Facilitating Judicial Legislative Dialogue Through the Remedy of Suspended Declarations of Invalidity in Canada

By

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Abstract

This thesis examines how courts have used suspended declarations of invalidity as a judicial remedy to encourage a dialogue with the legislature in Canada. It adopts a doctrinal approach and integrates a theoretical framework of dialogue. The findings suggest that suspended declarations have facilitated dialogue between courts and legislatures. This occurs when judicial review of laws prompts and receives a legislative response, ultimately advancing legal development in Canada. This thesis contributes to the understanding of how suspended declarations are used as mechanisms for institutional dialogue, demonstrating their significance in the development of Canadian laws

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CONTENTS

Chapter 1: Introduction

A suspended declaration of invalidity is a judicial remedy that allows a court to postpone the effect of declaring a law invalid when it fails to meet constitutional standards.[1] During this period, the law remains in force, in order to give the legislature time to amend or replace the invalidated law.[2] However, if the legislature does not amend the law to bring it into constitutional compliance by the end of the suspension period, the court's invalidation of the law will take effect.[3]

The Supreme Court of Canada first applied this remedy in the case of *Reference Re Manitoba Language Rights* in 1985.[4] The Court encountered a constitutional challenge when Manitoba enacted its laws in English only, contrary to the constitutional requirement that laws be written in both English and French.[5] The Court held that the Province's unilingual laws were constitutionally invalid.[6] It relied on its authority under subsection 52(1) of the *Constitution Act*, 1982.[7] This provision states that "any law inconsistent with the provision of the Constitution is to the extent of its inconsistency of no force or effect."[8] To avoid leaving Manitoba without a functioning legal system, the Supreme Court declared the province's unilingual laws invalid but suspended the effect of its declaration.[9] Had the Court immediately struck down the laws without

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[1] Grant Hoole, "*Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law*" (Master of Laws Thesis, University of Toronto, Faculty of Law, 2010) [Unpublished] [Hoole] at 4.
[2] *Ibid*.
[3] *Ibid*.
[4] 1985 SCC 33, [1985] 1 SCR 721. [*Manitoba Language Reference*].
[5] *Manitoba Act*, RSC 1870, App II s 23. See also *Manitoba Language Reference*, *ibid* at 747.
[6] *Manitoba Language Reference*, *ibid.*
[7] *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52(1). [*Constitution Act*].
[8] *Ibid*.
[9] *Manitoba Language Reference*, *ibid* at 748-753.

a suspension, it would have disrupted the rights, obligations, and legal relationships established under those laws, thereby undermining the rule of law.[10] By suspending the declaration of invalidity, the Court gave the Manitoba Legislature time to translate, re-enact, print, and publish its laws in both official languages.[11] This approach ensured legal continuity while upholding the constitutional requirement of legislative bilingualism.[12]

The next significant application of this remedy was in the case of *Schachter v Canada*.[13] This case set out three circumstances in which a suspension may be justified: (i) when the public safety is at risk; (ii) when the rule of law would be compromised; or (iii) when a law is underinclusive and striking it down immediately would harm deserving individuals.[14] Although the Court in *Schachter* emphasized that these guidelines should direct how this remedy is applied.[15] Later cases have departed from that strict framework, often relying instead on institutional considerations.[16]

Since *Schachter*, the Supreme Court has continued to apply suspended declarations of invalidity in significant constitutional cases.[17] For example, in *Carter v Attorney General of*

[10] *Manitoba Language Reference*, *ibid* at 753.
[11] *Manitoba Language Reference*, *ibid* at 754.
[12] *Manitoba Language Reference*, *ibid.*
[13] *Schachter v Canada*, 1992 SCC 74, [1992] 2 SCR 679. [*Schachter*].
[14] *Schachter*, *ibid* at para 719.
[15] *Schachter*, *ibid.*
[16] Hoole, *supra* note 1 at 9.
[17] See generally *Carter v Canada (Attorney-General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter* 2015]; *Carter v Canada (Attorney-General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter* 2016]; *Truchon v Attorney General of Canada*, 2019 QCCS 3792 [*Truchon*]; *R v Swain*, 1991 SCC 104, [1991] 1 SCR 933 [*Swain*]; *Canada (Attorney-General) v Bedford*, 2013 SCC 72; [2013] 3 SCR 1101 [*Bedford*], *Eldridge v British Columbia (Attorney General)*, 1997 SCC 327, [1997] 3 SCR 624 [*Eldridge*]; *Egan v Canada*, 1995 SCC 98, [1995] 2 SCR 513 [*Egan*]; *Dunmore v Ontario (Attorney General of Canada)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*]; *Figueora v Canada (Attorney General of Canada)*, 2003 SCC 37, [2003] 1 SCR 912 [*Figueora*]; *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 [*Demers*]; *Ontario (Attorney- General) v G*, 2020 SCC 38, [2020] 3 SCR 629 [*Ontario* v *G*]; *R v Ndhlovu* 2022 SCC 38 [*Ndhlovu*]; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 687 SCC, [1999] 2 SCR 203 [*Corbiere*]; *Dixon v British Columbia*, 1989 248 (BC SC) [*Dixon*].

Canada,[18] the Supreme Court held that the "absolute prohibition" against "physician assistance in terminating life" was unconstitutional.[19] Specifically, the Court held that sections 14 and 241(b) of the *Criminal Code*[20] were unconstitutional.[21] Because they infringed on the rights to life, liberty, and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[22] In addition, the Court held that this violation of rights was not justified under section 1 of the *Charter*.[23] As a result, the Court suspended the declaration of invalidity for twelve months,[24] in order to allow Parliament time to enact new legislation that would respect the *Charter* rights of individuals seeking "physician-assisted dying."[25]

In 2016, the Attorney General of Canada applied to the Supreme Court for an extension of the suspension period due to delays caused by the federal election.[26] The Court granted a four-month extension, which allowed the existing prohibition to remain in effect.[27] Furthermore, the Court granted an exemption for those seeking physician-assisted death, allowing interested individuals to apply to a Superior Court provided they met the criteria established in *Carter* (2015).[28] These criteria required that applicants be a competent adults who give their consent and suffer from a grievous and irremediable medical condition causing enduring and intolerable

[18] *Carter* 2015, *ibid.*
[19] *Carter* 2015, *ibid* at para 126. The Supreme Court in its decision used the terms, "physician assistance in terminating life", "physician-assisted dying", "physician-assisted death" to describe situations defined as: "… the situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient." *Carter* 2015, *ibid* at para 40. For the purpose of this thesis, these terms will be used synonymously. The Supreme Court aligns with the statutory meaning of "medical assistance in dying" or "MAiD". It should be noted that physicians and nurse practitioners are authorized to provide or administer MAiD under the *Criminal Code.*
[20] *Criminal Code* RSC 1985, c C-46 [*Criminal Code*].
[21] *Carter* 2015, *supra* note 17 at para 126
[22] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being in Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 7 [*Charter*]. See also *Carter* 2015, *supra* note 17 at para 126.
[23] *Carter* 2015, *ibid.*
[24] *Carter* 2015, *ibid* at para 128.
[25] *Carter* 2015, *ibid* at para 126.
[26] *Carter* 2016, *supra* note 17 17at para 1.
[27] *Carter* 2016, *ibid* at para 7.
[28] *Carter* 2016, *ibid.*

suffering.[29] Parliament responded by enacting Bill C-14,[30] which allowed MAiD under specific eligibility criteria, such as when a person's natural death is reasonably foreseeable.[31]

In *Truchon v Attorney General of Canada*,[32] the Quebec Superior Court held that section 241.2(2)(d) of the *Criminal Code* violated section 7 of the *Charter* because it infringed on the applicants' rights to life, liberty, and security of the person in a manner inconsistent with the principles of fundamental justice.[33] It also held that the law breached subsection 15(1) of the *Charter* by discriminating against persons with non-terminal conditions, thereby denying them equal access to MAiD.[34] The Superior Court concluded that neither of these violations could be justified under section 1 of the *Charter*.[35]

The Superior Court in *Truchon* also examined section 26(3) of the *Quebec Act Respecting End-of-Life Care*.[36] which limited access to MAiD for persons at the "end-of-life".[37] The Court held that this restriction violated section 15 of the *Charter*, which guarantees the right to equality, and that the violation was not justified under section 1 of the *Charter*.[38] However, the Superior Court suspended the declaration of invalidity for six months to allow both legislatures (Quebec and Parliament) time to amend the law.[39] This decision influenced the enactment of Bill C-7, which amended Bill C-14 to extend eligibility beyond those whose natural death is reasonably

[29] *Carter* 2016, *ibid.*
[30] Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying*), 1st Sess, 42nd Parl, (received Royal Assent June 17, 2016).
[31] *Ibid* at s 241.2(1)(d).
[32] *Truchon* 2019, *supra* note 17.
[33] *Truchon* 2019, *ibid* at para 764.
[34] *Truchon* 2019, *ibid* at para 765.
[35] *Truchon* 2019, *ibid* at paras 764 - 765.
[36] Bill C-52, *An Act respecting end-of-life care*, 1st Sess, 41st Leg, Quebec, 2014 (assented to 10 June 2014), s 26(5). Note that prior to the *Carter* 2015, decision *supra* note 17, Quebec had passed its own provincial end-of-life law allowing "aid in dying" for persons at end of life. The Quebec law was in place notwithstanding that the *Criminal Code* had not yet been amended to permit medical assistance dying.
[37] *Truchon* 2019, *ibid* at paras 691-733.
[38] *Truchon* 2019, *ibid* at para 765.
[39] *Truchon* 2019, *ibid* at para 767.

foreseeable.[40] Also, the Quebec legislature amended the *Quebec Act Respecting End-of-Life Care* to align it with the Superior Court's decision.[41]

In *Eldridge v British Columbia*,[42] the Supreme Court held that failure to provide sign language interpretation in medical settings violated the equality rights of people who have a hearing disability.[43] The Court further held that this violation was not justified under section 1 of the *Charter*.[44] In response to the Court's decision, rather than passing a new legislation, the British Columbia government revised its administrative policies to bring them in line with the Court's decision.[45]

In *Canada (Attorney-General)* v *Bedford*,[46] the Supreme Court held that the three *Criminal Code* provisions, sections 210, 212(1)(j), and 213(1)(c) violated section 7 of the *Charter*.[47] The Court held that these provisions effectively prevented sex workers from implementing safety measures, such as working indoors or hiring security.[48] The Court suspended the declaration of invalidity for one year to give Parliament time to develop new legislation.[49] In response, Parliament enacted Bill C-36,[50] which established a new legal framework by criminalizing the

[40] Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2021, cl 1(2.1) (assented to 17 March 2021), SC 2021 c 2, [Bill C-7].
[41] Bill 11, *An Act to amend the Act respecting end-of-life care and other legislative provisions*, 1st Sess, 43rd Leg, Québec, 2023 (assented to 7th June 2023), SQ 2023, c 25.
[42] *Eldridge*, *supra* note 17.
[43] *Eldridge*, *ibid* at para 95.
[44] *Eldridge*, *ibid*.
[45] Karle Tate, Library of Parliament, "Disability and Health Care: The *Eldridge* Case",(2 April 2001), online: <prb012-e.pdf> at 3 [Tate].
[46] *Bedford*, *supra* note 17.
[47] *Bedford*, *ibid* at para 165.
[48] *Bedford*, *ibid*.
[49] *Bedford*, *ibid* at para 169.
[50] Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney-General of Canada v. Bedford and to make consequential amendments to the other Acts*, 2nd Sess, 41st Parl, 2014, (assented to by the House of Commons 6th November 2014).

purchase of sexual services and the advertising of others' services, effectively making prostitution a "de facto" illegal activity.[51]

This thesis, therefore, examines how the remedy of a suspended declaration of invalidity encourages dialogue between the judiciary and the legislature. It argues that the use of this remedy in court decisions has enabled both branches of government to work together in the development of laws in Canada. It employs a doctrinal methodology, focusing on the analysis of legal documents. This includes an examination of primary legal sources and case laws. It also reviews secondary sources, such as legal commentaries, scholarly articles, and other relevant literature, to understand how this judicial remedy has shaped Canadian law.

Chapter Two will examine the historical development, growth, and judicial use of suspended declarations of invalidity in cases. Part One discusses the origin of this remedy, beginning with early reservations about its legitimacy. It also analyzes landmark decisions, such as *Manitoba Language Reference* and *Schachter*, which established the legal and principled basis for its use. Part Two examines other cases that have applied this remedy and what scholars have argued about the increased use of this remedy which will be part of the literature review of this thesis. Part Three discusses contemporary judicial application of this remedy in more recent court decisions.

Chapter Three will focus on discussing more cases where courts have applied this remedy, such as in *Bedford and Eldridge,* and the respective legislative response that followed.

[51] Lyne Casavant & Dominique Valiquet, "Bill C-36: An Act to amend the *Criminal Code* in response to the Supreme Court of Canada decision in *Attorney-General of Canada v. Bedford* and to make consequential amendments to other Acts" (18 July, 2014), online: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-epdf> at 1-2.

Chapter Four focuses on the cases that the Supreme Court has applied this remedy that led to the development of the law regulating MAiD in Canada. Part One analyzes the case of *Carter*, where the Supreme Court suspended its declaration for 12 months and later extended the suspension period by four months to allow Parliament time to respond. Parliament's response led to the enactment of Bill C-14, which introduced an eligibility criterion more restrictive than those set out in *Carter*.

Part Two examines the case of *Truchon*, where the Quebec Superior Court issued a suspended declaration to give federal and provincial legislatures time to revise their MAiD laws. This decision led to the enactment of Bill C-7, which introduced certain MAiD eligibility criteria and a two-track safeguard system. Then, Part Three examines aspects of *Carter* and *Truchon* that demonstrate how the use of this remedy has promoted inter-institutional dialogue.

Chapter Five concludes the thesis by synthesizing key findings and offers some recommendations. Part One summarizes the research conclusions. Part Two discusses proposals aimed at enhancing the application of suspended declarations of invalidity, such as introducing a proportionality framework and incorporating public consultation during suspension periods. Part Three concludes the thesis with a summary of key insights and final reflections.

Chapter 2

The Historical Development, Growth and Judicial Use of Suspended Declarations of Invalidity in Cases

Canada's constitutional text does not explicitly authorize courts to issue suspended declarations of invalidity.[52] Section 52(1) of the *Constitution Act, 1982*[53] merely affirms the supremacy of the Constitution over ordinary statutes.[54] It provides that "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." [55] A literal interpretation of this provision suggests that courts should immediately invalidate any law that is *ultra vires* the Constitution.[56]

Before the Supreme Court introduced suspended declarations of invalidity into Canadian jurisprudence in 1985, courts exclusively used immediate invalidation to remedy constitutional breaches.[57] These included decisions that invalidated laws restricting abortion,[58] and removed procedural barriers to the public expression of disputed religious doctrines.[59] Courts also struck

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[52] Hoole, *supra* note 1 at 3.
[53] *Constitution Act*, *supra* note 7. See also Hoole, *ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] Hoole, *supra* note 1 at 4.
[57] *Ibid.*
[58] *R v Morgentaler*, 1988 90 SCC, [1988] 1 SCR 30. [*Morgentaler*]. A group of medical professionals set up a clinic to perform abortions on women who had not obtained a certificate from a therapeutic abortion committee at an accredited or approved hospital, as required by law at the time. The appellants challenged the constitutionality of the relevant provisions in the *Criminal Code*. They argued that the provisions violated the right to life, liberty, and security of the person, as protected by section 7 of the *Charter*. Parliament did not enact a new law, which made the Supreme Court's 1988 decision the final word on the issue.
[59] *Saumur v City of Quebec*, 1953 SCC 3, [1953] 2 SCR 299 [*Saumur*]. In this case, the Supreme Court of Canada struck down a municipal by-law that required individuals to obtain police permission before distributing publications in public spaces. *Saumur, ibid* at 334. Laurier Saumur, a Jehovah's Witness, challenged the by-law after being arrested over 100 times for distributing religious pamphlets in Québec City. *Saumur, ibid* at 302-303. The Court held that the by-law infringed on the rights to freedom of religion and freedom of speech, which the majority characterized as original freedoms inherent to Canada's legal order and beyond provincial jurisdiction. *Saumur, ibid* at 334. This

down legislation that imposed a religiously mandated day of rest,[60] and eliminated evidentiary and procedural obstacles that hindered the defence of criminally accused individuals.[61] In each case, the courts provided "no grace period for legislatures or the public to adjust".[62] Although many of these decisions generated controversy at the time, they are now recognized as landmark contributions to the development of a just and inclusive society.[63] In contrast to this earlier period, courts, including the Supreme Court of Canada, now rely more frequently on suspended declarations of invalidity as the preferred remedy when striking down unconstitutional laws.[64]

The Historical Development of Suspended Declarations in Canada

Manitoba Language Reference

The Supreme Court first introduced suspended declarations into Canadian law in its 1985 decision in the *Manitoba Language Reference* case.[65] The Province of Manitoba faced a significant issue, all of its laws were written only in English, rather than in both English and French.[66] This violated the requirements outlined in the *Manitoba Act, 1870*,[67] which provided that all legislative Acts in the province be enacted, printed, and published in both official languages.[68] Despite this

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decision led to the dismissal of over 1,000 charges against Witnesses and became a pivotal moment in protecting minority rights during Québec's *Grande Noirceur* era.

