File No. 38585

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Respondent)

- and -

G.

RESPONDENT
(Applicant)

- and -

ATTORNEY GENERAL OF CANADA

INTERVENER
(Respondent)

- and -

CRIMINAL LAWYERS ASSOCIATION (ONTARIO)

ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

EMPOWERMENT COUNCIL

ASSOCIATION CANADIENNE POUR LA SANTÉ MENTALE, ONTARIO

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

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INTERVENER'S FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

A. Overview

1. It is consistent with section 7 of the *Charter* to apply registration requirements to persons found not criminally responsible on account of mental disorder ("NCR") in relation to a sexual offence and absolutely discharged by the Review Board. Sex offender registries facilitate the prevention and investigation of recidivism by providing police with rapid access to accurate information to help identify and locate persons with a history of sexual offence conduct. Access to the information in the registry is tightly constrained. Individuals subject to the registry obligations are required to report once a year in order to have their identifying information updated. This type of information is routinely required by various government agencies in other contexts.

2. Complying with these obligations is not demeaning. Any psychological stress or stigma flowing from being charged with a designated offence or being found NCR is independent from the registry's requirements. The registry is not meant to punish, but rather to promote public safety through the creation of a database of individuals at higher risk of committing designated offences. The evidence accepted by the Application Judge is that individuals found NCR represent a higher risk of recidivism for sexual offences than the general population.

3. The reporting requirements are moderate and impose minimal restraints on individual liberty. The obligations imposed by the law are not of such nature as to cause any serious and profound effect on psychological integrity. It is not arbitrary or overbroad that these individuals are required to comply with reporting requirements. The effects of the reporting requirements are modest, and are not grossly disproportionate to the law's objectives.

B. Statement of Facts

4. Individuals found guilty as well as individuals found not criminally responsible by reason of mental disorder of a sexual offence must comply with registration requirements of *Christopher's Law*.[1] In the case of individuals found NCR, they must register at a police station within seven (7) days after being discharged by the Review Board established under part XX.1 of the *Criminal Code*.[2] All individuals subject to the Registry must initially be photographed and provide basic identifying information such as address, place of work and vehicle descriptors.[3] They must then report to the police annually to update this information.[4] The impugned legislation does not prevent them from going anywhere or doing anything. Access to the information collected in the registry is limited by law and unauthorized disclosure is an offence.[5] The registry is designed to assist law enforcement in investigating and preventing sex offences.

5. The Attorney General of Canada ("Canada") relies on the facts as set out in the decision of the Application Judge. Among his conclusions, the Application Judge accepted the actuarial evidence that in assessing the risk of recidivism, it makes little difference whether the sexual offence results in a criminal conviction or an NCR verdict. In fact, individuals found NCR, like convicted offenders, have recidivism rates that are substantially higher than the rates of spontaneous offending among individuals with no prior criminal history. Moreover, this risk was not eliminated following an absolute discharge. A study showed the likelihood of new offences by individuals found NCR to be 1.30 times higher after they were discharged absolutely by the Review Board, compared with their risk of recidivism during Review

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1 *Christopher's Law (Sex Offender Registry), 2000*, SO 2000, c 1 [*Christopher's Law*, "the legislation" or "the impugned legislation"].

2 RSC 1985, c C-46; *Christopher's Law*, s. 3(1)(b); O Reg 69/01 under *Christopher's Law*, s. 1.2.

3 *Christopher's Law*, s. 3(2); O Reg 69/01, s. 2(1).

4 *Christopher's Law*, s. 3(1)(f) and (g).

5 *Christopher's Law*, ss. 10 and 11(2).

Board supervision in the community.[6] The registry is an effective tool which helps law enforcement in the way it can investigate and prevent recidivism. The registry also expedites investigations, and allows police to more quickly eliminate potential suspects.[7]

PART II – ISSUES

6. Canada intervenes in relation to the constitutional question raised by the Respondent relating to s. 7 of the Charter.

7. Canada takes no position on the issues raised in the appeal relating to s. 15.

PART III – ARGUMENT

A. The legislation impacts section 7 interests only in a modest way

8. The Court of Appeal held that the impugned legislation engages the liberty interest, albeit in a modest way. Canada does not take issue with this finding.

