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Remedial Postscripts — Reflections on *Carter II*, Suspensions, Extensions and Exemptions

Jeanette Ettel*

I. INTRODUCTION

In *Carter*, the Supreme Court of Canada declared unconstitutional the absolute criminal prohibition on medical assistance in dying but suspended its declaration for 12 months to allow time for Parliament and the provincial legislatures to respond to the decision.[1] In part because of the intervening federal election, Parliament was unable to pass a response to *Carter* in time and, prior to the expiry of the suspension, applied for a six-month extension. *Carter II* was the Court's decision on the extension application — and on the issue of whether exemptions should be granted from the temporarily valid law (1) within Quebec having regard for the coming into force of Quebec's law governing medical assistance in dying; and (2) outside of Quebec for individuals who met the criteria in the *Carter* declaration.[2]

Though short, the Court's 15-paragraph judgment provides an interesting window into three remedial issues whose importance is belied by the relative infrequency with which they are discussed — suspensions, extensions (of suspensions) and exemptions (from suspensions). This article uses *Carter II* as a springboard to take a closer look at these three issues, to identify areas in which the jurisprudence remains unsettled, and to offer a few modest suggestions on the function and scope of these remedial tools.

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[1] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) [hereinafter "*Carter*"].

[2] *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, 2016 SCC 4, [2016] 1 S.C.R. 13 (S.C.C.) [hereinafter "*Carter II*"].

II. A Closer Look at *Carter II*

1. Laying the Groundwork — a Few Words on Suspended Declarations of Invalidity

Before turning to the main issue in *Carter II* (the extension), a few words are in order about suspended declarations of invalidity and the remedial context in which they arise.[3] When a court finds legislation unconstitutional, it must, in keeping with the language of section 52(1) of the *Constitution Act 1982*,[4] first define the extent of the inconsistency. Having done so, it must then select among the remedies of striking down, severance, reading-in, and reading-down. In contrast to striking down, the remedies of severance, reading-in and reading-down involve a form of judicial amendment of the legislative text (tantamount to adding or subtracting words) to bring the law into conformity with the requirements of the Constitution. In selecting among these remedies, the court must be informed by the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Canadian Charter of Rights and Freedoms* ("Charter").[5] This, in turn, requires consideration of a number of factors such as whether the judicial amendment (1) flows with precision from the requirements of the Constitution; (2) interferes with the legislative objective; (3) markedly transforms the legislation; or (4) preserves a long-standing legislative measure. Where judicial amendment would intrude unduly on the legislative sphere, the appropriate remedy is to strike the legislative provision(s) down. It is in these cases that the further question of whether to suspend the declaration of invalidity arises.

Though the practice of granting suspensions is not uncommon, judicial discussion of the principles underpinning the practice remains relatively scant. The most extensive treatment of the issue remains that in Lamer C.J.C.'s seminal discussion in *Schachter*.[6] Of particular relevance for present purposes are his comments on (1) the threshold on which a suspension should be granted; and (2) the relationship between the suspension issue and the basic remedial analysis (*i.e.*, the choice between striking down and the

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[3] See generally *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) [hereinafter "*Schachter*"].

[4] (U.K.), 1982, c. 11.

[5] The *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[6] *Schachter*, *supra*, note 3.

alternative remedies of reading-in, reading-down and severance, which I refer to collectively as the "judicial amendment remedies").

On the issue of threshold, Lamer C.J.C. acknowledged the significance of suspended declarations, writing:

> A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation.[7]

He nevertheless explained that "...[t]here may be good pragmatic reasons" to grant suspensions in particular cases.[8] A suspension will be "clearly appropriate" where the striking down of the provision poses a potential danger to the public or otherwise threatens the rule of law.[9] A suspension may also be appropriate in cases where the constitutional defect stems from underinclusiveness rather than overbreadth. In such cases, the appropriate remedy will often be to strike down the underinclusive benefit entirely, which would in the absence of a suspension deprive deserving persons of the benefit without providing it to the group that had been unconstitutionally excluded.[10]

Although it has been suggested that *Schachter* restricted suspensions to situations of exigency,[11] the judgment arguably supports a more flexible interpretation — setting out the obvious cases (*i.e.*, those where suspensions are "clearly appropriate") while hinting at a broader set of cases in which suspensions may be appropriate, namely those in which an immediate declaration would create an undesirable gap in the law. While it is true that a suspension may leave the successful claimant without a tangible remedy unless an exemption (from the suspension) is also granted, it is in at least some cases an inevitable consequence of the remedial scheme outlined in *Schachter* and the underlying considerations about the respective roles of courts and legislatures.