[60] *R v Big M Drug Mart Ltd*, 1985 SCC 69, [1985] 1 SCR 295 [*Big M Drug Mart*]. In this case, the Supreme Court of Canada struck down the federal *lord's day act*, RSC 1970, c L-13, as a violation of freedom of religion under section 2(a) of the *Charter*, because the purpose of the Act was to enforce observance of the Christian Sabbath. See *Big M Drug Mart*, *ibid* at para 143; see also *Lord's Day Act*, s 4. Big M Drug Mart, a corporation operating a Calgary supermarket, was charged with selling goods on Sunday's contrary to the Act. See *Big M Drug Mart*, *ibid* at para 1. See also Hoole, *supra* note 1 at 4.

[61] *R v Oakes*, 1986 SCC 46, [1986] 1 SCR 103. [*Oakes*]. In this case, the Supreme Court of Canada established the "*Oakes* test" for determining whether a law that infringes a *Charter* right can be justified under section 1 of the *Charter*. See *Oakes*, *ibid* at paras 62-71.

[62] Hoole, *supra* note 1 at 4.

[63] *Ibid.*

[64] *Ibid.*

[65] *Manitoba Language Reference*, *supra* note 4.

[66] *Manitoba Language Reference*, *ibid* at 747.

[67] *Manitoba Act*, *supra* note 5 at s 23.

[68] *Ibid*.

constitutional obligation, Manitoba failed to comply with the bilingualism requirement for ninety-five years.[69] The Court held that all of Manitoba's provincial laws were invalid because they did not meet the bilingual requirement.[70]

However, the Court considered that immediately striking down all provincial laws would have caused legal chaos, since Manitoba had enforced its unilingual laws since 1890.[71] Such an immediate invalidation of Manitoba laws would have undermined the rule of law.[72] The rule of law is a fundamental principle of the Constitution that ensures that the law is supreme over both government officials and private individuals, and it prevents the arbitrary exercise of power.[73] It also required the maintenance of a legal order that ensured legal continuity while the Manitoba legislature addressed the constitutional violations.[74] In order to preserve the rule of law by avoiding a legal chaos in Manitoba, the Court introduced an innovative remedy. It held:

> The Constitution will not suffer a province without laws. Thus, the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws before the date of this judgment, which are not saved by the de facto or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided, and the rule of law preserved.
>
> To summarize, the legal situation in the Province of Manitoba is as follows: all unilingual enacted Acts of the Manitoba Legislature are, and have always been, invalid and of no force or effect.
>
> All Acts of the Manitoba Legislature that would currently be valid and in force, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing, and publishing. Rights, obligations and any other effects which have arisen under these current laws by reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate, are enforceable and forever beyond challenge under the *de facto* doctrine. The same is true of those rights, obligations and other effects which have arisen under current laws and are saved by doctrines such as *res judicata* and mistake of law.[75]

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[69] *Manitoba Language Reference*, *supra* note 4 at 731-732.
[70] *Manitoba Language Reference*, *ibid* at 747.
[71] *Manitoba Language Reference*, *ibid.*
[72] *Manitoba Language Reference*, *ibid.*
[73] *Manitoba Language Reference*, *ibid.*
[74] *Manitoba Language Reference*, *ibid.*
[75] *Manitoba Language Reference*, *ibid* at 767.

Suspended declarations of invalidity "were thus introduced to Canadian law to avert a constitutional crisis".[76] Also, in applying this remedy, the Court acknowledged that the situation was serious and also pointed out the emergency circumstances that made it necessary to be applied in this case.[77] The Court also explained that the suspension period would be limited to the minimum period necessary for the legislature to correct the constitutional defect.[78] Initially, the Court did not set a fixed suspension period; instead, it directed the Attorney General of Canada or the Attorney General of Manitoba to apply for an extension within 120 days if additional time was needed.[79] In addition, the Court stated that from the date of its judgment, all future laws should follow the bilingual language requirements in the *Manitoba Act*, 1870.[80]

The Increased Use of Suspended Declarations in Canadian Cases

Canadian courts gradually increased their use of suspended declarations in the early 1990s, following the *Manitoba Language Reference* decision.[81] In *Dixon v British Columbia(Attorney-General)*,[82] the British Columbia Supreme Court invalidated a system of provincial electoral boundaries held to have violated the *Charter*-protected right to vote.[83] But suspended its declaration of invalidity to ensure the continued operation of a viable electoral system in the event of an election.[84] The Court held that, given the nature of parliamentary democracy where elections

[76] *Manitoba Language Reference, ibid* at 747- 754.
[77] *Manitoba Language Reference, ibid* at 767.
[78] *Manitoba Language Reference, ibid.*
[79] *Manitoba Language Reference, ibid* at 768-769.
[80] *Manitoba Language Reference, ibid* at 769.
[81] Hoole, *supra* note 1 at 6.
[82] *Dixon, supra* note 17.
[83] *Dixon, ibid* at 60.
[84] *Dixon, ibid.*

could be called at any moment, this presented an "emergency" situation.[85] This, in the Court's view, warranted a suspended declaration, consistent with the same reason it was applied in the *Manitoba Language Reference* case.[86]

In *R v Swain*,[87] the Supreme Court of Canada suspended its declaration of invalidity for six months. [88] It did so after it held that section 542(2) of the *Criminal Code*,[89] which mandated the automatic detention of individuals acquitted by reason of insanity, violated sections 7 and 9 of the *Charter*.[90] The Court held that immediately striking down the provision would have resulted in the release of individuals who might have posed a risk to public safety.[91] To mitigate this risk, while allowing Parliament time to enact a more tailored legislative response, the Court opted for a suspended declaration.[92] During the suspension period, the Court implemented an interim framework that restricted detention to a maximum of thirty days, subject to *habeas corpus* review by a superior court judge.[93] In *Swain*, the Court also retained jurisdiction to hear requests for an extension of the suspension or for changes to the interim framework regime.[94] The Court acted consistently with its approach in *Manitoba Language Reference*.[95]

[85] *Dixon, ibid.*
[86] *Dixon, ibid.*
[87] *Swain, supra* note 17.
[88] *Swain, ibid* at para 1021.
[89] *Criminal Code, supra* note 20.
[90] *Charter, supra* note 22. See also *Swain, supra* note 17 at 1021.
[91] *Swain, supra* note 1717 at 1019.
[92] *Swain, ibid*, at 1021.
[93] *Swain, ibid*, at 1021-1022.
[94] *Swain, ibid.*
[95] *Swain, ibid.*

The Establishment of the *Schachter* Principles

A significant subsequent instance of the Supreme Court applying a suspended declaration of invalidity occurred in *Schachter*.[96] An examination of more recent case law will illustrate that courts have significantly departed from the principles established in *Schachter*.[97] Nevertheless, this case continues to represent the Supreme Court's most important doctrinal statement regarding the standards for this remedy.[98] Beyond its role as a reference point for suspended declarations, *Schachter* is also one of the key decisions in the Supreme Court's jurisprudence on constitutional remedies.[99]

Schachter challenged the federal government's parental benefits system under section 15 of the *Charter*.[100] The system provided equal benefits to adoptive parents and biological mothers but excluded biological fathers from receiving the same benefits.[101] The Supreme Court concluded that this exclusion amounted to discrimination contrary to section 15 of the *Charter*.[102] However, it held that the impugned provisions could neither be severed nor remedied through reading-in.[103] An immediate declaration of invalidity would have resulted in the loss of parental benefits for existing recipients.[104] To prevent such deprivation, the Court suspended the declaration of

[96] *Schachter*, *supra* note 13.
[97] Hoole, *supra* note 1 at 7.
[98] *Ibid.*
[99] *Ibid.*
[100] *Charter*, *supra* note 22. See also *Schachter*, *supra* note 1313 at 689-690.
[101] *Schachter*, *ibid.*
[102] *Schachter*, *ibid* at 691-694.
[103] *Schachter*, *ibid* at 705-715.
[104] *Schachter*, *ibid* at 715-716.

invalidity, finding this remedy appropriate in situations where striking down the law immediately would deprive deserving persons of benefits without extending them to the applicant.[105]

The Supreme Court in *Schachter* introduced and established a set of guidelines outlining when a temporary suspension of a declaration of invalidity would be appropriate. It identified the following situations:

(a) when an immediate invalidation of the law would endanger public safety;

(b) when an immediate invalidation would undermine the rule of law; or

(c) when the impugned legislation is unconstitutional due to under-inclusiveness rather than overbreadth. Specifically, where striking down the law immediately would deprive deserving individuals of benefits without providing any corresponding advantage to the claimant whose rights were infringed.[106]

Although the Court clarified that these guidelines were not intended to serve as strict rules. it emphasized that suspended declarations should remain an exceptional remedy.[107] Lamer C.J.'s reasons on this point deserve attention and careful consideration:

> While [suspended declarations] are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s[ection] 52.
>
> A [suspended declarations] is a serious matter from the point of view of the enforcement of the *Charter*. A [suspended declarations] allows a state of affairs which has been held to violate standards embodied in the *Charter* to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the *Charter*.
>
> Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature

[105] *Schachter, ibid* at 717.
[106] *Schachter, ibid* at 719.
[107] *Schachter, ibid.*

> would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus, [suspended declarations] of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.
>
> The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.[108]

Hoole is of the view that the Court limitation in applying this remedy arose from a dual concern: (a) the safeguarding of *Charter* rights; and (b) a specific interpretation of the courts' jurisdictional responsibilities.[109] Concerning the latter, the Court noted that a legislative provision is deemed invalid only after a court has determined that a "constitutional defect" cannot be rectified through alternative methods, "such as reading in, severance, or reading down".[110] without undermining the legislature's intent and thereby exceeding the court's jurisdiction.[111]

Alongside his constitutional challenge to the federal parental benefits scheme on equality grounds in *Schachter*, he also pursued financial compensation because he believed that the scheme had wrongfully denied him such benefits.[112] *Schachter* sought this remedy under section 24(1) of the *Charter*,[113] which provides that "anyone whose *Charter* rights have been violated may apply to a court for a remedy the court deems appropriate and just in the circumstances".[114] However, the Court dismissed his request for financial compensation because Parliament could remedy the inequality by either increasing or eliminating parental benefits.[115] Therefore, there was no clear basis to claim that *Schachter* was entitled to a specific

[108] *Schachter, ibid* at 716-717.
[109] Hoole, *supra* note 1 at 8.
[110] Hoole, *ibid.*
[111] *Schachter, supra* note 13 at 721.
[112] *Schachter, ibid* at 719.
[113] *Charter, supra* note 2222. See also *Schachter, ibid* at 719-720.
[114] *Charter, ibid*.
[115] *Schachter, supra* note 13 at 720.

monetary award.[116] The Court explained that granting such a remedy under section 24(1) of the *Charter* depends on the assumptions about what the claimant's position would have been if the *Charter* breach had not occurred.[117]

Critiques of the Increased Use of Suspended Declarations of Invalidity

Bruce Ryder addresses the increased use of suspended declarations of invalidity through a critique that identifies two distinct areas of concern.[118] First, he questions the adequacy of judicial reasoning when courts choose to suspend declarations.[119] Second, he critiques the tendency of courts to defer excessively to the legislature, sometimes at the expense of individuals whose rights have already been infringed.[120]

Ryder discusses cases in which the courts issued suspended declarations without offering a clear rationale for doing so.[121] For example, in the case of *Gosselin v Quebec*,[122] the court was faced with a challenge based on alleged violations of sections 7 and 15 of the *Charter*.[123] The challenge concerned Quebec regulations that drastically reduced the social assistance entitlement of persons under the age of 30.[124] Chief Justice McLachlin, writing for the majority of the Court, expressed her discomfort with the breadth of the remedy requested:

> On [Gosselin's] submissions, this would mean ordering the government to pay almost $389 million in benefits plus the interest accrued since 1985. Ms.Gosselin claim[ed] this remedy on behalf of over 75,000 unnamed class members, none of them who came forward in support of her claim.[125]

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[116] *Schachter, ibid.*
[117] *Schachter, ibid.*
[118] Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2d) 267 at 267-268. [Ryder].
[119] *Ibid* at 287.
[120] *Ibid.*
[121] *Ibid* at 268.
[122] 2002 SCC 84, [2002] 4 SCR 429. [*Gosselin*].
[123] *Gosselin, ibid* at para 3.
[124] *Gosselin, ibid.*
[125] *Gosselin, ibid* at para 4.

Chief Justice McLachlin did not have to grapple with these profound remedial implications because she held that the Quebec scheme did not violate the *Charter*.[126] Justice Bastarache, in dissent, held that the difference in treatment based on age amounted to unjustifiable discrimination.[127] On the remedial issue, he concluded that if the legislation were still in force, he would not have issued an immediate declaration of invalidity that would have had the effect of extending the higher welfare rate to persons under the age of 30.[128] Instead, he would have issued a suspended declaration of invalidity:

> …given the broad impact of this legislation on Quebec society, as well as the wide range of alternatives that might be taken in order to bring complex social legislation such as this into line with constitutional standards, I believe that suspension of the declaration would have been appropriate in this case. Given the large sums of money spent by legislatures on social assistance programs such as this and the complexity of the programs at issue, a court should not intrude too deeply into the role of [the] legislature in this field. As noted earlier, given that the provision in question is no longer in force, this issue is moot. However, if the legislation [were] still in place, I would have ordered that the declaration of invalidity be suspended for a period of 18 months, the period that the government demonstrated would be required to implement changes to the legislation.[129]

Ryder notes that Bastarache J. did not consider an order that an order of money damages was an appropriate remedy for this violation.[130] Ryder argues that while the majority and dissenting options on section 15 in *Gosselin* thus fashioned very different responses to the *Charter* challenge, there was very little difference in the practical results.[131] Neither opinion delivered any remedy to the claimant, nor imposed any costs on the Quebec government.[132]

He argues that the dissent of Justice Bastarache in *Gosselin* illustrates how important suspended declarations of invalidity can be shape the practical results of *Charter* litigation.[133] From Bastarache J's point of view, the suspended declaration enabled him to delegate the

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[126] *Gosselin, ibid* at para 5.
[127] *Gosselin, ibid.*
[128] *Gosselin, ibid* at para 273.
[129] *Gosselin, ibid.*
[130] *Gosselin, ibid.*
[131] Ryder, *supra* note 118 at 269-270.
[132] *Ibid.*
[133] *Ibid.*

responsibility for managing the policy implications of his *Charter* analysis to the legislature.[134] From another point of view, his opinion illustrates how suspended declarations can serve to deprive even successful *Charter* claims of any practical impact.[135] From the legislature's point of view, he argues that suspended declarations can make it possible to achieve a seamless, costless transition to a *Charter*-compliant legal regime.[136]

Ryder discusses the *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*,[137] case as another instance where the Court applied this remedy without articulating a principled basis.[138] In this case the Court invalidated a New Brunswick law that altered the workload of provincial judges who had chosen supernumerary status.[139] Despite the serious implications for judicial independence, Ryder argues that the Court suspended the declaration of invalidity without fully explaining why a temporary delay in remedy was necessary in this context.[140]

Justice Gonthier, delivering the majority opinion, concluded that eliminating the supernumerary status without first obtaining the approval of an independent commission undermined the institutional financial security of provincial judges.[141] This, he held, breached section 11(d) of the *Charter*.[142] Referring to the *Manitoba Language Reference*, he suspended the declaration of invalidity for six months to prevent a legal vacuum and to allow the New Brunswick government time to enact a constitutionally compliant response.[143] However, Ryder

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[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] 2002 SCC 13, [2002] 1 SCR 405. [*Mackin*].
[138] Ryder, *supra* note 118 at 270.
[139] *Mackin supra* note 137 at para 76.
[140] *Mackin ibid* at para 77. See also Ryder, *supra* note 118 at 270.
[141] *Mackin ibid* at para 73.
[142] *Mackin ibid*.
[143] *Mackin ibid* at para 77.

contends that Justice Gonthier failed to justify how an immediate invalidation would have resulted in a legal vacuum comparable to that in the *Manitoba Language Reference*.[144] Nor did he explain how temporarily maintaining the unconstitutional regime would have meaningfully improved the government's capacity to develop a constitutional law.[145]

The third example cited by Ryder on this issue is the *R v Guignard* case.[146] In that decision, the Court struck down a municipal by-law enacted by the city of Saint-Hyacinthe.[147] Instead of declaring the by-law immediately invalid, he permitted it to remain in force for six months.[148]

> The only appropriate remedy in this case is a declaration that the provisions of the municipal by-law the appellant has challenged are invalid. …However, given the importance of the zoning by-law in municipal land use planning and the risk of creating acquired rights, during a period in which there was a legal vacuum, which could be set up against a subsequent by-law, that relief must be tempered by suspending the declaration of invalidity for a period of six months, to give the municipality an opportunity to revise its by-law. It will [of] no doubt be in the respondent's interest to rethink the definition of "advertising sign" in particular, and more clearly identify the real objectives of the bans imposed."[149]

Ryder argues that the unanimous result in *Guignard* is a striking illustration of how casually the Court now approaches suspended declarations.[150] He argues that the reason Justice LeBel gave for issuing a suspended declaration, rather than an immediate one, would have allowed unregulated commercial expression on signs in the city of Saint-Hyacinthe.[151] This outcome, he notes, aligned with the exercise of the *Charter* freedom at issue.[152] He argues that the countervailing interest, controlling was a valid through hardly urgent objective of