9. The Court of Appeal properly found that the legislation does not engage security of the person. A claimant who alleges a deprivation of security of the person must establish a sufficient causal connection between the impugned state measure or conduct and the alleged harm, and a significant enough deprivation to warrant constitutional protection. The consequence must extend beyond ordinary stress or anxiety. Also, the effects of any state

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6 *G v Ontario (AG) et al*, 2017 ONSC 6713 at paras. 97, 105, 111-112, 125, 179 [SCJ reasons].

7 SCJ reasons at para. 179; *G v Ontario (AG)*, 2019 ONCA 264 at paras. 39-40, 81 [ONCA reasons].

interference are to be assessed objectively. As this Court stated in *G(J)*, "*the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action*" do not engage section 7. If the effect on an individual claimant were to be examined subjectively, the potential for deprivations of security of the person would be endless, which would substantially expand the scope of judicial review and trivialize the constitutional guarantee.[8]

10. The Respondent has not shown that the legislation is of such nature as to create a serious and profound state-imposed deprivation of psychological integrity. When viewed objectively and in their proper context, the registration and reporting requirements are modest and do not rise to the level of causing psychological harm that would be so severe as to engage security of the person.[9]

11. The obligations imposed by the law are modest: individuals are required to attend at a reporting centre once a year at a time of their choosing (between the 11th and 12th month since their last appearance), to be photographed and provide updated personal information (e.g., address, place of work, vehicle descriptors, etc.).[10] This is the type of information already routinely provided to other government agencies such as motor vehicle licensing bodies, health insurance and employment insurance authorities.[11] The reporting usually takes less than an hour.[12] The psychological impact of these requirements is commensurate with

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8 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras. 59-60.

9 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras. 57 and 81.

10 *Christopher's Law*, s. 3(1)(b), (f) and (g); O Reg 69/01, s. 1.2, 2(1) and (4).

11 SCJ reasons at paras. 118-119; *R. v Dyck*, 2008 ONCA 309, 90 OR (3d) 409 at para. 109 [*Dyck*].

12 SCJ reasons at para. 58.

the ordinary stresses and anxieties that a person of reasonable sensibility would experience in similar circumstances.[13]

12. Further, the use that may be made of the information collected by virtue of the impugned legislation is strictly regulated. The registry is not publicly accessible and violation of the prohibition on disclosure of registry information is an offence under *Christopher's Law*. Even access by police is circumscribed, including for the purposes of the legislation, crime prevention and law enforcement.[14] Meanwhile, records related to an NCR finding exist independent of the impugned legislation and are already a matter of public record, as noted by the courts below.[15]

13. The modest effects of registration are borne out by the evidence in this case. As found by the Application Judge, the obligation to report has had minimal impact on the Respondent.[16] Over more than a decade of compliance, the Application Judge found no substantive effect on the Appellant's mental health, familial relationships or employment have been unaffected.[17] Properly understood, it is unreasonable to conclude that the modest obligation to report once a year would be sufficient to cause harm to personal psychological well-being.

14. The registry is also not meant to be punitive, but instead to promote public safety and facilitate the prevention and investigation of sexual offences through the creation of a database of higher-risk individuals. A reasonable and well-informed person would understand that complying with these obligations is not demeaning and that any stigma the

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13 *Dyck*, *supra* note 11 at paras. 106 and 109; affirmed in *R v Long*, 2018 ONCA 282, 45 CR (7th) 98 at para. 147 (leave to appeal to the SCC refused Jan 9, 2020) [*Long*].

14 *Christopher's Law*, ss. 10 and 11(2).

15 SCJ reasons at paras. 51-52; ONCA reasons at paras. 33, 52.

16 SCJ reasons at paras. 59-79; ONCA reasons at paras. 55-63.

17 SCJ reasons at para. 149.

registrant may experience flows from the circumstances that gave rise to the charges and the NCR finding, rather than from the registration and reporting requirements.

