than 10 years or if they committed more than one sexual offence. There is some opportunity, based on an individualized assessment, for those found guilty of sexual offences to be removed or exempted from the registry or relieved of their reporting obligations. By contrast, no one found NCRMD of sexual offences can ever be removed from the registry or exempted from reporting, even if they have received an absolute discharge from a review board.

In June 2002, G was found NCRMD of two sexual offences. In August 2003, he was absolutely discharged by the Ontario Review Board on the basis that he no longer represented a significant risk to the safety of the public. Despite this discharge, G was placed on the provincial sex offender registry in August 2004, as required by *Christopher's Law*. G brought an application challenging *Christopher's Law* as it applies to persons found NCRMD in respect of sexual offences who have been absolutely discharged. He argued that the inability of people in his situation to be granted an exemption or be removed from the provincial registry or relieved of

reporting requirements, as compared to those found guilty of the same offences, violates ss. 7 and 15(1) of the *Charter*.

The application judge dismissed G's application, but the Court of Appeal allowed G's appeal on the basis of his s. 15(1) claim, and concluded that the s. 15(1) breach was not justified under s. 1 of the *Charter*. It declared *Christopher's Law* to be of no force or effect as it applies to those found NCRMD who were granted an absolute discharge, suspended the declaration of invalidity for 12 months, and exempted G from that suspension by relieving him of further compliance with the legislation and ordering that his information be deleted from the registry immediately. The Attorney General of Ontario appealed to the Court.

Held (Côté and Brown JJ. dissenting in part): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Martin and Kasirer JJ.: *Christopher's Law* draws discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the *Charter*. These discriminatory distinctions cannot be justified in a free and democratic society. The remedy granted by the Court of Appeal was appropriate, and its orders should be upheld.

The first step in determining whether a law infringes s. 15(1) of the *Charter* asks whether the law, on its face or in its impact, creates a distinction based on

enumerated or analogous grounds. In the present case, there are clear distinctions drawn based on the enumerated ground of mental disability. Offenders found guilty of sexual offences can be exempted from having to report and register in the first place by receiving a discharge in their sentencing hearing. Convicted registrants can also be removed from the sex offender registry by receiving a free pardon, and can be relieved of the obligation to continue to report upon receipt of a free pardon or record suspension. However, those found NCRMD of the same offences have no such opportunities, even if they have received an absolute discharge. NCRMD individuals are plainly subjected to different treatment.

The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage. By denying those found NCRMD opportunities for exemption, removal, or relief from the sex offender registry, *Christopher's Law* effectively presumes that they are inherently and permanently dangerous. It considers NCRMD individuals a perpetual threat to the public. *Christopher's Law* imposes a burden on people found NCRMD in a manner that violates s. 15(1) in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses; and the law puts those found NCRMD in a worse position than those found guilty. Both effects perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses. The distinctions drawn by *Christopher's Law* are thus discriminatory.

The burden of establishing that the infringement of s. 15(1) is justified under s. 1 of the *Charter* belongs to the Attorney General, on a balance of probabilities. First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with the s. 15(1) right; it must be rationally connected to the objective, the means chosen must interfere as little as possible with the s. 15(1) right, and the benefits of the infringing measure must outweigh its negative effects. In the present case, the parties agree that the purpose of *Christopher's Law* is to assist in the investigation and prevention of sexual offences, that this purpose is pressing and substantial, and that the limits it places on *Charter* rights are rationally connected to that purpose. However, *Christopher's Law* is not minimally impairing of the s. 15(1) rights of NCRMD individuals. The inclusion of any method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing. Thus, the Attorney General has not justified the s. 15(1) infringement.

The determination of appropriate remedies for legislation that violates the *Charter* must follow a principled approach. Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency. A general declaration is the means by which courts give full effect to the broad terms of s. 52(1). A court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so. A measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution. While s. 52(1) recognizes the

primacy of the Constitution, including the fundamental rights and freedoms of individuals and groups guaranteed by the *Charter*, fashioning constitutional remedies inevitably implicates other — at times competing — constitutional principles. Courts must strike an appropriate balance between these principles in determining how to give effect to s. 52(1) in a manner that best aligns with Canada's constitutional order.

The Court's leading decision on remedies for laws that violate the *Charter*, *Schachter v. Canada*, [1992] 2 S.C.R. 679, provides helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws. *Schachter* set out a general approach to granting remedies. It endorsed remedies tailored to the breadth of rights violations, thereby allowing constitutionally compliant aspects of unconstitutional legislation to be preserved, and recognized that, in rare circumstances, the effect of a declaration of invalidity could be suspended for a period of time to protect the public interest. *Schachter* also considered how s. 52(1) remedies can be combined with individual remedies for *Charter* violations, including whether the claimant should receive an individual exemption from a suspension, thereby ensuring that successful claimants can enjoy the immediate benefit of a declaration of invalidity.

By employing and building on *Schachter's* guidance in determining the form and breadth of declarations of invalidity, suspending the effect of those declarations, and exempting individuals from suspensions, the Court's jurisprudence has coalesced around a group of core remedial principles that structure the exercise of principled remedial discretion and provide the groundwork for meaningful remedies in

different contexts. First, safeguarding rights lies at the core of granting *Charter* remedies because the *Charter* exists to protect rights, freedoms, and inherent dignity. Second, the public has an interest in legislation that is constitutionally compliant. Third, the public is entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm. Fourth, courts and legislatures play different institutional roles: the legislature is sovereign in the sense that it has exclusive authority to enact, amend, and repeal any law as it sees fit, while courts remain guardians of the Constitution and of individuals' rights under it. These principles provide guidance to courts and encourage them to transparently explain remedial results.

As the language of s. 52(1) directs, the first step in crafting an appropriate remedy is determining the extent of the legislation's inconsistency with the Constitution. The nature and extent of the *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach. The second step is determining the form that a declaration should take. Remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. To respect the differing roles of courts and legislatures, determining whether to strike down legislation in its entirety or to grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that it would have enacted the law as modified by the court.

When an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law, the court may suspend the effect of the declaration. The power to suspend the effect of a declaration of invalidity arises from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid. Suspensions of declarations of invalidity should be rare; the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

When the effect of a declaration of invalidity is suspended, an individual remedy for the claimant under s. 24(1) of the *Charter* in the form of an individual exemption from the suspension will often be appropriate and just. A s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case. A court's approach to s. 24(1) remedies must stay flexible and responsive to the needs

of a given case. The public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws, and claimants invest time and resources to pursue matters in the public interest. Thus, if an exemption is otherwise appropriate and just, claimants should be exempted from suspensions in the absence of compelling reasons not to.

In the present case, the declaration of invalidity was properly limited to those who have been found NCRMD of a sexual offence and absolutely discharged. A tailored remedy was clearly appropriate here, since granting such a remedy better protects the public's interest in legislation enacted for its benefit, like *Christopher's Law*, and better respects the role of the legislature while also safeguarding *Charter* rights and realizing the public's interest in constitutionally compliant legislation.

The declaration of invalidity was also properly suspended for a 12-month period. Although the terms of s. 52(1) and the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration, those factors must be balanced against protecting the public's interest in legislation passed for its benefit. To do so requires considering the nature and extent of both the continued rights violations and the danger to an identified public interest that could flow from an immediate declaration of invalidity.

In the instant case, public safety has been identified as the public interest that justifies a suspension. NCRMD persons are at a statistically higher risk of offending than the general population. Granting an immediate declaration would

therefore endanger the public interest in safety to some extent. The registry contributes to public safety by enhancing the ability of police to prevent and investigate sexual offences. Immediately relieving people who may pose some risk of committing sexual offences from the obligation to report or permitting them to seek removal of their information could detract from this enhanced ability. The threat to public safety is therefore meaningful. However, given that persons found NCRMD who pose the highest demonstrable risk to reoffend are not given absolute discharges, this threat is limited. The other public interest at stake is respect for the legislature: granting an immediate declaration of invalidity could risk compromising the legislature's ability to fulfil its role and restrict the effectiveness of whatever new version of *Christopher's Law* is eventually enacted. Balanced against these considerations is the significance of the rights violation that the suspension would temporarily prolong: *Christopher's Law* treats those found NCRMD in accordance with a persistent, demeaning stereotype without providing an opportunity to determine whether they pose sufficient risk. On balance, the combination of these two interests justifies temporarily depriving those affected of the immediate benefit of the declaration.

Finally, the exercise of the Court of Appeal's discretion in granting G an individual exemption from the suspension deserves deference. G's record since his release 17 years ago has been spotless and there is no indication that he poses a risk to public safety. An exemption ensures that G receives an effective remedy and is not denied the benefit of his success on the constitutional merits.

Per Rowe J.: The appeal should be dismissed. There is agreement with Côté and Brown JJ. regarding s. 15(1) of the *Charter*, and regarding the general approach to ordering an individual exemption under s. 24(1) from the suspended effect of a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*. However, there is disagreement on the proper approach to suspending a declaration of invalidity under s. 52(1). The Court's approach in *Schachter* should be reaffirmed.

The majority's principled discretion approach to suspended declarations of invalidity lacks analytic structure, and its four principles are so indeterminate and truistic as to provide no meaningful guidance. This discretionary approach could lead to a continuation of current trends in which declarations of invalidity are suspended in a way that varies with the length of the Chancellor's foot. There is no legitimate basis to read remedial discretion into s. 52(1). The absence of remedial discretion in s. 52(1) is not an oversight, and the inherent jurisdiction of a court is not a sound or sufficient legal basis to depart from the immediate effect of s. 52(1). The only basis on which a court can order a constitutionally invalid statute to be enforced notwithstanding its illegality is if an immediate declaration of invalidity would offend some other constitutional principle.

Schachter is grounded in a view that suspended declarations are exceptional and should be ordered only where: (1) an immediate declaration of invalidity would pose a potential danger to the public; (2) it would otherwise threaten the rule of law; or (3) the impugned law is underinclusive and the court cannot

determine properly whether to cancel or extend its benefits. These categories exemplify circumstances in which countervailing constitutional principles constitute a valid basis to suspend an immediate declaration of invalidity. While not exhaustive, the *Schachter* categories should be extended only where an immediate declaration would infringe some constitutional principle.

In the case at bar, the declaration of invalidity was suspended on the basis of public safety concerns. However, as the 12-month suspension of the declaration of invalidity ordered by the Court of Appeal has expired, this issue is now moot, as is the issue of the individual exemption order for G. Consequently, there is no cause to decide whether the declaration was properly suspended, or whether the individual exemption was rightly ordered.

Per Côté and Brown JJ. (dissenting in part): There is agreement with the majority that *Christopher's Law* infringes G's s. 15(1) *Charter* right to equal treatment, and that the declaration of invalidity was properly suspended for a period of 12 months. However, the suspension of the declaration of invalidity should be grounded solely on the threat to the rule of law that would otherwise manifest, in the present case, in the form of a threat to public safety. Consistent with the limited role of the judiciary vis-à-vis the legislature, an individual exemption from the suspended declaration of invalidity should not be granted. The appeal should therefore be allowed in part.

The section 15(1) issue is easily disposed of. *Christopher's Law* draws a distinction between persons found NCRMD and persons found guilty. That distinction

exacerbates pre-existing disadvantage by perpetuating the stereotype that persons with mental illness are inherently dangerous. Persons found guilty of sexual offences have several exit ramps leading away from the obligation to comply with *Christopher's Law* but persons found NCRMD do not, even where the Ontario Review Board determines that they no longer pose a significant threat to public safety and grants them an absolute discharge. This constitutes differential treatment on the basis of an enumerated ground: mental disability. The proper remedy is to require the legislature to provide persons found NCRMD who have been absolutely discharged with an opportunity for exemption and removal from the *Christopher's Law* registry.

Suspended declarations of invalidity are only warranted when there is a threat to the rule of law, for three principal reasons. First, this was what the Court envisioned in assuming for the first time the power to issue a suspended declaration in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. The Court in *Manitoba Reference* tightly constrained the use of suspended declarations to situations where they are necessary to preserve the rule of law under conditions of emergency, when it is impossible to comply with constitutional rights. Since *Manitoba Reference*, however, the Court has lost its way and has suspended declarations of invalidity almost as a matter of course, often with no justification or attention to the rule of law.

Secondly, the Constitution contemplates immediate declarations as the norm, subject only to a rule of law concern. Once it is found that a statute is inconsistent with the Constitution, s. 52(1) limits the role of courts to declaring a law is of no force

or effect. While the Constitution does not expressly permit courts to suspend a declaration of invalidity, it does provide a means for Parliament and legislatures to do so in certain cases under s. 33(1). Courts must therefore be judicious, measured and principled when exercising the judicially created power to suspend a declaration of invalidity. Rights under the *Charter* may be temporarily judicially displaced by the operation of a suspended declaration of invalidity only where necessary to preserve the rule of law and to ensure its continuity. In such instances, courts are not fulfilling an impermissible legislative role as they otherwise would be by granting a suspended declaration, but an assuredly judicial role.

Thirdly, lessons that follow from *Schachter*'s jurisprudential progeny show why it is essential to confine judicial discretion. Restraint is imperative because suspending a declaration will often pull a court beyond its institutional competence and capacity, and into the role of the legislature. As well, courts are ill-equipped to determine the period of time during which a suspended declaration should govern. Further, allowing an unconstitutional law to remain in force not only withholds the immediate relief to which a successful claimant is expressly entitled under s. 52(1), but also sustains the invalidated law's capacity to produce harm. Finally, suspended declarations can exacerbate pre-existing disadvantage and discourage rights holders from bringing *Charter* claims forward in the first place.

If used improperly, suspended declarations can undermine the rule of law they were meant to preserve in two ways: they can lead to uncertainty in the law during

the period of suspension; and they can lessen the consequences for lawmakers of enacting laws that violate the *Charter*, which in turn, reduces the incentives for complying with rights when making law.

In the present case, granting an immediate declaration of invalidity would threaten public safety and, therefore, the rule of law, as it would mean that the *Christopher's Law* registry would not apply to all persons found NCRMD and who have been granted absolute discharges by the Ontario Review Board. While *Christopher's Law* likely captures persons who do not pose a significant risk of reoffending, it also captures many who do. More importantly, it must be remembered that the recidivism risk is that of committing sexual offences, which are violent crimes that cause profound harm to the most vulnerable members of society. Given that an immediate declaration of invalidity would remove persons found NCRMD who are potentially dangerous from the registry, it would create a lacuna in the regime that would undoubtedly pose a danger to the public and thus threaten the rule of law.

If a suspended declaration of invalidity should be rare, then an individual exemption from that suspension must be exceedingly so. There is disagreement with the majority that judges are well-suited to conduct an individualized assessment as to whether an exemption would endanger public safety. Rather, a helpful consideration in determining whether an individual exemption should be granted is to ask whether an exemption is necessary to prevent irreparable harm to the interests the *Charter* was designed to protect during the suspension. The case for irreparable harm must be so

significant that it overcomes the weighty need to leave the manner of addressing a constitutional infringement to the legislature.

Although G has shown that he is entitled to the opportunity for exemption and removal from the registry, this is not one of those rare cases where an individual exemption is warranted. A delayed remedy will not deprive G of an effective one, nor preclude him from accessing the new opportunity for exemption in whatever form that may take. Further, G will, at most, have to report to the police station one more time as part of his obligation to report annually, a far cry from irreparable harm. In G's case, as in most, crafting an individual exemption will exceed the competence of the Court and encroach on what is an issue for resolution by the legislature, which is in a far better position to determine what the appropriate mechanism is to provide persons found NCRMD with the opportunity for exemption.

Granting G an individual exemption also raises concerns of horizontal unfairness — that is, of treating G better than others who are similarly situated. In a constitutional case involving the validity of a statute of general applicability, a litigant should not be entitled to a better or more immediate constitutional remedy than all other persons similarly situated merely because they brought the case.

Cases Cited

By Karakatsanis J.

Discussed: *Schachter v. Canada*, [1992] 2 S.C.R. 679; **considered:** *R. v. Swain*, [1991] 1 S.C.R. 933; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; **referred to:** *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409; *R. v. Long*, 2018 ONCA 282, 45 C.R. (7th) 98; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Egan v. Canada*, [1995] 2 S.C.R. 513; *R. v. Campbell*, 2013 BCCA 43, 334 B.C.A.C. 16; *R. v. C.C.*, 2007 ABPC 337, 435 A.R. 215; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 722; *R. v. Ndhlovu*, 2020 ABCA 307, rev'g 2016 ABQB 595, 44 Alta. L.R. (6th) 382; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Nova Scotia (Workers' Compensation Board) v. Martin*,

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Anita Szigeti, Andrew Menchynski, Ruby Dhand and Meaghan McMahon, for the intervener the Empowerment Council.

Erin Dann and Michelle Psutka, for the intervener the Criminal Lawyers' Association (Ontario).

Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Adam Goldenberg and Ljiljana Stanić, for the intervener the Canadian Mental Health Association, Ontario.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] People with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them. In particular, discriminatory perceptions that those with mental illnesses are inherently and indefinitely dangerous persist. These perceptions have served to support some of the most unjust treatment of those with mental illnesses. As this case demonstrates, such perceptions still find some expression in legislation.

[2] Section 15 of the *Canadian Charter of Rights and Freedoms* prevents such discrimination from being given the force of law. This appeal requires the Court to apply the equality guarantee to the manner in which those found not criminally responsible on account of mental disorder (NCRMD) of sexual offences are treated by Ontario's sex offender registry regime. It also provides an opportunity to set out a consistent set of principles applicable to granting remedies for legislation that violates the *Charter*.

[3] In Ontario, *Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1 (*Christopher's Law*), requires those who are either convicted or found NCRMD of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. They must continue to report in person at least once a year to keep their information up to date. They must also report every time certain information changes. Even when individuals are no longer required to report or when they die, information previously gathered about them under the registry is retained.

[4] Those who are found guilty of a sexual offence can be exempted from reporting in the first place by receiving a discharge under s. 730 of the *Criminal Code*, R.S.C. 1985, c. C-46, can be removed from the registry upon receipt of a free pardon, and can be exempted from continuing to report upon receipt of either a free pardon or criminal record suspension. There is therefore some opportunity, based on an individualized assessment, to be exempted from the sex offender registry. By contrast,

everyone found NCRMD *must* report upon discharge by a provincial review board or court, without exception, no one found NCRMD can *ever* be removed from the registry, and no one found NCRMD can *ever* be exempted from reporting. This is so even if they have received a discharge from a review board.

[5] G, the respondent, was found NCRMD of two sexual offences and then absolutely discharged by the Ontario Review Board (ORB). His record in the 19 years since those offences occurred has been spotless. Nevertheless, as *Christopher's Law* currently stands, G will have to report and will be a registered "sex offender" for the rest of his life. His information will remain in the registry even after he passes away. He has *no* opportunity for removal.

[6] In my view, *Christopher's Law* draws discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the *Charter*. These discriminatory distinctions cannot be justified in a free and democratic society. I would therefore dismiss the appeal and uphold the Court of Appeal's orders declaring *Christopher's Law* to be of no force or effect as it applies to those found NCRMD and granted an absolute discharge, suspending the declaration of invalidity for 12 months, and exempting G from that suspension by relieving him of further compliance with the legislation and ordering that his information be deleted from the registry immediately.

II. Background

[7] In September 2001, G experienced his first and only manic episode. A month later, he was charged with two counts of sexually assaulting his then-wife, one count of unlawfully confining her, and one count of harassment. The two incidents underlying the charges occurred as a result of that manic episode.

[8] In June 2002, G was found NCRMD. When G appeared before the ORB in July 2002, he received a conditional discharge. In August 2003, the ORB ordered that he be absolutely discharged on the basis that “[t]here is simply no evidence to find that [G] is a significant risk to the safety of the public” (2017 ONSC 6713, 401 C.R.R. (2d) 297, at para. 17). G has not engaged in criminal activity since being absolutely discharged approximately 17 years ago. He has adhered to treatment and his symptoms have been in full remission. He has maintained stable employment and has strong and supportive relationships with his family.

[9] G was placed on the provincial sex offender registry in August 2004, and on the federal registry in January 2005. Since then, G has fully complied with his reporting obligations. He has reported in person annually as required by *Christopher’s Law* and has complied with other requirements imposed by the federal *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (*SOIRA*).

[10] G brought an application challenging *Christopher’s Law* (and the federal registry, which is not at issue in this appeal) as it applies to persons found NCRMD who have been absolutely discharged under Part XX.1 of the *Criminal Code* in respect of offences giving rise to registration. He took the position that the inability of people

in his situation to be granted an exemption or be removed from the registry violates ss. 7 and 15(1) of the *Charter*. G's application was dismissed at first instance, but his appeal was allowed in part.

A. *Ontario Superior Court of Justice (2017 ONSC 6713, 401 C.R.R. (2d) 297) (Lederer J.)*

[11] Relying on the evidence of the government's expert witness, the application judge found that, although it is not possible to predict the risk of recidivism with certainty using actuarial data, the risk of reoffending for a person found NCRMD is no less than that of an individual found guilty. He concluded that, from the perspective of risk assessment, it makes little difference whether the sexual offence results in a criminal conviction or a finding of NCRMD, because people who have been found NCRMD have criminal recidivism rates that are substantially higher than the rates of first-time offending among individuals with no criminal history.

[12] Dealing with the s. 7 claim, the application judge accepted that G's liberty interest is engaged but rejected G's argument that his security of the person interest is engaged. Relying on the conclusion of the Ontario Court of Appeal in *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409, at para. 106, that the registration and reporting requirements were "quite modest", the application judge concluded that any deprivation of liberty is in accordance with the principles of fundamental justice.

[13] The application judge also found no violation of s. 15(1). He found that *Christopher's Law* does not distinguish between those found NCRMD and those found guilty of an offence, either on the face of the law or in its impact. This is because the distinction between those found guilty and those found NCRMD is not found in *Christopher's Law* and because the impact of *Christopher's Law* is “modest”.

B. *Ontario Court of Appeal (2019 ONCA 264, 145 O.R. (3d) 161) (Doherty, van Rensburg and Hourigan JJ.A.)*

[14] On appeal, Doherty J.A. for a unanimous Court of Appeal upheld the application judge's dismissal of G's s. 7 argument. He agreed with the application judge that *Christopher's Law* engages G's liberty interest but not his security of the person interest. He also agreed that the deprivation of liberty conforms to the principles of fundamental justice, relying on the Court of Appeal's prior decisions in *Dyck* and *R. v. Long*, 2018 ONCA 282, 45 C.R. (7th) 98.