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[144] Ryder, *supra* note 118 at 270.
[145] *Ibid.*
[146] *R v Guignard* 2002 SCC 14, [2002] 1 SCR 472. [*Guignard*].
[147] *Guignard, ibid* at para 32.
[148] *Guignard, ibid.*
[149] *Guignard, ibid.*
[150] Ryder, *supra* note 118 at 271.
[151] *Ibid.*
[152] *Ibid.*

municipal regulation.[153] This is because this interest was not sufficiently pressing to justify restrictions on expressive activity that had already occurred, but was sufficiently pressing to override the exercise of expressive freedom for a temporary period following the decision.[154] He notes that Justice LeBel viewed the continued exercise of freedom of expression as an inconvenience that had to give way to effective land use planning.[155]

With respect to the latter on the courts' increased willingness to yield to legislative discretion, occasionally to the detriment of those whose *Charter* rights have already been breached. Ryder notes, for example, that in the dissenting decision in *Egan v Canada*,[156] Justice Iacobucci:

> would have changed the definition of spouse in the *Old Age Security Act* to include same-sex couples through a combination of severance and reading in. He would have suspended the coming into force of the new definition for one year because it was an "issue of public policy" on which "some latitude ought to be given to Parliament to address the issue and devise its own approach to ensuring that that the spousal allowance be distributed in a manner that conforms with the equality guarantees of the *Charter*.[157]

Similarly, in the case of *Thibaudeau v Canada*,[158] McLachlin and L'Heureux-Dube JJ. in their dissent stated that they would suspend the declarations of invalidity in relation to the inclusion-dedication scheme for child support payments in the *Income Tax Act* to enable Parliament to seek out and implement a less discriminatory alternative.[159] Likewise, in *Dunmore v Ontario (Attorney General)*,[160] rather than issuing an immediate invalidation that would have restored the collective bargaining rights of agricultural workers.[161] Basterache J. suspended the declaration of invalidity

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[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Egan*, *supra* note 17.
[157] *Egan*, *ibid* at para 96.
[158] 1995 99 SCC, [1995] 2 SCR 627. [*Thibaudeau*].
[159] *Thibaudeau, ibid* at 635.
[160] *Dunmore*, *supra* note 17.
[161] Ryder, *supra* note 118 at 279.

for 18 months to enable the legislature to decide how it wished to respect those workers's freedom of expression.[162]

Grant Hoole updated Ryder's work by reviewing Supreme Court jurisprudence since 2003 and identifying several troubling trends in the use of suspended declarations of invalidity.[163] First, Hoole notes a recurring problem of inadequate judicial reasoning, where courts fail to sufficiently justify the suspension of a declaration.[164] Second, he raises concerns about harm to *Charter* applicants, particularly when courts delay remedies for individuals whose rights have already been violated.[165] Third, Hoole criticizes the Court's tendency to invoke broad institutional assumptions namely, that remedial discretion should default to legislatures without offering a concrete explanation of why such deference is warranted in each case.[166]

The first concern which is on the absence of clear and principled reasoning to justify a suspension was discussed by Hoole in the Supreme Court's decision of *Figueora v Canada (Attorney General)*.[167] The Court examined the *Canada Election Act*,[168] provision requiring a political party to have at least 50 candidates to qualify for registered party benefits, such as issuing tax receipts and listing party affiliation on election materials.[169] The applicant, who was the leader of the Communist Party of Canada, challenged the 50-candidate threshold as violating section 3 of the *Charter*, which guarantees every Canadian citizen the right to vote and run for office.[170] The

[162] *Dunmore*, *supra* note 17 at para 66.
[163] Hoole, *supra* note 1 at 118.
[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid.*
[167] *Figueora*, *supra* note 17.
[168] *Election Act*, RSC 1985, c E-2, ss 24(2), 24(3), 28(2) [amended]. [*Election Act*].
[169] *Ibid.*
[170] *Figueora*, *supra* note 17 at para 16.

Court, in a majority decision, concluded that the threshold created obstacles for smaller political parties that conflicted with the *Charter*'s protections: As the Court observed:

> [T]he 50-candidate threshold does infringe section 3 of the *Charter*. It undermines both the capacity of individual citizens to influence policy by introducing ideas and opinions into the public discourse and debate through participation in the electoral process, and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their preferences. In each instance, the threshold requirement is inconsistent with the purpose of section 3 of the *Charter* the preservation of the right of each citizen to play a meaningful role in the electoral process.[171]

Instead of immediately invalidating the provision, the Court suspended the declaration of invalidity for 12 months to allow the government time to comply.[172] However, the Court offered no compelling justification for this suspension beyond the vague rationale of providing "time to comply".[173] Hoole argues this reasoning lacks substance because immediate invalidation would have resulted in the same legislative outcome, while suspending the declaration prolonged enforcement of a *Charter*-infringing provision and extended harm.[174]

Hoole identified the case of *Nguyen v. Quebec*,[175] as another case in which the Supreme Court failed to provide adequate reasoning on the application of this remedy.[176] The Court addressed a challenge under section 23(2) of the *Charter* to provisions of Quebec's *Charter of the French Language*,[177] which aimed to promote the French language by generally requiring public education to be conducted in French.[178] However, section 23(2) of the *Charter* guarantees minority language educational rights, and the law contained exceptions for English-language instruction in

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[171] *Figueora, ibid* at para 58.
[172] *Figueora, ibid* at para 93.
[173] *Figueora, ibid*.
[174] Hoole, *supra* note 1 at 22-23.
[175] *Nguyen v Quebec (Education, Recreation and Sports),* 2009 SCC 47, [2009] 3 SCR 208. [*Nguyen*].
[176] Hoole, *supra* note 1 at 26.
[177] RSQ, c C-11 s 73. See also *Nguyen, supra* note 175 at para 21.
[178] *Ibid.*

specific circumstances.[179] In 2002, Quebec amended the statute to close a perceived loophole, parents had been temporarily enrolling their children in unsubsidized private English-language schools to qualify them for entry into the public English-language system.[180] The amendment disqualified such time from counting toward eligibility for English-language public education, and also excluded time spent in English-language programs granted by special authorization, such as for learning disabilities.[181]

The Supreme Court found that these provisions violated section 23(2) of the *Charter*,[182] as they imposed an absolute prohibition that failed to consider the individual educational needs of children.[183] While the Court acknowledged that promoting the French language constituted a legitimate legislative objective, it held that the impugned provisions went too far.[184] Despite recognizing the constitutional breach, the Court suspended its declaration of invalidity for one year,[185] citing only the "difficulties [that] this declaration of invalidity may entail" and the need to allow Quebec's National Assembly time to respond.[186] Hoole criticizes this reasoning as insufficient, arguing that the Court failed to provide a principled explanation for the suspension, particularly in light of the clear rights violation and the lack of evidence that immediate invalidation would have produced systemic harm or unmanageable consequences.[187]

[179] *Charter, supra* note 22.
[180] *An Act to amend the Charter of the French language,* SQ 2002, c 28.
[181] *Ibid* at sections 88.1 & 88.2.
[182] *Charter, supra* note 22.
[183] *Nguyen, supra* note 175 at para 42.
[184] *Nguyen, ibid* at para 43.
[185] *Nguyen, ibid* at para 46.
[186] *Nguyen, ibid.*
[187] Hoole, *supra* note 1 at 27.

The third example Hoole identifies as demonstrating inadequate reasoning for a suspended declaration is in the Supreme Court's decision in *Health Services and Support Facilities Subsector Bargaining Association v British Columbia*.[188] The Court addressed a challenge to the *Health and Social Services Delivery Improvement Act*,[189] enacted in 2002 to control rising health care costs in the province.[190] The legislation allowed health care employers to restructure their workforce in ways that would otherwise be restricted by collective agreements.[191] The applicants, representing health sector employees, argued that the Act infringed their members' rights under section 2(d) of the *Charter*.[192] The Supreme Court agreed, concluding that several provisions of the Act particularly sections 6(2), 6(4), and 9 substantially interfered with the right to bargain collectively and therefore violated the *Charter*.[193]

Nevertheless, the Court suspended its declaration of invalidity for twelve months, offering only a brief justification to allow the government to address the "repercussions" of the decision.[194] Hoole criticized this reasoning as unsubstantiated and lacking in transparency.[195] He argued that the Court failed to identify the nature of the anticipated repercussions, in order to explain why legislative time was necessary, or justify why such institutional considerations should have outweighed the immediate enforcement of *Charter* rights.[196] Although the Court acknowledged that the statute responded to earlier fiscal exigencies, Hoole emphasized that the legislation had already been in force for five years by the time of the judgment, and the evidentiary record did not

[188] 2007 SCC 27, [2007] 2 SCR 391. [*Health Services*].
[189] SBC 2002 c. 2, s 2. [*Health and Social Services Delivery Improvement Act*].
[190] *Ibid* at sections 2-10.
[191] *Health and Social Services Delivery Improvement Act, supra* note 189.
[192] *Health Services, supra* note 188 at para 1.
[193] *Health Services, ibid* at para 2.
[194] *Health Services, ibid* at para 168.
[195] Hoole, *supra* note 1 at 28.
[196] *Ibid*.

establish a clear connection between the statute and any meaningful cost reductions.[197] In his view, the more plausible consequence of immediate invalidation would have been a return to the pre-2002 legal framework, without evidence of significant harm to the health care system.[198] Hoole argues that the Court in *Health Services* failed to provide a principled or evidence-based justification for its suspension, thereby weakening the credibility of the remedy granted.[199]

Hoole illustrated his second concern through a court decision in which the judge suspended the declaration of invalidity without making sufficient judicial effort to minimize its harmful interim effects on the *Charter* applicant.[200] In *R v Demers*,[201] the accused was a person with down syndrome who had been held unfit to stand trial due to mental incapacity.[202] At that time, the *Criminal Code* established a framework for managing such individuals after a finding of unfitness, courts or review boards held disposition hearings to determine conditions of detention.[203] However, review boards could not grant absolute discharge and had to hold annual reviews, with the Crown required every two years to prove a prima facie case existed.[204] This regime allowed individuals deemed permanently unfit to remain indefinitely under restrictive conditions, even if they posed no public safety threat or chance of recovery.[205]

The Supreme Court held that this legislative scheme infringed on the rights protected under section 7 of the *Charter*: As the Court explained:

> [the regime] fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society's interest in bringing accused persons to trial cannot be accomplished, nor

[197] *Ibid.*
[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid* at 41.
[201] *Demers, supra* note 17.
[202] *Demers, ibid* at para 10.
[203] *Demers, ibid.*
[204] *Demers, ibid.*
[205] *Demers, ibid* at para 11.

> can society's interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court, who do not even have the power to order a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused's current circumstances. Thus, the failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered, renders the entire scheme under [regime] overbroad as it relates to permanently unfit accused who do not pose a significant threat to the safety of the public.[206]

Applying the framework from *Schachter*, the Court suspended the declaration for 12 months to allow Parliament to amend the *Criminal Code*.[207] In addition, the Court expressed a concern that immediately invalidating the provision would have created a legislative vacuum, potentially leading to the release of individuals who might have posed a risk to public safety.[208] The Court emphasized that Parliament was institutionally better positioned to carry out the complex and far-reaching amendments required.[209]

Hoole criticizes the suspension in *Demers* for prolonging constitutional harm without offering a compelling reason to withhold interim relief.[210] He questions why courts could not have granted relief when there was no risk to public safety or Parliament's ability to act.[211] In his view, the suspension denied meaningful relief not only to the claimant but also to others enduring more severe hardships, including continued detention.[212]

Hoole's third concern relates to the Court's reliance on institutional assumptions when deciding to suspend declarations of invalidity. Specifically, he discusses *Corbiere v Canada*

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[206] *Demers*, *ibid* at para 55.
[207] *Demers*, *ibid* at para 58.
[208] *Demers*, *ibid.*
[209] *Demers*, *ibid.*
[210] Hoole, *supra* note 1 at 42.
[211] *Ibid.*
[212] *Ibid.*

(Minister of Indian and Northern Affairs),[213] as an example of what he terms a "flawed institutional assumption."[214] In that case, the applicants challenged section 77(1) of the *Indian Act*,[215] which limited voting rights in First Nations band elections to members "ordinarily resident" on reserves.[216] The applicants, who were off-reserve members of the Batchewana Band, argued that this exclusion violated their equality rights under section 15 of the *Charter*.[217]

The Supreme Court held in favour of the applicants, finding that off-reserve members constituted an analogous group and that their exclusion perpetuated historical disadvantage.[218] Nevertheless, the appropriate remedy presented a challenge, as striking down the provision would have had broad implications for all First Nations bands.[219] To manage these implications, the Court suspended the declaration of invalidity for 18 months to allow Parliament time to consult affected communities and enact revised legislation.[220]

Importantly, the Court refused to grant the applicants' request for an immediate constitutional exemption during the suspension period.[221] Because combining an exemption with a suspension could complicate the electoral process and potentially conflict with future legislation.[222] The Court acknowledged that suspending a declaration is "a serious matter," as it permits an unconstitutional law to remain in force temporarily.[223] In addition, the Court suggested

[213] *Corbiere, supra* note 17 .
[214] Hoole, *supra* note 1 at 30-35.
[215] RSC 1985, c I-5.
[216] *Corbiere, supra* note 17 at para 3.
[217] *Corbiere, ibid.*
[218] *Corbiere, ibid* at paras 15- 21.
[219] *Corbiere, ibid* at para 22.
[220] *Corbiere, ibid.*
[221] *Corbiere, ibid* at para 23.
[222] *Corbiere, ibid.*
[223] *Corbiere, ibid.*

that concerns about interim rights infringements could be addressed through separate legal challenges.[224]

Hoole argues that the Court viewed immediate invalidation as inadequate for allowing a careful, context-sensitive situation rather, it considered legislative deliberation necessary.[225] Although the Court recognized the gravity of temporarily preserving an unconstitutional provision, it concluded that the benefits of granting lawmakers time to respond outweighed the resulting harm.[226] In Hoole's view, the decision was influenced not solely by deference to Parliament but by the aim of achieving a more inclusive and responsive outcome for all affected parties.[227]

Although Hoole offers several criticisms regarding the use of suspended declarations of invalidity, he also acknowledges significant judicial restraint in certain instances.[228] Notably, Hoole analyzes the Supreme Court's decision in *Canada (Attorney General) v Hislop*,[229] where the Court denied a suspended declaration of invalidity.[230] In this case, the Court examined a challenge to amendments made to the *Canada Pension Plan*,[231] which extended benefits to surviving same-sex partners following the Court's earlier decision in *M. v. H.*.[232] That prior decision had found the exclusion of same-sex partners from spousal support violated section 15 of the *Charter*,[233] prompting legislative reforms to ensure equal access to benefits. However, despite

[224] *Corbere, ibid.*
[225] Hoole, *supra* note 1 at 32.
[226] *Ibid.*
[227] *Ibid* at 33.
[228] Hoole, *supra* note 1 at 50.
[229] 2007 SCC 10, [2007] 1 SCR 429. [*Hislop*].
[230] Hoole, *supra* note 1 at 50.
[231] RSC 1985, c C-8.
[232] 1999 SCC 686, [1999] 2 SCR 3. [*M. v. H.]*.
[233] *M. v. H, ibid* at para 74.

these amendments, the Court chose not to suspend the declaration, demonstrating judicial caution and a measured approach to the remedy of suspended declarations.[234]

Complementing this example of judicial restraint, Hoole also identifies the 2009 decision of the Court of Appeal for British Columbia in *McIvor v Canada (Registrar of Indian and Northern Affairs)*,[235] as a compelling illustration of a thorough and principled justification for suspending a declaration of invalidity.[236] In *McIvor*, the court addressed a challenge to section 6 of the *Indian Act*,[237] which regulates who may register as "Indians" under the Act.[238] The 1985 amendment to the Act removed explicitly discriminatory provisions that barred women from retaining Indian status after marrying non-Indian men and limited the transmission of status to children based on non-Indian matrilineal lineage.[239]

These amendments restored status to those previously excluded.[240] However, the changes unintentionally preserved differential treatment for individuals who, due to maternal Indian parentage, could not pass on Indian status to their children in the same way as those with paternal Indian parentage.[241] The court therefore found these provisions violated the applicants' equality rights.[242] Although the provisions pursued a pressing and substantial objective affirming the Indian status of deserving individuals, they failed to minimally impair the rights of those whose transmission of status the law arbitrarily restricted.[243]

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[234] Hislop, *ibid* at para 121.
[235] 2009 BCCA 153. [*McIvor*].
[236] Hoole, *supra* note 1 at 47.
[237] RSC 1985, c. I-5.
[238] *Ibid.*
[239] *McIvor*, *supra* note 235 at paras 4-11.
[240] *Ibid.*
[241] *McIvor, ibid* at paras 44-45.
[242] *McIvor, ibid* at para 117.
[243] *McIvor, ibid* at para 143.