B. The legislation is consistent with the principles of fundamental justice

15. Although the constitutional right to security of the person is not engaged, a registrant's liberty is modestly restricted. Therefore, it is necessary to proceed to the second step of the section 7 analysis. The question is whether the impact on liberty accords with the principles of fundamental justice against arbitrariness, overbreadth and gross disproportionality.[18]

16. The impugned legislation pursues public safety objectives which serve the public interest. It seeks to facilitate the prevention and investigation of recidivism by providing law enforcement officials with rapid access to up-to-date information about persons with a history of sexual offence acts. In addition, the legislation is designed to limit the manner in which such information is accessed and used.[19] It is not arbitrary to require such persons, who are more likely than the general public to commit offences in the future, to comply with reporting requirements. The inclusion of those found NCR of sexual offences is not overbroad, since the empirical evidence shows that they present an elevated risk to commit sexual offences in the future, compared to the general public.[20] The effects of the reporting requirements are modest, and are not grossly disproportionate to the law's objectives.

a) The legislation is not arbitrary

17. The legislation is not arbitrary because the limits it imposes are rationally connected to its important public safety objectives.[21]

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18 *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras. 93-123 [*Bedford*].
19 SCJ reasons at para. 92; ONCA reasons at paras. 96-101.
20 SCJ Reasons at paras. 97, 105, 111-112, 125, 179.
21 *Bedford*, *supra* note 18 at para. 111.

18. As the courts below properly concluded, the deprivation of liberty resulting from the obligation to register and report to the police has a rational connection to the purpose of providing police with rapid access to such information.[22]

19. According to the intervention of the Canadian Civil Liberties Association ("CCLA"), the impugned provisions are arbitrary, in part because some offenders who are found guilty may receive discharges under s. 730 of the *Criminal Code* in lieu of being convicted and thus, exceptionally, not be required to register. The CCLA characterizes this as a "safety valve," but complains that this mechanism is not available to those found NCR of designated offences.

20. Fundamentally, this type of comparison has no place in the s. 7 arbitrariness analysis. In *Long*, a five-member panel of the Ontario Court of Appeal rejected a similar argument and explained that a law does not become arbitrary just because similarly situated persons are treated differently.[23] The fact that some may escape the imposition of a law does not necessarily mean that it is arbitrary in relation to those to whom it applies. The constitutional requirement remains simply that there be a rational basis for the rule to apply to those who are caught by it. Inasmuch as CCLA makes the same argument with respect to overbreadth, it should be rejected for the same reason.

21. What matters in the analysis of arbitrariness is whether there is a rational connection between the measures and the objectives. Here there is no doubt that the prevention and investigation of crime is facilitated by a sex offender registry.

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22 SCJ reasons at para. 92; ONCA reasons at paras. 96-101.

23 *Long*, *supra* note 13 at paras. 133-141.

b) The legislation is not overbroad

22. The inclusion of individuals found NCR of sexual offences in the registry is not overbroad, since the empirical evidence shows that they present a greater risk of committing sexual offences in the future than the general public.

23. Overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts. Overbreadth allows courts to recognize that the law is rational in some cases, but overreaches in its effect in others.[24] There is a heavy onus on the party challenging the legislation to establish that there is no connection between an effect of the law and its purpose. The standard "is not easily met".[25]

i. Inclusion in the registry of NCR individuals may rest on a reasoned apprehension of harm based on actuarial evidence

24. The courts below properly rejected the Appellant's argument that there is no connection between the effects and the purpose of the impugned legislation, insofar as it requires absolutely discharged NCR individuals to register and report. The Appellant did not meet his burden of establishing that absolutely discharged NCR individuals are not at a greater risk to commit sexual crime than the general population, such that their inclusion in the registry deprives liberty for no reason.[26]

25. The court below accepted the evidence of Dr. Hanson, the only expert called in this case whose specific area of expertise is the assessment of recidivism risk of sexual offenders. His actuarial evidence supported the findings that those found NCR in relation to sexual offences

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24 *Bedford*, *supra* note 18 at paras. 112-113.
25 *Bedford*, *supra* note 18 at para. 119.
26 SCJ Reasons at paras. 94-113; ONCA reasons at paras. 41-46, 53-54, 73-74, 94, 99-101.

are more likely than the general population to commit new sexual offences, and that the risk of recidivism is significant.[27]

26. The Respondent argues that it is illegitimate to rely on actuarial risk. In order to avoid overbreadth, he claims that the legislation must establish an individualized process based on the relative risk of individuals within the group committing a sexual offence in the future.