[15] However, Doherty J.A. allowed the appeal on the basis of G's s. 15(1) claim. He found that the effects of *Christopher's Law* distinguish between convicted persons and persons found NCRMD on the basis of disability. Convicted persons, Doherty J.A. reasoned, can access mechanisms that allow them to avoid registration in the first place, to be relieved of reporting requirements, or to be removed from the registry. Persons found NCRMD cannot access comparable “exit ramps”, even once they have been absolutely discharged. Doherty J.A. concluded that those distinctions

are discriminatory because they foster the stereotypical idea that persons found NCRMD are inherently and perpetually dangerous.

[16] Doherty J.A. also concluded that the law violates the s. 15(1) right of those found NCRMD who receive an absolute discharge by failing to provide them with individualized treatment, citing *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. Substantive equality, in his view, mandates that those found NCRMD and absolutely discharged have some opportunity for individualized assessment as a precondition for being subject to registry obligations.

[17] Because the law does not minimally impair equality rights, Doherty J.A. concluded that the s. 15(1) breaches are not justified under s. 1. There was no evidence the public safety objective of *Christopher's Law* would be undermined by extending exemptions to persons found NCRMD who have been absolutely discharged. He reasoned that exemptions have already been extended to convicted persons without apparent damage to this objective.

[18] As to remedy, Doherty J.A. suspended the declaration of invalidity for 12 months to allow the legislature to determine the appropriate response. However, he exempted G from the suspension by ordering that he be immediately removed from and relieved of obligations under the registry. Doherty J.A. reached the same conclusions with respect to the federal sex offender regime under *SOIRA*; the Attorney General of Canada did not appeal the decision.

III. Issues

[19] The Attorney General of Ontario appeals the order declaring *Christopher's Law* to be without force or effect as it applies to those found NCRMD and absolutely discharged, as well as the order that G be immediately removed from and relieved of his obligations under the registry.

[20] The following issues, relating to whether the sex offender scheme infringes the rights of those found NCRMD, arise in this case:

- A. Does *Christopher's Law* violate s. 15(1)?
- B. If so, is it justified as a reasonable limit under s. 1 of the *Charter*?
- C. Does *Christopher's Law* violate s. 7?
- D. What is the appropriate remedy? Was the declaration of invalidity properly suspended for some period of time? If so, was G properly granted an individual exemption from that suspension?

[21] I begin by outlining the relevant aspects of *Christopher's Law* and Part XX.1 of the *Criminal Code*, then turn to the issues in this appeal.

IV. Christopher's Law

[22] *Christopher's Law* establishes a registry containing, among other things, the names, dates of birth, addresses, personal and business phone numbers, employers, descriptions, and photographs of Ontario residents who have been convicted or found NCRMD in respect of a sexual offence, along with the sexual offence in question (s. 2; *Christopher's Law (Sex Offender Registry)*, 2000, O. Reg. 69/01 (*Christopher's Law Regulation*), s. 2).

[23] *Christopher's Law* imposes three distinct types of burdens on registrants. First, registrants must comply with initial reporting requirements that, broadly, apply upon release into the community. Second, registrants must continue to report at least once a year and within seven days of specified events, such as changing their addresses or names. Third, registrants' information persists in the registry, subject to removal only in the event that a registrant receives a free pardon (s. 9.1; *Christopher's Law Regulation*, s. 2(3)). I explain these burdens in more detail below.

[24] Registrants must present themselves in person at a police station or other designated place to comply with their initial reporting requirements within seven days of release from custody, release on parole, release following absolute or conditional discharge after being found NCRMD, and becoming resident in Ontario (s. 3(1); *Christopher's Law Regulation*, s. 1.2). This initial in-person reporting obligation takes 45-60 minutes to complete at a police station.

[25] Registrants must present themselves at least once a year to fulfil their ongoing reporting obligations (s. 3(1)(f) and (g)). They must provide a wide variety of information identified in the regulations, including their name and any present or past aliases, their addresses, their personal and business phone numbers, the name of their employers, their photograph, their physical description, their driver's licence number, their licence plate number, the characteristics of the car they regularly use, and the educational institutions in which they are enrolled (s. 3(2); *Christopher's Law Regulation*, s. 2). It takes 30-60 minutes to fulfil the annual reporting obligation. Registrants are also required to report every time they change their address, change their name, and become or cease to be an Ontario resident.

[26] Registrants must comply with the reporting obligations for 10 years if the maximum sentence for the sexual offence of which they were convicted or found NCRMD is 10 years or less (s. 7(1)(a)). They must comply for life if the maximum sentence is greater than 10 years or if they were convicted or found NCRMD of more than one sexual offence (s. 7(1)(b) and (c)).

[27] There is no reporting obligation for those who receive conditional or absolute discharges under s. 730 of the *Criminal Code*, because s. 730(3) deems those individuals not to have been convicted of the offence, and s. 3 of *Christopher's Law* only captures persons who have been convicted or found NCRMD of an offence.

[28] Under s. 7(4) of *Christopher's Law*, a registrant is no longer required to report upon receiving either a free pardon or a criminal record suspension. A free

pardon deems the recipient to have never committed the offence of which they were convicted (*Criminal Code*, s. 748(3)). A free pardon may be granted either under the Crown's prerogative of mercy or under s. 748 of the *Criminal Code*. Historically, the prerogative of mercy and the free pardon, one of the remedies the prerogative can provide, have been exercised to correct wrongful convictions and to compassionately ameliorate the impacts of convictions (*Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 28; G. T. Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" (2001), 26 *Queen's L.J.* 339). A record suspension is granted by the National Parole Board to those who have been convicted of an offence. Good conduct in the period since the end of imprisonment or probation is among the circumstances to be considered in granting a record suspension (*Criminal Records Act*, R.S.C. 1985, c. C-47, ss. 4 and 4.1).

[29] Under s. 9.1 of *Christopher's Law*, a registrant will be removed from the registry upon receiving a free pardon. At the time of G's registration, s. 9.1 also provided that a registrant would be removed from the registry upon receiving what is now referred to as a record suspension. However, while a record suspension removes the reporting requirement, it no longer leads to removal from the registry (*Christopher's Law (Sex Offender Registry) Amendment Act, 2011*, S.O. 2011, c. 8, ss. 1(1) and 6). Finally, there is no mechanism for removing registrants' information upon a successful appeal, nor when they pass away. Instead, the registrant's date of death is added to the registry (*Christopher's Law Regulation*, s. 2(1) 10).

[30] Information contained in the registry can be disclosed to police forces within and outside Canada for crime prevention and law enforcement purposes, and disclosed publically by a chief of police or designate under certain circumstances (s. 10(2) and (3); *Police Services Act*, R.S.O. 1990, c. P.15, s. 41(1.1) and (1.2)).

[31] Significantly, *Christopher's Law* requires police forces to make reasonable efforts to verify an offender's address at least once a year, which may consist of attending at a registrant's home (s. 4(2)). It does not set limits on the number of checks that can be conducted for verification purposes and does not require police forces to give registrants notice of verification efforts.

[32] Registrants who fail to comply with *Christopher's Law* are subject to a maximum fine of \$25,000 or up to a year's imprisonment for a first offence and a maximum fine of \$25,000 or up to two years' imprisonment less a day for a subsequent offence (s. 11).

V. *Criminal Code*, Part XX.1

[33] Part XX.1 of the *Criminal Code* sets out the "assessment-treatment system" that applies to persons who are exempt from criminal responsibility and receive a verdict of NCRMD by virtue of ss. 16(1) and 672.34 (*Winko*, at para. 16). Part XX.1 provides for the establishment of provincial review boards, with the

responsibility to hold hearings to determine whether to grant persons found NCRMD conditional or absolute discharges under s. 672.54.¹

[34] In *Winko*, at para. 20, this Court described the purposes of Part XX.1, a scheme founded on the “twin goals of fair treatment [for those found NCRMD] and public safety”:

. . . the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. . . . [The NCRMD finding] triggers a balanced assessment of the offender’s possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1’s goals of public protection and fairness to the NCR accused. [para. 43]

[35] Following a disposition or review hearing, a review board may order an absolute discharge, a conditional discharge, or a hospital detention (s. 672.54). In arriving at a disposition that is “necessary and appropriate in the circumstances”, review boards must take into account the safety of the public, along with the mental condition of the person found NCRMD, their reintegration into society, and their other needs (s. 672.54). Conditions relating to treatment may only be included in a disposition if the accused consents to the condition (s. 672.55).

¹ Though Part XX.1 also empowers courts to make such orders in certain circumstances, review boards are responsible for making the large majority of these orders (Department of Justice, Research and Statistics Division, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (2006), at p. 2). That is why I refer to review boards throughout these reasons.

[36] In general, disposition hearings are held within 45 days of an NCRMD verdict, and disposition review hearings are held no more than 12 months after the most recent disposition or disposition review hearing (ss. 672.47 and 672.81).

[37] The review board *must* absolutely discharge any person found NCRMD unless it concludes, based on the evidence presented at the hearing, that the person poses a “significant risk of committing a serious criminal offence” (*Winko*, at para. 57; see also s. 672.54(a)). If the review board cannot make the required positive finding of significant risk, jurisdiction under Part XX.1 falls away — the criminal law cannot legitimately restrain that individual’s liberty any further (*Winko*, at para. 33).

[38] This constitutional imperative, coupled with the individualized review that the review board must undertake at least annually in every person’s case, illustrate Part XX.1’s rejection of “invidious” stereotypical notions that persons with mental illnesses are inherently dangerous (*Winko*, at paras. 35, 47 and 89). Risk cannot be assumed; it must be positively found. And it must be found based on evidence considered within an individualized assessment of a person’s circumstances.

VI. Analysis

A. *Does Christopher’s Law Infringe the Equality Rights of Those Found NCRMD?*

(1) General principles

[39] The equality guarantee has a powerful remedial purpose (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 3; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171). As Abella J. noted in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, the “root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed” (para. 332) — though, of course, *historical* discrimination need not be demonstrated for a court to find that a law infringes s. 15(1). The equality guarantee seeks to prevent and remedy discrimination against groups subject to social, political, and legal disadvantage in Canadian society (*R. v. Swain*, [1991] 1 S.C.R. 933, at p. 994; see also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 54). It expresses a commitment to recognizing the essential, inalienable equal worth of all persons through the law (*Andrews*, at p. 171; *Eldridge*, at para. 54). In *Andrews*, the launching pad of the Court’s *Charter* equality jurisprudence, McIntyre J. observed that the “worst oppression will result from discriminatory measures having the force of law” (p. 172). The equality guarantee means that discriminatory laws will have no force at all.

[40] The Court asks two questions in determining whether a law infringes s. 15(1). First, does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground? If a law is facially neutral, it may draw a distinction indirectly where it has an adverse impact upon members of a protected group. Second, if it does draw a distinction, does it impose “burdens or [deny] a benefit

in a manner that has the effect of reinforcing, perpetuating or exacerbating . . . disadvantage”, including “historical” disadvantage? (See *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 22, citing *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20, and *Quebec v. A*, at paras. 323-24 and 327; see also *Quebec v. A*, at para. 332, *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 25-28, and *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paras. 27 and 30, per Abella J.)

[41] The first step — whether the law creates a distinction based on enumerated or analogous grounds — is not a preliminary merits test or “an onerous hurdle designed to weed out claims on technical bases” (*Quebec v. Alliance*, at para. 26). It is aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect (*Alliance*, at para. 26). In cases involving laws that draw distinctions in their impact, the disproportionate impact on a protected group is enough — the disproportionate impact need not be *caused* by the protected ground (*Fraser*, at para. 70).

[42] The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that is discriminatory. Importantly, it does not matter to either step of the analysis whether the challenged law *created* the social, political or legal disadvantage of protected groups (*Centrale des syndicats*, at para. 32, citing

Vriend v. Alberta, [1998] 1 S.C.R. 493, at paras. 84 and 97; *Fraser*, at para. 71). If the law reinforces, perpetuates, or exacerbates their disadvantage, it violates the equality guarantee and thereby gives discrimination the force of law.

[43] The ultimate issue in s. 15(1) cases is whether the challenged law violates the animating norm of substantive equality (*Quebec v. A*, at para. 325, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; *Fraser*, at para. 42; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 14). Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present-day social, political, and legal disadvantage. An appreciation of the role substantive equality has played in our jurisprudence is necessary to understand why many of the arguments the Attorney General presented to this Court must be rejected.

[44] This Court's conception of substantive equality has developed in opposition to formal equality approaches. Formal equality is limited to equality "before the law", and sees equality as a principle fulfilled by "treating likes alike" (*Andrews*, at pp. 165-68 and 170; *Centrale des syndicats*, at para. 27). Formalist approaches to equality rights involve a "decontextualized application of objectified rules and definitions" that fails to account for, among others, conditions of material inequality, the concrete impacts that laws have on individuals and groups, and the manner in which individuals' choices are embedded in their social and economic surroundings

(S. McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination”, in F. Faraday, M. Denike and M. K. Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2nd ed. 2009), 99, at p. 105; *Fraser*, at para. 89; *Quebec. v. A.*, at para. 342, citing M. Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15”, in S. Rodgers and S. McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 190-91 and 196).

[45] In *Andrews*, this Court interpreted the *Charter*’s broadly worded equality rights guarantee as a clear repudiation of the formalism that had dominated under the *Canadian Bill of Rights*, S.C. 1960, c. 44, whose more limited equality guarantee was rendered ineffectual by narrow interpretation (p. 170). Recognizing that identical treatment may produce inequality and that different treatment may not always produce inequality, the Court properly highlighted the law’s impact on individual claimants and groups as the main consideration (pp. 164-65).

[46] Since then, the Court has remained vigilant in its jurisprudence in guarding the s. 15(1) analysis from incursions by formal equality approaches (see *Centrale des syndicats*, at paras. 25-26; *Withler*, at para. 43). To this end, it has eschewed a formalistic analysis based on “mirror comparator groups” because the search for the “proper” comparator group obscured the oppressive nature of some laws (*Withler*, at para. 2); it has rejected discriminatory intent as a necessary element of discrimination in favour of focusing on a law’s concrete impacts (*Eldridge*, at para. 62; *Andrews*, at

p. 173); and it has held fast to the view that the adverse effects of a facially neutral law can constitute discrimination contrary to s. 15(1) (*Eldridge*, at paras. 77-78; *Andrews*, at p. 173).

[47] Emerging from the foundation laid in *Andrews*, substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach “that looks at the full context, including the situation of the claimant group and . . . the impact of the impugned law” on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40) or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to “real people’s real experiences” (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 53, per L’Heureux-Dubé J.): it must not be applied “with one’s eyes shut” (McIntyre, at p. 103). Further, as Wilson J. reasoned in *Andrews*, at p. 153: “It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the ‘unremitting protection’ of equality rights in the years to come.”

(2) Distinction Based on the Enumerated Ground of Mental Disability

[48] The first step is to identify a distinction made on the face of the law or in its impact based on an enumerated or analogous ground.

[49] The Attorney General submits before this Court that *Christopher's Law* does not draw a distinction by denying those found NCRMD access to exit ramps. The Attorney General says the denial of a benefit to those found NCRMD results from distinctions drawn by the federal legislation, which is outside the Ontario legislature's control.

[50] Here, there are clear distinctions drawn based on the enumerated ground of mental disability. Offenders found guilty can be exempted from having to report and register in the first place by receiving a discharge in their sentencing hearing. Convicted registrants can be removed from the registry by receiving a free pardon, and can be relieved of the obligation to continue to report upon receipt of a free pardon or record suspension. A discharge, as a possible result of a sentencing hearing, is necessarily tailored to the individual circumstances of the accused (see *R. v. Campbell*, 2013 BCCA 43, 334 B.C.A.C. 16, at para. 27). Both free pardons and record suspensions are granted following some assessment of the offender's individual circumstances. These existing mechanisms, as they apply to those found guilty, provide opportunities, based on some level of individualized assessment, for exemption, removal, or relief from the sex offender registry. But there is no way for those found NCRMD to be exempted from having to report and register, to be removed from the registry once they have been put on it, or to be relieved of the obligation of continuing to report.

[51] These distinctions flow from the manner in which *Christopher's Law* interacts with federal legislation, including the *Criminal Code* and *Criminal Records*

Act. However, legislation does not exist in a vacuum — *Christopher’s Law* imposes a scheme of obligations on persons convicted of or found NCRMD in respect of sexual offences. It is layered on top of the consequences of findings made under the *Criminal Code* by design. Even if the legislature made these distinctions inadvertently, a substantive equality analysis considers distinctions that are unintentional or result from the law’s interaction with other statutes or circumstances. These are core lessons of this Court’s jurisprudence (*Fraser*, at paras. 31-34, 41-47 and 69; *Andrews*, at p. 173; *Eldridge*, at paras. 62 and 77-78). The combined effect of multiple statutes is particularly important for those with mental illnesses, as their lives are often regulated by what the intervener, the Canadian Mental Health Association, Ontario, calls a “complex web of statutes and regulations” (I.F., at para. 7).

[52] Here, it is determinative that those found NCRMD have *no opportunity* to be exempted from initial registration, removed from the registry, or relieved of the obligation to report, whereas opportunities for exemption, removal, and relief are available to those found guilty of the same offences. This distinction arises precisely because of the NCRMD regime. NCRMD individuals are plainly subjected to different treatment based on the enumerated ground of mental disability.

[53] The Attorney General argues that the distinction identified — the lack of removal or exemption mechanisms — could be cured by removing those mechanisms for *all* individuals, so those found criminally responsible for sexual offences are treated the same as those found NCRMD.

[54] Such a proposal invites at least two other constitutional concerns.

[55] First, the s. 15(1) analysis is not merely concerned with formal distinctions apparent on the face of a law. Eliminating overt distinctions may not amount to eliminating all relevant distinctions. Thus, I cannot accept the premise on which the Attorney General's argument appears to rest — that withholding exit ramps from all persons to whom *Christopher's Law* applies would *necessarily* be consistent with s. 15(1). It does not follow inexorably from the fact that all who are subject to the sex offender registry would be treated the same on the face of the law that the law would not impose a heavier burden on persons found NCRMD.

[56] Second, eliminating all removal and exemption mechanisms would invite the concern that such a scheme could fail s. 7 scrutiny in respect of all registrants. Of course, the Court need not address this hypothetical situation: whether the existing regime as it applies to those found guilty is compatible with s. 7 of the *Charter* is beyond the scope of this appeal.

(3) Discrimination

[57] Step two of the s. 15(1) analysis asks whether the distinction drawn is a discriminatory one, that is, “whether it imposes burdens or denies benefits in a way that reinforces, perpetuates, or exacerbates disadvantage” (*Centrale des syndicats*, at para. 30).

[58] The Attorney General argues that *Christopher's Law* includes persons found NCRMD in the registry based on actuarial data about risk, and therefore does not stereotype them. Highlighting that pardons and record suspensions are inappropriate for persons found NCRMD, who have not been convicted of a crime, the Attorney General submits that Doherty J.A. erred in finding that a process of individualized assessment is constitutionally required by s. 15(1). The Attorney General argues that the comparatively modest impact of the registry on individuals should allow the government to proceed based on statistical generalizations.

[59] G supports Doherty J.A.'s analysis. He submits that, by denying those found NCRMD access to exit ramps, *Christopher's Law* effectively presumes that those found NCRMD have no prospect for rehabilitation and accordingly perpetuates disadvantage and negative stereotypes about persons with mental illness. Ontario has decided to subject persons found NCRMD of sexual offences to the registry, so G says it must consider the needs and circumstances of that group.

[60] I have no difficulty concluding that the denial of exit ramps to those found NCRMD and discharged is discriminatory.

[61] In our society, persons with disabilities regrettably “face recurring coercion, marginalization, and social exclusion” (R. Devlin and D. Pothier, “Introduction: Toward a Critical Theory of Dis-Citizenship”, in D. Pothier and R. Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (2006), 1, at p. 1). As this Court has recognized, “[t]his historical disadvantage

has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw” (*Eldridge*, at para. 56). In reality, persons with disabilities are not flawed, nor can they all be painted with the same brush. While they may share experiences of “[s]tigma, discrimination, and imputations of difference and inferiority” (D. Wasserman et al., “Disability: Definitions, Models, Experience” in E. N. Zalta et al., eds., *Stanford Encyclopedia of Philosophy* (2016) (online), at §3.2), diversity within those labelled disabled is not the exception but the rule (see, e.g., E. Barnes, *The Minority Body: A Theory of Disability* (2016), at p. 9). Section 15’s promise of respect for “the equal worth and human dignity of all persons” (*Eldridge*, at para. 54) requires that those with disabilities be considered and treated as worthy and afforded dignity in their plurality. And s. 15’s guarantee that discrimination not be given the force of law requires careful attention to the diverse impacts that government action will have on those with disabilities.

[62] The stereotyping, exclusion, and marginalization experienced by persons with disabilities is also visited on those with mental illnesses (P. Bracken and P. Thomas, *Postpsychiatry* (2005), at pp. 79-100). The prejudicial idea that those with mental illnesses are inherently and perpetually dangerous, along with other stigmatizing, prejudicial notions, has led to profound disadvantage for individuals living with mental illnesses (*Winko*, at paras. 35-37; *Swain*, at p. 994; P. W. Corrigan and A. C. Watson, “Understanding the impact of stigma on people with mental illness” (2002), 1 *World Psychiatry* 16). This disadvantage has deep historical roots (H. Stuart,

J. Arboleda-Flórez and N. Sartorius, *Paradigms Lost: Fighting Stigma and the Lessons Learned* (2012), at pp. 103-11):

Mental illnesses are not like other illnesses, because they regularly cause people to lose their rights and freedoms in ways that are unimaginable in other health conditions

Historically, the care of the mentally ill has been deplorable. During the great confinement in the early part of the 1800s, hospital officials in Europe had the authority to round up and imprison people who were mentally ill (termed then madmen and idiots), along with beggars, vagabonds, criminals, the unemployed, and other undesirables. The characterization of the mentally ill as wild beasts justified their forcible confinement and social banishment. [Emphasis deleted; p. 103.]

[63] Though the early 19th century’s most abhorrent treatment of those with mental illnesses has been left behind, stigmatizing attitudes persist in Canadian society to this day (H. Stuart et al., “Stigma in Canada: Results from a Rapid Response Survey” (2014), 59 *Can. J. Psychiatry* S27). As Stuart, Arboleda-Flórez, and Sartorius observe, “perceptions of violence and risk of violence are central to . . . support for coercive treatments, legislative solutions, and justifications for social inequities and injustices” (p. 108). While discriminatory attitudes and impacts against those with mental illnesses regrettably persist, they must not be given the force of law (*Andrews*, at p. 172).

[64] The Attorney General submits that the distinctions drawn by *Christopher’s Law* are not discriminatory because they are based on statistical generalizations and “empirical fact” and impose only “modest” impacts on registrants. I cannot agree. The relevant question is whether *Christopher’s Law* imposes burdens or denies benefits in

a manner that reinforces, perpetuates, or exacerbates disadvantage. There is no threshold requirement of severity.

[65] The distinctions drawn by *Christopher's Law* reinforce and further the stigmatizing idea that those with mental illness are inherently and permanently dangerous and, in so doing, perpetuate the disadvantage they experience. As Doherty J.A. recognized, they “reflec[t] 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” (C.A. reasons, at para. 122).

[66] In addition to being stigmatized as dangerous, forced compliance with registry requirements, as the intervener the Empowerment Council notes, can also contribute to a “double stigma” for those found NCRMD, as a result of being considered both “mentally ill” and a “sexual offender” (*R. v. C.C.*, 2007 ABPC 337, 435 A.R. 215, at paras. 18, 43, 59 and 84; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206, at para. 31).

[67] The law thus imposes a burden on people found NCRMD in a manner that violates the norm of substantive equality in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses, feeding harmful stigma; and the law puts those found NCRMD in a worse position than those found guilty. Both effects perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

[68] For G, being denied access to exemption and removal mechanisms based on individualized assessment means that he will be registered as a sex offender for the rest of his life; he may be subject to random police checks and will have to report at least annually for the rest of his life; and his information will never be removed from the registry, even after death, no matter what he does. His NCRMD finding, absolute discharge, spotless compliance record, consistent employment, strong family relationships — none of that matters. By withholding exit ramps, *Christopher's Law* signals that the law considers G a perpetual threat to the public. That the state will not take its eyes off G suggests that, in the opinion of the law, he will always be dangerous.

[69] The Attorney General's argument that government's intention not to stereotype is relevant to the s. 15(1) analysis betrays a profound misunderstanding of equality rights — which protect substantive equality. As this Court has repeatedly said, “a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation” (*Eldridge*, at para. 62; *Quebec v. A*, at paras. 328-29 and 331-33). As Abella J. held in *Quebec v. A*, if the impugned measure “widens the gap between the historically disadvantaged group and the rest of society” or reinforces, perpetuates, or exacerbates historical disadvantage, then it is discriminatory (para. 332; *Quebec v. Alliance*, at para. 25). The question is not whether there is some legitimate basis upon which the distinction exists or “widens the gap” (see *Fraser*, at paras. 79-80 and 177). That is relevant only to the proportionality analysis under s. 1 of the *Charter*. The focus is on the law's real impact on the claimant and the groups to which they belong (*Withler*, at para. 2).

[70] In sum, *Christopher's Law* infringes s. 15(1) of the *Charter* by requiring those found NCRMD to comply with the sex offender registry without providing them with opportunities for exemption and removal based on individualized assessment. While the opportunities for exemption and removal that exist for those found guilty involve some kind of individualized assessment, I need not determine the nature or extent of the opportunities that must be provided for those found NCRMD. That is not a determination to be made in the abstract — subject to the requirements of the *Charter*, the legislature may choose from a range of policy options.

B. *Is Christopher's Law a Reasonable Limit on Equality Rights?*

[71] The Attorney General must establish, on a balance of probabilities, that the infringement of s. 15(1) is justified under s. 1. First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with s. 15(1) rights in furtherance of that objective. The second part of the *Oakes* test has three parts. The state must demonstrate the infringement is rationally connected to the objective, the means chosen to further the objective interfere as little as reasonably possible with the s. 15(1) right, and the benefits of the infringing measure outweigh its negative effects (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-40; *Vriend*, at paras. 109-10; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 48, 53 and 76-78).

[72] The Attorney General's burden is not to establish that the legislative scheme as a whole is a reasonable limit on s. 15(1) that can be demonstrably justified

in a free and democratic society, but to justify the *infringing measure itself*. As this Court has underscored, “it is the infringing measure and nothing else which is sought to be justified” (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 722, at para. 20). The objective of the infringing measure is thus the proper focus of the analysis; however, it may be necessary to situate the infringing measure in the context of the broader legislative scheme to understand the limitation’s function (*Vriend*, at para. 111).

[73] The parties agree that the purpose of *Christopher’s Law* is to assist in the investigation and prevention of sexual offences. G concedes that that purpose is pressing and substantial and that the limits it places on *Charter* rights are rationally connected to that purpose. In effect, he acknowledges that requiring all persons found NCRMD to comply with *Christopher’s Law* without any opportunity for exemption or removal based on individualized assessment is rationally connected to assisting in investigating and preventing sexual offences (C.A. reasons, at para. 141).

(1) Minimal Impairment

[74] I agree with the Court of Appeal that *Christopher’s Law* is not minimally impairing of the s. 15(1) rights of those who were found NCRMD of a sexual offence and discharged. *Christopher’s Law* itself includes mechanisms by which, after some form of individualized assessment of their circumstances, offenders who were not found NCRMD can be removed from the registry (free pardon), relieved of the

obligation to report (free pardon and record suspension), or exempted from reporting in the first place (discharge under s. 730 of the *Criminal Code*). The inclusion of *any* method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing of their s. 15(1) rights and could actually increase the registry's effectiveness by narrowing its application to individuals who pose a greater risk to the community.

[75] I would reject the Attorney General's submission that risk assessments can never be certain, and therefore the object of the legislation can only be achieved by a mandatory and permanent registry for all those found NCRMD. First, the same could be said for all those found guilty of sexual offences: the individualized assessments that occur when an absolute discharge, a free pardon, or a record suspension is granted can equally never predict risk with certainty. Second, the minimal impairment requirement requires only that the objective be *substantially* achieved (*Hutterian Brethren*, at paras. 53-55). Individual assessment does not need to perfectly predict risk — certainty cannot be the standard. There was no evidence that providing persons found NCRMD with the opportunity to be exempted or removed from the registry based on an individualized assessment of their circumstances would significantly lessen the usefulness of the registry to law enforcement. Indeed, as Doherty J.A. noted, 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” (C.A. reasons, at para. 145).

[76] I accordingly conclude that the Attorney General has not met his burden under s. 1 to demonstrate that the infringing measure is not minimally impairing of the right and therefore has not justified the s. 15(1) infringement.

C. *Does Christopher's Law Infringe the Right to Life, Liberty and Security of the Person?*

[77] Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because the privacy and liberty interests of those found NCRMD are the very interests that are unequally burdened by *Christopher's Law*, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy. Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.

[78] Even so, these reasons should not be taken as agreeing with the Ontario Court of Appeal's approach to s. 7 in this case, or in *Dyck* and *Long*. Those approaches rest on the conclusion in those cases that the legislation's intrusion on liberty is "modest", a conclusion that has been challenged. I make no further comment on this point, given that a s. 7 challenge to the federal sex offender registry is currently before

the courts (see *R. v. Ndhlovu*, 2020 ABCA 307, rev'g 2016 ABQB 595, 44 Alta. L.R. (6th) 382).

D. *What Is the Appropriate Remedy?*

[79] The Court of Appeal issued a declaration that *Christopher's Law* is of no force or effect insofar as it applies to those found NCRMD of a sexual offence and granted an absolute discharge by a provincial review board. It suspended the effect of that declaration for a year but exempted G from the suspension, ordering that his information be immediately removed from the registry.

[80] The parties submit that the effect of any declaration that *Christopher's Law* is of no force or effect should be suspended, but disagree on whether G should be immediately exempted from that suspension. The Attorney General submits that individual exemptions from suspensions should not be granted except in extreme cases where, absent an exemption, the claimant will not benefit from the declaration. The intervener, the David Asper Centre for Constitutional Rights, submits that issuing the appropriate remedy in this appeal will require clarification of this Court's remedial jurisprudence by returning to the principles that underlie the remedies it has granted in the past.

[81] In recent years, academic commentators have urged that remedies for unconstitutional laws be determined in a more principled, coherent, and transparent way. In particular, our jurisprudence dealing with suspensions of declarations of

invalidity, and the exemption of individuals from those suspensions, has been criticized for unduly compromising the protection of rights by failing to grant meaningful remedies (see, e.g., R. Leckey, “The harms of remedial discretion” (2016), 14 *I CON* 584, at pp. 591-93), and for diminishing the quality of decision making by failing to transparently explain the basis for a suspension (see, e.g., G. R. Hoole, “Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law” (2011), 49 *Alta. L. Rev.* 107, at pp. 118 and 123). I would accept the Asper Centre’s invitation to articulate a principled approach to remedies for legislation that violates the *Charter*.

[82] As I shall explain, this Court’s leading decision on remedies for laws that violate the *Charter*, *Schachter v. Canada*, [1992] 2 S.C.R. 679, has provided helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws for nearly three decades. But, in some respects, this Court’s remedial jurisprudence has moved beyond *Schachter*. By employing and building on *Schachter*’s guidance in determining the form and breadth of declarations of invalidity, suspending the effect of those declarations, and exempting individuals from suspensions, this Court’s remedial practice has come to coalesce around a group of core remedial principles. Recognizing those remedial principles and explicitly identifying approaches that strike the right balance between them will encourage greater consistency and transparency in remedial decision making.

[83] As I will explain, I conclude that suspensions of declarations of invalidity should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect. And when declarations are suspended, granting individual exemptions pursuant to s. 24(1) of the *Charter* will often balance the interests of the litigant, the broader public, and the legislature in a manner that is "appropriate and just".

(1) Principled Remedial Discretion

[84] Section 52(1) of the *Constitution Act, 1982*, reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[85] Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency. Although it states the legal result where there is conflict between a law and the Constitution, s. 52(1) does not explicitly provide courts with a grant of remedial jurisdiction.² A general declaration pursuant to courts' statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1).

² Unlike, e.g., the Constitution of South Africa, s. 172(1)(a), which specifically mandates courts to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

[86] That a law is “of no force or effect” only “to the extent of the inconsistency” with the Constitution means that a court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so. Our jurisprudence teaches us that a measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution.

[87] There is a theory, consonant with the Blackstonian declaratory theory of the law, that “judges never make law, but merely discover it” (*Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 79). On this view, when a law is unconstitutional, courts and other decision-makers have no remedial discretion — s. 52(1) renders unconstitutional laws of no force or effect from the moment of their enactment (see, e.g., *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28).

[88] However, while s. 52(1) is the substantive basis of constitutional invalidity, the public and the state will often disagree about whether a given law is unconstitutional and, if so, to what extent. Our legal order, grounded in related principles of constitutional supremacy and the rule of law, requires that there be an institution empowered to finally determine a law’s constitutionality; s. 52(1) confirms “[t]he existence of an impartial and authoritative judicial arbiter” to determine whether the law is of no force and effect (*Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 89). Even in the absence of a formal declaration,

s. 52(1) operates to prevent the application of unconstitutional laws. For example, because of the limits of its statutory jurisdiction, a tribunal or a provincial court's determination that legislation is unconstitutional has no legal effect beyond the decision itself; nevertheless, it must refuse to give effect to legislation it considers unconstitutional (see, e.g., *Martin*, at para. 31; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 15). Thus, the reach of a judicial determination of the unconstitutionality of a law will be limited in the absence of statutory or inherent jurisdiction to issue a general declaration of invalidity.

[89] As I will explain, while s. 52(1) recognizes the primacy of the Constitution, including the fundamental rights and freedoms of individuals and groups guaranteed by the *Charter*, fashioning constitutional remedies inevitably implicates other — at times, competing — constitutional principles (K. Roach, “Principled Remedial Discretion Under the Charter” (2004), 25 *S.C.L.R.* (2d) 101, at pp. 112-13). Courts must strike an appropriate balance between these principles in determining how to give effect to s. 52(1) in a manner that best aligns with our broader constitutional order.

[90] Kent Roach argues, and the intervener the Asper Centre submits, that *Charter* remedies should be granted in accordance with “principled discretion”: a middle ground between “strong” or “pure” discretion, which would give judges free rein to fashion remedies as they see fit, and “rule-based” discretion, which would tightly constrain judges with hard-and-fast rules (Roach (2004), at pp. 102 and 107-13). I agree.

[91] Pure discretion has the benefit of being endlessly adaptable to any factual context, but has the clear downside of permitting results based on “the wills and whims of a person or a group of people” (Roach (2004), at p. 107, quoting P. Birks, “Three Kinds of Objections to Discretionary Remedialism” (2000), 20 *Uwa. L. Rev.* 1, at p. 15). It also fails to encourage transparent reasoning — if the decision-maker can do anything, there is less incentive to explain the basis for the decision. Rule-based discretion, by contrast, has the benefit of being applicable in different contexts in a predictable way. However, it does not encourage courts to engage with the purposes behind the rules and tends to lead to mechanical application of those rules, which can produce unfair results in individual cases (Roach (2004), at pp. 109-10 and 140).

[92] A review of this Court’s jurisprudence shows that it favours principled discretion, which requires judges to consider multiple, competing remedial principles and resolve conflicts between them while justifying their prioritization of certain considerations over others.

[93] “Remedial principles”, in this sense, are more general than rules and, unlike rules, may conflict and be weighed differently (Roach (2004), at pp. 111-13, citing R. Dworkin, *Taking Rights Seriously* (1977)). Articulating the core general principles that structure the exercise of principled remedial discretion will assist in promoting principled, transparent, and consistent approaches to s. 52(1) remedies.

[94] *Schachter* provided remedial principles of this kind, identifying twin principles of respect for the purposes of the *Charter* and respect for the legislature, and

thereby guiding the discretion of Canadian courts for nearly three decades. But in the process of applying that approach, this Court has sometimes articulated additional relevant or analogous principles. As I will explain, when legislation violates the *Charter*, courts have been guided by the following fundamental remedial principles, grounded in the Constitution, in determining the appropriate remedy, applying them at every stage:

- A. *Charter* rights should be safeguarded through effective remedies.
- B. The public has an interest in the constitutional compliance of legislation.
- C. The public is entitled to the benefit of legislation.
- D. Courts and legislatures play different institutional roles.

[95] Safeguarding rights lies at the core of granting *Charter* remedies because the *Charter* exists to protect rights, freedoms, and inherent dignity; this purpose inheres in the *Charter* as a whole (see *Vriend*, at para. 153; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 57). The Court's purposive approach to constitutional remedies ensures that the effective vindication and protection of rights is at the core of the remedies it grants for legislation that violates the *Charter* (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104).

[96] The rule of law is explicitly recognized in the preamble to the *Charter*, which says that “Canada is founded upon principles that recognize . . . the rule of law”. It is also implicitly recognized in the preamble to the *Constitution Act, 1867*, which says Canada has “a Constitution similar in Principle to that of the United Kingdom” (see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750). Two facets of the rule of law are foundational here: the government must act within the law and there must be positive laws to preserve order in society. This Court has recognized that adherence to the principle of the rule of law means that the impact of legislation, even unconstitutional legislation, extends beyond those whose rights are violated — it is bad for all of society for unconstitutional legislation to “remain on the books” (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 51; see also *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 (*SWUAV*), at para. 31). But the public interest cuts both ways — the public is also entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm (*Manitoba Language Rights*, at pp. 748-49 and 757). Laws validly enacted by democratically elected legislatures “are generally passed for the common good” and there is accordingly a “public interest” in legislation that “weighs heavily in the balance” of remedial discretion (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 135; see also *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9).

[97] Legislation is enacted by the legislature, which is sovereign in the sense that, within its constitutional ambit, it has “*exclusive* authority to enact, amend, and

repeal any law as it sees fit” (*Reference re pan-Canadian securities regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 54; *Constitution Act, 1867*, ss. 91 to 95; *Constitution Act, 1982*, ss. 44 and 45). This fact serves as an important constraint on courts’ exercise of their remedial authority. Parliamentary sovereignty is an expression of democracy, because it accords exclusive legislative authority to Parliament and the provincial legislatures, each of which includes an elected chamber without whose consent no law can be made (*Constitution Act, 1867*, ss. 17, 40, 48, 55 and 91; *Charter*, ss. 3 and 4; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 62-65).

[98] Even so, the courts remain “guardians of the Constitution and of individuals’ rights under it” (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169) — “[d]eference ends . . . where the constitutional rights that the courts are charged with protecting begin” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 36). This is because “[i]t is emphatically the province and duty of [the courts] to say what the law is” (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at p. 177).

[99] These remedial principles — fundamental aspects of our constitutional order, including democracy and the rule of law — are reflected in the Court’s remedial decisions since the *Charter* came into force.

(2) Schachter

[100] In *Schachter*, this Court set out a general approach to granting remedies for legislation that violates the *Charter*. *Schachter* endorsed remedies tailored to the breadth of rights violations, thereby allowing constitutionally compliant aspects of unconstitutional legislation to be preserved. *Schachter* also recognized that, in rare circumstances, the effect of a declaration of invalidity could be suspended for a period of time to protect the public interest.

[101] At the core of *Schachter* was its recognition that flexibility is necessary to arrive at appropriate remedies involving legislation, and its endorsement of remedies short of a full declaration of invalidity. Lamer C.J. made clear that “[d]epending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in” (p. 695).

[102] Different types of remedy can be granted because the circumstances may implicate general remedial principles in different ways. *Schachter* recognized the “twin guiding principles” of “respect for the role of the legislature and the purposes of the *Charter*” (p. 715) that play a key role in determining the type of remedy that would be ordered.

[103] *Schachter* held that the first step in choosing the appropriate remedy is defining the extent of the inconsistency between the legislation and the *Charter*. The second step is determining the form of the declaration. Beyond the extent of the inconsistency, *Schachter* said that the form of a remedy would be influenced by courts’

respect for the role of the legislature. The general rule is that tailored remedies should only be granted when a court can fairly conclude that the legislature would have enacted the law as it would be modified by the court (pp. 697 and 700).

[104] *Schachter* also endorsed the use of suspended declarations — declarations that legislation is unconstitutional, but whose *effect* is suspended for some period of time. Lamer C.J. reasoned that a delayed order could be justified based on the effect of an immediate declaration on the public and that, by contrast, the roles of courts and legislatures should *not* enter into the question of whether to suspend a declaration (p. 717).

[105] Finally, *Schachter* considered how s. 52(1) remedies could be combined with individual remedies for *Charter* violations. Lamer C.J. concluded that individual remedies under s. 24(1) of the *Charter* “will rarely be available in conjunction with” remedies involving legislation (p. 720).

[106] Much of *Schachter* remains good guidance three decades later. However, as I will explain, the jurisprudence on *Charter* remedies has built upon the foundation of *Schachter* and moved beyond it in some ways. While *Schachter* wisely advised courts to consider the principled basis for their remedial decisions, those remedial principles have since been further developed. In part, the guidelines *Schachter* endorsed for determining the extent of rights violations were tied to an articulation of the *Oakes* test that has since been overtaken. Aspects of its discussion of suspended declarations have been overlooked by courts and criticized in academic commentary for their failure

to rely on coherent principles and encourage transparent application. Finally, its admonition against combining s. 52(1) and individual remedies has frequently not been followed.

[107] Since *Schachter*, this Court has granted at least 60 s. 52(1) remedies for *Charter* breaches. In my view, the guidelines given in *Schachter* should be clarified and updated in light of those decisions.

(3) The Form and Breadth of Section 52(1) Declarations

[108] As our jurisprudence demonstrates, and the language of s. 52(1) directs, the first step in crafting an appropriate s. 52(1) remedy in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1" (*Schachter*, at p. 702) in crafting tailored remedies. (While this general guideline remains useful, courts should bear in mind that the *Oakes* test has evolved since *Schachter* was decided, such that it now focuses on justifying the infringing measure rather than the law as a whole (compare *Schachter*, at pp. 703-5 and *RJR-MacDonald*, at para. 144).) The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.

[109] Defining the extent of the constitutional defect by reference to the substantive violation of the *Charter* safeguards the rights of all those directly affected

by ensuring that the law is cured of all its constitutional defects. It also serves the broader public interest in having government act in accordance with the Constitution. These remedies reach beyond the claimant — and can even be granted when the claimant is not directly affected by the law — because “[n]o one should be subjected to an unconstitutional law” (*Nur*, at para. 51; see also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313). This step of the analysis therefore reflects the *Charter*’s rights-protecting purpose, the public’s interest in constitutional compliance, and the text of s. 52(1) — the law is of no force or effect to the *full* extent of its inconsistency with the Constitution.

[110] For example, in some cases where a criminal offence’s effects on particular groups of people or in certain circumstances have been found unconstitutional, *all* of those people and circumstances have been exempted from criminal liability (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, as interpreted in *R. v. Barabash*, 2015 SCC 29, [2015] 2 S.C.R. 522; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, as interpreted in *R. v. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602). The same is true for mandatory minimum penalties, which can be invalidated even when the applicant is not directly affected (see, e.g., *Nur*; *Lloyd*).

[111] On the other hand, it also follows from s. 52(1) that to the extent they are not inconsistent with the Constitution, the public is entitled to the benefit of laws passed by the legislature. Tailored remedies that address the precise constitutional flaw can

permit a court to both safeguard the constitutional rights of all those affected and preserve the constitutional aspects of the law. Many of the Court’s tailored remedies reflect both these principles. The criminal offences considered in *Carter, Sharpe, Smith*, and *Appulonappa*, for example, were declared of no force or effect *only* to the extent that they violated rights, preserving their constitutionally compliant effects.

[112] The second step is determining the form that a declaration should take. In doing so, *Schachter* explained that remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. Full statutory schemes or Acts are rarely struck down in their entirety — to my knowledge, this Court has only done so on eight occasions.³ To ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). Crucially, in Canada, the declaration issued cures the law’s unconstitutionality. A declaration that fails to do so, like the kind suggested by my colleagues, Justice Côté and Justice Brown, at para. 248 of their reasons, is more akin to the declaration of “inconsistency” or “incompatibility” made in jurisdictions where courts do not have the authority to strike down unconstitutional legislation (see, e.g.,

³ See *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 246, at para. 97; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 40; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 88; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 176-77; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at p. 1108; *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 309-10; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 355-56.

Attorney-General v. Taylor, [2018] NZSC 104, [2019] 1 N.Z.L.R. 213; *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4(4) and (6)).

[113] Reading *down* is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when “the offending portion of a statute can be defined in a limited manner” (*Schachter*, at p. 697). Inversely, reading *in* is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect. Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as “what the statute wrongly excludes rather than what it wrongly includes” (*Schachter*, at p. 698, emphasis in original). *Severance* is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation’s reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. These forms of remedy illustrate a court’s flexibility in responding to a constitutional violation.

[114] However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. *Schachter* cautioned that tailored remedies should only be granted where it can be fairly assumed that “the legislature would have passed the constitutionally sound part of the scheme without the unsound part” and where it is possible to precisely define the unconstitutional aspect of the law (p. 697, citing *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.)),

at p. 518). If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty (*Schachter*, at pp. 705-6; *Hunter*, at p. 169). The significance of the remaining portion of the statute must be considered, and tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole (*Schachter*, at pp. 705-15). For example, in *Vriend*, Iacobucci J. read “sexual orientation” into the *Individual’s Rights Protection Act*, R.S.A. 1980, c. I-2, because the term was sufficiently precise and because the legislature would rather have included that protection than sacrificed the entire scheme (paras. 155-60 and 167-69). In *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, McLachlin C.J. severed part of the tertiary ground for denying bail because the rest of the provision “is capable of standing alone without doing damage to Parliament’s intention” (para. 44). This Court has granted a remedy short of full invalidity of a statutory provision at least 24 times.⁴ Nonetheless, a tailored remedy will frequently

⁴ See *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 96; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 83-85; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at paras. 30-31; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67-115; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 126-27, 132 and 147; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1102, at para. 164; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 164; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at paras. 22, 44 and 45; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 1, 55 and 101; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 128-29; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 105 and 159; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 23-24 and 114-18; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 148-79; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 276 and 294; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 103-5; *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras. 176-81; *R. v. Laba*, [1994] 3 S.C.R. 965, at pp. 1011-16; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 243-45; *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 741-43; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 101-6; *R. v. Hess*,

not be appropriate. This Court has opted to fully invalidate a provision at least 55 times.⁵ These include the cases dealing with mandatory minimum penalties referenced

[1990] 2 S.C.R. 906, at pp. 933-34; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88.

⁵ Note that some of the cases listed here are also listed at footnote 4, *supra*, since they contain both full invalidations of certain legislative provisions, as well as only partial invalidations of other provisions. See *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 73; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 5, 23 and 58; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 103; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 4; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 74; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 56; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 119; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67 and 115; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 154 and 158; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 81-89; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1102, at para. 164; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 100-103; *Quebec (Education Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 89-91; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56 and 58; *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 64; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 47-48; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 79-80; *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 136-45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 131; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 86; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 292; *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 803-4; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, at pp. 439-40; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 89-90 and 117; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 778; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 725; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 104 and 164-65; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 207-8 and 255; *R. v. Sit*, [1991] 3 S.C.R. 124, at p. 130; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 630; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at pp. 38-47; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1021; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 164-66, 226-27 and 251; *R. v. Arkel*, [1990] 2 S.C.R. 695, at p. 702; *R. v. Martineau*, [1990] 2 S.C.R. 633; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 251-53; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at pp. 394-96; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1351 and 1368; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at pp. 633-34; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 745; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 812; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033, at pp. 1045-46; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 80 and

above — the goal of a mandatory minimum sentence is to remove judicial discretion, so tailoring the declaration to reintroduce that discretion would distort the provision so that it no longer conformed to its legislative purpose (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 50 and 53).

[115] Lamer C.J. was also conscious of the limitation of the judicial role, explaining in *Schachter* that tailored remedies should not be granted when they do not “flo[w] with sufficient precision from the requirements of the Constitution”, because although courts are capable of determining what the Constitution requires, they are not well-suited to making “*ad hoc* choices from a variety of options” (p. 707).

[116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading

184; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1081; *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 142; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 521; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169.

down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.

(4) Suspending the Effect of Section 52(1) Declarations

[117] There are times when an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law that violates *Charter* rights.

[118] In total, this Court has suspended declarations of invalidity in 23 out of approximately 90 decisions in which it declared legislation to be of no force or effect for violating the *Charter*.⁶ The approach to suspensions has varied over the last 35

⁶ *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1102; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Nova Scotia*

years. Suspensions were initially recognized to be available when necessary to protect against serious threats to the rule of law. Then, in *Schachter*, this Court took an approach to granting suspensions based on determining whether cases fit into one of a list of categories — threats to the rule of law, threats to public safety, or underinclusive benefits — based on the public interest in the law’s interim application. Since then, many cases have gone beyond the *Schachter* categories to grant suspensions for other reasons, including concerns related to the roles and capacities of courts and legislatures. The 12 declarations of invalidity for *Charter* violations after *Schachter* between 1992 and 1997 — from *Zundel* to *Benner* — took immediate effect. By contrast, between 2003 and 2015 — from *Trociuk* to *Carter* — 13 out of 17 s. 52(1) declarations were suspended. Those more recent cases have been criticized for suspending declarations too frequently and without sufficient explanation. This case gives the Court an opportunity to recalibrate the remedial principles that guide the judicial discretion to delay the effect of a declaration of invalidity.

[119] Suspensions of declarations of invalidity have attracted significant concern even as they have come to be used in jurisdictions around the world, including Canada, Germany, South Africa, Hong Kong, and Indonesia (see, e.g., Leckey; S. Jhaveri, “Sunsetting suspension orders in Hong Kong”, in P. J. Yap, ed., *Constitutional*

(*Worker’s Compensation Board*) v. *Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Figueroa v. Canada* (*Attorney General*), 2003 SCC 37, [2003] 1 S.C.R. 912; *Trociuk v. British Columbia* (*Attorney General*), 2003 SCC 34, [2003] 1 S.C.R. 835; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *Mackin v. New Brunswick* (*Minister of Finance*), 2002 SCC 13, [2002] 1 S.C.R. 405; *Dunmore v. Ontario* (*Attorney General*), 2001 SCC 94, [2001] 3 S.C.R. 1016; *U.F.C.W., Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Corbiere v. Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203; *M. v. H.*, [1999] 2 S.C.R. 3; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Schachter v. Canada*, [1992] 2 S.C.R. 679, ; *R. v. Bain*, [1992] 1 S.C.R. 91; and *R. v. Swain*, [1991] 1 S.C.R. 933.

Remedies in Asia (2019), 49). While most accept that there will be some circumstances when the immediate enforcement of rights must give way to other constitutional concerns, opinions vary on the appropriate underlying principles and the right balance between them. Some argue suspensions should only be granted in “extreme cases” in order to prevent “legal chaos” (B. Bird, “The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity” (2019), 42 *Man. L.J.* 23, at pp. 39 and 46). Others suggest that suspensions can be granted to “remand complex issues to legislative institutions” (S. Choudhry and K. Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003), 21 *S.C.L.R.* (2d) 205, at p. 232), giving them the first opportunity to respond to a finding of unconstitutionality. Still others endorse an approach based on proportionality, which would import considerations from the *Oakes* test to require the government to demonstrate that a suspension is justified (Hoole, at pp. 136-47; B. Ryder, “Suspending the Charter” (2003), 21 *S.C.L.R.* (2d) 267, at pp. 282-83). But all commentators recognize some discretion to grant suspensions in Canada.

[120] While ss. 52(1) does not explicitly provide the authority to suspend a declaration,⁷ in adjudicating constitutional issues, courts “may have regard to unwritten postulates which form the very foundation of the Constitution of Canada” (*Manitoba*

⁷ Unlike, e.g., the Constitution of South Africa, s. 172(1)(b)(ii), which grants a court the power to “make any order that is just and equitable, including . . . an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect”.

Language Rights, at p. 752; see also *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52).

[121] The power to suspend the effect of a declaration of invalidity should be understood to arise from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid (see *Koo Sze Yiu v. Chief Executive of the HKSAR*, [2006] 3 H.K.L.R.D. 455, at para. 35). This is only one way in which giving immediate and retroactive effect to the fundamental rights and freedoms guaranteed by the *Charter* must, at times, yield to other imperatives. This reflects the “clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination” (*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1195). As examples, even when a declaration of invalidity is made, other legal doctrines, including the *de facto* doctrine, *res judicata*, and the law of limitations, may restrict its retrospective reach (*Hislop*, at para. 101).

[122] The idea that the effect of a declaration could be suspended originally aimed to protect against a potential emergency. In 1985, in *Manitoba Language Rights*, nearly all of Manitoba’s legislation was declared unconstitutional for being enacted in English alone. The Court issued a temporary declaration that the laws were valid in order to give the legislature the chance to re-enact them. The Court grounded this move in the constitutional principle of the rule of law, explicitly recognized in the preambles to the *Constitution Act, 1867*, and the *Charter*, and implicit in the “very nature of a

Constitution” (*Manitoba Language Rights*, at p. 750). The rule of law requires the creation and maintenance of an actual order of positive laws to govern society; a legal vacuum, along with the inevitable legal chaos, would have violated that principle (p. 753). The period of temporary validity ran from the date of judgment “to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing” (p. 767).

[123] The Court suspended the effect of a declaration of invalidity for the first time in a *Charter* case in *Swain*, in which automatic detention for those acquitted on what was then called the ground of “insanity” was found unconstitutional. Lamer C.J. suspended the declaration due to a concern that if the provision was immediately struck down, judges would have to free “those who may well be a danger to the public” (p. 1021).

[124] In *Schachter*, Lamer C.J. recognized three categories of cases in which suspensions could be granted: threats to the rule of law, threats to public safety, and underinclusive legislation (pp. 715-16). The first category flows directly from *Manitoba Language Rights*; the second corresponds with *Swain*; and the third category represents the circumstances of *Schachter* itself, in which immediate invalidity of the law would have deprived those entitled to financial benefits under the law without providing any remedy for those directly excluded from the benefits in question. All three categories reflect constitutionally grounded considerations, including recognizing the public’s interest in legislation passed for its benefit. Suspending the effect of a

declaration is one tool that allows courts to preserve the rights and entitlements that existing schemes extend to the public.

[125] *Schachter*'s categorical approach has resulted in uncertainty about when suspensions will be granted. Some decisions have gone beyond the *Schachter* categories. For example, a suspension was endorsed where it promoted a co-operative solution in the Aboriginal rights context (*R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 51) and granted where it was analogous to a *Schachter* category (*Trociuk*, at para. 43). In other cases, failing to fit into a *Schachter* category has been given as an explanation for declining to grant a suspension (*Boudreault*, at para. 98; *Hislop*, at para. 121). At times, the Court has provided *no* explanation for suspending the effect of its declaration (*Mounted Police Association*, at para. 158; *Saskatchewan Federation of Labour*, at para. 103). Academic commentators have noted the lack of transparent reasoning in some of this Court's decisions to grant suspensions (Roach (2004); Hoole, at pp. 118-23).

[126] A principled approach makes it possible to reconcile these cases on suspended declarations, and encourage consistency and transparency. As I will explain, the government bears the onus of demonstrating that a compelling public interest, like those included in *Schachter*, supports a suspension. These compelling interests cannot be reduced to a closed list of categories, but will be related to a remedial principle grounded in the Constitution — typically, the principle that the public is entitled to the benefit of legislation or that courts and legislatures play different institutional roles.

The categorical approach in *Schachter* has been overtaken by the underlying remedial principles that animated those categories. This is not surprising, given that *Schachter* had a limited number of cases to draw from in establishing its categorical approach.

[127] As well, the relevance of some of the underlying principles has evolved in our jurisprudence. Lamer C.J. specifically noted in *Schachter* that “whether to delay the application of a declaration of [invalidity] should . . . turn not on considerations of the role of the courts and the legislature, but rather on considerations . . . relating to the effect of an immediate declaration on the public” (p. 717, emphasis added).

[128] Nonetheless, since the late 1990s, the general principle that courts and legislatures have different roles and competencies has informed how the Court exercises its jurisdiction to suspend the effect of its declarations for a period of time. No fewer than 10 decisions of this Court have relied on the differing capacities and roles of legislatures and courts when suspending declarations’ effects.⁸ Roach has argued that the *dicta* in *Schachter* quoted in the previous paragraph should be rejected or qualified in light of these decisions, and institutional roles should be explicitly recognized as a legitimate rationale for granting suspensions (Roach (2004), at p. 144).

⁸ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 118-19; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 147; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 140; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 102; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 41; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66.

On the most expansive version of that view, suspensions allow the legislature to determine the remedy for its own breach of the Constitution, thereby “eliminat[ing] or dilut[ing] the counter-majoritarian objection to judicial review [of statutes]” (Choudhry and Roach, at p. 227). In my view, this presupposes an unduly narrow view of the role of courts. Respecting the legislature cannot come at the expense of the functions the Constitution assigns to the judiciary: giving effect to constitutional rights and making determinations of law.

[129] Although institutional roles can be relevant to remedial discretion, the decisions that rely on them have by and large failed to transparently explain how those roles can legitimately motivate suspensions (Hoole, at pp. 118-23). The relevance of institutional roles to granting suspensions cannot be divorced from the underlying rationale for granting suspensions in the first place: avoiding the harmful and undesirable consequences of an immediate declaration. In my view, *Schachter* and the cases that have come since are best reconciled by recognizing that allowing the legislature to fulfil its law making role can be a relevant consideration in whether to grant a suspension, but only when the government demonstrates that an immediately effective declaration would *significantly impair* the ability to legislate.

[130] In determining whether to exercise remedial discretion to suspend a declaration of invalidity, the Court should consider whether and to what extent the government has demonstrated that an immediately effective declaration would have a limiting effect on the legislature’s ability to set policy. In the vast majority of cases, as

Bruce Ryder recognizes, “[a] suspended declaration neither enlarges nor diminishes the range of constitutional choices open to a legislature” (p. 285). For example, in *M. v. H.*, in which the Court found unconstitutional the definition of “spouse” denying benefits to same-sex spouses, the effect of a declaration of invalidity was suspended because “if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus . . . the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion” (para. 147). However, an immediately effective declaration would not have prevented the legislature from addressing the issues more comprehensively in light of the Court’s decision. By contrast, there may be some cases where an immediate declaration could create legal rights that could narrow the range of constitutional policy choices available to the government or undermine the effectiveness of its policy choices. As I shall explain, this case offers an example of a situation in which the legal rights created by the declaration of invalidity could undermine the effectiveness of the legislature’s policy choices. Even so, avoiding such restrictions on the ability to legislate is but a relevant consideration, and may not be sufficient to justify a suspension of invalidity.

[131] The benefit achieved (or harm avoided) by the suspension must then be transparently weighed against countervailing fundamental remedial principles, namely the principles that *Charter* rights should be safeguarded through effective remedies and that the public has an interest in constitutionally compliant legislation. This includes considering factors such as the significance of the rights infringement (*Bedford*, at para. 167) — for example, the weight given to ongoing rights infringement will be

especially heavy when criminal jeopardy is at stake — and the potential that the suspension will create harm such as legal uncertainty (Leckey, at pp. 594-95). Albeit in different constitutional contexts, the Constitutional Courts of South Africa and Germany have similarly recognized that the propriety of a constitutional remedy short of an immediate declaration of invalidity is a question of balancing the harms of failing to immediately protect rights against the harms of an immediate declaration (see, e.g., *Coetzee v. Government of the Republic of South Africa*, [1995] ZACC 7, 1995 (4) S.A. 631, at para. 76; BVerfG, 2 BvC 62/14, Decision of January 29, 2019 (Germany), at paras. 136-37).

[132] However, a balancing approach does not mean that suspensions will be easier to justify. A categorical approach may have been intended to provide narrow circumstances in which an unconstitutional law may continue to apply temporarily, but it has not had that effect. A balancing approach permits courts to engage with the underlying principles and ensure that a delayed declaration is not ordered unless there are compelling reasons to do so. The appropriate balance will result in suspensions only in rare circumstances. Given the imperative language of s. 52(1), and the importance of the fundamental remedial principles of constitutional compliance and of providing an effective remedy that safeguards the rights of those directly affected, there is a strong interest in declarations with immediate effect. Indeed, leaving unconstitutional laws on the books can lead to legal uncertainty and instability, especially if those laws are criminal prohibitions, which compel multiple actors (including police, Crown prosecutors, and the public) to conduct themselves in a certain way (Leckey, at

pp. 594-95). Public confidence in the Constitution, the laws, and the justice system is undermined when an unconstitutional law continues to have legal effect without a compelling basis. And, of course, the violation of constitutional rights weighs heavily in favour of an immediate declaration of invalidity. A principled approach requires these countervailing factors to be weighed and does not allow for a suspension to be granted simply because the case engages, for example, public safety. In practice, therefore, a principled approach is disciplined and would be more stringent than a categorical approach, because any suspension must be specifically justified.

[133] Thus, I agree with the submissions of the Asper Centre that the government bears the onus of demonstrating that the importance of another compelling interest grounded in the Constitution outweighs the continued breach of constitutional rights. In each case, the specific interest, and the manner in which an immediate declaration would endanger that interest, must be identified and, where necessary, supported by evidence. Suspensions of declarations of invalidity will be rare. Indeed, this aligns with this Court's recent practice. This Court has not suspended the effect of a declaration of invalidity since its decision in *Carter* over five years ago, making 13 immediately effective declarations that legislation was of no force or effect for violating the *Charter* over that period.⁹

⁹ *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; *R. v.*

[134] When deciding whether to grant a suspension, a court must also determine its length. In Hong Kong, the Court of Final Appeal has said that suspensions should not be granted for longer than “necessary” (*Koo Sze Yiu*, at para. 41). In *Corbiere*, on the other hand, suspending the effect of the declaration for a relatively long period allowed the legislature greater flexibility in putting its capacity to consult to use (paras. 119 and 121, per L’Heureux-Dubé J.). In *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 14, the extension of a suspension was accompanied by a process by which any rights holder could apply for a remedy under s. 24(1) to alleviate the harmful impact of the unconstitutional provision.

[135] In my view, the onus to demonstrate the appropriate length of time remains with the government and there is no “default” length of time such as 12 months. In *Manitoba Language Rights*, in the absence of submissions, this Court considered itself ill-equipped to determine the appropriate length of time for Manitoba’s legislature to re-enact all of its legislation in both English and French (p. 769). It is the government’s responsibility to make a case for the length of the suspension it seeks.

[136] I add this. My colleagues contend that s. 33 of the *Charter* is an express and, thus, more legitimate source of authority that allows Parliament or a provincial legislature to suspend the effect of a declaration of invalidity. Since the Constitution

Safarzadeh-Markhali, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at para. 32; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401.

gives Parliament and the provincial legislatures this power, my colleagues suggest that suspension is legislative in nature and at odds with the judicial role.

[137] This is an unsustainable proposition. Section 33 permits Parliament or a provincial legislature to temporarily exempt an Act from the application of rights and freedoms guaranteed by ss. 2 and 7 to 15 of our *Charter*, even for purely political reasons (*Charter*, ss. 32(1) and 33(1) and (2); *Quebec Association of Protestant School Boards*, at p. 86). When a court determines that a law violates the *Charter* in a manner that cannot be justified in a free and democratic society under s. 1, the court must grant the appropriate remedy. This includes, in some rare cases, delaying the effects of a declaration of invalidity based on a compelling public interest. Court-ordered suspension leaves Parliament and the legislatures free to respond to the declaration of invalidity, including by using s. 33 (see *Vriend*, at paras. 139 and 178). The court cannot shirk its responsibility to remedy constitutional violations simply because s. 33 permits Parliament or a legislature to exceptionally override certain *Charter* rights and freedoms.

[138] The court has the authority — and responsibility — to determine whether a declaration of invalidity should be suspended. It is not for the courts to direct or encourage Parliament and the provincial legislatures to use their exceptional authority to override *Charter* rights and freedoms.

[139] In sum, the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a

compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The court must consider the impact of such a suspension on rights holders and the public, as well as whether an immediate declaration of invalidity would significantly impair the legislature's democratic authority to set policy through legislation. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it has demonstrated it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

(5) Individual Remedies — Exemptions From Suspensions

[140] Where a declaration of invalidity is suspended, it often raises the issue of whether the claimant should receive an individual remedy or exemption from that suspension. The Attorney General argues that individual exemptions from suspensions should not be granted except in extreme circumstances where the claimant will not benefit from the declaration absent an exemption. He says individual exemptions create uncertainty and undermine the rule of law by applying laws to everyone except the claimants who challenged them. He says granting individual exemptions usurps the role of the legislature by imposing judicial discretion where the statute precludes it.

[141] The Attorney General also relies on a “rule” endorsed in *Demers* that s. 24(1) remedies cannot be combined with s. 52(1) remedies, precluding courts from granting a s. 24(1) individual remedy during the suspension period (para. 62).

However, in *Demers*, at para. 61, Iacobucci and Bastarache JJ. drew that conclusion from a passage in *Schachter* cautioning that “where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available” (p. 720, emphasis added) because such a remedy would undermine the suspension. When it came to giving an individual remedy during a period of suspension, Lamer C.J. reasoned that it would be “tantamount” to giving the declaration retroactive effect.

[142] To the extent that *Demers* reads *Schachter* as setting out a hard-and-fast rule against combining s. 24(1) and s. 52(1) remedies, it misreads that case. As I will explain, s. 24(1) is too flexible to be restricted in this way. As other jurisprudence of this Court suggests, individual exemptions from suspensions will often be an “appropriate and just” remedy when an individual claimant has braved the storm of constitutional litigation and obtained a declaration whose benefit “enures to society at large” (*Demers*, at para. 99, per LeBel J.). On the other hand, where an exemption would undermine the rationale for the suspension, this will be a strong countervailing factor against granting an exemption.

[143] Section 24(1) of the *Charter* provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[144] This Court has said that to be “appropriate and just”, a s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of

powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case (*Doucet-Boudreau*, at paras. 55-59). In particular, an effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant's experience and address the circumstances of the rights violation, and will not be "smothered" in procedural delays and difficulties (para. 55). The court's approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case (para. 59).

[145] This Court's jurisprudence makes clear that granting individual remedies while the effects of declarations of invalidity are suspended can be appropriate and just. The Court granted a worker disability benefits for chronic pain during the suspension of a declaration that provisions were invalid for *excluding* chronic pain from the workers' compensation system (*Martin*, at paras. 121-22). The Court has acquitted individuals of criminal or quasi-criminal charges stemming from unconstitutional laws despite suspending the effects of the declarations of invalidity (*Guignard*, at para. 32; *Bain*, at pp. 105 and 165; see also *Corbiere*, at paras. 22-23).

[146] A rule that individual claimants cannot be exempted from suspensions of declarations of invalidity would improperly fetter the broad discretion afforded under s. 24(1) of the *Charter* for courts to grant remedies they "conside[r] appropriate and just in the circumstances." Remedial discretion is a fundamental feature of the *Charter*.

A bar on exempting individual claimants would often be unfair to the claimant, especially given that it is a court's decision to grant a suspension that makes the individual remedy necessary. While the reason the suspension was granted is no doubt an important consideration in granting a s. 24(1) remedy — and, as I explain below, should be taken into account when the court is considering granting an exemption — Brendan Brammall has aptly described a strict rule as prioritizing fairness to government “over all countervailing reasons, such as providing an effective remedy” (“A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*” (2006), 64 *U.T. Fac. L. Rev.* 113, at p. 117).

[147] In my view, when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just. The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy. The concern for vindicating individual rights with effective remedies reaches back to Blackstone and Dicey, and continues to have force in the present day (see K. Roach, “Dialogic remedies” (2019), 17 *I CON* 860, at pp. 862-65).

[148] Exempting only the claimant from a suspension may appear unfair at first glance (see, in the context of prospective remedies, Choudhry and Roach, at p. 223, fn. 65, citing *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)). But the claimant is not in the same position as others subject to the impugned law in a key respect: the claimant who brings a successful constitutional challenge has done the public interest a service by

ensuring that an unconstitutional law is taken off the books — the claimant has pursued the “right of the citizenry to constitutional behaviour by Parliament” (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 163). While, as the Attorney General submits, it is in the public interest for laws to apply to everyone uniformly, immediate remedies for claimants are also in the public interest. The practical realities of bringing a constitutional challenge may reduce the incentive for rights claimants to bring cases that carry substantial societal benefits (Leckey, at pp. 594-95; Brammall, at p. 119, fn. 44, quoting *Demers*, at para. 99, per LeBel J.; see also Department of Justice, Research and Statistics Division, “*The Costs of Charter Litigation*” (2016)). Individual exemptions can temper any further disincentive caused by suspensions (Leckey, at p. 607). As a result, courts should focus not only on the case or legislation before them, but also encourage *Charter* compliance in the long term through their s. 24(1) remedies (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 29 and 38).

[149] Like the decision of whether to suspend a declaration of invalidity despite the continued rights violation, there must be a compelling reason to deny the claimant an immediately effective remedy. Two examples seem apparent.

[150] First, a court must consider whether and to what degree granting an exemption in the claimant’s particular circumstances would undermine the interest motivating the suspension in the first place. Thus, the ability of the legislature to fashion policy responses to the declaration and the public interest in the interim

operation of the legislation will be important considerations in determining whether an exemption can be granted. For example, when the effect of a declaration is suspended to protect public safety, an individual exemption would not be appropriate and just if it would endanger public safety. Evidence of the individual claimant's situation, which the court will likely have, will inform whether this is the case.

[151] Second, courts may also have a compelling reason to refrain from granting an individual exemption where practical considerations like judicial economy make it inappropriate to do so. For instance, if a large group or class of claimants comes forward, it may not be practical — or even possible — to conduct the individual assessments necessary to grant them all individual exemptions.

[152] Ultimately, the public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws. Claimants, unlike others similarly situated, invest time and resources to pursue matters in the public interest — and those investments can pay dividends for others directly affected, especially those without the means to challenge the law themselves. Thus, if an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to. Exemptions from suspensions will often be necessary to balance the interests of the litigant, the broader public, and the legislature.

(6) General Remedial Principles for Legislation That Violates the *Charter*

[153] As I have explained, running through this Court’s remedial practice — from determining the form and breadth of remedies involving legislation, to suspending the effect of those remedies, to exempting litigants from suspensions — are recurring touchstones. These guide the principled discretion that this Court exercises when granting remedies for legislation that violates the *Charter*.

[154] Safeguarding rights lies at the core of that remedial approach. Section 52(1) calls for courts to invalidate any legislation to the extent it violates the *Charter*. The *Charter* “constrain[s] government action in conformity with certain individual rights and freedoms, the preservation of which [is] essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized” (*Richardson*, at para. 57). The fundamental principle that courts should provide meaningful remedies for the violation of constitutional rights (*Doucet-Boudreau*, at para. 25) shapes the form and breadth of the declaration, acts as a strong counterweight against suspending the effect of such a declaration, and weighs in favour of granting an individual remedy in tandem with a suspension.

[155] It is a defining feature of our society, reflected in s. 52(1) and required by the rule of law, that state laws and state action must comply with the Constitution (*SWUAV*, at para. 31; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 250; *Secession Reference*, at para. 72). That the public has an interest in the constitutional compliance of the laws that govern it can be seen throughout this Court’s remedial decisions. Courts ensure

that a remedy covers the full scope of *Charter* violations; while this plays an important rights-protecting function, it also serves the public interest, ensuring that the government acts in accordance with the law — “[c]ompliance with *Charter* standards is a foundational principle of good governance” (*Ward*, at para. 38). The importance of constitutional compliance weighs against suspension of the declaration, and in favour of an individual exemption from any suspension.

[156] Another aspect of the rule of law, reflected in s. 52(1)’s caution that laws are of no force or effect only “to the extent of the inconsistency” with the Constitution, is the entitlement to a positive order of laws that organizes society and protects it from harm. The public has an interest in preserving legislation duly enacted by its democratically elected legislatures, to the extent it is not unconstitutional. This is why courts will tailor remedies to retain constitutional aspects of an unconstitutional law where possible and will temporarily suspend the effect of a declaration when an immediate order would undermine the public interest by depriving the public of laws passed for its benefit. In contrast, concerns about legal instability may weigh against suspension.

[157] Finally, running through this Court’s remedial practice for unconstitutional legislation is respect for the role of the legislature coupled with an understanding of the duties of the judicial role. When determining the form and breadth of remedies, courts will preserve as much of the law as possible to respect the legislature’s policy choices, following its discernible intention when doing so. But courts will not shrink from

performing their duty to protect rights through s. 52(1) remedies, determining the full extent of inconsistencies with the Constitution and declaring legislation to be of no force or effect when necessary. Suspensions can be granted when the legislature's democratic role as policymaker would be so seriously undermined by an immediately effective declaration that it outweighs important countervailing principles. In such circumstances, if an exemption would undermine that role, it will weigh against an individual remedy.

[158] As I have explained, these constitutional considerations, drawn from our constitutional text and the broader architecture of our constitutional order and the rule of law, have repeatedly arisen in this Court's decisions on s. 52(1) remedies for *Charter* violations and give rise to four foundational principles:

- A. *Charter* rights should be safeguarded through effective remedies.
- B. The public has an interest in the constitutional compliance of legislation.
- C. The public is entitled to the benefit of legislation.
- D. Courts and legislatures play different institutional roles.

[159] In my view, these remedial principles provide the groundwork for meaningful remedies in different contexts. They provide guidance to courts and

encourage them to transparently explain remedial results. They will not always lead to agreement on the correct outcome; their value is in transparency, helping those who disagree articulate their specific points of disagreement.

(7) Application to This Case

(a) *What Form and Breadth Should the Remedy Take?*

[160] The first step in determining the breadth and form of a s. 52(1) remedy is determining the extent of the law's inconsistency with the *Charter*, which is defined by the nature of the substantive rights violation.

[161] Here, *Christopher's Law* limits s. 15(1) of the *Charter* by requiring those found NCRMD to comply with the sex offender registry upon discharge without providing them with any opportunities for exemption and removal based on individualized assessment. It draws distinctions based on the enumerated ground of mental disability by extending opportunities for exemption and removal to those found guilty of a sexual offence but denying them to those found NCRMD. Those distinctions are discriminatory because they perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

[162] The s. 15(1) infringement was found not to be minimally impairing of the right because making any form of individualized assessment that could lead to

exemption and removal available to those found NCRMD would be less impairing of the right.

[163] Turning to the second step, a court must determine whether a tailored remedy would be appropriate, rather than a declaration of invalidity applying to the whole of the challenged law.

[164] Given the limited and precisely defined nature of the violation in the context of the overall scheme of the sex offender registry, some form of tailored remedy was clearly appropriate to respond to the unconstitutionality. The legislature would no doubt have enacted *Christopher's Law* to apply to those convicted of a sexual offence even if it could not include those found NCRMD and granted a discharge.

[165] In this case, reading in an individualized assessment requirement would intrude on the legislative sphere — there are many ways to provide for such an assessment and “it is the legislature’s role to fill in the gaps, not the court’s” (*Schachter*, at p. 705).

[166] On the other hand, a declaration reading down *Christopher's Law* such that it is of no force or effect to the extent it applies to everyone unconstitutionally affected effectively vindicates rights without interfering with aspects of the statute’s operation unaffected by the finding of unconstitutionality. Granting a tailored remedy here will better protect the public’s interest in legislation enacted for its benefit and will better

respect the role of the legislature, while also safeguarding *Charter* rights and realizing the public's interest in constitutionally compliant legislation.

[167] There is one final issue respecting the proper scope of the declaration in this case. Although G's argument that *Christopher's Law* violates s. 15(1) of the *Charter*, which has been accepted by this Court and by the Court of Appeal, applies to all those found NCRMD of sexual offences who have been discharged, G framed his constitutional challenge to cover only those who have been *absolutely* discharged. The order of the Court of Appeal and the constitutional questions the parties stated before this Court were also limited. Should the s. 52(1) declaration be limited in this way?

[168] In my view, the formal limits on the scope of G's application do not reflect the substance of the constitutional issue before the Court, as argued by the parties. G's arguments on s. 15(1) apply to all those found NCRMD of a sexual offence who do not have access to exemption and removal mechanisms based on individualized assessment: that is, all those found NCRMD who have been discharged. The Attorney General's central s. 1 argument attempting to justify the s. 15(1) violation — that this Court should defer to the legislature's determination that all those found NCRMD in respect of a sexual offence should be registered because they are more likely to reoffend than a member of the general public is to commit a first-time offence and there is no way to predict with certainty whether they will reoffend — also applies to all those found NCRMD. Of course, those conditionally discharged have the opportunity to

obtain an absolute discharge following each annual disposition review hearing before the review board.

[169] However, had G's application been framed to include all those found NCRMD of a sexual offence and discharged, the Attorney General may have brought other evidence to support his s. 1 arguments, and addressed the differential risks — in particular the risk of reoffending posed by those found NCRMD of a sexual offence and *conditionally* discharged.

[170] Because I cannot conclude that the Attorney General had the “fullest opportunity to support the validity” of *Christopher's Law* in relation to those conditionally discharged, like the Court of Appeal, I would limit the declaration to those who have been found NCRMD of a sexual offence and absolutely discharged (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at paras. 19 and 22).

(b) *Was the Effect of the Declaration Properly Suspended?*

[171] As noted above, the terms of s. 52(1) and the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration. However, those must be balanced against protecting the public's interest in legislation passed for its benefit. To do so, the Court must consider the nature and extent of both the continued rights violations and the danger to an identified public interest that could flow from an immediate declaration of invalidity.

[172] The Attorney General has identified public safety as the public interest that justifies a suspension. The importance of this interest, and its appropriate weight in the analysis, is informed by the danger posed by those found NCRMD of sexual offences and granted absolute discharges by a provincial review board.

[173] The *Criminal Code* requires provincial review boards to absolutely discharge any person found NCRMD who does not pose a significant risk of committing a serious criminal offence (*Winko*, at para. 57). If a person poses that type of risk, the review board may discharge them subject to conditions it considers appropriate (*Criminal Code*, s. 672.54(b)). The review board's "paramount consideration" in making any disposition is public safety.

[174] The application judge found those discharged after an NCRMD finding to be at a statistically higher risk of offending than the general population. Those who are absolutely discharged therefore may pose *some* elevated risk of committing criminal offences. Granting an immediate declaration would endanger the public interest in safety from sexual offences to some extent because some individuals who still pose a greater risk to offend would be relieved of their reporting obligations. Those individuals would also be able to apply to have their personal information removed from the database pursuant to s. 24(1) (see, e.g., *Boudreault*, at paras. 107-9).

[175] The application judge found that the registry contributed to public safety by enhancing the ability of police to prevent and investigate sexual offences. Immediately relieving a group of people who may pose some risk of committing sexual

offences from the obligation to report or permitting them to seek removal of their information could detract from this enhanced ability. The threat to public safety is therefore meaningful. However, given that persons found NCRMD who pose the highest demonstrable risk to reoffend are not given absolute discharges, this threat is limited.

[176] The other public interest at stake is respect for the legislature's ability to enact its preferred rights-respecting scheme. Granting an immediate declaration of invalidity could risk compromising the legislature's ability to fulfil its role as policymaker because allowing everyone found NCRMD of a sexual offence and absolutely discharged to be removed from the sex offender registry could restrict the effectiveness of the new version of *Christopher's Law* eventually enacted by the Ontario legislature in response to these reasons. Identifying those individuals and requiring them to register and report again — or to undergo individualized assessment of some kind — would likely be impracticable because their information simply would not be retained in the interim.

[177] Balanced against these considerations is the significance of the rights violation that the suspension would temporarily prolong. *Christopher's Law* treats those found NCRMD and discharged in accordance with a persistent, demeaning stereotype. The law compels them to report in person to a police station, subjects them to the spectre of random police checks at their residence, and retains their personal information without providing an opportunity to determine whether they pose sufficient

risk to justify that intrusion on their liberty and privacy. Importantly, granting a suspension also runs counter to the public's interest in constitutionally compliant legislation.

[178] Here, there is an ongoing threat to public safety, although it is limited as the group of individuals whose information would no longer be tracked consists entirely of persons who the Review Board has deemed do not pose a significant threat to public safety. The legislature's ability to address that gap in public safety would, however, be appreciably restricted by an immediate declaration. This is a close call. But on balance, the combination of these two legitimate interests (public safety and preserving the legislature's latitude to respond to the finding of unconstitutionality) justifies temporarily depriving those affected of the immediate benefit of this judgment and allowing the violation to persist.

[179] The parties agree with the 12-month suspension ordered by the Court of Appeal. I see no basis to interfere with that determination. However, in future, courts will expect more detailed submissions on the length of time required.

(c) *Should G Have Been Exempted From the Suspension?*

[180] The final question is whether it was appropriate and just to exempt G from the suspension. The Attorney General submits that, because of a lack of "expert forensic risk assessment", it was not.

[181] Although judges may not have the expertise to conduct such forensic assessments themselves, they are well-suited to deciding and frequently charged with making determinations relating to public safety and risk in other contexts, including those that lead to exemption and removal from the sex offender registry. When judges decide whether to absolutely or conditionally discharge someone found guilty of an offence, they consider the best interests of the accused and the public interest (*Criminal Code*, s. 730). Further, a judge deciding whether to make a termination or exemption order in respect of a person subject to the federal sex offender registry must determine whether the impact of compliance on the applicant “would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature” (*Criminal Code*, ss. 490.016(1) and 490.023(2); Bill C-16, *Sex Offender Information Registration Act*, 3rd Sess., 37th Parl., 2004, s. 20).¹⁰ These are not decisions that require expert forensic evidence. And the *adjudicative* task of assessing risk in a particular case, in order to grant a remedy that is appropriate and just in the claimant’s circumstances, is distinct from the *legislative* task of creating a regime designed to assess risk.

¹⁰ Under the previous version of s. 490.012(4) of the *Criminal Code*, in effect until 2011, courts considered a number of relevant factors when deciding whether to refuse to make an initial order requiring compliance with *SOIRA*, such as the nature of the offence, the offender’s risk to reoffend, the offender’s criminal record, the impact on the offender’s privacy and liberty interests, stigmatizing effects registration may have, and other matters relating to the offender’s present and future personal circumstances (see *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421, at paras. 65-70; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206, at paras. 30-31). Though the discretion not to make a compliance order under s. 490.012(4) has been removed, the wording in that provision is very similar to that of ss. 490.016(1) and 490.023(2) (*Martin’s Annual Criminal Code*, by M. Henein, M. Rosenberg and E. L. Greenspan (2019), at pp. 1018-19). The only difference since 2011 is that the current provisions refer to effectively *preventing* crimes of a sexual nature in addition to effectively investigating them.

[182] The Court of Appeal granted G an individual exemption from *Christopher's Law*. Doherty J.A. concluded that an exemption did not undermine the suspension; it was difficult to envision a constitutionally compliant legislative scheme that would not exempt G from the registry. The exercise of the court's discretion deserves deference. The ORB, an expert tribunal, determined that G was not at significant risk of committing a serious criminal offence 17 years ago. His record since his release has been spotless and there is no indication that he poses a risk to public safety. An exemption would ensure he receives an effective remedy — nearly six years have passed since he filed his notice of application and his case has been argued in three levels of court. He should not be denied the benefit of his success on the constitutional merits.

[183] The individual exemption to the suspension by definition lasts only as long as the suspension by itself. Whether G will be caught by new legislation, while highly unlikely, will depend on whether he comes within its terms. Courts cannot grant an exemption to legislation that has not yet been enacted, because they cannot predict the outcome of the legislative process.

VII. Conclusion

[184] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

ROWE J. —

[185] I agree with Justices Côté and Brown regarding s. 15(1) of the *Canadian Charter of Rights and Freedoms* (at paras. 221-24), and regarding the general approach to ordering an individual exemption under s. 24(1) from the suspended effect of a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* (interspersed among paras. 273-93).

[186] On the proper approach to suspending a declaration of invalidity under s. 52(1), however, I would reaffirm *Schachter v. Canada*, [1992] 2 S.C.R. 679. As the Court stated in that case, a declaration of invalidity should be suspended only in certain circumstances, where: (1) an immediate declaration of invalidity would pose a potential danger to the public; (2) it would otherwise threaten the rule of law; or (3) the law is underinclusive and the court cannot determine properly whether to cancel or extend its benefits, but rather should provide an opportunity for the legislature to decide that. I would not treat these categories as closed. Nor would I abandon them in favour of some loosely defined exercise of discretion. Rather, they should be extended only where an immediate declaration would infringe some constitutional principle.

[187] The Court should depart from a precedent such as *Schachter* only in “compelling circumstances” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 18). For example, a precedent can be revisited if it is “unsound in principle”, “unworkable and unnecessarily complex to apply”, or if it has

“attracted significant and valid judicial, academic, and other criticism” (*Vavilov*, at para. 20).

[188] In recent years, the Court has departed from the approach set out in *Schachter* without sufficient reflection. It has suspended declarations beyond *Schachter*’s categories and without regard to the reasoning underlying those categories. Some suspensions have been ordered without reference to *Schachter*. This gap between theory and practice — between precedent and its application — is noted by Justice Karakatsanis (at paras. 106 and 125) and by Justices Côté and Brown (paras. 233-35).

[189] Such a gap invites reflection. But, that does not mean the precedent should be abandoned, as my colleagues favour. Upon reflection, I would affirm the approach in *Schachter*, as I shall explain.

I. *Schachter* Is Sound in Principle

[190] *Schachter* is grounded in a view that suspended declarations of invalidity need be reserved for exceptional circumstances, as s. 52(1) does not imbue courts with a remedial discretion. The starting point for reflecting on *Schachter* is whether that interpretation of s. 52(1) is sound.

[191] In line with the purposive approach to constitutional interpretation, the language of s. 52(1) needs to be understood in the context of the character and larger objects of the *Constitution Act, 1982* (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295,

at p. 344; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at paras. 178-85, per Rowe J.; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 39).

[192] Aside from the circumstance of unlawfully obtained evidence (s. 24(2)), the *Constitution Act, 1982*, provides two remedies for unlawful state action. The contrast between these is instructive:

- a) Where rights or freedoms have been infringed, s. 24(1) states that a court may provide “such remedy as the court considers appropriate and just in the circumstances”. It is “difficult to imagine language which could give the court a wider and less fettered discretion” (*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965).
- b) An individual who complains not of a particular infringement but of an unconstitutional law can seek a remedy under s. 52(1). Unlike s. 24(1), s. 52(1) refers neither to judicial process, nor to discretion. Rather, a law that is inconsistent with the Constitution “is, to the extent of the inconsistency, of no force or effect”.

[193] Thus, while under s. 24(1) the courts have wide discretion to craft remedies for specific infringements, no such discretion is conferred under s. 52(1) with respect to unconstitutional laws. The rationale for this dichotomy can be seen in the language of s. 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and

freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The power to limit constitutional rights has been entrusted to the legislatures rather than to the courts.

[194] On a purposive interpretation, the absence of remedial discretion in s. 52(1) is no oversight. The *Constitution Act, 1982*, does not give courts a choice as to whether to give effect to Canadians’ right to be free from unconstitutional laws. The Constitution is not an equitable remedy or a writ of grace that lies in the favour of the courts. It confers rights of which Canadians are entitled to immediate protection. But the *Constitution Act, 1982*, is not the whole Constitution.

[195] The *Constitution Act, 1982*’s first decade revealed situations in which this immediate approach to s. 52(1), unqualified, would cause conflict with other constitutional principles. An immediate declaration of invalidity in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, would have threatened the rule of law. An immediate declaration of invalidity in *R. v. Swain*, [1991] 1 S.C.R. 933, would have posed a potential danger to the public, thereby depriving Canadians of the protection of the law, which is an aspect of the rule of law. In these cases, resolution of the conflict between competing constitutional principles called for a suspended declaration.

[196] As well, *Schachter* addressed an ambiguity latent within s. 52(1). When a law offers an underinclusive benefit, there may be no unique “extent of the inconsistency” to strike down. It might be possible to render the scheme constitutional

by severing words (*R. v. Morales*, [1992] 3 S.C.R. 711), reading in words (*Vriend v. Alberta*, [1998] 1 S.C.R. 493), reading down the scheme (*Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401), or striking down the scheme altogether.

[197] Because the appropriate remedy cannot always be discerned by a court in situations of underinclusive benefits, the supremacy of the legislature as a constitutional principle legitimately comes to bear; a declaration of suspended invalidity provides an opportunity for this to be given effect. For example, *Schachter* concerned a *financial* benefit that was available to adoptive parents, but not to natural parents. Reading in natural parents would have massively expanded and transformed the benefit, causing the Court (as Chief Justice Lamer noted) to act beyond its proper institutional role. Conversely, striking the benefit down altogether would have harmed many adoptive parents without benefiting the plaintiffs. A suspension of the declaration of invalidity ensured that the legislation would be made constitutional, but left the means of so doing to Parliament.

[198] The remark in *Schachter* that the decision to suspend a s. 52(1) remedy turns on “the effect of an immediate declaration on the public” rather than “considerations of the role of the courts and the legislature” (p. 717) must be understood in this context. Institutional considerations by themselves do not provide a constitutional basis for a suspension. Rather, it is only in a situation of underinclusiveness where the proper s. 52(1) remedy is unclear that such institutional

considerations may have an effect on whether to order a suspension, as indeed was the case in *Schachter* (pp. 721-24).

[199] In this view, the *Schachter* categories exemplify circumstances in which countervailing constitutional principles constitute a valid basis to suspend an immediate declaration of invalidity that would otherwise follow by virtue of s. 52(1). While in my view the three categories are not exhaustive, a court should suspend a declaration of invalidity only if there is a constitutional basis for doing so. By necessary implication, the inherent jurisdiction of a court is not a sound or sufficient legal basis to depart from the immediate effect of s. 52(1).

II. *Schachter* Can Be Workable

[200] While the Court has departed from *Schachter*, this does not indicate that there are conceptual flaws with the approach in *Schachter*. I say this mindful of cases such as *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, in which this Court struck down offences relating to sex work. Chief Justice McLachlin indicated that “[w]hether immediate invalidity would pose a danger to the public or imperil the rule of law . . . may be subject to debate”, but suspended the declaration because “moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians” (para. 167). Was a suspension legally justified in *Bedford*? I am not confident that the concerns noted by the Chief Justice constitute a valid legal basis for continuing to subject Canadians to laws rendered unconstitutional by virtue of s. 52(1).

[201] Nor have the *Schachter* categories proved unworkable or difficult to apply in practice. Academics have had little difficulty identifying cases in which the Court has departed from *Schachter*: B. Ryder, “Suspending the Charter” (2003), 21 *S.C.L.R.* (2d) 267; C. Mouland, “Remedying the Remedy: *Bedford*’s Suspended Declaration of Invalidity” (2018), 41 *Man. L.J.* 281, at pp. 289-90; L. Weinrib, *Suspended invalidity orders out of sync with Constitution*, August 21, 2006 (online); R. Leckey, “The harms of remedial discretion” (2016), 14 *I CON* 584; S. Burningham, “A Comment on the Court’s Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*” (2015), 78 *Sask. L. Rev.* 201; G. R. Hoole, “Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law” (2011), 49 *Alta. L. Rev.* 107.

[202] In the six years after *Schachter*, its categories were applied without difficulty. According to Ryder’s count, only two out of sixteen s. 52(1) remedies were suspended (Ryder, pp. 294-97). *Schachter* did not prove unworkable in practice; the problem was that it was too often honoured in the breach. It had been tested, it had worked well, and it can continue to do so.

III. Alternative Approaches Are Not Preferable

[203] Justice Karakatsanis suggests that the *Schachter* categories be replaced by what she calls a “principled discretion”. This is distinguished from what she refers to as “complete discretion” by four principles:

- A. *Charter* rights should be safeguarded through effective remedies.
- B. The public has an interest in the constitutional compliance of legislation.
- C. The public is entitled to the benefit of legislation.
- D. Courts and legislatures play different institutional roles. [para. 94]

[204] I take no issue with these four statements. But, they lack analytic structure. Rather, they are so indeterminate and truistic as to provide no meaningful guidance. While they are compatible with the Court's uneven jurisprudence, they are equally compatible with very different choices. They present less a constraint on judicial discretion than a vocabulary for justifying *ad hoc* decisions.

[205] My colleague says that a "principled" approach is better as it requires justification. This is not persuasive. All decisions require justification. Whether the framework is expressed using principles or categories, what is at issue is whether it constrains discretion — as the *Schachter* framework does — or whether in reality it throws open the door to judicial fiat. I am concerned that the discretionary approach Justice Karakatsanis advocates will lead to a continuation of current trends, in which declarations of invalidity are suspended in a way that varies with the length of the Chancellor's foot.

[206] More fundamentally, I see no legitimate basis to read remedial discretion into s. 52(1). The provision admits of no such discretion. Rather, it is only by virtue of competing constitutional principles or ambiguity within s. 52(1) itself that one can justify suspending a declaration of invalidity. Statutes that are inconsistent with the Constitution are of no effect. Nothing can revive them. The only basis on which they can be ordered to be enforced notwithstanding their illegality is that to declare them to be immediately illegal would offend some other constitutional principle. Courts have no inherent authority to make legal that which is not. In this I differ fundamentally with my colleague.

[207] My colleague writes at paras. 120-21:

While s. 52(1) does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts “may have regard to unwritten postulates which form the very foundation of the Constitution of Canada” (*Manitoba Language Rights*, at p. 752; see also *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 at para. 52). [Footnote omitted]

The power to suspend the effect of a declaration of invalidity should be understood to arise from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid. . . .

She also writes, at para. 85, that “[a] general declaration pursuant to courts’ statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1)”.

[208] Respectfully, I disagree. This suggests that Superior Courts possess a form of inherent authority sufficient to override express provisions of the Constitution. On

occasion courts have been called on to answer questions concerning the relationship of institutions of the state for which no answer is provided in the written Constitution, e.g. in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. On such rare and exceptional occasions courts “may have regard to unwritten postulates which form the very foundation of the Constitution of Canada”, which might be called structural analysis. But, in such instances, courts provide an answer as to the authority of the legislature or the executive where the written Constitution is silent. Where the Constitution is explicit, as s. 52(1) is, more is required. The power to suspend a declaration of invalidity is not “included” in s. 52(1); rather, it contradicts s. 52(1). Thus, in order to justify a suspension, one must rely on a countervailing constitutional principle.

[209] As for Justices Côté and Brown’s approach, the rule of law is not the only constitutional principle that can justify suspending a declaration of invalidity. Notably, on a purposive interpretation, underinclusive benefits call for a court to order a suspension so as to give proper place to the legislature in framing a remedy.

IV. Applying *Schachter*

[210] In this case, the declaration of invalidity was suspended on the basis of public safety concerns.

[211] The analysis above suggests that courts cannot suspend a declaration of invalidity simply because an immediate declaration might create some risk to public safety. Rather, the risk to public safety must be sufficient to infringe the constitutional

principle of the rule of law, so that the court is forced to reconcile two conflicting constitutional principles.

[212] The threshold for suspending a declaration of invalidity can be illustrated by the cases in which the Court has invoked the public safety rationale. In *Swain*, the Court struck down the power to detain accused who were acquitted “by reason of insanity”, as it was phrased at the time. In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the Court struck down the scheme for detaining those found unfit to stand trial. In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, the Court struck down a scheme for detaining foreign nationals or permanent residents on grounds of security.

[213] In all three cases, an immediate declaration would have released individuals who were held in custody because they posed a danger to public safety. The risk to public safety was high, as would be expected to justify reading into the Constitution a discretion to suspend a declaration of invalidity.

[214] In this case, neither party focused their submissions on the suspension. In addition, this Court refused to stay the 12-month suspension (*Ontario (Attorney General) v. G*, 2019 SCC 36), which thus expired on April 4, 2020, rendering the issue moot. In the circumstances, there is no cause to decide whether the declaration was properly suspended.

[215] The issue of the exemption order is also moot. The respondent does not need to be exempted from legislation that is already of no force or effect. As a result, although I am in substantial agreement with the approach to individual exemptions set out by Justices Côté and Brown, there is no cause to decide whether the individual exemption was rightly ordered.

V. Conclusion

[216] Rather than departing from *Schachter* and replacing it with another approach, I would affirm it, with the explanations that I have set out above.

[217] In the result, I would dismiss the appeal.

The following are the reasons delivered by

CÔTÉ AND BROWN JJ. —

I. Overview

[218] While we agree with our colleague Karakatsanis J.'s conclusion that *Christopher's Law* infringes Mr. G's *Charter* right to equal treatment under the law, we write separately to constitutionally ground the usage of suspended declarations of invalidity in a way our colleague does not. In our view, suspended declarations of

invalidity — which allow for the ongoing infringement of *Charter* rights — ought to be granted as a measure of last resort, and only to protect the rule of law. Relatedly, we respectfully disagree with our colleague that this Court’s remedial jurisprudence since *Schachter v. Canada*, [1992] 2 S.C.R. 679, “has come to coalesce around a group of core remedial principles” (Karakatsanis J.’s reasons, at para. 82). To the contrary, our reading of this Court’s jurisprudence reveals none of the principles our colleague identifies. Instead, unmoored from the rule of law, it has produced inconsistent and unprincipled results. A return to first principles is necessary.

[219] Our colleague would also grant Mr. G an individual exemption from the suspended declaration. With respect, doing so here would exceed the institutional competence of this Court and intrude into legislative domain.

[220] For the reasons that follow, we would uphold the 12-month suspension of the declaration of invalidity. We would not, however, grant the respondent an individual exemption.

II. Section 15(1) of the *Canadian Charter of Rights and Freedoms*

[221] Before we embark on our discussion of remedy, we offer these observations on our colleague’s treatment of s. 15(1) of the *Charter*.

[222] In our view, the s. 15(1) issue is easily disposed of. *Christopher’s Law* (*Sex Offender Registry*), 2000, S.O. 2000, c. 1 (“*Christopher’s Law*”), draws a distinction

between persons found not criminally responsible on account of mental disorder (“NCRMD”) and persons found guilty. And that distinction exacerbates pre-existing disadvantage by perpetuating the stereotype that persons with mental illness are inherently dangerous (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20). Persons found guilty have several “exit ramps” leading away from the obligation to comply with *Christopher’s Law*’s sex-offender registry: a conditional or absolute discharge under s. 730 of the *Criminal Code*, R.S.C. 1985, c. C-46, a pardon, or a record suspension (*Christopher’s Law*, ss. 1(1) “offender” and “pardon”, 7(4) and 9.1). Persons found NCRMD, by contrast, do not, even where the Ontario Review Board determines that they no longer pose a significant threat to public safety and grants them an absolute discharge. As a result, those persons found NCRMD in respect of more than one sex offence, or in respect of a sex offence with a maximum sentence of more than 10 years, must — categorically and without exception — comply with *Christopher’s Law* for the rest of their lives (s. 7(1)(b-c)). This constitutes differential treatment on the basis of an enumerated ground: mental disability. The proper remedy is to require the legislature to provide persons found NCRMD who have been absolutely discharged with an *opportunity* for exemption and removal from the *Christopher’s Law* registry.

[223] This disposes fully of the merits of the s. 15(1) issue. Our colleague, however, goes further, and in extensive *obiter dicta* discusses adverse-effects discrimination and “substantive equality” (paras. 41-69). Her doctrinal statements are not remotely relevant to the issues raised by this appeal, especially considering this is

not an adverse-effects case. The distinction in this case is facially apparent: *Christopher's Law* explicitly states that persons found NCRMD — persons with a mental disability — and those who are “convicted” must comply with its registry (ss. 1(1) “offender”, 2 and 8(1)(c)). It then explicitly exempts from compliance with the registry those who have received a pardon, those who have received a record suspension, and those who have received a conditional or absolute discharge under s. 730 of the *Code*. However, a person found NCRMD is ineligible to receive a pardon, a record suspension, or a discharge under s. 730 because they are deemed under the *Code* to have committed no crime (ss. 16(1), 672.1(1), 672.34 and 672.35). A discriminatory result such as this one, that arises from reading two or more statutes together, is not adverse-effects discrimination. In cases of adverse-effects discrimination, the discriminatory law appears facially neutral, and causation is the central issue: whether, in spite of its apparent neutrality, the impugned law augments pre-existing disadvantage in its effect (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 75-76). Consequently, in those cases, the claimant has “more work to do” (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64). Here, there is simply no work to be done nor any causal connection wanting: the statutes, read together, draw a facial distinction on the basis of mental disability.

[224] Thus, our silence on paragraphs 41-69 of our colleague’s reasons should not be taken as tacit approval of their content. We simply do not see them as offering *actual reasons* for her judgment, but “commentary . . . or exposition” instead (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).

III. Suspended Declarations of Invalidity

[225] As we see it, there are three principal reasons why only a threat to the rule of law should warrant a suspended declaration of invalidity. First, this was what the Court envisioned in assuming for the first time the power to issue a suspended declaration in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (“*Manitoba Reference*”). Secondly, the Constitution commands such a result: the text contemplates immediate declarations as the norm, subject only to a rule of law concern. Thirdly, lessons learned in the wake of *Schachter* about the practical implications of suspended declarations reveal why a discretionary approach focused on “remedial principles” is undesirable, and why a constitutional tether to the rule of law is so essential. We will address each point in turn.

A. *The Genesis and Evolution of Suspended Declarations*

[226] To understand the necessarily exceptional quality of suspended declarations, it is helpful to recount the unprecedented circumstances of *Manitoba Reference*. Because Manitoba had failed to enact its legislation in English and French, virtually all of its laws passed over more than nine decades were poised to become invalid. Declaring those laws immediately invalid, however, would have created a “legal vacuum . . . with consequent legal chaos” of intolerable proportions (p. 747). All of Manitoba’s governing bodies created by law including courts, tribunals, public offices, and school boards would have been stripped of legal authority. The composition of the Manitoba Legislature would have been called into question. The

legal order that regulated the affairs of Manitobans “since 1890 [would have been] destroyed and [their] rights, obligations and other effects arising under [the unilingual] laws [would have become] invalid and unenforceable” (p. 749; see also pp. 747-48). An unprecedented “state of emergency” was imminent (p. 766).

[227] In response, the Court created the suspended declaration, modelled after the doctrine of state necessity. The doctrine of state necessity, reserved for exceptional circumstances like an insurrection or forging a new constitution, allows a government temporary reprieve from complying with its constitution in order to address a public emergency and preserve the rule of law (*Manitoba Reference*, at p. 761). By accepting for itself the authority to take similar emergency action, the Court was taking a momentous step, since the precedents on state necessity cited by the Court involved emergency action being taken by the executive or legislative branches, not by courts (pp. 763 and 765-66). Further, for obvious reasons the doctrine of state necessity is potentially dangerous, and must be “severely circumscribe[d]” and “narrowly and carefully applied” in order to constitute an affirmation of, rather than an affront to, the rule of law (M. M. Stavsky, “The Doctrine of State Necessity in Pakistan” (1983), 16 *Cornell Int’l L.J.* 341, at pp. 344 and 342; see also p. 354; *Manitoba Reference*, at pp. 758-59). The line between using the doctrine as a veil for usurpation of authority and using it to safeguard the constitutional order from harm is fine. For this reason, at the core of the doctrine lies the premise that “courts should be reluctant to permit deviations from constitutional norms” (Stavsky, at p. 344).

[228] Recognizing the magnitude of this step and its potential threat to the division of powers and the rule of law, the Court in *Manitoba Reference* tightly constrained the use of suspended declarations. It concluded that a suspended declaration should only be used “in order to preserve the rule of law . . . under conditions of emergency, when it is impossible to comply with” constitutional rights (p. 763 (emphasis added)). The operative focus must be whether a “failure to [suspend the declaration] would lead to legal chaos” (p. 766) or, in other words, whether a suspended declaration is necessary “to preserve the rule of law the Constitution was meant to constitute” (B. Ryder, “Suspending the *Charter*” (2003), 21 *S.C.L.R.* (2d) 267, at p. 268). In short, the Court in *Manitoba Reference* “clearly viewed a temporary suspension of constitutional requirements as extraordinary” (Ryder, at p. 268). It was contingent on the exigency: “to avoid a state of emergency” (*Manitoba Reference*, at p. 763).

[229] Since *Manitoba Reference*, however, this Court has lost its way. The Court now suspends declarations of invalidity almost as a matter of course, often with no justification or attention to the rule of law.¹¹ In our view, most of the cases in which suspended declarations have issued since *Manitoba Reference* do not come close to reaching the high threshold it decreed. Rather, suspended declarations have become

¹¹ e.g. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 158; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 103; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79-80; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 24; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 128.

this Court's "remedial instrument of choice", applied "casually" and as a matter of "routine" or "preference" while affording only "lip service . . . to the dangers of allowing continued violations of *Charter* rights and freedoms" (G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011), 49 *Alta. L. Rev.* 107, at pp. 110-11; Ryder, at pp. 271-72 and 280; S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at p. 228; S. Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" (2015), 78 *Sask. L. Rev.* 201, at p. 202; R. Leckey, "Remedial Practice Beyond Constitutional Text" (2016), 64 *Am. J. Comp. L.* 1 ("Leckey, 'Remedial'"), at p. 23).

[230] In other words, this Court has been issuing suspended declarations, and even *extending* those suspensions, with little constitutional or jurisprudential grounding. For instance, in both *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Court offered meagre reasons for suspending a declaration of invalidity. In *Bedford*, the Court suspended the declaration of invalidity on the enigmatic notion that leaving prostitution unregulated "would be a matter of great concern to many Canadians", despite finding that it was "subject to debate" whether an immediate declaration would endanger the public or otherwise imperil the rule of law (para. 167). Even more remarkably, in *Carter*, the Court gave *no* reasons for suspending its declaration of invalidity (para. 128).

[231] The result is that the Court’s use of suspended declarations has become wholly detached from the principled foundations stated in *Manitoba Reference* that animated the existence of what was supposed to be considered a measure of last resort. Today, that remedy has become the norm, rather than the exception. We do not take our colleague as disagreeing with this proposition. But her solution presupposes that there were *some other* principles quietly at work in the cases. With respect, we are not remotely convinced that this is so.

[232] Nor do we agree with our colleague that *Schachter* is the vaccine. Indeed, it is the germ. Prior to *Schachter* (but after *Manitoba Reference*), this Court assumed “that laws inconsistent with the new Charter should be declared invalid immediately [and, in the process,] affirmed the primacy and inviolability of the rights and freedoms entrenched in the Charter” (Ryder, at p. 268). After *Schachter*, however, this Court’s posture changed. Statistics bear this out: by our count, out of the 44 times this Court has declared a law invalid for unconstitutionality since *Schachter*, it has suspended that declaration 23 times (that is, 52 per cent of the time).¹² And those numbers have been

¹² The total number of 44 is current to the beginning of this year. It excludes cases involving mandatory minimums (which, by their nature, must be struck down immediately: Karakatsanis J.’s reasons, at para. 114) and those cases where the Court rectified the constitutional flaw through a tailored remedy, such as severance or reading in. The cases included in this number are as follows (cases with suspended declarations are in bold): *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 73; ***Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux***, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 3 and 5; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 103; ***Saskatchewan Federation of Labour v. Saskatchewan***, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 103; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at paras. 30-32; ***Mounted Police Association of Ontario v. Canada (Attorney General)***, 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 154 and 158; ***Carter v. Canada (Attorney General)***, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 128; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 88-89; ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 166-69; ***Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401***, 2013 SCC 62, [2013] 3 S.C.R. 733, at

trending upwards: between 2003 and 2015, that number rose to 74 per cent of declarations (see also Ryder, at p. 272; Hoole, at p. 114; J. B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (2005), at p. 175). The smallest inconvenience associated with an immediate declaration, and circumstances that pale in comparison to the grave situation the Court faced in *Manitoba Reference*, will now lead the Court to temporarily suspend the operation of the *Charter*.

[233] This slippage is due to a move away from the principle stated in *Manitoba Reference*. *Schachter* shifted the considerations that can justify a suspended declaration

para. 41; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 100-103; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 89-91; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 95; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 140; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 121; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56-60; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 119; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 77; *R. v. Guignard*, 2002 SCC 14, [2002] 3 S.C.R. 472, at paras. 32 and 34; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 64; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 47-48; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 1, 55 and 101; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 105 and 159; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 24 and 118; *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 136-45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 131; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 86; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 103-5; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 292; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 176-77; *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 803-4; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, at pp. 439-40; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at p. 1108; *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 453-55; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 778.

away from the rule of law to “the effect of an immediate declaration on the public” (p. 715; see also pp. 716-17). Further, *Schachter* expressly recognized two additional circumstances in which a suspended declaration of invalidity could issue: threats to public safety and under-inclusive legislation (p. 715). It also made clear (as our colleague does with her reasons) that these categories are not exhaustive (p. 719). Additionally, *Schachter* explicitly *required* courts to consider whether a suspended declaration should issue in each case (pp. 715 and 717).

[234] Unsurprisingly, after *Schachter* courts began to find other reasons for issuing suspended declarations, one of which became this Court’s primary justification for suspending a declaration: affording the legislature the time it needs to craft a response and choose between *Charter*-compliant regimes (e.g. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at para. 32). But this justification strikes us as irrelevant. The judiciary’s choice between an immediate and suspended declaration has no impact on the range of constitutional options open to a legislature in the aftermath of a successful *Charter* challenge. As Professor Ryder explains:

A key flaw [in the Court’s] line of reasoning is that suspended declarations do not in fact offer anything to the legislature that it does not already have. By emphasizing the role of suspended declarations in fostering legislative choice, and dialogue with affected groups, the Court seems to be suggesting that suspensions have the effect of enlarging a legislature’s range of choices and consultative possibilities. But this is not necessarily

the case. Whether the operation of a declaration of invalidity is immediate or delayed, a legislature faces the exact same range of constitutional possibilities. It is free to disagree with the legal regime that follows upon a Court's choice of an immediate declaration of invalidity and substitute some other constitutional option. It is also free to consult as widely as it wishes in the design of a new Charter-compliant legal regime. [p. 281]

(See also p. 285.)

[235] Respectfully, the proper response to this rampant misuse of suspended declarations is not, as our colleague proposes, to expand the *Schachter* categories in reliance on newly divined “remedial principles” and “recurring touchstones” (paras. 82 and 153). In practice, this will result in a measure of broad discretion that is anomalous in a legal regime committed to the rule of law and the protection of rights. *Schachter*'s discretion bred inconsistent and unprincipled results, and we see no reason to believe our colleague's appeal to a “broader [constitutional] architecture” (para. 158) will be any different. Rather, the more appropriate response is to return our focus to the Constitution, and particularly its founding principle of the rule of law, in order to ensure the proper vindication of *Charter* rights and carefully circumscribe the situations in which a suspended declaration can issue.

B. *The Constitution*

- (1) Section 52(1) of the *Constitution Act, 1982*, and Section 33(1) of the *Canadian Charter of Rights and Freedoms*

[236] Section 52(1) of the *Constitution Act, 1982*, provides the following:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[237] The text could not be clearer: its use of the present tense “*is*” contemplates, by definition, only *immediate* declarations of invalidity. Indeed, on “a plain reading of this provision, the invalidation of any law found to be ultra vires the Constitution should be immediate” (B. Bird, “The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity” (2019), 42 *Man. L.J.* 23, at p. 32, citing Hoole, at p. 110; see also pp. 34-36). In other words, suspended declarations are, by their nature, “in tension with the clear words of s. 52(1) that contemplate that unconstitutional legislation is of no force and effect” (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at §14.1540).

[238] To be sure, once it is found that a statute is inconsistent with the Constitution, “consequences for that legislation flow directly from the Constitution’s status as supreme law” (Leckey, “Remedial”, at p. 30): courts have “not only the power, but the duty, to regard the inconsistent statute . . . as being no longer ‘of force or effect’” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 353 (emphasis added)). While we commonly refer to a court “striking down” a law, in reality, “the law has failed by operation of s. 52 of the *Constitution Act, 1982*”, because s. 52(1) “confers no discretion on judges” (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 35). It is a “provision that suggests that declarations of invalidity can only be given immediate

effect” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 99 (emphasis added)).

[239] Unlike the constitutions of other countries, such as the *Constitution of the Republic of South Africa*, at s. 172(1)(b),¹³ nothing in the text of our Constitution expressly empowers Canadian courts to issue suspended declarations. (And even in South Africa, suspended declarations are rare, as the “general assumption” is that the Constitutional Court of South Africa will issue an immediate declaration (Leckey, “Remedial”, at p. 20)). The framers of our Constitution could easily have suggested such a power by including the words “will be . . . of no force or effect” (and indeed, this is how this Court has been reading s. 52(1) in the wake of *Schachter*). Instead, the Constitution limits the role of courts to declaring a law “is of no force or effect”. Therefore, when exercising such a *judicially created* power to suspend a declaration of invalidity, this Court must be judicious, measured and principled. We stress “judicially created” for a reason, which also goes to the need for restraint: while our Constitution does not expressly permit *courts* to suspend a declaration of invalidity, it *does* provide a means for *Parliament and legislatures* to do so in certain cases under s. 33(1). In other words, by keeping on life support a law that has been struck down for unconstitutionality, a court is effectively stepping into a role assigned by the Constitution *to the legislative branch* and, indeed, *is legislating*. As Bird persuasively explains:

¹³ See also: *Scotland Act, 1998* (U.K.), 1998, c. 46, at ss. 102(2)-102(3).

[W]here the Constitution assigns a specific power to a branch of government, th[e] principle of exclusivity applies. It is intuitive to say that a function expressly assigned to one branch of government by the Constitution must not be performed by another branch. . . .

This, I submit, is the case with suspended declarations of invalidity In the Canadian Constitution, the only branch of government that is expressly permitted to give life to an unconstitutional law is the legislature by way of the “notwithstanding clause”. [pp. 43-44]

[240] Indeed, s. 33(1) suggests that, in cases to which it applies, *legislatures*, and *not courts*, are best positioned to know when a suspended declaration is desirable and if so, for how long (see D. Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities” in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at pp. 230-31). This, in fact, is a primary purpose of s. 33(1): to allow a legislature to consider the impact of a court’s decision on considerations “in respect of which only the legislature has institutional capacity” (Newman, at p. 218 (see also p. 224); see also Hon. A. E. Blakeney, “The Notwithstanding Clause, the *Charter*, and Canada’s Patriated Constitution: What I Thought We Were Doing” (2010), 19 *Constitutional Forum* 1, at p. 5; J. D. Whyte, “Sometimes Constitutions are Made in the Streets: The Future of the *Charter*’s Notwithstanding Clause” (2007), 16 *Constitutional Forum* 79, at p. 83; P. H. Russell, “Standing Up for Notwithstanding” (1991), 29 *Alta. L. Rev.* 293, at pp. 308-9; P. C. Weiler, “Rights and Judges in a Democracy: A New Canadian Version” (1984), 18 *U. Mich. J. L. Reform* 51, at p. 86).

[241] At bottom, s. 33(1) is a “factor that should serve to constrain the use of the suspended declaration” (E. Macfarlane, “Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*” (2017), 49 *Ottawa L. Rev.* 107, at p. 120). Our colleague says in response that a “court cannot shirk its responsibility to remedy constitutional violations simply because [of] s. 33” (para. 137). With respect, this misses our point. We agree that a court must remedy constitutional violations. Our point is that s. 33(1) militates against *her* position that courts have broad discretion to *delay* remedying such violations. Instead, “[c]ourts should respect the entire constitutional structure, including the possibility of using the override when exercising remedial discretion” (Roach, *Constitutional Remedies*, at §14.1450 (emphasis added)). All this fortifies our view that, so as not to engorge or strain the judicial function, court-ordered suspended declarations ought to be confined to addressing threats to the rule of law.

(2) Rule of Law

[242] Given that s. 52(1) does not expressly allow for suspended declarations, a court’s authority to suspend must be found elsewhere in the Constitution. In particular, suspended declarations should be grounded not in appeals to abstruse “broader constitutional considerations” or to a heretofore undiscovered ancillary power to a court’s “inherent jurisdiction” to declare legislation invalid (Karakatsanis J.’s reasons, at paras. 121 and 85), but in the constitutional principle of the rule of law. The rule of law has long been considered “a fundamental postulate of our constitutional structure”

(per Rand J., *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). This is evidenced by its invocation in the single-sentence preamble to the *Charter*: “Canada is *founded upon* principles that recognize . . . the rule of law”. The rule of law is proclaimed by our written constitution to be the “very foundation” on which our country, and its *Charter*, rest (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 229). It occupies hallowed ground as the “root of our system of government” and a “vital . . . assumptio[n]” on which our Constitution is based (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at paras. 70 and 49).

[243] The centrality of the rule of law to our constitutional order is what led to the creation of suspended declarations in *Manitoba Reference* in the first place. Rights under the *Charter* may be temporarily judicially displaced only where necessary “to preserve the rule of law” (p. 763) and to ensure its “continuity” (p. 753). By relying on the protection of the rule of law as the justification for suspended declarations, courts are able to “recognize [both] the unconstitutionality of [the impugned] laws and the Legislature’s duty to comply with the ‘supreme law’ of this country” while upholding the Constitution (*Manitoba Reference*, at p. 753; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169). Indeed, just as much as it is the Court’s role to safeguard the rights guaranteed in the *Charter* (*Hunter v. Southam*, at p. 169), it is also the Court’s responsibility to ensure that the rule of law is not “transgress[ed]” (*Manitoba Reference*, at p. 753). Where an immediate declaration would transgress the rule of law, the Court would be “abdicat[ing]” its role as “protector and preserver of the Constitution” (p. 753) to allow such a state of affairs to arise. In such instances, then,

the Court is not fulfilling an impermissible legislative role as it otherwise would be by granting a suspended declaration, but an assuredly *judicial* role. This is not a novel interpretation, but simply the circumspect guidance that the Court in *Manitoba Reference* offered when recognizing this extraordinary judicial remedy.

[244] There is no basis in our Constitution for this Court to have departed from this guidance. Our colleague can point to no other part of our written Constitution that could ground a court-ordered temporary suspension of *Charter* rights, and fails to identify a single case that shows why limiting suspended declarations to threats to the rule of law is unworkable, relative to the medley of “underlying”, “competing”, “general”, “countervailing” constitutional or remedial “principles” and “touchstones” to which she points (paras. 89, 92, 102, 126, 131-132 and 153). In this regard, we find the extra-judicial commentary of Justice Scalia apt:

[W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where “law,” properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

I stand with Aristotle, then — which is a pretty good place to stand — in the view that “personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.” [Emphasis added; footnote omitted.]

(A. Scalia, “The Rule of Law as a Law of Rules” (1989), 56 *U. Chicago L. Rev.* 1175, at p. 1182)

Our Constitution makes an exact pronouncement on the matter of suspended declarations: they are exceptional. Immediate declarations must be the norm, absent a rule of law concern. There is no need to go further.

[245] It is worthwhile to describe a few instances where an impending threat to the rule of law warrants a suspended declaration. The prototypical instance of a threat to the rule of law is an existential one, as in *Manitoba Reference*. There, as noted above, the Court was concerned with “a legal vacuum” and that the “constitutional guarantee of rule of law [could] not tolerate such chaos and anarchy” (pp. 747, 753 and 758).

[246] There is, however, a second form of threat to the rule of law that may give rise to a suspended declaration of invalidity: a threat to public safety. As explained in *Manitoba Reference*, a tenet of the rule of law is that a state’s people should not “be allowed to perish for the sake of the constitution; on the contrary, a constitution should exist for the preservation of the State and the welfare of the people” (p. 766, citing *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195, at p. 237 (emphasis deleted)). In other words, the rule of law requires that this Court ensure an “order of positive laws which preserves and embodies the more general principle of normative order” (p. 749). Normative order is lost where public safety is put at risk. Indeed, “[l]aw and order are indispensable elements of civilized life” (p. 749) and the rule of law has long implied “the existence of public order”

(W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43, cited in *Manitoba Reference*, at p. 749). The rule of law “vouchsafes to the citizens and residents of the country a stable, predictable and ordered society” (*Secession Reference*, at para. 70). Maintaining public safety, in this sense at least, is therefore an instance of preserving the rule of law.

[247] Our colleague, following *Schachter*, lists “underinclusive” benefits or legislation as one of her *non-exhaustive* categories qualifying for suspension (paras. 118 and 124). She pronounces, without citing any authority in support, that the categories “reflect constitutionally grounded considerations”, which are said (again, without citing to any authority) to include “recognizing the public’s interest in legislation passed for its benefit” (para. 124). There is, in our respectful view, no legal rule, and certainly no constitutional principle or the even more amorphous “constitutionally grounded considerations”, to support under-inclusiveness as a category qualifying for suspension.

[248] With great respect, the creation of this category in *Schachter* was ill-conceived, inconsistent as it is with the strictures of *Manitoba Reference*. Further, even on its own terms, it cannot stand. According to *Schachter*, the impetus for recognizing under-inclusive benefits as a category that justifies suspending a declaration is the concern that “striking down the law immediately would deprive deserving persons of benefits” (p. 715; see also pp. 716 and 721). However, to the extent that a law is under-inclusive, the appropriate response is not to strike down the

benefits for all because, in these rare situations, the “extent of the inconsistency” under s. 52(1) refers to the legislation’s *omission*, or failure to provide benefits to a certain group. The other aspects of the legislation will not have been declared unconstitutional and, as our colleague quite rightly observes, “[t]he public has an interest in preserving legislation duly enacted . . . to the extent it is not unconstitutional” (para. 156). Explained in another way, striking down benefits is only warranted where the benefits are *prohibited*, not where they are *under-inclusive*. *Schachter*’s apprehension of depriving benefits from deserving persons (which grounded the justification for suspension) then withers away. The more appropriate response in such cases is not suspension, but resort to the other tools in a court’s remedial toolbox, such as severance or reading in. Critically, a court can simply issue a declaration stating that the legislation is unconstitutional to the extent it does not extend benefits to a particular group and requiring that — after the government determines the best method for extending those benefits — the benefits be provided retroactively (e.g. *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at pp. 46-47). Clearly then, under-inclusive benefits can be remedied without “depriv[ing] deserving persons of benefits”, and there is therefore no corresponding need to suspend a declaration to avoid this state of affairs.

[249] But our colleague goes further, identifying *yet another* category, beyond those listed in *Schachter*, that could justify a suspended declaration. A suspension should also be granted, we are told, when “an immediately effective declaration would have a limiting effect on the legislature’s ability to set policy” (Karakatsanis J.’s

reasons, at para. 130 (emphasis added)). This category requires refinement. A mere “limiting effect” on policy-making, whatever that means, is surely insufficient to warrant the continued infringement of *Charter* rights. We say a suspended declaration is warranted only where it can be demonstrated that the immediate vesting of rights — and the concomitant gathering of reliance and expectation interests around the new legal regime, or the development of substantial administrative structures (Ryder, at pp. 281 and 285) — would preclude the government from creating or maintaining “an actual order of positive laws” to govern society (*Manitoba Reference*, at p. 749; see also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), at pp. 88-89). These cases will be extremely rare because, as we will explain below, the legislature is well equipped to respond promptly to immediate declarations of invalidity and to avoid the accrual of vested interests (for example, by invoking s. 33(1) where applicable or by enacting new or amended legislation).

[250] Without a tether to the rule of law, our colleague’s novel category, paired with her call to “respect . . . the role of the legislature” (para. 157), will, over time, allow the flawed rationale of deference to the convenience of the legislature — one of the central causes, if not *the* cause, of the unprincipled expansion of suspended declarations — to resurface. Indeed, her new category is practically indistinguishable from that rationale. If the history of suspended declarations that we have recounted is any indicator of future trends, governments and courts will frequently dodge the constitutional mandate of s. 52(1) by claiming that an immediate declaration has an ostensible “limiting effect” on (para. 130), or would “significantly impair” (paras. 129

and 139) or “undermine” (para. 157), the legislature’s ability to enact its “preferred” (para. 176) scheme (e.g. *Guignard*, at paras. 23 and 29-31, and *Ryder*, at pp. 271, 272, 286 and 288).

[251] While we appreciate our colleague’s efforts to strive to bring greater consistency and transparency to remedial decision making, we see her enunciation of various “core” or “fundamental” “touchstones” and “principles” as promoting uncertainty and unpredictability instead. Worse, their dubious status only exacerbates the obscurity. It is unclear whether these principles are constitutional, non-constitutional, or constitutive of a new hybrid category. Overall, it is difficult to know how to reconcile our colleague’s statement that “suspensions of declarations of invalidity should be rare” (para. 83) with the imprecision of her expanded principles and categories that justify their usage. There is, quite simply, no need to broaden the “narrow circumstances” in which a suspended declaration can issue (*contra* Karakatsanis J.’s reasons, at para. 132). Indeed, and as we explain below, there is good reason for *not* doing so, since it only risks unduly compromising the enforcement of rights.

[252] In sum, as we see the matter, a suspended declaration of invalidity may be constitutionally issued by a court only to counter a threat to the constitutional principle of the rule of law, which includes threats to public safety. And indeed, a suspended declaration *must* issue in such circumstances, because “[f]or the Court to allow such a

situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution” (*Manitoba Reference*, at p. 753).

C. *Lessons Learned Post-Schachter*

[253] Before applying the foregoing to the facts of this case, we add the following considerations that warrant a return to first principles — that is, that warrant reinstating the rule of law as the sole justification for suspended declarations of invalidity. These considerations are, in effect, lessons that follow from *Schachter*’s jurisprudential progeny that show why it is essential to confine judicial discretion.

[254] First, restraint is imperative because suspending a declaration will often pull a court beyond its institutional competence and capacity. On several occasions where this Court has suspended a declaration of invalidity, the legislature has chosen *not* to enact new legislation (Choudhry and Roach, Table B, at pp. 257-66). Or, as in *Corbiere v. Canada (Attorney General)*, 2015 SCC 15, [2015] 1 S.C.R. 331, “the new electoral regime instantiated by the government was virtually identical to what would have resulted from the immediate invalidation of the impugned law” (Hoole, at p. 125; see also pp. 124 and 126). Such a deeply regrettable state of affairs should lead us to reflect, even if only briefly, on its significance: this Court, mistakenly believing it had the institutional competence to properly assess whether a suspended declaration was necessary, allowed injury to the *Charter* rights of Canadians to persist unnecessarily. The dangers of judicial activism — indeed, of judicial legislation — are on full display.

[255] Conversely, when an immediate declaration of invalidity is issued, “one may not speak of judicial activism Rather, even though the declaration is channeled through the court, it is in truth issued by [s. 52(1) of] the original constitution” (G. C. N. Webber, “Originalism’s Constitution”, in G. Huscroft and B. W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (2011), 147, at pp. 166-67; see also *Ferguson*, at para. 35, and *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28). The responsibility for responding to the declaration of invalidity then, as our Constitution intended, falls to the legislature — the branch with the competence and toolbox necessary to craft an appropriate response. Not only do legislatures have the ability in certain cases to respond to an immediate declaration of invalidity by using s. 33(1) (as discussed above), but they may also enact amended legislation before or upon release of the Court’s decision (Hoole, at pp. 120-21 and 134; e.g. *Schachter*, at pp. 690 and 724-25; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 92). As Stavsky explains:

A legislature is a functioning entity, fully capable of responding to any set of circumstances. The contention that legislatures act too slowly in emergency situations is erroneous. . . . There are no inherent barriers in the legislative system that prevent expedient action when it is necessary. [p. 345]

In the end, it must not be forgotten that before *Schachter*, immediate declarations of invalidity were the established practice, and some of the Court’s most striking decisions were rendered in this fashion without any adverse consequences (e.g. *Big M Drug Mart*;

R. v. Morgentaler, [1988] 1 S.C.R. 30; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *R. v. Oakes*, [1986] 1 S.C.R. 103). We are unaware of any reports that Parliament or the legislature had difficulty responding to immediate declarations of invalidity then, and it would be pure conjecture on this Court's part to wonder if they will now.

[256] Secondly, a return to a norm of immediate declarations would have the effect of avoiding this Court's particularly arbitrary and uninformed exercise of determining the length of a suspension. In *Manitoba Reference*, the Court recognized its limits in this regard: "As presently equipped, the Court is incapable of determining the period of time during which" a suspended declaration should govern (p. 769). Nothing we have seen in the intervening 35 years persuades us that this has fundamentally changed.

[257] A court's institutional incapacity to estimate the amount of time required is only heightened "if there is no majority in government, if party discipline is weakened or if the unelected upper house of Canada's federal Parliament exercises its powers" (K. Roach, "The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies" (2018), 5 *J. Int'l Comp. L.* 315, at p. 335). It is no surprise then that, as in the case at bar (see Karakatsanis J.'s reasons, at para. 179), this Court often "appears unwilling to articulate why [its] long period[s] of suspension [are] appropriate," (A. van Kralingen, "The Dialogic Saga of Same-Sex Marriage: *EGALE*, *Halpern*, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights"

(2004), 62 *U.T. Fac. L. Rev.* 149, at p. 176; e.g. *Corbiere*, at para. 27) and simply resorts to its standard durations of six months, a year, or 18 months with little guidance or consistency (Hoole, at p. 122).

[258] There is, consequently, a strong chance courts will overshoot the mark and allot the legislature more time than it requires. That was the case in *Corbiere*, where the 18-month suspension acted “as a sedative, not a stimulant”, excusing the legislature from acting forthwith (C. Mouland, “Remedying the Remedy: *Bedford’s* Suspended Declaration of Invalidity” (2018), 41 *Man. L.J.* 281, at p. 331; see also Macfarlane, at p. 118). In the end, the legislature waited until the *seventh* month before even *beginning* to respond (Mouland, at p. 331). To allow for an unconstitutional state of affairs, and the maintenance of its “harmful . . . effects [including] exacerbating existing disadvantage and marginalization” (R. Leckey, *Bills of Rights in the Common Law* (2015) (“Leckey, *Bills*”), at pp. 173-74) to persist for a day longer than necessary is offensive to our constitutional order. Thus, we strongly reject any notion that affording the legislature “time” is on its own a sufficient justification for extending the harms associated with the law in the first place. This brings us to our third point.

[259] It also behooves us to consider the harms inflicted on *Charter* claimants and other affected rights holders by this Court’s liberal and unprincipled use of suspended declarations. In allowing an unconstitutional law to remain in force, a court not only withholds the immediate relief to a successful claimant to which he or she is expressly entitled under s. 52(1) of our Constitution, but also sustains the law’s capacity

to produce harm. In the process, the significance of the right at issue is diluted. For this reason, the improper use of suspended declarations pose “a threat to the very idea of constitutional supremacy” (Choudhry and Roach, at p. 230) precisely because they “impose substantial costs on litigants” (Leckey, *Bills*, at p. 170) who must bear the brunt of the unenforced norm (see R. Leckey, *Suspended Declarations of Invalidity and the Rule of Law*, March 12, 2014 (online); Burningham, at p. 206; and Macfarlane, at p. 120).

[260] Similarly, suspended declarations can exacerbate pre-existing disadvantage. Dean Leckey highlights how “the delayed declaration risk[s] leveraging factual differences among members [of a litigant’s class] into arbitrary and unjust legal effects” (R. Leckey, “The harms of remedial discretion” (2016), 14 *I CON* 584, at p. 592). Mouland echoes this when she writes of “horizontal inequity” (p. 338) as a harm incurred by suspended declarations. For instance, in the context of an unconstitutional criminal law, “individuals arrested and charged under the unconstitutional provisions late in the [suspended declaration period] would be much less likely to receive a conviction before that period elapsed than those arrested and charged earlier” (Leckey, at p. 592). The arbitrariness of this result is not only temporally based however, as an individual’s access to resources and socioeconomic position are also determinative: “Individuals with decent legal advice . . . know not to plead guilty under the law, but to keep their file open until the suspension lapse[s],” whereas those without such advice, typically the marginalized and vulnerable, may not (p. 592). Further, prosecutorial discretion in charging may be informed by whether the

Crown in a particular jurisdiction has knowledge of the government's intention (or lack thereof) to replace the legislation (and if so, with what), resulting in further arbitrary distinctions among those in the claimant's class (p. 595). Ultimately, "incarcerating individuals convicted under an interdiction known to violate rights" engenders marginalization and "intensifies concerns for the rule of law and for justice generally" (p. 593; see also p. 595).

[261] In addition to its potential to extend harm, the routine use of suspended declarations risks discouraging rights holders from bringing *Charter* claims forward in the first place. Commentators have suggested that suspended declarations "contribute to a chilling effect on constitutional litigation in Canada. . . . [T]here is a legitimate risk that suspended declarations add to the already steep disincentives against individuals initiating constitutional challenges" (Hoole, at p. 131; see also Ryder, at p. 287). We see a case in point in our colleague's "balancing the harms" (para. 131) approach, which adds one more step at which claimants must assert their rights against other factors. It cannot be anything but discouraging for potential *Charter* claimants to know that, under our colleague's test, even where the government fails to justify the infringement of their *Charter* rights under s. 1, they must be ready to parry any "identifiable public interest" (para. 83; see also paras. 117, 139 and 171) that the government can muster to justify allowing that infringement to persist.

[262] In contemplating a test for suspended declarations then, we must recognize that the balancing at the s. 1 stage has already been resolved in *favour* of the protection

of the *Charter* right. For a court to then alter this balance *against* the protection of that right strikes us as a monumental and unfortunate step. This is especially so where a court has already concluded that there is no rational connection between a law's *Charter* infringement and its objective (*contra Figueroa*, at paras. 86 and 92-93): if an impugned law is not rationally serving the interests it purports to in the first place, we fail to see why the law should remain temporarily in effect. Again, we would return to first principles. Courts should legitimize a deviation from the initial balance struck only where the weighty interest in originally protecting the right is outweighed by a threat to the rule of law.

[263] A final point of concern. Suspended declarations, if used improperly (as we see this Court having used them), can actually undermine the rule of law they were designed to preserve in at least two ways. First, suspended declarations can lead to uncertainty in the law. For example, this Court's suspended declaration in *Bedford* caused such significant uncertainty that "police and prosecution units across the country took different approaches to laying charges under the provisions maintained temporarily in effect, generating [extensive] litigation" and concern about unjust imprisonment (Leckey, *Bills*, at p. 176; see also Hoole, at pp. 125-26). Secondly, suspended declarations can "lessen the consequences for lawmakers of enacting laws that violate the [*Charter*, which] in turn, reduces the incentives for complying with rights when making [the] law" (Leckey, *Bills*, at p. 177; see also *Schachter*, at p. 728, per La Forest J.: "It is the duty of the courts to see that . . . laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on

legislative bodies to stay within the confines of their constitutional powers from the outset.”). Professor Ryder explains:

One result of routinely suspending declarations of invalidity when legislation unjustifiably infringes Charter rights and freedoms is that the costs to lawmakers of risking Charter violations may no longer be apparent. . . . Lawmakers might be getting the message that they take no significant risks if they pass laws without serious regard for Charter rights and freedoms. . . . The consequences of drafting laws that may violate the Charter, from a government’s point of view, may be nothing worse than litigation and a second chance at drafting Charter-compliant legislation a few years down the road. [p. 288]

In other words, suspended declarations have actually become an invitation for governments to be bolder with their legislation, because the potentially negative consequences of doing so have been so largely contained, or are uncertain to occur. A remedy initially designed to *serve* the rule of law, in the absence of being grounded in the Constitution, now risks *causing*, even *promoting*, its violation (Ryder, at p. 288). We would therefore return to the familiar rule of law path that was set in *Manitoba Reference*, and that is entirely within the province of the judiciary. And we would leave the concerns for policy-making constraints to those orders of the state (legislative and executive) that know of such matters.