Accordingly, the court issued a suspended declaration of invalidity to preserve those interests while the legislature corrected the scheme. It provided detailed reasons for this decision:

> The legislation at issue has now been in force for 24 years. People have made decisions and planned their lives on the basis that the law as it was enacted in 1985 governs the question of whether or not they have Indian status. The length of time that the law has remained in force may, unfortunately, make the consequences of amendment more serious than they would have been in the few years after the legislation took effect.
>
> Contextual factors, including the reliance that people have placed on the existing state of the law, may affect the options currently available to the Federal government in remedying the *Charter* violation. It may be that some of the options that were available in 1985 are no longer practical. On the other hand, options that would not have been appropriate in 1985 may be justifiable today, under s. 1 of the *Charter*, in order to avoid draconian effects.
>
> I cannot say which legislative choice would have been made in 1985 had the violation of s. 15 been recognized. I am even less certain of the options that the government might choose today to make the legislation constitutional. For that reason, I am reluctant to read new entitlements into s. 6 of the *Indian Act*. I am even more reluctant to read down the entitlement of the comparator group, especially given that it is not represented before this Court. In *Schachter v. Canada* … the Supreme Court of Canada discussed situations in which the appropriate remedy is a declaration of invalidity that is temporarily suspended. …
>
> [Quotation omitted] …
>
> It seems to me that this reasoning is apt to the case at bar. It would not be appropriate for the Court to augment [the claimant"s] Indian status, or grant such status to his children; there is no obligation on the government to grant such status. On the other hand, it would be entirely unfair for this Court to instantaneously deprive persons who have had status since 1985 of that status as a result of a dispute between the government and the plaintiffs. In the end, the decision as to how the inequality should be remedied is one for Parliament.
>
> … Accordingly, I would declare [the impugned provisions] to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation and make it constitutional.[244]

Hoole argues that these reasons exemplify how courts can reconcile institutional concerns with a principled application of *Schachter*.[245] He emphasizes that, by applying *Schachter*, the court prioritizes the potential harm that an immediate declaration of invalidity might cause particularly the disruption to the reliance interests of individuals whose Indian status depends on the legislation.[246]

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[244] *McIvor, ibid* at paras 157-161.
[245] Hoole *supra* note 1 at 48.
[246] *Ibid.*

The court based its decision on protecting the existing regime and recognized that correcting the legislation required expertise beyond its capacity, involving policy decisions outside its institutional role.[247] It therefore provided a detailed explanation of the factors supporting a suspended declaration.[248] Prioritizing the public interest, the court sought to safeguard existing rights while encouraging an optimal remedial amendment.[249] The prejudice to successful *Charter* claimants was relatively minimal they faced a delay in receiving substantive changes to their legal rights, but this delay reflected a proper deference to the legislature's role in determining the content of those rights.[250]

On the other hand, scholars welcome the increased use of suspended declarations as being compatible with dialogue theory. According to Choudhry and Roach, the increased use of this remedy fits within the conception of judicial-legislative interaction, wherein both branches share responsibility for upholding constitutional principles.[251] Similarly, Hogg *et al*. argue that the purpose of suspending a declaration of invalidity is to give the legislature an opportunity to respond directly to judicial decisions.[252]

Building on these scholarly perspectives, the thesis updates Hoole's analysis by examining selected decisions of the Court issued since 2011, along with a 1997 case in which suspended declarations of invalidity were applied. This chapter discusses the contemporary judicial application of this remedy, and this thesis extends the analysis in subsequent chapters by considering additional cases that illustrate its use, including decisions addressing MAiD and the

[247] *Ibid* at 49.
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*
[251] Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies", (2003) 21 SCLR (2d) 205 at 232 [Choudhry and Roach].
[252] Hogg *et al.*, "*Charter* Dialogue Revisited Or 'Much Ado About Metaphors", (2007) 45 Osgoode Hall LJ 1, at 14 -18 [*Hogg et al.*].

corresponding legislative responses. In particular instances, this thesis assesses the *Charter* reasoning, the Court's conclusions, and the remedies granted. These cases reveal a discernible trend: the Court consistently relies on suspended declarations to uphold the institutional roles of both the legislature and the judiciary in a manner that facilitates dialogue.

Illustrative Instance of Effective Application of Suspended Declaration of Invalidity

The 2020 Supreme Court cases of *Ontario (Attorney General) v G* and *R v Ndhlovu* provide a unique and useful illustration of how this type of remedy has been applied in practice. A significant aspect of these cases is the individual exemption granted to the claimants.

Overview: Post-2011 Developments and a 1997 Foundational Precedent Case on Suspended Declarations

Case Name /Year	**Court**	***Charter* Section(s) Involved**	**Duration of Suspension Period**
Ontario v G (2020)	Supreme Court of Canada	Subsection 15(1) of the *Charter*	Twelve Months
R v Ndhlovu (2022)	Supreme Court of Canada	Section 7 of the *Charter*	Twelve Months
Canada (Attorney-General) v Bedford (2013)	Supreme Court of Canada	Section 7 of the *Charter*	Twelve Months

Eldridge v British Columbia (1997)	Supreme Court of Canada	Section 15 of the *Charter*	Six Months
Carter (Attorney-General) v Canada (2015)	Supreme Court of Canada	Section 7 of the *Charter*	Sixteen Months in total.
Truchon v Attorney-General of Canada (2019)	Quebec Superior Court	Sections 7 and 15 of the *Charter*	Fourteen Months in total.

Individual Exemption

In *Ontario v G,*[253] the Supreme Court considered G's challenge to Ontario's sex-offender registry (*Christopher Law)*.[254] In June 2002, G was held not criminally responsible on account of mental disorder (NCRMD) for committing two sexual offences.[255] A year later, in August 2003, the Ontario Review Board granted him an absolute discharge after determining that he no longer posed a significant risk to public safety.[256] Despite this discharge, G was still added to the Ontario's sex-offender registry.[257] Thus, G argued that it infringed on his section 7 and subsection 15(1) *Charter* rights.[258]

Section 15: *Charter* Analysis

The Court followed the established two-step test in its subsection 15(1) *Charter* analysis. It first identified a clear distinction based on an analogous ground (mental disability),[259] and then asked whether the distinction perpetuated a disadvantage.[260]

(a) Whether *Christopher's Law* created a distinction made on the face of the law or in its impact based on an enumerated or analogous ground?

The Court held that Christopher's Law established a clear distinction based on the enumerated ground of mental disability. This distinction was present because:

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[253] *Ontario* v *G, supra* note 17.
[254] 2000, S O 2000, c 1 [*Christopher's Law Sex Offenders Registry*].
[255] *Ontario* v *G, ibid* at para 5.
[256] *Ontario* v *G, ibid* at para 8.
[257] *Ontario* v *G, ibid* at para 9.
[258] *Charter*, *supra* note 22. See also *Ontario* v *G, ibid* at para 10.
[259] *Ontario* v *G, supra* note 17 at para 40.
[260] *Ontario* v *G, ibid.*

Offenders held guilty of sexual offences had access to several options that allowed for individualized assessments, which could have led to:

(a) An exemption from reporting and registration through a discharge at sentencing,

(b) A removal from the sex offender registry via a free pardon, and

(c) A relief from the obligation to continue reporting through either a free pardon or record suspension.[261]

These options provided convicted individuals with opportunities for exemption, removal, or relief based on their personal circumstances.[262] In contrast, those held not criminally responsible on account of mental disorder (NCRMD) had no such opportunities; they could not be exempted from initial registration, removed from the registry once registered, or relieved of reporting obligations.[263]

Thus, the law subjected NCRMD individuals to differential treatment solely because of their mental disability, demonstrating a distinction based on an enumerated ground. This difference was not merely theoretical but had a reasonable impact on those individuals' rights and freedoms.[264]

(b) 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?

The Court held that Christopher's Law reinforced harmful stigmas by portraying individuals with mental illness as inherently and permanently dangerous, thereby perpetuating their social disadvantage.[265] It imposed a "double stigma" on those held NCRMD, labeling them both

[261] *Ontario* v *G*, *ibid* at para 50.
[262] *Ontario* v *G*, *ibid* at para 52.
[263] *Ontario* v *G*, *ibid.*
[264] *Ontario* v *G*, *ibid.*
[265] *Ontario* v *G*, *ibid* at para 65.

"mentally ill" and "sexual offenders."[266] This burden violated substantive equality by relying on prejudicial stereotypes and placing NCRMD individuals in a worse position than those held guilty.[267]

For G, the law denied access to exemption and removal based on individualized assessment, resulting in lifelong registration, mandatory reporting, and police monitoring, regardless of his absolute discharge, compliance, or personal circumstances.[268] This permanent surveillance signaled that the law considered him a perpetual public threat.[269]

Accordingly, the Court held that Christopher's Law infringed subsection 15(1) of the *Charter* by imposing registry requirements on NCRMD individuals without offering exemption or removal opportunities based on individualized assessment, unlike those available to convicted offenders.[270]

Section 1: *Charter* Analysis

To justify a violation of Subsection 15(1) under section 1 of the *Charter*, the Attorney General was required to establish, on a balance of probabilities, that the infringement was reasonable and demonstrably justified in a free and democratic society.[271]

This justification involves a two-step process:

(1). **Pressing and Substantial Objective**: The government must show that the law or measure addresses an important and urgent goal.

[266] *Ontario* v *G, ibid.*
[267] *Ontario* v *G, ibid* at para 66.
[268] *Ontario* v *G, ibid* at para 68.
[269] *Ontario* v *G, ibid.*
[270] *Ontario* v *G, ibid* at para 70.
[271] *Charter, supra* note 22.

(2). **Proportionality Analysis**: The government must demonstrate that the infringement on rights is proportionate to that goal.

This involves three components:

(a) **Rational Connection**: The law must be logically connected to achieving its objective.

(b) **Minimal Impairment**: The law must impair the right as little as reasonably possible.

(c) **Proportionality Between Effect and Objective**: The benefits of the law must outweigh its negative impact on the right.

This test is known as the *Oakes* test.[272]

(a) Did Christopher's Law pursue a pressing and substantial objective?

The Court held that the purpose of Christopher's Law (Ontario's sex offender registry law) was to help prevent and investigate sexual offences.[273]

(b) Was Christopher's Law rationally connected to its objective of preventing and investigating sexual offences?

The Court held that the requirement that all persons held NCRMD comply with Christopher's Law without exemption or removal opportunities is logically connected to achieving that purpose.[274]

(c) Did Christopher's Law impair Subsection 15(1) *Charter* rights as little as reasonably possible?

[272] *Oakes, supra* note 61.
[273] *Ontario* v *G, supra* note 1717 at para 73.
[274] *Ontario* v *G, ibid.*

The Supreme Court held, that "Christopher's Law was not minimally impairing of the subsection 15(1) rights of those who were held NCRMD of a sexual offence and discharged.[275] The Court held that while individuals not found NCRMD could benefit from mechanisms for removal or exemption based on individualized assessment, such as a free pardon, record suspension, or discharge …, "the inclusion of any method of exempting and removing those held NCRMD from the registry based on individualized assessment would be less impairing of their subsection 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.[276]

The Attorney General argued that because risk assessments could never be certain, a mandatory and permanent registry for all individuals held NCRMD was justified.[277] The Court rejected this argument on several grounds.[278] First, it noted that the same logic could apply to all individuals held guilty of sexual offences, as the individualized assessments involved in granting absolute discharges, pardons, or record suspensions also could not guarantee risk prediction with certainty.[279] Second, the Court emphasized that the minimal impairment requirement demanded only that the legislative objective be substantially achieved, not perfectly.[280]

Furthermore, the Court noted that individualized assessments did not require predicting risk with absolute certainty.[281] There was no evidence to suggest that allowing persons held NCRMD to seek exemption or removal based on individualized assessments would significantly diminish the registry's usefulness to law enforcement.[282] Consequently, the Court held that the Attorney

[275] *Ontario* v *G, ibid* at para 75.
[276] *Ontario* v *G, ibid.*
[277] *Ontario* v *G, ibid.*
[278] *Ontario* v *G, ibid.*
[279] *Ontario* v *G, ibid.*
[280] *Ontario* v *G, ibid.*
[281] *Ontario* v *G, ibid.*
[282] *Ontario* v *G, ibid.*

General had failed to satisfy the burden under section 1 of the *Charter*.[283] Therefore, the infringement of subsection 15(1) was unjustified.[284]

It is important to note that the Court did not engage in a section 7 analysis, finding it unnecessary given its conclusion that *Christopher's Law* violated subsection 15(1) in its application to persons held NCRMD.[285]

Declaration of Invalidity

The Supreme Court upheld the Court of Appeal's decision to suspend the declaration of invalidity for a period of twelve months.[286] The Court ordered that his information be immediately removed from the registry (individual exemption).[287]

Key Distinction from Precedent Cases

In order to distinguish this case from previous instances where this remedy has been applied, the following observation have been made. In *Manitoba Language Reference* case, an immediate invalidation would have created a legal vacuum and jeopardized the rule of law.[288] Similarly, in *Swain*, an instant declaration of invalidity threatened the public safety.[289] By contrast, in this case, there was an issue of continued subjection to a mandatory requirement by law for a group of persons without any pressing or necessary justification.

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[283] *Ontario* v *G, ibid* at para 76.
[284] *Ontario* v *G, ibid.*
[285] *Ontario* v *G, ibid* at paras 77- 78.
[286] *Ontario* v *G, ibid* at 79.
[287] *Ontario* v *G, ibid.*
[288] *Manitoba Language Reference, supra* note 4 at 753.
[289] *Swain, supra* note 17 at para 1019.

R v Ndhlovu

In 2015, the defendant, Eugene Ndhlovu, pleaded guilty to two counts of sexual assault involving separate complainants, in relation to incidents that occurred at a party in 2011.[290] After considering the accused's personal background and the evidence presented, the sentencing judge determined that the risk of reoffending was low.[291] However, due to the convictions for the two sexual assault offences, the accused was automatically required pursuant to subsections 490.012(1) and 490.013(2.1) of the *Criminal Code* to register for life in the national sex offender registry established under the *Sex Offender Information Registration Act* (SOIRA).[292] Mr. Ndhlovu subsequently challenged the constitutionality of these provisions at the Supreme Court of Canada.[293] He argued that sections 490.012 and 490.013(2.1) violated his rights under section 7 of the *Charter* and could not be justified under section 1.[294]

Section 7: Charter Analysis

To demonstrate a violation of section 7 of the *Charter*, Mr. Ndhlovu had to meet a three-part test: First, he needed to establish that the law interfered with one or more of the protected interests under section 7, namely life, liberty, or security of the person.[295] Once interference with a protected interest can be shown, Mr. Ndhlovu then had to demonstrate that this deprivation was inconsistent with the principles of fundamental justice.[296] If a breach of section 7 is established,

[290] *R v Ndhlovu*, 2016 ABQB 595 at para 1. [*Ndhlovu*].
[291] *Ndhlovu, ibid* at para 6.
[292] SC 2004, c 10 [*Sex Offender Information Registration Act*].
[293] *Ndhlovu, supra* note 17 at para 26.
[294] *Charter, supra* note 22. See also *Ndhlovu*, 1717*ibid.*
[295] *Ndhlovu, ibid* at para 49.
[296] *Ndhlovu, ibid.*

the final step would be to assess whether the infringement could be justified under section 1 of the *Charter* as a reasonable limit prescribed by law.[297]

(a) Did sections 490.012 and 490.013(2.1) interfere with the right to liberty?

The majority of the Court held that sections 490.012 and 490.013(2.1) interfered with Mr. Ndhlovu's right to liberty "in serious ways" because: "Liberty is obviously undermined when personal information is collected, under threat of imprisonment, for the very purpose of monitoring a person in the community and promptly identifying the person's whereabouts in the course of a criminal investigation."[298]

(b) Were the provisions overbroad?

The Court held that section 490.012 was overbroad because it applied to individuals who did not present an elevated risk of reoffending.[299] The Court also held that section 490.013(2.1), which mandated lifetime registration for individuals convicted of more than one sexual offence, was overbroad.[300] Although the provision aimed to grant police "longer period of access to information [about] offenders at a higher risk of reoffending", yet the Court held that it captured individuals whose multiple offences arose from a single incident.[301] The Court further held that, despite their comparatively lower risk, the provision provided no discretion to exempt such individuals from lifetime registration.[302]

[297] *Ndhlovu, ibid.*
[298] *Ndhlovu, ibid* at para 57.
[299] *Ndhlovu, ibid* at para 111.
[300] *Ndhlovu, ibid* at para 112.
[301] *Ndhlovu, ibid* at para 114.
[302] *Ndhlovu, ibid.*

(C). Were the provisions grossly disproportionate?

The Court held that it unnecessary to decide on whether they were grossly disproportionate after finding that the law was overbroad.[303]

Section 1: *Charter* Analysis

This justification involves a two-step process:

(1). **Pressing and Substantial Objective**: The government must show that the law or measure addresses an important and urgent goal.

(2). **Proportionality Analysis**: The government must demonstrate that the infringement on rights is proportionate to that goal.

This involves three components:

(a) **Rational Connection**: The law must be logically connected to achieving its objective.

(b) **Minimal Impairment**: The law must impair the right as little as reasonably possible.

(c) **Proportionality Between Effects and Objective**: The benefits of the law must outweigh its negative impact on the right.

This test is known as the *Oakes* test.[304]

(a) Was the legislative objective pressing and substantial?