27. This argument misunderstands the nature of risk assessment and the nature of the overbreadth analysis. The design of the legislation is based on the assessment of the risk of future harm, which is "an exercise that is inherently imprecise".[28] A specific individual's risk of recidivism cannot "be predicted with precision": There is no mechanism that can reliably predict whether a specific individual will or will not reoffend.[29]

28. Sexual offence recidivism in particular can only be estimated with considerable uncertainty, because sexual offending is often carried out in secret, and because the conditions necessary for offending (vulnerable victim, motivated offender, lack of supervision) may arise only once every few years. Furthermore, there are often long delays between the time when a sexual offence is committed and when it is disclosed and prosecuted.[30]

29. Where the legislature has a reasoned apprehension of harm, it is not overbroad for it to take action despite it being difficult or impossible to measure precisely the risk of harm. The evidence in this case, showing there is a significant risk of recidivism among those who

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27 SCJ Reasons at paras. 96-111 (esp 98-99), 125; ONCA reasons at paras. 41-46, 53-54, 73-74, 94, 99-101.

28 *Long, supra* note 13 at paras. 125 and 136; *Dyck, supra* note 11 at para. 125.

29 *Long, supra* note 13 at paras. 125 and 136; *Dyck, supra* note 11 at para. 125; Transcript of the cross-examination of Dr. Karl Hanson, October 6, 2016, Q43, Appeal Book, vol. XVII, pp. 21-23; Dr. Hanson First Affidavit, para. 10, **Appellant's Record (hereafter « A.R."), vol. VI, p. 71.**

30 Dr. Hanson First Affidavit, paras. 10, 12, 43, **A.R., vol. VI, pp. 71, 77**; SCJ Reasons at paras. 97-99 and 110.

commit sexual offences, including those found NCR[31], more than meets this reasoned apprehension of harm standard. In these circumstances, it was open to the legislature to use the criteria of prior offending behaviour to determine who should be included in the registry, given the strong empirical support for this factor as a predictor of the risk of recidivism. The fact that some NCR individuals will not ultimately reoffend is not determinative. The registration requirement responds to a reasoned apprehension of harm, based on the evidence that those who have engaged in prior offending behaviour are more likely to reoffend than members of the general population. In light of this heightened risk, it cannot be said that there is no connection between registration (and the resulting modest impacts on liberty) for persons found NCR of a sexual offence and the legislative objectives.[32]

30. Contrary to arguments that have been made in this case, *Swain* does not stand for the proposition that the principles of fundamental justice require an individual assessment for every deprivation of liberty, no matter how modest. In *Swain*, this Court considered, among other things, the constitutional validity of the former requirement that, upon rendering a verdict of not guilty by reason of insanity, the judge must automatically order the person into strict custody for an indeterminate duration.[33] In contrast to that very serious deprivation of liberty, the obligation to register and report once a year under the impugned legislation is quite modest.

ii. Absolute discharge by the Review Board is not an appropriate basis to exclude NCR individuals from the registry

31. In considering the overbreadth of the registry legislation, it is important to emphasize that an absolute discharge granted by a Review Board and inclusion in the sex offender registry

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31 SCJ Reasons at paras. 97-105, esp. 104-105.

32 *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 at para. 133; *Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827 at paras. 77-78; *Cochrane v Ontario (AG)*, 2008 ONCA 718, 92 OR (3d) 321 at para. 26.

33 *R v Swain*, [1991] 1 SCR 933 at para. 119 [*Swain*].

are different matters. The Court of Appeal correctly recognized the distinct purposes served by these different schemes.[34]

32. As the restrictions upon liberty imposed by a Review Board can be profound, they are justified only where the individual is shown to pose a significant threat to the safety of the public. This implies a risk of serious physical or psychological harm to members of the public resulting from conduct that is criminal in nature.[35] If the evidence about the individual in any way falls short of demonstrating this level of risk, the individual must be absolutely discharged. With this in mind, the granting of an absolute discharge cannot be understood to signify that the person presents a level of risk that is comparable to that of the general population.

33. By contrast, the reporting obligations imposed by the impugned legislation target a different public safety purpose. As the parties agreed below, the purpose of sex offender registries is to assist in the investigation and prevention of designated sexual offences by providing police with access to information about the identity and location of persons known to have committed such offences.[36] This information is required because of the heightened risk such persons pose as compared to the general population, even after discharge by the Review Board. On the evidence accepted by the Application Judge, persons who have committed a designated sexual offence in the past pose a statistically elevated risk of reoffending in the future. This actuarial relationship holds whether the offence results in a criminal conviction or a finding of NCR, or whether the person receives an absolute discharge by the Review Board or not. In fact, the statistical risk of recidivism is 1.30 times higher following the

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34 ONCA reasons at paras. 91-101, esp. 65-96.