D. *Conclusion*

[264] This Court’s use of suspended declarations as an instrument of remedial delegation to the legislature is not only “at odds with the precepts of Canada’s constitutional model . . . [but] has [also] produced a problem of analytic incoherency,

exacerbated flawed institutional assumptions that impose undue costs on *Charter* claimants, and caused unnecessary injury to *Charter* rights” (Hoole, at p. 147). Beyond upholding the constitutional principle of the rule of law, we see no defensible justification — at least no judicially cognizable justification — for a court to suspend the enforcement of constitutional rights. If the Court’s concern with using immediate declarations is deferential restraint, we say that *true* deference lies in conforming to the Constitution, and not in “engag[ing] in a discretionary exercise each time” (Leckey, *Bills*, at p. 178; see also p. 177).

[265] It is tempting, and indeed it is venerable judicial methodology to scrutinize decided cases to discern principles that allow us to reconcile those cases with each other, and to identify a path forward in deciding a present case. But it must be borne in mind what is at stake. Fundamentally, “[i]t is the duty of the courts to uphold the Constitution, not to seal its suspension” (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 463-64). Unless, therefore, an immediate declaration of invalidity would transgress the rule of law — the very “foundation of [our] [C]onstitution” (*Manitoba Reference*, at p. 766) — the *Charter* must not be abrogated. We return again to Professor Ryder, who makes the point compellingly:

... suspended declarations ... appea[r] to conflict with [s. 52(1)] and section 1 of the Charter. These sections place on governments the responsibility for demonstrating that limits on rights and freedoms are justified, and they place on the judiciary the responsibility for declaring invalid laws that have not been so justified. ... Judges partially abdicate their constitutional obligations if they grant to legislatures the responsibility for initially bringing invalid legislation into compliance with constitutional norms whenever a range of Charter-compliant options exists.

Remedial dialogue should follow *after* the judiciary has exercised its section 52 responsibilities; it should not provide a reason for temporarily abdicating those responsibilities in the first place. [Emphasis in original; p. 282.]

[266] With great respect to our colleague who strives to find meaningful principles in what is a haphazard body of case law, it is time to restore discipline and restraint to this Court’s approach to suspended declarations, and re-impose narrow conditions that give practical effect to its statements that the suspended declaration is a “high standard” to meet and an “extraordinary step” (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13, at para. 2). As we see it, this can only be done by turning back the clock to *Manitoba Reference* and reverting to its sound guidance that suspended declarations ought to be unusual and exigent, reserved exclusively for those cases where the rule of law is imperilled. The solution is *not* to rely on “principles” in decided cases that simply are not there to be seen. As was said by Lord Shaw of Dunfermline more than a century ago, “[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand” (*Scott v. Scott*, [1913] A.C. 417 (H.L.), at p. 477). When it comes to protecting *Charter* rights from undue suspension, it must be the law, our Constitution — not pure discretion (which our colleague only nominally rejects) — that is in command. Accordingly, this Court should not shy away from using immediate declarations of invalidity in the future. In most cases, immediate declarations are necessary to enforce protected rights, uphold constitutionalism, and vindicate the rule of law. We now turn to applying this approach to the case at bar.

E. *Application*

[267] In our view, granting an immediate declaration of invalidity in this case would threaten public safety and, therefore, the rule of law. We find the concerns in this case to be of the nature and magnitude of those that warranted suspended declarations in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1021 (holding that the detention of *all* persons found not guilty by reason of (what was then called) “insanity” was arbitrary because some will not be dangerous at the time of sentencing) and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56-57 (holding that absolute discharges must be *available* to permanently unfit accused who do not pose a significant threat to public safety). In *Swain*, the Court considered that an immediate declaration would mean that “judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public” (p. 1021). Because of potentially “serious consequences” (p. 1021) to public safety, the Court issued a six-month suspended declaration of invalidity (p. 1022). Likewise, in *Demers*, the Court found that “striking down the legislation could create a danger to public safety” (para. 57) as it would, by necessary implication of its holding, have given absolute discharges to some unfit accused who *did* pose a threat to society.

[268] Similarly, in this case, an immediate declaration would mean that the *Christopher’s Law* registry would not apply to all persons found NCRMD who have been granted absolute discharges by the Ontario Review Board. While we are confident *Christopher’s Law* captures persons who do not pose a significant risk of reoffending,

we are equally confident that it also captures many who do. The application judge accepted Dr. Hanson's evidence that, in general, persons found NCRMD pose an elevated risk of committing another sexual offence as compared to the general population, and further, that those who receive an absolute discharge have an increased probability of offending (2017 ONSC 6713, 401 C.R.R. (2d) 297, at paras. 102, 103, 112 and 165). An absolute discharge cannot be equated with an absence of a risk of recidivism (*Ferguson v. Regional Mental Health Care St. Thomas*, 2010 ONCA 810, 271 O.A.C. 104, at paras. 1, 3 and 41-45; *Kassa (Re)*, 2019 ONCA 313, at paras. 33-35 (CanLII)). Indeed, in some cases, the review board might not have granted an absolute discharge had they known the person found NCRMD was not going to be subject to *Christopher's Law*.

[269] Most importantly, it must be remembered that the "recidivism risk" we are referring to in this case is the risk of committing sexual offences, "violent crimes that . . . cause profound harm" to our most vulnerable (*R. v. Friesen*, 2020 SCC 9, at para. 5). Removing all absolutely discharged persons found NCRMD from the *Christopher's Law* registry would significantly hamper the prevention and investigation of these offences. Given that an immediate declaration of invalidity would remove persons found NCRMD who *are* potentially dangerous from the registry, it would, like in *Swain* and *Demers*, create a lacuna in the regime that would undoubtedly pose a danger to the public and thus threaten the rule of law.

[270] In addition to public safety, our colleague adds what she considers an additional justification to suspend the declaration of invalidity: she would suspend the declaration on the basis of “preserving the legislature’s latitude to respond to the finding of unconstitutionality” (para. 178). With respect, there is no reason to suppose that difficulty in getting persons found NCRMD back on the registry (see para. 176) would reduce the number of ways in which the legislature could provide an opportunity for exemption, or otherwise undermine the effectiveness of that policy choice (para. 130). The legislature could simply enact amended legislation that, like the current version of *Christopher’s Law*, requires everyone who falls under its jurisdiction to report forthwith, subject to penalty (ss. 3(1) and 11(1)).

[271] In any event, and for the reasons we have already given, the practical difficulties that a government may face in rolling out constitutionally compliant legislation cannot justify suspending *Charter* rights. Indeed, to us this indicates how dangerously close our colleague’s new category comes to the impermissible rationale of legislative deference from which this Court should disassociate itself. Rather than depending on vague notions of “the public’s interest in legislation enacted for its benefit” and “the role of the legislature” (para. 166), we would instead ground a suspended declaration of invalidity here solely on the threat to the rule of law that would otherwise manifest in the form of a threat to public safety.

[272] Nor do we see any need for our colleague to invoke “the significance of the rights violation that the suspension would temporarily prolong” in this case

(para. 177). Were our colleague's new approach to suspended declarations grounded in the constitutional principle of the rule of law, such commentary would not be necessary. Indeed, it appears to be necessitated only by what we see as our colleague's unsound "balancing" approach, since showing that it works in practice requires her to identify some concern to place on the respondent's side of the scale to weigh against suspending the declaration (para. 177).

IV. Individual Exemptions

[273] If a suspended declaration of invalidity should be rare, then an individual exemption from that suspension must be exceedingly so. Indeed, this Court's jurisprudence dictates that, in order to respect the role of the legislature, the limits of a court's institutional capacity, and the potential for horizontal unfairness, an individual exemption is only appropriate in *highly* "unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy" (*Ferguson*, at para. 63 (emphasis added); see also *Schachter*, at p. 720; *Demers*, at paras. 62-63). We see no reason to depart from this.

[274] A helpful consideration in determining whether an individual exemption is necessary to provide an "effective" remedy is to ask the question the interveners, the David Asper Centre for Constitutional Rights, and the Attorney General of Canada, posit: whether an exemption is necessary to prevent "irreparable harm" to the interests the *Charter* was designed to protect during the suspension (Asper Centre factum, at para. 2; A.G.C. factum, at para. 55; Roach, *Constitutional Remedies*, at §§14.60,

14.910, 14.930 and 14.1790). The case for irreparable harm must be so significant that it overcomes the weighty need to leave the manner of addressing a constitutional infringement to the legislature. For example, an exemption may be warranted where the litigant needs urgent medical treatment or to ensure the claimant is released from custody. In our view, the test from *Ferguson* gives flexible interpretation to the words “appropriate and just” in s. 24(1) and allows courts to adhere to their role as defender of fundamental rights by minimizing any injustice caused by the suspension while also — by limiting exemptions to exceptional cases — allowing the legislature to discharge its singular role in formulating complex and multi-faceted legislation.

[275] Considered here, this is not one of those rare cases where an individual exemption is warranted. There is, to speak plainly, nothing highly unusual about this case: a delayed remedy will not deprive Mr. G of an effective one, nor preclude him from accessing the government’s new opportunity for exemption in whatever form that may take. Further, a suspended declaration of 12 months means that Mr. G will, at most, have to report to the police station one more time (for approximately 30-60 minutes (Sup. Ct. reasons, at para. 58)) as part of his obligation to report annually (see *Christopher’s Law*, at ss. 3(1)(f)-(g)). This is a far cry from “irreparable harm”. We are, therefore, in respectful disagreement with our colleague’s decision to grant Mr. G an individual exemption.

[276] What is particularly troubling, however, is that our colleague’s reasons appear to establish a *presumption in favour* of individual exemptions in all cases (“if

an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to” (para. 152)). We therefore proceed to offer two important reasons why an individual exemption is inappropriate in this case, and in turn, why setting such a presumption and departing from the collective wisdom of *Schachter*, *Demers*, and *Ferguson*, is imprudent.

[277] First, in this case, as in most, crafting an individual exemption will exceed the competence of a court and encroach on what is at bottom an issue for resolution by the legislature. This Court has long made clear that filling gaps in unconstitutional legislation is a task for the legislature, not the judiciary: *Hunter v. Southam*, at p. 169; see also *Schachter*, at pp. 705 and 707.

[278] In the case at bar, the legislature is in a far better position than this Court — indeed it is its role — to determine, through research and study, what the appropriate mechanism is to provide persons found NCRMD with the opportunity for exemption, who has the necessary expertise to grant those exemptions, and which factors ought to inform that inquiry. Indeed, there are a plethora of options for the legislature to choose from. Our colleague even acknowledges as much:

... reading in an individualized assessment requirement would intrude on the legislative sphere — there are many ways to provide for such an assessment and “it is the legislature’s role to fill in the gaps, not the court’s” (*Schachter*, at p. 705). [Emphasis added; para. 165.]

(See also para. 183.)

[279] The Court of Appeal similarly notes that, because the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (“*SOIRA*”), has been invalidated in Ontario, the Ontario legislature and Parliament will have to consult one another as to the best way to provide exemptions for those unconstitutionally affected:

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.

(2019 ONCA 264, 145 O.R. (3d) 161, at para. 150)

[280] However, while acknowledging “reading in an individualized assessment requirement would intrude on the legislative sphere” (para. 165), our colleague effectively does just that by granting an individual exemption to Mr. G. Our reading-in jurisprudence teaches us that “if it is not clear that Parliament would have passed the scheme with the modifications being considered by the court” (in this case, allowing *courts* to determine who should and should not be on the *Christopher’s Law* registry), “then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere” (*Ferguson*, at para. 51 (see also para. 50); see also *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 74-75). Put differently, in attempting to provide an effective remedy, courts must not “leap into the kind of decisions and functions for which [their] design and expertise are manifestly unsuited” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62,

[2003] 3 S.C.R. 3, at para. 57). This concern, and the related need to avoid dictating the content of new legislation, should govern our decisions on whether to issue an individual exemption (Roach, *Constitutional Remedies*, at §14.901).

[281] The legislature may, for example, conclude that only the Ontario Review Board has the requisite expertise to determine whether a person who has been absolutely discharged should be subject to *Christopher's Law*, and that courts are institutionally ill-suited to make any legitimate assessment of persons found NCRMD. Indeed, as J. Barrett and R. Shandler observe, “courts simply lack the medical expertise and institutional knowledge necessary” to assess the dangerousness of a person found NCRMD (*Mental Disorder in Canadian Criminal Law* (loose-leaf), at §11.1(a)(i)(B), citing *R. v. Peckham* (1994), 93 C.C.C. (3d) 443 (Ont. C.A.), at para. 39; see also *Ferguson* (ONCA), at para. 11). This is particularly true in the case of sexual offences, given that, according to the evidence of the appellant’s expert, Dr. Hanson, it often takes considerable time for sexual recidivism to manifest. Dr. Hanson, whose evidence was accepted by the application judge, testified that while most non-sexual recidivists will be identified within five years, new sexual recidivists are identified even after long periods, with studies showing that recidivism rates increase significantly after 10 years of being offence-free. This aligns with our collective knowledge that sexual offences, for various reasons, “can all too often be invisible to society” and remain undiscovered for years (*Friesen*, at para. 67).

[282] In light of these considerations, it seems to us profoundly ill-advised for this Court to short-circuit the legislative process and gift unto itself the ability to grant exemptions from the registry, even for Mr. G and even temporarily.

[283] To be clear, we do not say that Mr. G is likely to reoffend. Our point is simply that what Mr. G has shown is that persons found NCRMD who have been granted absolute discharges are entitled to “opportunities for exemption and removal” (Karakatsanis J.’s reasons, at para. 161), and that this Court cannot assume for itself the mantle of deciding what form these opportunities should take. In other words, the “benefit of [Mr. G’s] success” (*ibid.*, at para. 182) is that, like those who are found guilty of a sexual offence, he is entitled to the *opportunity* for exemption and removal from the registry, not that he must *necessarily* be removed.

[284] We are, further, in respectful disagreement with our colleague’s rationale that judges “are well-suited to deciding and frequently charged with making determinations” such as the one she has made for Mr. G (para. 181). Our colleague points specifically to termination and exemption orders in respect of a person subject to *SOIRA* under ss. 490.016(1) and 490.023(2) of the *Code* (para. 181). Without deciding the issue, we note that appellate courts have concluded that the “very high” standard (*R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206, at para. 43) to be met by an applicant seeking a termination or exemption order pursuant to these sections *does not* focus on risk. Instead, it focuses on those rare cases where the applicant’s unique circumstances make the impact of registration on their liberty and privacy interests

particularly severe and something more than “the normal inconvenience [someone] would incur in complying with the requirements of registration” (*R. v. R.L.*, 2007 ONCA 347, at para. 7 (CanLII); see also paras. 2-6 and 8; see also *R. v. Debidin* (2008), 94 O.R. (3d) 421, at paras. 32, 68, 70 and 80; *Redhead*, at paras. 3, 21, 31 and 37-43). The Court of Appeal for Ontario, for example, has concluded that “[i]t is error to enhance the impact on an offender or to dilute the public interest in registration on the basis of a diminished risk of recidivism. Indeed, it may be open to question whether accurate forecasts of the unlikelihood of recidivism can even be made [by courts]” (*Debidin*, at para. 70). Moreover, we find our colleague’s reference to judicial discretion under *SOIRA* particularly curious, given that Parliament has amended s. 490.012(4) of the *Code*, thereby eliminating the possibility for a sentencing judge to refuse to issue an order to comply with the registry (see *Protecting Victims from Sex Offenders Act*, S.C. 2010, c. 17, at s. 5).

[285] The other two examples our colleague offers, discharges under s. 730 and record suspensions *issued by the Parole Board of Canada* (not courts) under s. 4.1(1) of the *Criminal Records Act*, R.S.C. 1985, c. C-47, do not — as she amply recognizes throughout her reasons — apply to or address the unique circumstances of persons found NCRMD. In any event, these are all modes of assessment that Parliament, not courts, has deemed appropriate.

[286] In conclusion, and with respect, there are unresolved contradictions in our colleague’s reasoning. She accepts that this Court does not have the institutional

competence to craft a new regime that would determine who should be on the registry and who should not, evidenced by her decision to issue a declaration of invalidity and not some other remedy. Yet, this decision is ultimately “at cross-purposes” (*Hislop*, at para. 92) with her conclusion that this Court, and thereby other courts, has the institutional competence to assess for itself the level of risk posed by persons found NCRMD and to issue corresponding exemptions.

[287] We add a second reason for not granting an individual exemption here, and generally against establishing a presumption in favour of doing so. Granting an individual exemption in this case, as in most cases, raises concerns of horizontal unfairness — that is, of treating the litigant better than others who are similarly situated. It is, in our respectful view, inappropriate to reward (even temporarily) only the litigant who was able to fund extensive constitutional litigation. There are undoubtedly other persons found NCRMD — perhaps those who are more vulnerable, or have committed less egregious offences than Mr. G — who are just as, if not more, in need of relief.

[288] Our colleague responds that “the claimant is not in the same position as others subject to the impugned law in a key respect: [he] has done the public interest a service by ensuring that an unconstitutional law is taken off the books” (para. 148). Respectfully, we are unconvinced that there exists any principled reason why an individual constitutional remedy ought to become a device to reward a successful litigant for “brav[ing] the storm of constitutional litigation” (para. 142). The fact that a litigant has prevailed will entitle them to judgment in their favour, and may also entitle

them to an order for costs to indemnify them for expenses sustained (see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 21). But in a constitutional case involving the validity of a statute of *general* applicability, a litigant should not be entitled to a better or more immediate constitutional remedy than all other persons similarly situated merely because they brought the case. As this Court recognized in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, many members of our society, particularly the marginalized, are simply “unable to participate in a court challenge” for various reasons beyond cost, such as “risk of public exposure [and loss of privacy], fear for [their] personal safety, and the potential loss of social services, income assistance . . . and [future education or] employment opportunities” (paras. 6 and 71). Several of these factors, in addition to the “stigmatizing, prejudicial notions [that have] led to profound disadvantage for individuals living with mental illnesses” (Karakatsanis J.’s reasons, at para. 62), have no doubt encumbered persons found NCRMD from challenging *Christopher’s Law*. Considered in this light, our colleague’s justification for individual exemptions falls away.

[289] Further, it is worth considering what is to happen if a legislature ultimately decides to deem court-ordered exemptions inappropriate in its future regime. Here the risk of horizontal unfairness, which is associated with the rule of law, and of “creating further inequities” in the process (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 179) looms large, since this leaves all other persons found NCRMD in an inferior position

relative to Mr. G, who received a special court-ordered exemption from which they are precluded (see K. Roach, “Dialogic Judicial Review and its Critics” (2004), 23 *S.C.L.R.* (2d) 49, at p. 84).

[290] In our colleague’s view, a claimant should only be denied an individual exemption for a “compelling reason” (para. 149). She offers two examples. First, an individual exemption should be denied only where it “would undermine the interest motivating the suspension in the first place” (para. 150). She says that, where a declaration is suspended to protect public safety, an individual exemption would be inappropriate if it would endanger public safety. But again, judges are not well-suited to conduct an individualized assessment as to whether an exemption would endanger public safety in cases such as this one, whether evidence of the individual claimant’s situation is available or not.

[291] Secondly, our colleague says that an individual exemption should be denied where practical considerations such as “judicial economy” (para. 151) make it inappropriate to grant one. She offers the example of a large group of claimants, where it might be impractical or impossible to conduct the individualized assessments necessary to grant individual exemptions to each claimant. We agree that in cases involving a large number of claimants, a court might be disinclined to conduct multiple individual assessments. Indeed, such reticence might well be apt in cases involving a *single* claimant, where — as here — the Court lacks the competence to conduct even a single assessment. This suggests a converse danger, which is that a court confronted

with multiple claimants could — as our colleague does in this case — simply skate over the assessments and grant exemptions all around. All that said, we observe that our colleague gives no guidance as to how the practical considerations she raises might, in a difficult case, be weighed against the supposed constitutional imperatives she identifies.

[292] Respectfully, we view our colleague’s reasons on the matter of an individual exemption, considered in their totality, as internally inconsistent. First, they acknowledge that “tailored remedies should only be granted when a court can fairly conclude that the legislature would have enacted the law as it would be modified by the court” (para. 103), and that “although courts are capable of determining what the Constitution requires, they are not well-suited to making ‘*ad hoc*’ choices from a variety of options” (para. 115 (citation omitted)). Then, without *any* evidence of the legislature’s intention and without *any* expert assessment of Mr. G,¹⁴ they grant him an individual exemption. Our colleague’s statements that “the legislature may choose from a range of policy options” (para. 70) or “any form of individualized assessment” (para. 162) are undermined by her later conjecture that it will be “highly unlikely” that Mr. G will be caught by the new legislation (para. 183). In this way, our colleague has usurped the legislative function and is legislating not just in effect, but in fact. In reality,

¹⁴ We highlight that no forensic risk assessment was ever made as to Mr. G. The respondent’s expert Dr. Brink, did not examine the respondent, nor did the appellant’s expert Dr. Hanson. The only witness who assessed the respondent was his treating physician, who had no expertise in forensic assessment and who was found by both courts below to be unreliable (A.G.O. factum, at para. 96; Sup. Ct. reasons, at paras. 64-68; C.A. reasons, at paras. 48-49).

amended legislation may capture Mr. G, or it may not — it is not the role of the judiciary to postulate on whether or how the legislature will respond.

[293] In the end, the proliferation of individual exemptions is simply the unfortunate upshot of failing to properly confine the use of suspended declarations (see Karakatsanis J.’s reasons, at para. 146: “it is a court’s decision to grant a suspension that makes the individual remedy necessary”). We would reject our colleague’s *post-hoc* solution that “[i]ndividual exemptions can temper any further disincentive caused by suspensions” (para. 148). Rather, the more appropriate response is to closely circumscribe the use of suspended declarations, as mandated by the Constitution. Once suspended declarations are properly limited to the exceptional situations where the rule of law is imperilled, the concern for providing an immediate remedy to the claimant fades.

V. Conclusion

[294] For all these reasons, we are unable to join our colleague’s reasons, which to us represent an unbridled expansion of judicial discretion, with regard to issuing both suspended declarations and individual exemptions. We agree with our colleague that *Christopher’s Law* infringes Mr. G’s *Charter* right to equal treatment under the law, and that the declaration of invalidity was properly suspended. However, the suspension should be constitutionally grounded in the principle of the rule of law and the threat to public safety that would manifest otherwise. Consistent with *Manitoba Reference*, at p. 769, we would have invited submissions from the Attorney General of Ontario as to

the minimum period necessary for *Christopher's Law* to be made constitutionally compliant. In the absence of that evidence, we would simply uphold the 12-month suspension of the declaration of invalidity. Consistent with the limited role of the judiciary vis-à-vis the legislature, we would not grant the respondent an individual exemption from that suspension. We would therefore allow the appeal in part.

Appeal dismissed with costs, CÔTÉ and BROWN JJ. dissenting in part.

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