The Court held that the prevention and investigation of sex crimes (under sections 490.012 and 490.013(2.1)) represented a pressing and substantial goal, describing Parliament's objectives

[303] *Ndhlovu, ibid* at para 116.
[304] *Oakes, supra* note 61.

as "laudable".[305] This is because "Parliament's efforts to provide tools to make it easier to prevent and investigate sex offences are clearly aligned with the public interest in preventing sex crimes and bringing sex offenders to justice".[306]

(b) **Was there a rational connection between the means and the objective of these provisions?**

The Court held that there was a rational connection because "… a conviction for a sexual offence is a reliable indicator of an increased risk of reoffending and committing another sex offence after a conviction can increase recidivism risk".[307] Thus, "it is reasonable to suppose the provisions may further respective objectives".[308]

(c). **Did the measure minimally impair the right of these provisions?**

The Court held that the minimal impairment requirement was not met. Despite the Crown's concession that judicial discretion could still maintain a high inclusion rate (90%) in the registry, no evidence was provided to show why this would undermine Parliament's objective.[309] Nor was there evidence that judicial discretion would hamper law enforcement or that risk assessments needed to be perfectly certain.[310] The Court emphasized that a range of tailored alternatives, including judicial discretion guided by specific criteria or expert evidence, remained unexplored.[311]

[305] *Ndhlovu*, *ibid* at para 120.
[306] *Ndhlovu*, *ibid.*
[307] *Ndhlovu*, *ibid* at para 121.
[308] *Ndhlovu*, *ibid.*
[309] *Ndhlovu*, *ibid* at para 124.
[310] *Ndhlovu*, *ibid.*
[311] *Ndhlovu*, *ibid.*

(d).Did the benefits of the law outweigh its harmful effects of these provisions?

In weighing the proportionality between its effect and objectives, the Court held that the serious and onerous impacts of SOIRA's reporting requirements, particularly on marginalized individuals.[312] With sparse evidence demonstrating benefits and the registration of low-risk offenders constituting about 10% of registrants, the Court held that the harmful effects outweighed the provisions' purposes.[313]

Declaration of Invalidity

The Court held that an immediate declaration of invalidity for section 490.012 would have prevented courts from imposing registration orders on all offenders, including those assessed as high risk for reoffending.[314] Such a consequence, the Court held, could compromise public safety by undermining efforts to prevent and investigate sexual offences.[315] Although allowing the provision to remain temporarily in effect extended a constitutional violation, it held that the risk to public safety justified suspending the declaration of invalidity for 12 months.[316]

In contrast, the Court declared subsection 490.013(2.1), which mandated lifetime registration for certain offenders, to be immediately of no force or effect.[317] It held that striking down the provision would not create a legislative gap, since affected individuals would remain on the registry.[318] The Court also held no persuasive justification to rebut the presumption of retroactivity. As a result, the declaration applied to all individuals impacted by the provision since

[312] *Ndhlovu, ibid* at para 135.
[313] *Ndhlovu, ibid.*
[314] *Ndhlovu, ibid* at para 139.
[315] *Ndhlovu, ibid.*
[316] *Ndhlovu, ibid.*
[317] *Ndhlovu, ibid* at para 142.
[318] *Ndhlovu, ibid.*

its enactment in 2011.[319] Offenders subject to lifetime registration under this subsection, based solely on multiple convictions arising from a single incident, could seek a remedy under section 24(1) of the *Charter* to reduce the length of their registration.[320]

Suspended Declaration of Invalidity

The Supreme Court suspended its declaration for 12 months,[321] and Mr. Ndhlovu was granted an individual exemption. [322]

Key Distinctions from Precedent Cases

A notable change in approach in the use of suspended declarations of invalidity is the Court's increasing tendency to grant individual exemptions alongside the suspension. This contrasts with earlier *Charter* cases, such as *Manitoba Language Reference*,[323] and *Schachter*,[324] where the Court suspended declarations only in exceptional circumstances and did not provide exemption to individual claimants. By granting individual exemptions in *Ndhlovu* and *Ontario v G*, the Court ensured that the successful litigants received immediate relief, rather than having to wait during the suspension period.

[319] *Ndhlovu, ibid.*
[320] *Ndhlovu, ibid.*
[321] *Ndhlovu, ibid* at para 143.
[322] *Ndhlovu, ibid.*
[323] *Manitoba Language Reference, supra* note 4 at 754.
[324] *Schachter, supra* note 13 at 717.

Chapter 3: Judicial Use of Suspended Declarations of Invalidity to Facilitate Dialogue

Suspended declarations of invalidity play a key role in enabling courts to promote dialogue between the judiciary and the legislature.[325] Peter Hogg and Allison Bushell, in their influential 1997 article, present dialogue theory as a response to concerns that *Charter* review is anti-democratic because it allows judges to review unconstitutional legislation.[326]

Hogg and Bushell described the concept of dialogue as follows:

> "…where a judicial decision is open to legislative reversal, modification or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue".[327]

In essence, their theory emphasizes that there is a dynamic relationship between the judiciary and the legislature. When courts declare a law unconstitutional under the *Charter*, legislatures can choose to reverse, modify, or avoid the effects of the ruling.[328] If the legislature responds in this way, it engages in a form of constitutional dialogue with the judiciary.[329] To support their theory, Hogg and Bushell analyzed sixty-five cases in which courts invalidated legislation for breaching the *Charter*.[330] Hogg and Bushell held that in "forty-four [of those] cases … [the legislature] amended the impugned law".[331] In respect of these particular cases, the authors were of the view that when the judiciary finds a law to contravene *Charter* rights, all that the legislature had to do

[325] *Hogg et al*., *supra* note 252 at 18.
[326] Peter Hogg & Allison Bushell, "The *Charter* Dialogue Between the Courts and Legislature's (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All") (1997) 35 Osgoode Hall LJ 75 at 77.
[327] *Ibid* at 79.
[328] *Ibid.*
[329] *Ibid.*
[330] *Ibid* at 80-81.
[331] *Ibid.*

was to make small changes to the law in order for it to comply with the *Charter* but "without compromising the objective of the original legislation".[332]

Yet Manfredi, raises a normative challenge to dialogue theory, arguing that it camouflages the power imbalance between courts and legislatures.[333] Manfredi argues that dialogue theory, as advanced by Hogg and Bushell, is normatively problematic because it hinders the power imbalance between courts and legislatures.[334] He contends that, while the theory presents judicial review and legislative response as a conversation between equals, in reality, courts often have the final say on constitutional matters, especially when they retain the authority to review and potentially strike down a legislative response.[335] He suggests that the "dialogue" is often an illusory because legislatures may appear to participate in a back-and-forth with courts, but the judicial branch maintains ultimate control.[336] This undermines the democratic legitimacy that dialogue theory purports to protect, since unelected judges can override the will of elected representatives, even after those representatives have responded to judicial rulings.[337]

Kent Roach expands on this theory and observes that remedies are important but are often an overlooked way in which courts interact with both the legislature and the executive.[338] Suspended declarations of invalidity help promote dialogue with the legislature by giving it a chance to respond to unconstitutional laws.[339] This remedy encourages legislative involvement

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[332] *Ibid* at 82.
[333] Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513.
[334] *Ibid* at 522.
[335] *Ibid* at 523.
[336] *Ibid.*
[337] *Ibid* at 523-524.
[338] Kent Roach, "Dialogue in Practice 2001- 2006" in *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc., 2016) at 379 [Roach 2016].
[339] *Ibid.*

while still allowing the courts to uphold constitutional rights.[340] He argues that "declarations allow the executive to use its expertise to decide the best way to comply with the *Charter*, but they are open to abuse if the executive is either unwilling or unable to comply with the *Charter*."[341]

The following case analysis reviews how courts have employed suspended declarations and examine the nature of legislative responses that followed. These cases help evaluate whether the judicial invitation to dialogue has fostered genuine institutional engagement. This is because while academic discussion is essential, the most valuable insights often emerge from the analysis of specific cases.

Canada (Attorney General) v Bedford

In *Bedford*,[342] the Supreme Court of Canada addressed the constitutionality of section 210, paragraph 212(1)(j), and section 213(1)(c) of the *Criminal Code*.[343] These provisions prohibited several activities, these included being an inmate of a bawdy-house, being held in a bawdy-house without lawful excuse, or being an owner, landlord, lessor, tenant, or occupier of a bawdy-house.[344] The provisions also prohibited living on the avails of another person's prostitution, as well as stopping or attempting to stop, or communicating or attempting to communicate with someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.[345]

Terri Jean Bedford, Amy Leibovitch, and Valerie Scott challenged the impugned provisions, claiming that they violated their rights under section 7 of the *Charter*, which guarantees the right

[340] *Ibid.*
[341] *Ibid.*
[342] *Bedford*, *supra* note 17.
[343] *Criminal Code*, *supra* note 20.[amended]. See also *Bedford*, *ibid* at para 6.
[344] *Ibid.*
[345] *Ibid.*

to life, liberty, and security of the person.[346] They contended that the laws prevented them from taking basic safety precautions such as working indoors, hiring security personnel, or screening clients and thus exposed them to heightened risks in an already dangerous profession.[347] They also argued that section 213(1)(c) of the *Criminal Code* infringed their section 2(b) *Charter* right to freedom of expression and that none of the provisions could be justified under section 1 of the *Charter*.[348]

The next section focuses exclusively on section 7 of the *Charter*. By narrowing the analysis in this way, the discussion can explore in greater depth how the impugned provisions potentially violated the applicants' rights to life, liberty, and security as protected by this specific section.

Section 7 Analysis

Section 7 of the *Charter* guarantees the right to life, liberty, and the security of the person but subject to reasonable limits set by law in a free and democratic society.[349]

(a) With respect to section 210 of the *Criminal Code*, the Court held that:

> The provision of section 210 engages with section 7 of the *Charter* because the prohibition stops sex workers from operating out of a fixed indoor location, which would be significantly safer than working on the streets or meeting clients in various places particularly since they are also barred from hiring drivers or security personnel. As a result, they are unable to build a regular client base or establish protective indoor measures such as hiring receptionists, assistants, security guards, or installing monitoring systems that could help reduce harm. Secondly, it interferes with the provision of health checks and preventive health measures because the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients.[350]

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[346] *Charter, supra* note 22. See also *Bedford, ibid.*
[347] *Bedford, ibid* at para 6.
[348] *Charter, supra* note 22. See also *Bedford, ibid.*
[349] See *Charter, supra* note 22 22.
[350] *Bedford, supra* note 17 at para 64.

(b) **With respect to paragraph 212(1)(*j*) of the *Criminal* Code**: The Court held that it engages with section 7 of the *Charter* because: "[i]t prevents a [sex workers] from hiring bodyguards, drivers and receptionists… thus preventing them from taking steps to reduce the risks they face and negatively impacting their personal security."[351]

(c) **Regarding Section 213(1)(*c*) of the *Criminal Code***: The Court held that it engages with section 7 of the *Charter* because: {[f]ace-to-face communication is an essential tool in enhancing street prostitutes' safety.[352] Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face."[353] In addition to that: "The law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers to more isolated areas, thereby making them more vulnerable".[354]

Also, that the law: "prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communication in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face".[355]

After determining that the impugned provisions infringed the applicants' right to security of the person and thereby engaged section 7 of the *Charter*, the Court proceeded to assess whether this deprivation conformed to the principles of fundamental justice.

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[351] *Bedford, ibid* at para 66.
[352] *Bedford, ibid* at para 69.
[353] *Bedford, ibid.*
[354] *Bedford, ibid* at para 70.
[355] *Bedford, ibid* at para 71.

(d) Was section 210 of the Bawdy-House Prohibition in compliance with the principle of fundamental justice:

The Court held that:

> the harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.[356]

(e) Was paragraph 212(1)(j): Living on the Avails of Prostitution, in compliance with the principle of fundamental justice:

The Court held:

> that living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. …that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.[357]

(f) Was section 213(1)(c): Communicating in Public for the purpose of Prostitution in compliance with the principle of fundamental justice:

The Court held that:

> The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.[358]

The Court did not conduct a full section 1 analysis. It observed that the government had not made a serious effort to justify the impugned laws under section 1 of the *Charter*, which permits rights to be limited only if the limit is reasonable and demonstrably justified in a free and democratic society.[359] The Attorney General of Canada addressed section 1 only briefly in written

[356] *Bedford, ibid* at para 136.
[357] *Bedford, ibid* at paras 139- 140.
[358] *Bedford, ibid* at para 159.
[359] *Bedford, ibid* at para 161.

submissions.[360] As a result, the Court considered a detailed section 1 analysis unnecessary. Nonetheless, it addressed some of the government's justifications when evaluating whether the laws infringed section 7 in a manner consistent with the principles of fundamental justice.[361]

The court held that:

> In particular, the Attorney General's attempt to justify the living on the avails provision on the basis that it must be drafted broadly to capture all exploitative relationships, which can be challenging to identify. However, the law not only catches drivers and bodyguards, who may be pimps, but it also catches non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of Section 1 of the *Charter* inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.[362]

In essence, the Court acknowledged that although the government intended the law to be sufficiently broad to capture exploitative relationships, such as those involving pimps, its scope extended too far. The provision also applied to individuals who were not engaged in exploitation, such as receptionists or accountants who worked with sex workers in non-exploitative capacities. As a result, the law failed to meet the *Charter* requirement of minimal impairment. In evaluating the provision's detrimental effects such as preventing sex workers from employing individuals who could enhance their safety against its intended objective of protecting them from exploitation, the Court concluded that the harm caused by the law outweighed its purported benefits.

Declaration of Invalidity

The Court declared Section 210, as it related to prostitution, and paragraph 212(1)(j) and 213(1)(c) to be inconsistent with the *Charter* and therefore void..[363] However, the Court suspended

[360] *Bedford, ibid.*
[361] *Bedford, ibid* at para 162.
[362] *Bedford, ibid.*
[363] *Bedford, ibid* at para 164.

this declaration of invalidity for one year,[364] because an immediate invalidation would leave prostitution unregulated while Parliament addressed the complex and sensitive issue of how to manage it.[365] The Court explained that regulating prostitution is a matter of significant public concern, and few countries leave it entirely unregulated.[366] It also noted that an abrupt shift from a regulated to a completely unregulated state would cause considerable concern for many Canadians.[367]

Legislative Response

In response to the Court's decision in *Bedford,* Bill C-36, the *Protection of Communities and Exploited Persons Act*, was enacted.[368] The Bill "addresses voluntary prostitution activities between two consenting adults".[369] Bill C-36 criminalizes the purchase of sexual services, thereby making prostitution between adults a "*de facto*" illegal activity for the first time in Canada's history.[370] Under the new law, the act of prostitution can no longer be practised without at least one of the individuals involved committing a crime.[371] The Bill introduced a notable shift such as:

(a) Protecting prostitutes considered to be victims of sexual exploitation

(b) Protecting communities from the harms caused by prostitution and;

(c) Reducing the demand for sexual services.

The Bill also creates two new prostitution-related criminal offences that would:

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[364] *Bedford, ibid* at para 169
[365] *Bedford*, *ibid* at para 167.
[366] *Bedford, ibid.*
[367] *Bedford, ibid.*
[368] Bill C-36, *supra* note 505050.
[369] *Supra* note 51 at 3.[Verbatim].
[370] *Ibid.*
[371] *Ibid.*

(a) Prohibit an individual from purchasing sexual services at any time and in any place

(b) Forbid advertising the sale of others; sexual services.

In addition, the Bill amended the existing provisions on procuring and on communicating for the purpose of prostitution so as to grant a certain degree of immunity to:

(a) individuals who offer their own sexual services in exchange for consideration and to individuals

(b) individuals who have legitimate living arrangements free of exploitation with persons selling sexual services for example (room mates, dependants, bodyguards).[372] Prostitutes face prosecution, however, if they communicate for the purpose of selling sexual services in public places where a child could reasonably be expected to be present. The bill also increased the existing penalties for offences related to prostitution and human trafficking, particularly for those involving minors.[373]

The government announced $20 million in new funding to support proposed measures to address prostitution. In particular, these funds were to support community organizations that provide assistance to vulnerable individuals. The Bill was also designed to support the establishment of programs to assist individuals who want to give up prostitution and rebuild their lives.[374]

The Supreme Court's approach to the remedy and legislative response provides a compelling illustration of dialogue theory. Immediate invalidation would have left sex work entirely unregulated, creating a legal vacuum because the public safety and vulnerable lives were involved. Rather than causing more harm, the suspended declarations prevented it while giving time for a

[372] *Ibid.*
[373] *Ibid.*
[374] *Ibid.*

legislative response. This suspension was a deliberate invitation to Parliament to engage in a legislative response, enabling lawmakers to address the constitutional defects identified by the Court without creating a legal vacuum. Thereby encouraging constructive dialogue between the judiciary and the legislature, as it allowed Parliament the opportunity to make a new law that better balanced public policy objectives with *Charter* rights.

During the suspension period, Parliament was free to consider a range of legislative options whether more restrictive or more permissive reflecting the dialogic principle that legislatures retain significant discretion in responding to judicial findings. This approach is consistent with the dialogue theory introduced by Hogg and Bushell, that judicial review under the *Charter* need not be viewed as anti-democratic, but rather as a process of institutional conversation.[375] The application of this remedy in *Bedford* allowed for a legislative response that was received.

Eldridge v British Columbia (Attorney-General)

In *Eldridge,*[376] medical care in British Columbia was provided mainly through two channels. Hospital services are covered by the government under the *Hospital Insurance Act,*[377] which "reimburses hospitals" for delivering medically necessary care to the public.[378] Meanwhile, the province's Medical Services Plan funds medically required services offered by physicians and other healthcare professionals.[379] This plan was created and was governed by the *Medical and Health Care Services Act*.[380] However, neither of these programs covered the cost of sign language

[375] Hogg, *supra* note 326 at 77.
[376] *Eldridge, supra* note17 17.
[377] See RSBC, 1979, c. 180[now RSBC 1996, c.204]. See also *Eldridge, ibid* at para 2.
[378] *Eldridge, ibid*
[379] *Eldridge, ibid*
[380] SBC 1992, c 76 (now *Medicare Protection Act, RSBC* 1996, 286).

interpretation for individuals who are deaf.[381] The appellants in this case were all born deaf and primarily communicated using sign language.[382] They argued that the lack of interpretation services hinders effective communication with their healthcare providers, potentially leading to misdiagnoses and inadequate treatment.[383]

To begin its assessment, the Court first determined whether the *Charter* applied to the decision to exclude sign language interpreters from the publicly funded healthcare system and, if so, how the *Charter* applied.[384] Second, the Court assessed whether the exclusion constituted a *prima facie* breach of subsection 15(1) of the *Charter*.[385] If a breach was held, the next step was to consider whether it could be justified under section 1 of the *Charter*. The Court then determined an appropriate remedy to be granted.

For the purposes of this discussion, the legal analysis will focus on whether the exclusion of sign language interpretation constituted a violation of Subsection 15(1) of the *Charter*, and if so, whether that violation can be justified under Section 1 of the *Charter*, and the appropriate remedy granted by the Court.

Section 15: *Charter* Analysis

Section 15 of the *Charter* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based

[381] *Eldridge, supra* note 17.
[382] *Eldridge, ibid* at paras 5-6.
[383] *Eldridge, ibid.*
[384] *Eldridge, ibid* at paras 17-18.
[385] *Eldridge, ibid.*

on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.[386] In finding a violation of their subsection 15(1) *Charter* right the Court held that:

> "the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the subsection 15(1) [*Charter*] right of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons".[387]

> … [Because] the absence of a publicly funded sign language interpretation service discriminated against the appellants by denying them the equal benefit of the British Columbia health care system. …, the quality of care received by the appellants was inferior to that available to hearing persons.[388]

This means that Section 15 of the *Charter* ensures that everyone must be treated equally and fairly under the law, without discrimination, including people with hearing disabilities. In this case, the lack of sign language interpreters in hospitals indicated that deaf patients could not communicate properly with their doctors. As a result, they did not get the same quality of care as hearing patients. This unequal treatment amounted to discrimination and a denial of their right to equal access to health care.

Section 1 of the *Charter* Analysis

This justification involves a two-step process:

(1). **Pressing and Substantial Objective**: The government must show that the law or measure addresses an important and urgent goal.

(2). **Proportionality Analysis**: The government must demonstrate that the infringement on rights is proportionate to that goal.

[386] *Charter*, *supra* note 22 22.
[387] *Eldridge*, *supra* note 1717 at para 80.
[388] *Eldridge*, *ibid* at para 83.

This involves three components:

(a) **Rational Connection**: The law must be logically connected to achieving its objective.

(b) **Minimal Impairment**: The law must impair the right as little as reasonably possible.

(c) **Proportionality Between Effects and Objective**: The benefits of the law must outweigh its negative impact on the right.

This test is known as the *Oakes* test.[389]

In this present case, the majority of the Court held that:

> It is not necessary to consider each of these elements in this case. Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit prescribed by law, that the objective of this decision … controlling health care expenditures is pressing and substantial, and that the decision is rationally connected to the objective, …[therefore that] it does not constitute a minimum impairment of subsection 15(1) [of the *Charter* right].[390]

Thus, the next test considered by the Court was whether the refusal to fund medical interpretation services for the deaf constitutes a minimal impairment. The Court held that:

> …the failure to fund sign language interpretation is not a minimal impairment of the [Subsection] 15(1) rights of deaf persons to equal benefit of the law without discrimination based on their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability.[391]

This means that the government's refusal to fund sign language interpretation for deaf patients cannot be justified as a necessary or proportionate means of achieving cost-saving goals. The infringement on the equality rights of deaf individuals is significant, as it results in unequal

[389] *Oakes, supra* note 61.
[390] *Eldridge, ibid* at para 84.
[391] *Eldridge, ibid* at para 94.

and inadequate access to essential medical services. Since the government failed to show that less discriminatory alternatives were unavailable or impractical, its actions do not meet the standard of minimal impairment required under section 1 of the *Charter*.

Declaration of Invalidity

In deciding on the appropriate remedy to be applied, the majority of the Court:

> …grant[ed] a declaration that this failure [to provide sign language interpreters for the deaf] is unconstitutional and direct[ed] the government of British Columbia to administer the *Medical and Health Care Services Act (now the Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of [subsection] 15(1) of the *Charter*.[392]

The reason being that:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. [That] it is not [the] Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.[393]

In essence, instead of ordering the government to take immediate action, the Court chose to suspend the declaration to give the government time to address these issues and to ensure that sign language interpreters would be available when needed, thereby enabling deaf patients to communicate effectively in medical settings.

[392] *Eldridge*, *ibid* at para 95.
[393] *Eldridge*, *ibid* at para 96.

Legislative Response

Following the court's decision, the province of British Columbia did not enact a new legislation but instead adjusted its policies to comply with the decision of the Court.[394] The government implemented measures to provide sign language interpretation services in healthcare settings.[395] This ensured that deaf individuals could effectively communicate with their healthcare providers, addressing the discrimination identified by the Court. In addition, the province of British Columbia revised its healthcare policies to include funding and support for interpretation services.[396] This was necessary to comply with the Court's directive that governments must take positive steps to ensure substantive equality for disadvantaged groups.[397]

It is important to note that this remedy required the government to take positive steps to ensure substantive equality but left the implementation to policymakers. The government responded by changing its policies to fund interpreter services in healthcare, demonstrating a responsive, iterative process between the judiciary and the executive. Notably, the suspended declaration of invalidity applied played an important role that encouraged a genuine, practical dialogue between the court and the government.

[394] See Tate, *supra* note 45 at 3.
[395] *Ibid.*
[396] *Ibid.*
[397] *Ibid.*

Chapter 4: The Role of Suspended Declarations of Invalidity in the Development of the Law Regulating Medical Assistance in Dying Law in Canada.

Carter v Canada (Attorney-General of Canada)

Facts

In this case, one of the plaintiffs, Gloria Taylor, was suffering from a "fatal neurodegenerative disease".[398] Two more, Lee Carter and Hollis Johnson, had both assisted Carter's mother, "Kay", in seeking assistance for dying with dignity in Switzerland.[399] The fourth person, William Shoichet,[400] was a physician from British Columbia willing to participate in MAiD, if it was made available. They all initiated a *Charter* challenge to the absolute prohibition on "physician-assisted death" in section 14 and section 241(b) of the *Criminal Code*.[401] They argued that the prohibition violated their rights under sections 7 and 15 of the *Charter* and that such a violation could not be justified under section 1 of the *Charter*.[402]

Preliminary Consideration

It is important to note that, due to the Supreme Court's interpretation of the matter under Section 7 of the *Charter*, which protects the rights to life, liberty, and security of the person.[403] The Supreme Court did not find it necessary to conduct an analysis under section 15 of the *Charter*,

[398] *Carter* 2015, *supra* note 171717 at para 11.
[399] *Carter* 2015, *ibid* at paras 11-17.
[400] *Carter* 2015, *ibid* at para 11.
[401] *Criminal Code*, *supra* note 2020.
[402] *Charter*, *supra* note 22 22. See also *Carter* 2015, *supra* note 1717 at para 40.
[403] *Carter* 2015, *ibid* 171717 at para 93.

which addresses equality rights.[404] Therefore, the discussion below focuses solely on the section 7 analysis.

Section 7: *Charter* Analysis

Section 7 of the *Charter* guarantees the right to life, liberty, and security but subject to reasonable limits set by law in a free and democratic society.[405]

(a) **On the Right to Life:** The Supreme Court of Canada held that the prohibition on "physician-assisted dying" could lead some individuals to end their lives earlier than they might otherwise choose.[406] This is due to the fear that they would be unable to seek assistance when their suffering becomes unbearable.[407] The Court held that this situation infringes upon the right to life, as it may cause individuals to take their own lives prematurely to avoid future suffering.[408]

(b) **Regarding the Right to Liberty:** The Supreme Court of Canada held that the prohibition interferes with the individuals' ability to make fundamental personal decisions about their own bodies and medical care.[409] This interference restricts their autonomy and freedom to choose how to manage their health and end-of-life decisions.[410]

(c) **Regarding the Right to Security of Person:** The Court held that it infringed on the the right to security of the person and held that forcing individuals to endure intolerable

[404] *Carter* 2015, *ibid.*
[405] *Charter, supra* note 22 22.
[406] *Carter* 2015, *supra* note 1717 at para 57.
[407] *Carter* 2015, *ibid.*
[408] *Carter* 2015, *ibid* at para 58.
[409] *Carter* 2015, *ibid* at para 66.
[410] *Carter* 2015, *ibid.*

suffering, such as Ms. Taylor, violates their psychological and physical integrity.[411] In a way that this prohibition on assisted dying compels individuals to suffer against their will, thereby infringing upon their right to security.[412]

Section 1: *Charter* Analysis

This justification involves a two-step process:

(1). **Pressing and Substantial Objective**: The government must show that the law or measure addresses an important and urgent goal.

(2). **Proportionality Analysis**: The government must demonstrate that the infringement on rights is proportionate to that goal.

This involves three components:

(a) **Rational Connection**: The law must be logically connected to achieving its objective.

(b) **Minimal Impairment**: The law must impair the right as little as reasonably possible.

(c) **Proportionality Between Effects and Objective**: The benefits of the law must outweigh its negative impact on the right.

This test is known as the *Oakes* test.[413]

However, there is a preliminary consideration, which is whether the law is prescribed by law. The Supreme Court held that sections 14 and 241(b) of the *Criminal Code* were "prescribed by law".[414]

[411] *Carter* 2015, *ibid.*
[412] *Carter* 2015, *ibid.*
[413] *Oakes*, *supra* note 61.
[414] *Carter* 2015, *supra* note 17 17 at para 96.

Did sections 14 and 241(b) of the *Criminal Code* have a "pressing and substantial object"?

The Supreme Court held that sections 14 and 241(b) of the *Criminal Code* had a pressing and substantial objective.[415]

In assessing the Proportionality assessment under Section 1 of the *Charter*? The following questions were considered.

(a) Was there a rational connection between sections 14 and 241(b) of the *Criminal Code*, objective and the means chosen to achieve it? The Supreme Court held that the prohibition on physician-assisted dying was rationally connected to the government's objective of protecting vulnerable persons because "where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks".[416]

(b) Did sections 14 and 241(b) of the *Criminal Code* prohibiting physician-assisted dying impair the *Charter* right as little as reasonably possible, or could a less restrictive measure achieve the same objective? The Supreme Court concurred with the trial judge's findings, who had reviewed extensive evidence from experts, including scientists and medical practitioners familiar with end-of-life decision-making both within Canada and internationally.[417] Based on this evidence, the trial judge concluded that a "permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error".[418]

[415] *Carter* 2015, *ibid* at para 96.
[416] *Carter* 2015, *ibid* at paras 99-101.
[417] *Carter* 2015, *ibid* at para 104.
[418] *Carter* 2015, *ibid* at para 105.

(c) Did sections 14 and 241(b) of the *Criminal Code* prohibiting physician-assisted dying have a deleterious effect and salutary Benefits? Since the Supreme Court of Canada determined that the law did not meet the minimal impairment requirement, it held it unnecessary to proceed to the final stage of the proportionality analysis, which assesses whether the benefits of the law outweigh its negative effects.[419]

Declaration of Invalidity

The majority of the Court held that the laws prohibiting a physician's assistance in terminating life (sections 241(b) and 14 of the *Criminal Code*) infringed Ms. Taylor's section 7 rights to life, liberty, and security of the person.[420]

(a) The infringement did not comply with the principles of fundamental justice.[421]

(b) The Court also held that this breach could not be justified under section 1 of the *Charter*.[422]

As a result, it was left to Parliament and the provincial legislatures to respond, if they chose, by enacting legislation consistent with the constitutional parameters set out in the Court's reasons.[423]

[419] *Carter* 2015, *ibid* at para 122.
[420] *Carter* 2015, *ibid* at para 126.
[421] *Carter* 2015, *ibid.*
[422] *Carter* 2015, *ibid.*
[423] *Carter* 2015, *ibid.*

Suspended Declaration of Invalidity

In providing a remedy, the Court suspended the declaration of invalidity for 12 months.[424] This suspension served as the Court's way of initiating a conversation with Parliament; it gave legislatures time to amend the law to comply with the *Charter* in a way that promoted dialogue.[425]

Legislative Response

In June 2016, following the Court's decision in *Carter*, the Canadian government introduced Bill C-14 in April 2016.[426]

(a) The reason for the law was to amend the *Criminal Code*, which established a legal framework for MAiD.[427]

(b) This legislative response aim is to respect individual autonomy and protect vulnerable persons. The Bill introduced specific eligibility criteria and procedural safeguards for MAiD.

The following table compares some of the eligibility criteria established by Bill C-14 with the procedural safeguards implemented to ensure the proper implemented to ensure the proper administration of MAiD:

Category		Procedural Safeguards

[424] *Carter* 2015, *ibid* at para 128. [Emphasis added].
[425] Chinecherem Chiamaka Anayo-Enechukwu, "From *Carter v Canada* (SCC) to Bill C-14: An Appraisal of Medical Assistance in Dying in Canada and Charter Dialogue" (26 April 2024), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4894230> at 32.
[426] Bill C-14, *supra* note 30 30 .
[427] *Ibid.*

Eligibility Criteria	Adult (18+ years) who have grievous and irremediable medical conditions, the suffering is enduring and intolerable, and their natural death is reasonably foreseeable.[428]	The request for MAiD must be written, signed, and dated by the person or proxy after a medical practitioner or nurse practitioner has informed the person that the person has a grievous and irremediable medical condition.[429]
Medical Assessments	The request for MAiD must be "signed and dated by the person or proxy in the presence of two independent witnesses".[430]	The "medical or nurse practitioners" must provide written consent stating that the individual meets all eligibility criteria.[431]
Consent	The person seeking MAiD must "make a voluntary request free from external pressure".[432]	The individual requesting MAiD must be informed that they can withdraw at any time. They should also give their express consent immediately

[428] *Ibid* at s 241.2 (2).
[429] *Ibid* at s 241.2(3)(b)(ii).
[430] *Ibid* at s 241.2 (3)(c).
[431] *Ibid* at s 241.2 (3)(e).
[432] *Ibid* at s 241.2 (1)(d).

		before the MAiD administration.[433]
Reporting and Monitoring	It established a mandatory reporting system.[434]	It established post-procedure reporting for monitoring and oversight.[435]
Reflection Period	There is a mandatory 10-day clear reflection period between the day the request was signed by or on behalf of the person and the day MAiD is provided.[436]	The mandatory 10 clear days' reflection period is waived if the person's death is imminent.[437]

Bill C-14's Ambiguous Legacy in MAiD Law

Certain debates arose shortly after Parliament enacted Bill C-14, which introduced additional procedural safeguards and imposed more stringent restrictions on eligibility criteria than the Court's decision in *Carter*.[438]

[433] *Ibid* at s 241.2(1)(h).
[434] *Ibid* at s 241.3 1(1)-(3).
[435] *Ibid.*
[436] *Ibid* at s 241.2(3)(g).
[437] *Ibid.*
[438] See Kiran Madesha, *The Future of Canada's Medical Assistance in Dying (MAID) for the Mentally Ill and Physically Disabled* (LLM Thesis, University of Toronto, 2017) [ProQuest Dissertations & Theses, 10624736] at 4. See also Paul Webster, "Canada debates medical assistance dying law" 387:10031 The Lancet 1893.

(a) Prominent organizations like the Canadian Medical Association and the Canadian Nurses Association supported Parliament's decision.[439] Meanwhile, others argue that the eligibility criteria established were more restrictive than those stated in the Court's decision in *Carter*. Specifically, Bill C-14 limited access to MAiD by requiring that a person's death be "reasonably foreseeable", a criterion that was not included in the Court's decision in *Carter*.[440]

(b) The British Columbia Civil Liberties Association (BCCLA) argued that the law was lacking because it "leaves out entire categories of suffering Canadians who should have a right to choose a safe and dignified assisted death".[441]

(c) Jocelyn Downie, a distinguished Professor at Dalhousie University, has extensively written and advocated for the rights of individuals facing end-of-life decisions.[442]

(d) Specifically, Downie and co-author Jennifer Chandler identify multiple points of interpretive uncertainty within the legislation, including the criteria that highlight the lack of clarity surrounding Bill C-14.[443] They argue that the vagueness of these "uncertain phrases" creates inconsistent legal application, potentially leading to unjust denials and inappropriate approvals of MAiD and having some effect on practitioners hesitant to navigate the uncertain legal landscape.[444]

(e) Another academic scholar, Thomas McMorrow states that if the Court were to "strike down" Bill C-14, it would likely do so based on a determination that limiting eligibility

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[439] *Ibid.*
[440] Bill C-14, *supra* note 30 at s 241.2(1) (c).
[441] *Ibid.*
[442] See Jocelyn Downie & Jennifer Chandler, "Interpreting Canada's Medical Assistance in Dying Legislation", (March 2018) online: <https://irpp.org/wp-content/uploads/2018/03/Interpreting-Canadas-Medical- Assistance-in-Dying-Legislation-MAiD.pdf> at 3. [Downie and Chandler]. [Emphasis added].
[443] *Ibid* at 5-6.
[444] *Ibid* at 7- 15.

for MAiD to individuals whose natural death is reasonably foreseeable contravenes the *Charter* in a way that cannot be justified within a free and democratic society.[445]

(f) Macfarlane argues that Bill C-14, which regulates access to MAiD, is likely "constitutionally suspect" because it establishes a narrower access threshold than the Supreme Court of Canada outlined in *Carter*.[446]

Despite these criticisms, the *Carter*-Bill C-14 sequence exemplifies the theory of dialogue. The legislature's choice to respond more cautiously, or even conservatively, remains a valid part of the constitutional conversation. Parliament responded cautiously, and while some criticized the approach as restrictive, it still represented a deliberate legislative reply to the Court's decision.

In 2019, the criterion that a person's death must be "reasonably foreseeable" led to the *Charter* challenge in the *Truchon* case, discussed below.

[445] See Thomas McMorrow, "MAiD in Canada? Debating the Constitutionality of Canada's New Medical Assistance in Dying Law" (2018) 44:1 Queen's LJ at 114 -115. [McMorrow].

[446] See Emmett 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) 49:1 Ottawa L Rev 107, at 110 [Macfarlane]. See also Carissima Mathen, "A Recent History of Government Responses to Constitutional Litigation" (2016) 25:3 Const Forum Const 101 at 102 [Mathen].

Truchon v Attorney-General of Canada

The plaintiffs, Jean Truchon and Nicole Gladu were persons of disability and suffered from numerous medical conditions, such as "spastic cerebral palsy" and "post-polio syndrome, a degenerative neurological disease").[447] That caused them severe suffering and the loss of their autonomy.[448] Despite meeting other eligibility requirements, they were not allowed to access MAiD because their death was not "reasonably foreseeable" under the applicable federal legislation.[449] They were also considered to be "at the end of life" under Quebec's provincial legislation.[450]

The plaintiffs argued that:

(a) These requirements violated their rights under section 7 of the *Charter*, which guarantees the right to life, liberty, and security.[451]

(b) These requirements violated their rights under section 15 of the *Charter*, which guarantees freedom from discrimination.[452]

[447] *Truchon*, 2019, *supra* note 17 at paras 17-69.
[448] *Truchon*, 2019, *ibid* at paras 33- 60.
[449] Bill C-14 supra note 30 at s 241.2(1)(d).
[450] Bill C-52, *supra* note 36 at s 26(5).
[451] *Truchon* 2019, *supra* note 17 at para 6.
[452] *Truchon* 2019, *ibid*.

Declaration of Invalidity

a. The Quebec Superior Court found that the "reasonably foreseeable natural death" eligibility criterion infringed the plaintiffs' rights under sections 7 and 15 of the *Charter* and could not be justified under section 1.[453]

b. The Court also held that the "end-of-life" criterion discriminated against persons with physical disabilities, thereby violating their section 15 *Charter* rights. This restriction was not justified under section 1 of the *Charter*.[454]

Suspended Declaration of Invalidity

(a) In *Truchon*, the Superior Court suspended the declaration of invalidity of Bill C-14 for six months, which restricted MAiD to individuals whose deaths were "reasonably foreseeable".[455]

(b). The Quebec Court also suspended the invalidation of Quebec's criterion, which required a person to be "at the end of life" to qualify for MAiD.[456]

(c). This six-month suspension was intended to allow Parliament and the Quebec provincial legislature sufficient time to amend the eligibility criteria for MAiD, specifically concerning the "reasonably foreseeable death" and "end-of-life" requirements.[457]

[453] *Truchon*, 2019, *ibid* at paras 764-765.
[454] *Truchon*, 2019, *ibid* at para 765.
[455] *Truchon* 2019, *ibid* at para 767.
[456] *Truchon* 2019, *ibid*.
[457] *Truchon* 2019, *ibid*.

Legislative Response

In 2020, the Attorney General of Canada first sought a four-month extension due to another federal election, which the Superior Court granted.[458] Later, the Attorney General requested further extensions, citing disruptions caused by the COVID-19 pandemic.[459] Since Parliamentary sessions were suspended in March 2020, delaying the legislative process, this request was granted until December 18, 2020.[460]

Following the *Truchon* decision, the federal government introduced Bill C-7 to expand eligibility for MAiD, removing the requirement of a "reasonably foreseeable natural death."[461] Further, this table introduces the two-track safeguards discussed below, summarizing some of these.

Criteria	Track 1: Natural Death Reasonably Foreseeable	Track 2: Natural Death Not Reasonably Foreseeable
Eligibility Criteria	As discussed above, the eligibility criteria outlined in Bill C-14 remain the same under Bill C-7, with the addition of the two-track approach based on whether a	This eligibility requirement outlined in Track 1 is applicable in Track 2.[463]

[458] *Truchon v Attorney General of Canada* 2020 QCCS 772 at paras 4- 9.
[459] *Truchon v Attorney General of Canada* 2020 QCCS at para 7.
[460] *Truchon v Attorney General of Canada* 2021 QCCS at paras 7-25.
[461] Bill C-7, *supra* note 40.
[463] *Ibid.*

	person's natural death is reasonably foreseeable.[462]	
Written Request	A request for MAiD must be made in writing, signed, and dated by the individual. This must occur after a medical practitioner or nurse practitioner has informed the person that they have a grievous and irremediable medical condition. Additionally, the request must be signed and dated by an independent witness, who must sign and date the document to confirm its validity.[464]	The written request requirement applied in Track 1 is applicable in Track 2.

[462] See Department of Justice Canada, "New medical Assistance in dying legislation becomes law", (17 March 2021), online: <https://www.canada.ca/en/department-justice/news/2021/03/new-medical-assistance-in-dying-legislation-becomes-law.html>.
[464] *Criminal Code, supra* note 20 at s 241.2(1) (3)(a)-(f).

Witness Requirement	The requirement for independent witnesses in Bill C-14 was reduced from two to one.[465]	This requirement, applicable in Track 1, is also relevant in Track 2.[466]
Reflection Period	The 10-day reflection period was removed.[467]	There has to "be at least 90 clear days between the day on which the first assessment is made and the provision of MAiD, unless both of the physicians or nurse practitioners believe that the person's loss of capacity is imminent". If the "loss of capacity is imminent, the physician or the nurse practitioner who is to provide MAiD determines the waiting period that is appropriate in the circumstances" [468]

[465] See Julia Nicol & Marlisa Tiedemann, "Legislative Summary Bill C-7: An Act to Amend the *Criminal Code* (Medical Assistance in Dying)", (19 April 2019), online: <https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/43-1/c7-e.pdf> at 7.[Nicol and Tiedemann].
[466] *Ibid.*
[467] *Ibid.*
[468] *Ibid.*

The Right to Live with Dignity

This legislative response prompted some serious concerns from disability communities, who warned that expanding access to MAiD without adequate safeguards could undermine their rights.[469] While the Court prioritized individual autonomy and equality, critics argue that such decisions risk deepening systemic inequalities and suggest that some lives carry less value than others.[470] This was because deferring to legislative judgment without requiring inclusive engagement can inadvertently disregard their perspectives. MAiD laws risk normalizing a medical and social environment in which choosing death becomes easier than receiving meaningful support to live with dignity.

The voices of persons with disabilities were not meant to be treated as an afterthought in the legislative process; rather, they ought to have been central to deliberations concerning the balance between individual autonomy and the state's obligation to protect vulnerable populations. The Legislative response should have been amended in a way to ensure that the role of the state was not to facilitate death, but to provide meaningful support that enables individuals to live with dignity and purpose, irrespective of their disability.

Moving forward, it was important that reforms respect constitutional rights and meaningfully engage with those whose lives were most affected by the resulting legislation,

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[469] Inclusion Canada, "Press Release: Open Letter from 65+ Disability Ally Organizations Calls for Trudeau Government Appeal of *Truchon and Gladu* Ruling" (7 October 2019), online: Inclusion Canada <https://inclusioncanada.ca/2019/10/07/press-release-open-letter-from-65-disability-ally-organizations-calls-for-trudeau-government-appeal-of-truchon-and-gladu-ruling/>. See also Krista Carr, Not All Lives Are Valued Equally When It Comes to Assisted Dying" (9 November 2022), online:<https://themighty.com/topic/disability/truchon-gladucase-assisted-dying-in-canada-disability/>.

[470] *Ibid.*

thereby fostering a more inclusive and just legal system. Judicial dialogue could only have served justice in a meaningful and inclusive way when the voices of persons with disabilities were not only heard but also considered during the deliberation of the law.

Mental Illness as a Sole Condition: The Unresolved MAiD Debate Following Bill C-7

Bill C-7 excluded individuals whose sole underlying condition is a mental illness.[471] For two years, on March 9, 2023, the federal government, under Bill C-39, extended this temporary exclusion until March 17, 2024.[472] Then, on February 29, 2024, Bill C-62 was enacted, extending the exclusion until March 17, 2027.[473] This extension was implemented in response to concerns regarding the establishment of safe and consistent assessment procedures, the need to develop requisite resources and training, and the objective of harmonizing MAiD practices with the recommendations put forth by relevant experts.[474]

Kent Roach has suggested that there should be a "Reference" to the Supreme Court to determine whether the frequent delays in granting MAiD for individuals with mental illness may violate certain *Charter* rights.[475] Excluding those with mental illness as their only underlying medical condition unjustifiably infringes upon "fundamental justice and equality".[476] And if the "exclusion perpetuates negative stereotypes about the mentally ill, as categorically

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[471] *Ibid* at 6-7.
[472] Bill C-39, *An Act to amend the Criminal Code (medical assistance in dying)*, 1st Sess, 44th Parl. 2023 (assented to March 9, 2023).
[473] Bill C-62, *An Act to amend the Criminal Code (medical assistance in dying)*, 1st Sess, 44th Parl. 2023 (assented to February 27, 2024).
[474] See Department of Justice, "Canada's Medical Assistance in Dying (MAiD) law", (1 March 2023), online, <https://www.justice.gc.ca/eng/cj-jp/ad-am/bk-di.html>.
[475] See Kent Roach, "Ottawa should ask the Supreme Court about MAID for Canadians with mental illness", (3 February 2024), online: <https://www.theglobeandmail.com/opinion/article-ottawa-should-ask-the-supreme-court-about-maid-forcanadians-with/>. [Roach].
[476] *Ibid.*

incompetent,"[477] He recommends that "the Court would provide answers on the merits after hearing from both sides of the debate" before the extension period expires.[478]

Indeed, a legal challenge regarding the exclusion of individuals with mental illness from MAiD eligibility is already underway in the Ontario Superior Court and has garnered significant attention.[479] Dying with Dignity, Claire Elyse Brosseau and John Scully filed their case[480], where they argued that the exclusion of mental illness as a sole condition for MAiD eligibility violates the rights guaranteed under sections 7 (which guarantees the rights to life, liberty, security of the person),[481] and 15 (which ensures equality before and under the law without discrimination) of the *Charter*.[482] As a result, the applicants are seeking a declaration of the unconstitutionality of this exemption, proposing that they be granted access to MAiD.[483] If the courts find the exclusion unconstitutional, it may lead to another expansion of access to MAiD.[484]

[477] *Ibid.*
[478] *Ibid.*
[479] See Stephaine Taylor, "*Charter* Challenge Launched Against Ottawa for Excluding Mental Illness from MAiD" *National Post,* (19 August 2024), online: <*Charter* challenge launched against Ottawa for excluding mental illness from MAID | National Post>. See also, "Assisted Dying Law Faces Constitutional Challenge Over Exception for Mental Disorders", *CBC News,* (19 August 2024), online: <Assisted dying law faces constitutional challenge over exception for mental disorders | CBC News>.
[480] See Canada: NGO Challenges Assisted Dying Law Excluding Individuals with Mental Disorders as Discriminatory", *JURIST* (20 August 2024), online: <https://www.jurist.org/news/2024/08/canada-ngo-challenges-assisted-dying-law-excluding-individuals-with-mental-disorders-as-discriminatory/>.
[481] *Charter*, *supra* note 22.
[482] *Charter*, *ibid.*
[483] *Supra* note 479.
[484] *Ibid.*

Chapter 5: Summary, Recommendations and Conclusion

Summary

This thesis examined the judicial remedy of suspended declarations of invalidity in Canadian constitutional law, with a particular focus on how it fosters dialogue between the courts and legislatures. The remedy was first applied by the Supreme Court of Canada in *Manitoba Language Reference*,[485] where the Court faced the complex challenge of dealing with the provincial laws of Manitoba that were constitutionally invalid for being enacted in English only.[486] Immediate invalidation would have caused legal chaos in Manitoba, so the Court suspended its declaration to allow time for translation and reenactment of the provincial laws to English and French.[487]

This thesis also considered scholarly critiques concerning the increasing use of suspended declarations of invalidity. Ryder identifies two major areas of concern: the lack of principled judicial reasoning in support of suspensions and the courts' growing tendency to defer to legislatures, often without providing remedies to successful claimants.[488] His analysis of cases such as *Gosselin*, *Mackin*, and *Guignard* illustrates how suspended declarations can sometimes serve to shield government from accountability, deprive individuals of effective relief, and allow unconstitutional laws to persist without sufficient justification.

[485] *Manitoba Language Reference, supra* note 4.
[486] *Manitoba Language Reference, supra* note 4 at 747.
[487] *Manitoba Language Reference, ibid* at 753.
[488] Ryder, *supra* note 118 at 267-268.

Similarly, Grant Hoole expands on Ryder's concerns by identifying certain issues in more recent Supreme Court decisions, including *Figueroa*, *Demers*, and *Corbiere*.[489] Hoole criticizes the judiciary's reliance on vague institutional assumptions and its failure to mitigate ongoing harm during suspension periods.[490] In his view, this approach may erode the remedial purpose of the *Charter* and reduce incentives for litigants to seek constitutional redress. Despite these concerns, other scholars such as Choudhry, Roach, and Hogg view the expansion of suspended declarations as consistent with dialogue theory, positioning courts and legislatures as co-guardians of constitutional compliance.

As examined in Chapter 2, this early use of the remedy laid a strong understanding on how courts have applied this remedy in the years that followed. The analysis explained that in *Schachter*, the Supreme Court took important steps to clarify the legal principles guiding this remedy. This recent application of this remedy's use was discussed in the case of *Ontario (Attorney General) v G* and *Ndhlovu*, where the courts applied the remedy as a reasonable and appropriate response to the unconstitutional legislation in a way that respected the institutional roles of the legislatures. Notably, these cases also introduced a significant development by granting individual exemptions during the suspension period. In both G and *Ndhlovu*, the court recognized that while the law remained temporarily in force, the continued application of the unconstitutional provisions to the specific claimants would be unjust. As a result, the claimants were exempted from the ongoing effects of the law during the suspension period.

Through the detailed analyses of this cases of *Eldridge*, *Bedford*, *Carter* and *Truchon*, this thesis argues that suspended declarations of invalidity play a unique role in the development of

[489] Hoole, *supra* note 1 at 19-45.
[490] *Ibid.*

Canadian law. Suspended declarations of invalidity allows courts to address any unconstitutional law without causing an immediate disruption, it protects individual rights and respects the institutional role of the legislatures.

Recommendations

As discussed in *Bedford, Eldridge, Carter, and Truchon*, this remedy played an important role in enabling the legislatures to respond thoughtfully to constitutional decisions while maintaining legal continuity. I recommend that courts should continue to use suspended declarations of invalidity in these cases, especially the those involving complex and sensitive issues, such as MAiD, where immediate changes to the law will cause uncertainty. However, while the use of suspended declarations of invalidity has proven effective in these cases, there is still room for improvement in how courts should apply this remedy. To promote consistency, accountability, and fairness, the following measures are recommended:

1. **Courts should be Encouraged to Lay Out Guidelines for Suspension Periods.**

Courts are advised to establish guidelines for determining the duration of suspension periods. When creating these guidelines, factors such as the complexity of legislative amendments, the urgency of addressing unconstitutional provisions, and the potential impact on vulnerable persons during the suspension period should be considered. Uniform timelines should be set, and the Court, by so doing, can ensure that the legislature has the necessary time to give its response while avoiding prolonged legal uncertainty and instability. This guideline would encourage accountability and promote efficiency in the legislative process.

2. A Proportionality-Based Framework Should Be Adopted for Suspending the Declaration of Invalidity of an Unconstitutional Law.

Canadian courts should adopt a proportionality framework to guide their application of this remedy. Inspired by Hoole's proposal, courts should consider the following questions before suspending the declaration of invalidity of an unconstitutional law:

(a) Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose? Is there a rational connection between the purpose and a suspended declaration?[491]

(b) What impact on *Charter* rights will arise from the issuance of a suspended declaration and is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective?[492]

(c) Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on *Charter* rights?[493]

The first question "would require the court to state the possible consequences of an immediate declaration of invalidity, and to explain why those consequences should be avoided".[494] The second question of the proportionality analysis would require the court to acknowledge that suspended declarations can harm constitutional rights explicitly. The court would need to identify the nature of that harm and assess whether there are other ways to achieve the important objective identified in the first stage. If no alternatives are available, the minimal impairment requirement would still push the court to explore ways to lessen the impact of the suspension such as setting

[491] Hoole, *supra* note 1 at 75-76.
[492] *Ibid.*
[493] *Ibid.*
[494] *Ibid* at 76.

strict time limits, attaching conditions, or maintaining supervisory oversight during the suspension period.[495] The last question of the proportionality assessment would require the court to weigh the particular advantage gained from the suspended declaration against the particular harm it causes to constitutional rights.[496]

3. Public Engagements and Transparency Should be Promoted.

Public engagement is essential during a suspension period, as it ensures societal acceptance of legislative reforms. MAiD involves specific personal and ethical considerations that affect diverse groups within a society. Active public engagement during legislative processes creates room for inclusiveness in decision-making, ultimately reflecting the values, wants, and needs of affected societies.

4. Constitutional Exemptions Should Be Available for MAiD Applicants During Suspension Periods.

Constitutional exemption is a remedy that relieves an individual from being subject to an unconstitutional law while giving the legislature the time to amend the law during the suspension period.[497] As previously discussed in *Carter* 2015, the Court suspended the declaration of invalidity for a period of twelve months.[498] During this suspension period, no constitutional exemption was granted to individuals seeking MAiD, which left certain individuals unable to access MAiD until the legislature amended the *Criminal Code*.[499]

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[495] *Ibid* at 77.
[496] *Ibid.*
[497] See Nitin Kumar Srivastava, "On Constitutional Exemptions" (8 February 2016), online(blog): Alberta Civil Liberties Research Centre Blog <https://www.aclrc.com/blog/2016-2-8-on-constitutional-exemptions/>. See also Peter Hogg, *Constitutional Law of Canada,* (Toronto Ontario: Thompson Reuters Canada Limited, 2013) at 40:4.
[498] *Carter* 2015, *supra* note 17 at para 128.
[499] *Carter* 2015, *ibid* at para 129.

However, in *Carter* 2016, during the request by the Attorney-General for an extension on the suspension period, the Supreme Court reconsidered and allowed individuals to seek MAiD during the exemption period if they meet the criteria for the exemption set out in *Carter* 2015 and the requirement that a superior court in their jurisdiction authorize the exemption request.[500] Going forward, courts should consistently grant constitutional exemptions during suspension periods. This approach upholds the values of the *Charter*, which ensures timely access to rights and prevents unnecessary suffering for those in urgent need of relief.

5. There is a Need to Reassess the Present Remedial Consensus.

Roach observes that one response to the shortcomings associated with suspended declarations would be to move away from the current consensus on remedies and instead adopt a more frequent use of injunctions and immediate declarations of invalidity.[501] Suspended declarations offer significant advantages: they allow the government to engage in consultations with those affected, particularly minority groups who are often the primary beneficiaries of *Charter* protections and judicial decisions.[502] This flexibility enables lawmakers to select from among several constitutionally valid responses that are most suitable for their needs.[503] In many cases, this results in reforms that are more thorough, responsive, and lasting than what a court could achieve through an injunction or immediate invalidation.

Roach suggests that courts should retain jurisdiction to enable both successful *Charter* claimants and governments to return to the same judge, already familiar with the case, if

[500] *Carter* 2016, *supra* note 17 at para 6.
[501] See Kent Roach, "Remedial Consensus and Dialogue under the *Charter*: General Declarations and Delayed Declarations of Invalidity" (2002) 35:2 U Brit Colum L Rev 211. [Roach].
[502] *Ibid* at 269.
[503] *Ibid.*

disagreements arise concerning a suspended declaration of invalidity.[504] By maintaining jurisdiction after issuing a declaration, courts can facilitate continued engagement from both parties without requiring entirely new legal proceedings.[505] Incorporating Roach's insights, this thesis recommends that courts should be encouraged to improve how they suspend the declaration of invalidity. By retaining jurisdiction following a suspended declaration, it would enable both successful *Charter* claimants and governments to return to the same judge already familiar with the case if disagreements arise.

6. The Default Suspension Period in Complex Cases Should be Modified.

Leckey identified the *Carter* case as an example of a complex issue in which the Supreme Court suspended the declaration of invalidity for one year, embracing the metaphor of dialogue.[506] Furthermore, he distinguished Quebec's extensive five-year legislative process from that of the federal government's rushed sixteen-month legislative process, Bill C-14, which did not allow time for meaningful legislative engagement.[507] He argues that the one-year suspension period often granted by Courts may be insufficient for governments to engage in meaningful deliberation, "public consultation," and legislative drafting on complex policy issues.[508] He concludes with the suggestion that Courts should reconsider the default one year suspension and allow for longer suspension periods in complex issues in order to encourage more meaningful legislative engagement.[509]

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[504] *Ibid.*
[505] *Ibid.*
[506] Robert Leckey, "Assisted Dying, Suspended Declarations and Dialogue Time." (2019) 69:1 U British Columbia L J 1 at 1.
[507] *Ibid* at 8-17.
[508] *Ibid* at 17-22.
[509] *Ibid* at 26-28.

In line with Leckey's critique of the Supreme Court's one-year suspension in *Carter* and the rushed legislative process that followed (*i.e.*, Bill C-14). This thesis recommends that courts should reconsider the default approach of granting a one-year suspension of invalidity in cases involving complex moral, social, and policy questions. Where the subject matter requires extensive public consultation and thoughtful legislative design, as demonstrated by Quebec's more deliberative five-year process courts should be prepared to grant longer suspension periods. Doing so would promote genuine legislative engagement, allow for more inclusive policy development, and support the institutional dialogue envisioned by the Court.

7. There is a Need for Future Research on the Long-Term Impact of Suspended Declarations.

Future studies should examine the long-term effects of the suspended declaration of invalidity on laws and societal outcomes. Research can assess whether legislative responses effectively address constitutional concerns and identify patterns in judicial-legislative interactions across various *Charter* challenges. Such studies would provide valuable insights into the strengths and limitations of this remedy while informing its application in diverse contexts.

Conclusion

As Roach and other scholars argues, suspended declarations of invalidity promote institutional dialogue. By delaying the effect of a court decision, they allow Parliament time to introduce a measured legislative response rather than forcing immediate compliance. This reflects

the idea that judicial decisions need not end the conversation but rather invite a legislative reply that can amend the law. This back-and-forth between the courts demonstrates how suspended declarations can support a more thoughtful dialogue.

The early cases, such as *Manitoba Language Reference* and *Schachter*, laid the foundational understanding of how courts manage the tension between enforcing rights and maintaining legal stability. More recent decisions, including *Carter*, *Truchon*, *Bedford*, *Eldridge*, *Ontario (AG) v G*, and *Ndhlovu*, demonstrates how this remedy has been used to navigate complex social and legal questions, including MAiD, hearing disability in the medical setting, and the long-term effects of criminal records. It is a remedy that fosters dialogue between the judiciary and the legislature.

The recommendation proposed in this thesis is that this remedy should be applied with greater clarity, transparency, and fairness. Encouraging courts to adopt a proportionality-based framework, to set clearer timelines, and to grant individual exemptions more consistently, because it would improve the remedy's accessibility and legitimacy. In addition, Public engagement during the suspension period can also enhance the democratic input of the legislative response. In line with Roach's insight, it has also been argued that courts should consider retaining jurisdiction after issuing a suspended declaration to ensure both successful *Charter* claimants and governments return to the same judge already familiar with the case if disagreements arise.

This thesis does not only contribute to the understanding of suspended declarations of invalidity as a judicial tool but also offers a framework for evaluating their principled application in future cases. As our legal system continues to confront evolving and deeply contested rights

issues, this remedy offers a flexible yet principled approach for achieving constitutional compliance without compromising legal stability or democratic legitimacy.

Bibliography

Primary Sources: Legislation

1. *An Act to amend the Charter of the French Language*, SQ 2002, c 38.
2. Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying*), 2nd Sess, 43rd Parl, 2021, cl 1(2.1) (assented to 17 March 2021), SC 2021 c 2, [Bill C-7].
3. Bill 11, *An Act to amend the Act respecting end-of-life care and other legislative provisions*, 2023, SQ 2023, c 25.
4. Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, 1st Sess, 42nd Parl, 2016.
5. Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney-General of Canada v. Bedford and to make consequential amendments to the other Acts*, 2nd Sess, 41st Parl, 2014, (assented to by the House of Commons 6th November 2014).
6. Bill C-39, *An Act to Amend the Criminal Code (Medical Assistance in Dying)*, 1st Sess, 44th Parl, 2023 (assented to March 9, 2023).
7. Bill C-52, *An Act respecting end-of-life care*, 1st Sess, 41st Leg, Quebec, 2014.
8. Bill C-62, *An Act to Amend the Criminal Code (Medical Assistance in Dying)*, 1st Sess, 44th Parl, 2023 (assented to February 27, 2024).
9. *Canada Pension Plan* RSC 1985, c C-8.
10. *Charter of the French Language*, RSQ 2002, c c-11.
11. *Christopher's Law (Sex Offender Registry)*, 2000, SO 2000, c 1.
12. *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
13. *Criminal Code* RSC 1985, c. 46.

14. *Delivery Improvement Act,* SBC 2002 c 2.

15. *Election Act*, RSC 1985, c E-2.

16. *Federal Lord's Day Act*, RSC 1970, c L-13.

17. *Health and Social Services Delivery Improvement Act*, SBC 2002 c 2.

18. *Hospital Insurance Act, RSBC* 1979, c 180. [now RSBC 1996, c 204].

19. *Indian Act,* RSC 1985, c. I-5.

20. *Medicare Protection Act* SBC 1992, c 76 (now *Medicare Protection Act, RSBC* 1996, 286).

21. *Manitoba Act,* RSC 1970, App II, s 23.

22. *Sex Offender Information Registration Act* SC 2004, c 10.

Primary Sources: Jurisprudence

1. *Big M Drug Mart Ltd v Canada*, 1985 SCC 69, [1985] 1 SCR 295.
2. *Canada (Attorney-General) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101.
3. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.
4. *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13.
5. *Canada (Attorney General) v Hislop,* 2007 SCC 10, [2007] 1 SCR 429.
6. *Corbiere v Canada (Minister of Indian and Northern Affairs),* 1999 687 SCC, [1999] 2 SCR 203.
7. *Dunmore v Ontario (Attorney General of Canada),* 2001 SCC 94, [2001] 3 SCR 1016.
8. *Dixon v British Columbia*, 1989 248 (BC SC).
9. *Egan v Canada*, 1995 SCC 98, [1995] 2 SCR 513.
10. *Eldridge v British Columbia,* 1997 SCC 327, [1997] 3 SCR 624.
11. *Figueroa v Canada (Attorney General),* [2003] 1 SCR 912, 37 SCR 912.
12. *Gosselin v Quebec*, 2002 SCC 84, [2002] 4 SCR 429.

13. *Health Services and Support Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

14. *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*,2002 SCC 13, [2002] 1 SCR 405.

15. *Mclvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.

16. *M. v. H,* 1999 686 SCC, [1999] 2S SCR 3.

17. *Nguyen v Canada*, 2009 SCC 47, [2009] 3 SCR 208.

18. *Reference Re Manitoba Language Rights* 1985 SCC 33, [1985] 1 SCR 721.

19. *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489.

20. *R v Guignard,* 2002 SCC 14, [2002] 1 SCR 492.

21. *R v Oakes*, 1986 SCC 103, [1986] 1 SCR 103.

22. *R v Ndhlovu 2022 SCC 38.*

23. *R v Swain* 1991 SCC 104, [1991] 1 SCR 933.

24. *R v Morgentaler*, 1988 90 SCC, [1988] 1 SCR 30.

25. *R v Big M Drug Mart Ltd*

26. *Saumur v City of Quebec,* 1953 SCC 3, [1953] 2 SCR 299.

27. *Schachter v Canada*, 1992 SCC 74, [1992] 2 SCR 679.

28. *Ontario (Attorney-General) v G*, 2020 SCC 38, [2020] 3 SCR 629.

29. *Thibaudeau v Canada* 1995 99 SCC, [1995] 2 SCR 627

30. *Truchon v Attorney General of Canada,* 2019 QCCS 3792.

31. *Truchon v Attorney General of Canada,* 2020 QCCS 772.

32. *Truchon v Attorney General of Canada,* 2021 QCCS 3792.

Secondary Material: Online Resources

1. "Assisted Dying Law Faces Constitutional Challenge Over Exception for Mental Disorders", *CBC News*, (19 August 2024), online: <Assisted dying law faces constitutional challenge over exception for mental disorders | CBC News>.
2. Canada: NGO Challenges Assisted Dying Law Excluding Individuals with Mental Disorders as Discriminatory", *JURIST* (20 August 2024), online: <https://www.jurist.org/news/2024/08/canada-ngo-challenges-assisted-dying-law-excluding-individuals-with-mental-disorders-as-discriminatory/>.
3. Chinecherem Chiamaka Anayo-Enechukwu, "From *Carter v Canada* (SCC) to Bill C-14: An Appraisal of Medical Assistance in Dying in Canada and Charter Dialogue" (26 April 2024), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4894230>.
4. Department of Justice Canada, "Legislative Background: Medical Assistance in Dying (MAID)" (3 February 2023), online: <https://justice.canada.ca/eng/rp-pr/other-autre/pad-amm/a2.html>.
5. Department of Justice, "Canada's Medical Assistance in Dying (MAiD) law", (1 March 2023), online, <https://www.justice.gc.ca/eng/cj-jp/ad-am/bk-di.html>.
6. Inclusion Canada, "Press Release: Open Letter from 65+ Disability Ally Organizations Calls for Trudeau Government Appeal of Truchon and Gladu Ruling" (7 October 2019), online: Inclusion Canada <Press Release: Open Letter from 65+ Disability Ally Organizations calls for Trudeau Government Appeal of Truchon and Gladu Ruling – Inclusion Canada>.
7. Jocelyn Downie & Jennifer Chandler, "Interpreting Canada's Medical Assistance in Dying Legislation", (March 2018) online: <https://irpp.org/wp-

content/uploads/2018/03/Interpreting-Canadas-Medical-Assistance-in-Dying-Legislation-MAiD.pdf>

8. John Aldag, "Debate on Medical Assistance in Dying (Bill C-14)"s (2 May 2016), online: John Aldag https://parl44.johnaldag.ca/my-work/medical-assistance-in-dying-bill-c14-debate [https://parl44.johnaldag.ca/my-work/medical-assistance-in-dying-bill-c14-debate].
9. Julia Nicol and Marlisa Tiedemann, "Legislative Summary Bill C-7: An Act to Amend the Criminal Code (Medical Assistance in Dying)", (19 April 2019), online: <https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/43-1/c7-e.pdf>.
10. Krista Carr, Not All Lives Are Valued Equally When It Comes to Assisted Dying" (9 November 2022),online:<https://themighty.com/topic/disability/truchon-gladucase-assisted-dying-in-canada-disability/>.
11. Kent Roach, "Ottawa should ask the Supreme Court about MAID for Canadians with mental illness", (3 February 2024), online: <https://www.theglobeandmail.com/opinion/article-ottawa-should-ask-the-supreme-court-about-maid-forcanadians-with/>.
12. Nitin Kumar Srivastava, "On Constitutional Exemptions" (8 February 2016), online(blog): Alberta Civil Liberties Research Centre Blog <https://www.aclrc.com/blog/2016-2-8-on-constitutional-exemptions/>.
13. Lyne Casavant & Dominique Valiquet, "Bill C-36: An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney-General of Canada v. Bedford and to make consequential amendments to other Acts" (18 July, 2014), online:

<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-epdf>.

14. Julia Nicol & Marlisa Tiedemann, "Legislative Summary of Bill C-14: An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)" (21 April 2016) online: <Legislative Summary of Bill C-14: An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)>.
15. Stephaine Taylor, "*Charter* Challenge Launched Against Ottawa for Excluding Mental Illness from MAiD" *National Post*, (19 August 2024), online: <*Charter* challenge launched against Ottawa for excluding mental illness from MAID | National Post>.

Secondary Sources: Books

1. Peter Hogg, *Constitutional Law of Canada*, (Toronto Ontario: Thompson Reuters Canada Limited 2013).
2. Kent Roach, "Dialogue in Practice 2001- 2006" in *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc., 2016).

Secondary Sources: Articles

1. Bruce Ryder, "Suspending the *Charter*" (2003) 21 SCLR (2d).
2. Carissima Mathen, "A Recent History of Government Responses to Constitutional Litigation" (2016) 25:3 Const Forum Const
3. Emmett 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) 49:1 Ottawa L Rev 107.

4. Grant Hoole Russell, "*Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law"* (Master of Laws, University of Toronto Faculty of Law, 2010) [Unpublished].
5. Kent Roach, "Remedial Consensus and Dialogue under the *Charter*: General Declarations and Delayed Declarations of Invalidity" (2002) 35:2 U Brit Colum L Rev 211. [Roach].
6. Kiran Madesha, *The Future of Canada's Medical Assistance in Dying (MAID) for the Mentally Ill and Physically Disabled* (LLM Thesis, University of Toronto, 2017) [unpublished].
7. Peter Hogg & Allison Bushell, "The *Charter* Dialogue Between the Courts and Legislature's (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All") (1997) 35 Osgoode Hall LJ 75.
8. Peter Hogg, Allison Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited Or 'Much Ado About Metaphors", (2007) 45 Osgoode Hall LJ 1. [Hogg et al.].
9. Robert Leckey, "Assisted Dying, Suspended Declarations and Dialogue Time." (2019) 69:1 U British Columbia L J 1.
10. Sarah Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v Canada."* (2015) 78:2 Sask L Rev 201.
11. Sujit Choudhry & Kent Roach, "Putting the Past Behind us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21:1 Supreme Court L Rev 205.
12. Thomas McMorrow, "MAiD in Canada? Debating the Constitutionality of Canada's New Medical Assistance in Dying Law" (2018) 44:1 Queen's LJ 69.
13. Thomas Bateman & Matthew LeBlanc, "Dialogue on Death: Parliament and the Courts on Medically Assisted Dying." (2018) 85:1 Sask Court L Rev 387.

14. Webster C. Paul, “Canada Debates Medical Assistance Dying Law” (2016) 387:10031 The Lancet 1893.