35 *Criminal Code*, para. 672.54 (a) and s. 672.5401; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para. 57.

36 ONCA reasons at para. 91.

Review Board's discharge of an NCR individual than during the period of Review Board supervision.[37]

34. As a result, the application of the registry's reporting obligations to all persons with prior offending behaviour, including those who have received an absolute discharge from a Review Board, is required to best achieve the legislation's purpose. That objective would not be served by excluding NCR individuals absolutely discharged by the Review Board.

c) The legislation is not grossly disproportionate

35. The effects of the reporting requirements are modest, and are not grossly disproportionate to their objectives.

36. The rule against gross disproportionality only applies "in extreme cases" where the seriousness of the deprivation of the interest protected by section 7 is "totally out of sync" with the objective of the measure. The connection between the impact of the law and its object must be "entirely outside the norms accepted in our free and democratic society".[38]

37. As the courts below concluded, the constraint resulting from the obligation to register and report annually are not totally out of sync with the legislation's objective of providing police with rapid access to current information about past sexual offenders.[39]

38. Provincial appellate courts have also repeatedly characterized the negative impact of sex offender registration legislation on the individual's liberty interest as "moderate" or "minimal". The impugned legislation does not prevent individuals such as the Respondent from making any fundamental personal choices, such as where to work, live or travel, or from going anywhere, doing anything or associating with whomever they choose. It only

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37 SCJ Reasons at paras. 97-98, 101 and 103.
38 *Bedford, supra* note 18 at para. 120.
39 SCJ Reasons at paras. 114-122; ONCA reasons at para. 72.

requires these individuals to attend at a reporting centre once a year and update their basic identifying information. These requirements do not come close to constituting a "draconian impact" as described in *Bedford*.[40] It is not grossly disproportionate to ask individuals who pose a heightened risk of harming vulnerable members of the society (whether it is voluntarily or not) to comply with minimal reporting requirements which help law enforcement address this risk in a prompt, sensible and effective manner.

C. Any limitation to section 7 would be justified under section 1

39. In the alternative, if this Court finds that the impugned provisions limit section 7 of the *Charter*, there are good reasons for finding them to be justified as reasonable limits pursuant to section 1 of the *Charter*.

40. The purposes of the impugned provisions are pressing and substantial. They seek to render more effective the prevention and investigation of crimes of a sexual nature by providing law enforcement officials with rapid access to up-to-date information about persons with a history of sexual offence acts, while limiting the manner in which such information is accessed and used. The reporting obligations are also rationally connected to the achievement of this objective. The Respondent has not contested these elements in this case.[41]

41. With respect to minimal impairment, the question is whether the limit on the right is reasonably tailored to the objective. In other words, the issue is whether there are less impairing means of achieving the legislative goal as effectively. In considering whether the means are reasonably tailored to the objective, the legislature is accorded a measure of

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40 *Bedford, supra* note 18 at para. 120; *Dyck, supra* note 11 at paras. 86 and 106; *R v Hooyer*, 2016 ONCA 44, 129 OR (3d) 81 at para. 45; *R v Morin*, 2009 QCCA 187, [2009] RJQ 306 at para. 35; *R v SSC*, 2008 BCCA 262, 59 CR (6th) 237 at paras. 40 and 55; *R v Cross*, 2006 NSCA 30, 241 NSR (2d) 349 at para. 66.

41 ONCA reasons at paras. 139-141.

deference, particularly when as here it is attempting to reconcile competing interests and protect vulnerable members of society, when it is dealing with matters that are difficult to assess with scientific precision, or when the *Charter* right limitation is of marginal significance.[42] Courts must keep in mind that there may be many different ways to address problems, with limited certainty as to which approach will be effective. The minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.[43] Importantly, minimal impairment does not require the government to accept options that would reach the objective less effectively.[44]

42. In this case, the Respondent has argued that the minimal impairment standard is not met because the obligation to report is based on aggregate statistics and applies to everyone found NCR without consideration of the impact on the individual or whether the individual poses an actual risk to the public. However, neither the usage of aggregate data nor the absence of individualized assessment is inconsistent with the principles of minimal impairment. The issue for determination, rather, is whether there exists a less impairing alternative that also achieves the legislation's pressing and substantial objectives as effectively.

43. In this regard, the Respondent has proposed that questions of registration and termination should be determined on an individualized basis, either via the Review Board or an alternative judicial or administrative process. As set out above, the expert evidence however demonstrates that at the individual level the risk of sexual recidivism can only be estimated with considerable uncertainty.[45] Because individualized forecasting of sexual recidivism is

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42 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 at para. 57 [*Dunmore*]; *R v Butler*, [1992] 1 SCR 452 at p. 505.

43 *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331 at para. 102; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para. 53 [*Hutterian Brethren*]; *Canada v JTI-Macdonald*, 2007 SCC 30, [2007] 2 SCR 610 at para. 43.

44 *R v Chaulk*, [1990] 3 SCR 1303, p. 1341.

45 Dr. Hanson First Affidavit, para. 10, **A.R., vol. VI, p. 71**; Transcript of the cross-examination of Dr. Karl Hanson, October 6, 2016, Q43, Appeal Book, vol. XVII, pp. 21-23; see also: *Long*, *supra* note 13 at paras. 125 and 136; *Dyck*, *supra* note 11 at para. 125.

not an exact science, it is not possible to conclusively determine in advance who will reoffend and to impose reporting obligations only on those persons. The legislature is entitled to rely on the method that is likely to achieve its objectives in the most effective fashion. If some individuals are exempted as a result of individual assessments and later reoffend, the objectives of the legislation would be compromised. Law enforcement would be deprived of useful information to investigate efficiently, protect the public and prevent future sexual offences.

44. In light of the apparent inadequacy of the individualized alternative to achieving the objectives of the Registry, it was reasonable for the legislature to rely on the more general criterion of prior offending as the primary basis for determining who should be subject to reporting obligations. Moreover, as prior offending is the risk factor most closely associated with recidivism, the legislation's approach is reasonably tailored to its goal. This choice can at least be said to fall within a range of reasonable alternatives.[46]

45. With respect to the proportionality of effects, the last stage of the section 1 analysis, the Court must weigh the impact of the law on protected rights against the beneficial effect on the greater public good. This allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.[47] In this case, the impact of the impugned provisions is proportionate to the important public benefits they provide. As set out above, the impact of the reporting obligations is moderate. They impose minor limits on the liberty of registrants, who remain free to live, work and travel as they choose. While registrants may be required to provide their address and identifying information to police, they do not require permission to go anywhere or do anything.

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46 Dr. Hanson First Affidavit, para. 22, **A.R., vol. VI, p. 73.**

47 *Hutterian Brethren, supra* note 43 at para. 77; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527, at para. 48.

46. Here, the Application Judge found the reporting obligations to have had no apparent impact on the Respondent's health, employment or ability to travel.[48] There is no reason to believe the reporting requirements are of such nature as to have severe impacts on the individuals subject to these obligations.

47. On the benefits side of the equation, the impugned provisions provide clear and important benefits. The obligation to register assists police officers in their task of preventing and investigating of crimes and protecting vulnerable members of the public. The reporting of up-to-date information regarding the identity, profile and whereabouts of persons who are at higher risk to reoffend improves the ability of law enforcement to promptly, sensibly and effectively respond. In light of these important benefits, and the limited effect of the reporting obligations on the rights of individuals like the Respondent, the overall impact of the impugned provisions appears proportionate.[49]

D. Submissions on Remedy

48. Canada does not take any position on the appropriate remedy in this case, in the event that this Court finds the impugned legislation to be unconstitutional. However, Canada submits the following to assist the Court in clarifying the applicable legal principles.

49. Contrary to some of the arguments advanced by interveners, this is not an appropriate case for the Court to reconsider its remedial jurisprudence or adopt novel forms of "robust interim relief" based on different constitutional remedial powers in other countries.[50]

50. Rather, this case presents the Court with an opportunity to consolidate its relatively settled jurisprudence on suspensions of declarations of invalidity, and provide some additional clarity on the availability of s. 24(1) exemptions in conjunction with such declarations. The

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48 SCJ Reasons at paras. 64-79, 149 and 178.

49 Affidavit of Sergeant Tarnowski, Exhibit "E," **A.R., vol. XVI, pp. 76-80.**

50 Asper Centre, Motion for Leave to Intervene.

fundamental balance that the Court's jurisprudence has struck between the roles of legislatures and courts should be maintained.

51. It is settled law that the constitutional remedies available under s. 52 of the *Constitution Act, 1982* and s. 24(1) of the *Charter* serve different ends. While the latter affords personal remedies against unconstitutional government action, the former targets the validity of a law by providing that it is of no force or effect to the extent that it is inconsistent with the *Charter*.[51] As the Court held in *Schachter*, the wording of s. 52 affords courts a degree of flexibility in fashioning appropriate remedies, depending on the nature of the violation and the context of the specific legislation under consideration.[52]

52. This flexibility includes whether a declaration of invalidity should be temporarily suspended to permit the legislature to "fill the void." Although a delayed declaration is a serious matter from the point of view of enforcement of *Charter* rights, the Court has nonetheless found such suspensions to be appropriate in various circumstances. Well-known examples include cases in which "striking down the legislation without enacting something in its place would pose a danger to the public [or] threaten the rule of law."[53] But the broader animating principle that underlies this Court's frequent practice in granting suspensions is the avoidance of gaps in the law where crafting an appropriate remedy engages the institutional role and competencies of the legislature.[54]

53. As this Court's jurisprudence confirms, suspensions may thus also be appropriate when an untenable gap in the law would frustrate the orderly administration of justice,[55] deprive

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51 *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at paras. 58-66.

52 *Schachter v Canada*, [1992] 2 SCR 679 at paras. 25.

53 *Ibid.*, paras. 80 and 87, citing *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 and *R v Swain, supra* note 33.

54 J. Ettel, "Remedial Postscripts — Reflections on *Carter II*, Suspensions, Extensions and Exemptions" (2017) 81 SCLR (2d) 253 at 256.

55 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1998] 1 SCR 3 at para. 18

deserving individuals of a benefit,[56] or remove the protections of a generally beneficial law (e.g., Alberta's personal information protection legislation),[57] to name but three examples. This is consistent with the Court's recognition of the fact that the task of determining how to cure a constitutional defect often involves matters that go beyond the proper institutional role of courts.[58]

54. The jurisprudence is more nuanced than has been suggested with respect to whether an individual s. 24(1) remedy should be available in conjunction with a suspended declaration of invalidity. While the Court suggested in *Schachter* that such remedies will "rarely be available in conjunction with an action under section 52(1)," the jurisprudence has evolved to recognize the appropriateness of ordering individual exemptions in conjunction with suspended declarations in certain cases.

55. Exemptions may be appropriate where it is clear that it is not constitutionally open to the legislature to respond in a way that would fail to confer on the litigant relief that is tantamount to the effect of the exemption, and an exemption is necessary to prevent irreparable harm to the litigant's ability to obtain a meaningful remedy.[59] In this context, *Demers*[60] should not be interpreted in a categorical manner or as prohibiting the granting of a s. 24(1) exemption when issuing a suspended declaration of invalidity.

56. Canada takes no position on whether the factual record in the present case supports a similar constitutional exemption, irrespective of whether it is characterized explicitly as such, or

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56 *Schachter*, *supra* note 52 at para. 80.

57 *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62 at paras. 40-41 [*UFCW*].

58 *Dunmore*, *supra* note 42 at para. 66; *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405, 2002 SCC 13 at para. 77 [*Mackin*]; *M v H*, [1999] 2 SCR 3 at paras. 146-147; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para. 96.

59 See, *e.g.*, *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 SCR 208 at paras. 47, 51; *UFCW*, *supra* note 57 at paras. 40-41; *Mackin*, *supra* note 58 at paras. 74-77.

60 *R v Demers*, [2004] 2 SCR 489 at para. 62.

instead as a "qualified declaration of suspended invalidity which exempts the individual before the Court from its scope" – as the Court of Appeal put it.[61] Consistent with the principles discussed above, however, any need to rely on s. 24(1) for a meaningful remedy in this case must be considered in light of rule of law, respect for the legislative process, and respect for the different roles of legislatures and courts.

PART IV – COSTS

57. The Attorney General of Canada does not seek costs and requests that costs not be awarded against him.

PART V – REQUEST FOR PERMISSION TO MAKE ORAL ARGUMENT

58. The Attorney General of Canada requests permission to make oral submissions not exceeding 10 minutes.

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61 ONCA reasons at para. 153.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

59. The Attorney General of Canada has nothing to add to the submissions made by the Attorney General of Ontario regarding the confidentiality order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, February 5, 2020

Marc Ribeiro

M^e Marc Ribeiro
M^e John Provart
Department of Justice Canada
Counsel for the Intervener

PART VII –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine