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[7] *Id.*, at 716.

[8] *Id.*

[9] *Id.*, at 715.

[10] Chief Justice Lamer's reasons make it clear that one of the options that Parliament could have considered for remedying the constitutional defect was to eliminate or modify the benefit for everyone. This possibility underpinned his conclusion that extending the benefit through reading in was not appropriate in that case. See also *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, 2007 SCC 10, at para. 108 (S.C.C.) [hereinafter "*Hislop*"].

[11] Peter Hogg has argued that *Schachter* restricted the use of suspensions to "exigent situations" where "danger, disorder or deprivation" would result. P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007 (updated 2016, release 1)) at 40-9, 40-11.

A particularly important point that emerges from *Schachter* is that the question of whether a declaration should be suspended is analytically distinct from (and subsequent to) the more basic question of what the primary remedy should be. At the first stage of the analysis, the operative consideration is the respective roles of courts and legislature. The remedy that is selected at that stage of the analysis is, by definition, the one that respects these institutional roles. In those clear cases where judicial amendment is appropriate, the availability in principle of a suspended declaration of invalidity should not be relied upon to alter the basic remedial choice because an immediate remedy is evidently preferable to a delayed one. It is only in those cases where the appropriate remedy is a declaration of invalidity that the analysis proceeds to the second stage, at which the operative consideration is not the institutional roles of courts and legislatures, which have already been fully accounted for, but the impact of an immediate declaration on the public.[12]

This point is not always reflected in the later jurisprudence, however, which often uses the language of "facilitating dialogue" as a shorthand to explain the decision to suspend a declaration of invalidity.[13] Properly understood, it is the choice of the striking down remedy, which leaves a gap in the law that calls for a legislative response, that facilitates dialogue — with the suspension serving to protect the public against the effects of that gap for a limited time while the legislature crafts its response.

Just as the consideration of institutional roles has no real place in the suspension analysis, so too the consideration of the effect on the public has no place in the determination of the appropriate remedy. This is also a feature of *Schachter* that has occasionally been overlooked in subsequent jurisprudence. If the impact on the public were to be considered at the first stage, it is safe to assume that judicial amendment would be the result in a far greater range of cases, largely undercutting the remedial considerations outlined in *Schachter*.

There is no question that suspensions are a "serious matter from the point of view of the enforcement of the Charter."[14] Preserving an unconstitutional state of affairs, even for a limited period of time, sits in some tension with

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[12] But see Iacobucci J.'s dissenting reasons in *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at para. 217 (S.C.C.), in which he would have combined a judicial amendment remedy (severing the unconstitutional definition of "spouse" and reading in a constitutional definition that would include same-sex couples) with a suspension.

[13] This observation has been made by a number of commentators. See, *e.g.*, B. Ryder, "Suspending the *Charter*" (2003), 21 S.C.L.R. (2d) 267 [hereinafter "Ryder"]; K. Roach, "Enforcement of the Charter – Subsections 24(1) and 52(1) (2013), 62 S.C.L.R. (2d) 473-537.

[14] *Schachter*, *supra*, note 3, at 716.

the principle of constitutional supremacy as reflected in section 52(1) of the *Constitution Act, 1982*. The Court has explained that the invalidity of an unconstitutional statute arises not from the fact of its being declared unconstitutional but from the operation of section 52(1), such that the statute is in principle invalid from the moment it is enacted.[15] Suspensions also have the potential to deprive successful litigants of a remedy, out of keeping with the understanding that section 52(1) remedies generally have retroactive effect.[16] However, it is equally true that the task of determining how to cure a constitutional defect often involves matters that go beyond the proper institutional role of courts. In such cases, the basic remedy of striking down may leave an untenable gap in the law because the declaration of invalidity captures beneficial aspects of the law in addition to the unconstitutional ones. Although risks to public safety and rule of law are clear examples, an untenable gap in the law may also encompass things like frustrating the orderly administration of justice,[17] depriving deserving individuals of a benefit,[18] or removing the protections of a generally beneficial law,[19] to name just three. As the Court's practice reflects, these sorts of gaps are appropriately addressed through the use of a suspension.[20] This is not to say, of course, that suspensions should be granted reflexively or without serious consideration.

2. The Extension Decision

Carter II is one of only a handful of cases in which the Supreme Court has had occasion to consider a motion to extend a transition period (suspension). Within this small set of cases, *Carter II* is one of the only ones in which the Court issued reasons for its decision. Many of the decisions are unreported, and are simply listed as decisions on

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[15] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28 (S.C.C.) [hereinafter "*Martin*"]; *Hislop*, *supra*, note 10, at para. 91. See also *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, 2008 SCC 6, at para. 35 (S.C.C.) [hereinafter "*Ferguson*"].

[16] *Hislop*, *supra*, note 10, at paras. 83, 86.

[17] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1998] S.C.J. No. 10, [1998] 1 S.C.R. 3, at para. 18 (S.C.C.) [hereinafter "*P.E.I. Judges Reference*"].

[18] *Schachter*, *supra*, note 3, at 716.

[19] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, [2013] 3 S.C.R. 733, 2013 SCC 62, at paras. 40-41 (S.C.C.) [hereinafter "*UFCW*"] (striking down Alberta's personal information protection legislation in its entirety in light of its "comprehensive and integrated structure", but suspending the declaration for 12 months).

[20] See the Appendices to Ryder, *supra*, note 13, which list the Supreme Court decisions between 1984 and 2003 involving declarations of invalidity (Appendix A) and suspensions (Appendices B and C).

miscellaneous motions in the Court docket. As such, *Carter II* provides a rare glimpse into how the Court approaches the issue of extensions. Reading *Carter II* against the backdrop of the Court's past practice in relation to extensions suggests that its approach may be shifting.

(a) *The Practice Prior to* Carter II — *Overview of Previous Extension Cases*

A review of the Court's motion decisions indicates that prior to *Carter II*, the Court has considered at least seven motions to extend a suspension. In each of those cases, the Court granted the extension and did so on the terms requested by the applicant government. In light of the small number of cases involved, a brief look at each of them may assist in setting the stage for a few reflections on *Carter II*.

The first case involving an extension of a suspension was, perhaps unsurprisingly, also the case in which the Court first articulated the power to grant a suspension. In the *Manitoba Language Rights Reference*,[21] the Court declared invalid the entire corpus of Manitoba laws on the basis that they had been enacted in only one language. To avoid the legal vacuum that would have resulted from an immediate declaration, the Court deemed the laws temporarily valid "and of force and effect until the expiry of the minimum period required for translation, re-enactment, printing and publishing".[22] Shortly thereafter, the Court issued an order giving effect to a consent agreement with respect to that minimum period. The Order dictated that the period of temporary validity would continue for approximately three-and-a-half years to December 31, 1988 for the "Continuing Consolidation of the Statutes of Manitoba" and the "Regulations of Manitoba" and to December 31, 1990 for "all other laws of Manitoba".[23] On December 7, 1990, the Court issued a further extension in respect of matters raised in a new application concerning the scope of the original ruling, extending the period of temporary validity until judgment in that application was handed down.[24] When the Court decided the application on January 23, 1992, it granted a further extension of three months, plus such further period

[21] *Reference re: Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (June 13, 1985, S.C.C.). Note that this was not a Charter case.

[22] *Id.*, at para. 148.

[23] *Ref. Re Manitoba Language Rights*, [1985] S.C.J. No. 70, [1985] 2 S.C.R. 347, at para. 3 (November 11, 1985, S.C.C.).

[24] *Manitoba Language Rights Order (Re)*, [1990] S.C.J. No. 142, [1990] 3 S.C.R. 1417 (December 7, 1990, S.C.C.).

as the parties could agree upon.[25] The parties subsequently agreed to (and the Court approved) a final extension until July 15, 1992.[26]

Around the same time that the last of the extensions were wrapping up in the *Manitoba Language Rights Reference*, the issue came up again in *Swain*, which involved a challenge to provisions of the *Criminal Code* requiring the automatic detention of a person acquitted by reason of insanity.[27] In its main decision in that case, the Court had issued a declaration of invalidity but, because an immediate declaration would have resulted in the release of potentially dangerous individuals into the community, suspended its declaration for six-months. Interestingly, the Court went on to expressly note that any of the parties could apply to the Court for an extension of the suspension if more time were needed.[28] Shortly before the expiry of the suspension, the Court granted a three-month extension to allow for the passage of remedial legislation.[29]

Several years later, in *Feeney*, the Court held that warrantless arrests in dwelling houses were generally prohibited by the *Charter*.[30] On an application for re-hearing, the Court granted a six-month stay of its original judgment.[31] Just before the expiry of the stay, the Court granted an extension of approximately one month (or, if it were earlier, the date on which the remedial legislation received Royal Assent).[32]

The issue of extensions came up again a few months later in *Eldridge*. In its main decision in that case, the Court had issued a declaration that

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[25] *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (January 23, 1992, S.C.C.).

[26] *Attorney General of Canada v. Attorney General of Manitoba*, Docket 18606, online at: <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=18606>.

[27] *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) [hereinafter "*Swain*"].

[28] *Id.*, at 1022.

[29] *R. v. Swain*, [1986] S.C.C.A. No. 328 (S.C.C.) ("GRANTED: October 28, 1991. Transitional period extended to February 5, 1992. S.C.C. Bulletin, 1991, p. 2516").

[30] *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13 (May 22, 1997, S.C.C.).

[31] *R. v. Feeney [Application]*, [1997] S.C.J. No. 80, [1997] 2 S.C.R. 117 (S.C.C.) [hereinafter "*Feeney [Application]*"] (holding that the aspect of the judgment "relating to the requirement for a warrant to effect an arrest in a dwelling is stayed for a period of 6 months from the date such judgment was issued, namely May 22, 1997" and that the "transition period will have effect throughout Canada but will have no application to the disposition that has been made or is to be made of the present case").

[32] *R. v. Feeney [Application]*, [1997] S.C.J. No. 114 [1997] 3 S.C.R. 1008 (S.C.C.). The one-paragraph judgment provided: "The motion is granted. The stay of the judgment ordered by this Court on June 27, 1997, ... is extended to December 19, 1997 or, in the alternative, to the day Bill C‑16 (*An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*) receives Royal Assent if this occurs prior to December 19, 1997." [Citation omitted.]

the failure to provide sign language interpreters in the delivery of medical services violated the equality guarantee in section 15(1) of the Charter but suspended that declaration for six months "to enable the government to explore its options and formulate an appropriate response."[33] Just before the expiry of the suspension, the Court granted the application of the BC Attorney General and Medical Service Commission to extend the suspension to September 1, 1998.[34]

In the *P.E.I. Judges Reference*, the Court issued several declarations invalidating statutes and censuring acts of several provinces that interfered with the judicial independence of their provincial courts.[35] Further to a rehearing of the appeal, the Court granted a one-year suspension (as of the date of the original judgment) "to allow governments time to comply with the constitutional requirements mandated by [the original] decision, and to ensure that the orderly administration of justice is not disrupted in the interim".[36] Just before the expiry of the suspension period, the Court granted the Attorney General of Canada's motion to extend the suspension for a period of two months; or, if it was sooner, to the day the remedial legislation that was before Parliament received Royal Assent.[37]

In *Mackin*, the Court held that the elimination of New Brunswick's existing system of supernumerary judges, and its replacement with a panel of retired judges paid on a *per diem* basis, violated the institutional guarantee of judicial independence contained in section 11(d) of the Charter. The Court suspended its declaration for a period of six months "in order to fill the legal vacuum that would be created by a simple declaration of invalidity".[38] The suspension was extended twice — for six months each time.[39]

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[33] *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 96 (October 9, 1997, S.C.C.).

[34] *Eldridge v. British Columbia (Attorney General)*, [1995] S.C.C.A. No. 397 (S.C.C.). The application was heard on April 6, 1998 (S.C.C. Bulletin, 1998, p. 604). The motion (styled as a motion for stay of execution) was granted on April 27, 1998 (S.C.C. Bulletin, 1998, p. 710).

[35] *Supra*, note 17 (September 18, 1997).

[36] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] S.C.J. No. 10, [1998] 1 S.C.R. 3, at para. 18 (February 10, 1998, S.C.C.). (Motion for rehearing filed October 20, 1997; rehearing took place on January 19, 1998).

[37] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] S.C.J. No. 92, [1998] 2 S.C.R. 443 (September 15, 1998, S.C.C.).

[38] *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 77 (February 14, 2002, S.C.C.) [hereinafter "*Mackin*"].

[39] *Id.* The first extension was granted on June 17, 2002 (S.C.C. Bulletin, 2002, p. 956) and the second on January 24, 2003 (S.C.C. Bulletin, 2003, p. 155).

The last of the pre-*Carter* cases is the *UFCW* case, in which the Court held that Alberta's personal information protection legislation violated section 2(b) of the Charter because it restricted a union's ability to collect, use or disclose personal information during the course of a lawful strike.[40] In light of the "comprehensive and integrated structure of the statute" the Court held that the task of determining how best to make the legislation constitutional was properly one for the legislature and suspended its declaration for 12 months.[41] Shortly before the expiry of the suspension, the Court granted the application of the Attorney General of Alberta for a six-month extension.[42]

(b) The Approach in Carter II

In *Carter II*, the Court was unanimous in its decision to grant an extension to account for the interruption of work on a legislative response as a result of the federal election. It declined to grant the full six months that the Attorney General of Canada had requested, however, on the basis that Parliament had only been dissolved for four months.[43] The Court explained as follows:

> ...To suspend a declaration of the constitutional invalidity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society. To extend such a suspension is even more problematic. The appellants point to the severe harm caused to individuals by the extension. Extraordinary circumstances must be shown. The burden on the Attorney General who seeks an extension of a suspension of a declaration of constitutional invalidity is heavy.[44]

As suggested above, the characterization of suspended declarations as an "extraordinary step" is not entirely reflective of the Court's own practice

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[40] *Supra*, note 19 (November 15, 2013).

[41] *Id.*, at paras. 40-41.

[42] [2012] S.C.C.A. No. 288 (October 30, 2014, S.C.C.).

[43] On the same day that *Carter II* was handed down, the Court also issued its extension decision in the *Mounted Police Association of Ontario* case. In its original decision (*Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.) [hereinafter "*MPAO*"]), the Court had declared unconstitutional the exclusion of RCMP members from the federal public service labour relations regime, suspending its declaration of invalidity for a period of 12 months to give the Government time to craft a constitutionally compliant regime. As in *Carter II*, the Court granted an extension of four months, rather than the requested six months: [2012] S.C.C.A. No. 350 (S.C.C.). Although the Court did not issue reasons for its decision in *MPAO*, it seems likely that the reasoning would have been the same as in *Carter II*.

[44] *Carter II*, *supra*, note 2, at para. 2.

and, arguably, not a necessary implication of the remedial scheme set out in *Schachter*. The same can be said of the further suggestion that extensions of suspensions will only be available in extraordinary circumstances.

It is true that the number of extensions that has been granted since the Charter's passage is small and that extensions are rare in practice. As the foregoing review of the pre-*Carter II* extension cases makes clear, however, this is a function of the fact that governments have only *applied* for extensions in a limited number of cases. While it is clear that Attorneys General have exercised restraint in seeking extensions, it is nevertheless relevant that prior to *Carter II*, an extension appears to have been granted in every case in which one was sought — for the requested period — with no discussion or explanation.

The notion of constitutional dialogue is built on a foundation of mutual respect between courts and legislatures and of mutual trust that each branch will act responsibly within its constitutional sphere. Prior to *Carter II*, this mutual respect and trust was arguably evident both in the relative infrequency with which Attorneys General have sought extensions from the Supreme Court and in the Court's apparent willingness to take Attorneys General at their word about the time that was needed to complete the legislative process. With its decision in *Carter II* (and its extension decision in *MPAO*),[45] the Court has arguably adopted a slightly different posture both in declining to grant the requested six months and, relatedly, in treating the dissolution of Parliament as the only basis upon which an extension could be justified.

As with the discussion of suspensions, this is not to say that extensions should be sought or granted reflexively. It is simply to recognize that extensions, within reasonable limits, are not necessarily more problematic than suspensions. Like suspensions, extensions are at once a serious matter from the point of view of the enforcement of the Charter *and* an appropriate response to the inherent challenges associated with bringing the statute books into conformity with the Constitution while at the same time respecting the institutional roles of courts and legislatures. Where governments have been conducting themselves responsibly, the fact that more time is needed may be regrettable[46] but should not normally alter the basic considerations that supported the granting of the suspension in the first place: (1) respect for the role of the legislature, as reflected in the decision to issue a

[45] *Infra*, note 43.

[46] *Carter II*, *supra*, note 2, at para. 14.

declaration of invalidity rather than one of the judicial amendment remedies; and (2) the effect on the public if the declaration were to take effect in the absence of a legislative response. The expiry of a suspension should not in the ordinary course of things make the gap in the law that the declaration would create any less untenable in terms of its impact on the public.

3. The Exemption Decisions

In cases where a declaration of invalidity has been suspended, the practice of exempting the successful litigant from the temporarily valid law is not particularly uncommon in practice. This is an area, however, in which there is both a disconnect between the practice and (jurisprudential) theory — and a need for clarification of the governing principles. It is perhaps not surprising then that the Court was divided on the issue of whether exemptions should be granted during the period of the extension, with the majority granting both of the requested exemptions and the minority granting neither.

(a) General Principles Governing Exemptions from Temporarily Valid Laws

(i) A Note on Terminology – Exemptions from Suspensions vs. Constitutional Exemptions

At the outset, it is important to draw a distinction between an exemption from a temporarily valid law, granted in conjunction with a suspended declaration of invalidity, and a "constitutional exemption" in the form of a free-standing exemption from an otherwise valid law. Although the two may share some similarities on the surface, they serve different objectives and raise very different considerations at the constitutional and remedial levels. This is reflected in the fact that the Supreme Court has effectively closed the door on the latter (constitutional exemptions)[47] while — through its practice as much as its reasons — generally affirming the availability of the former. The type of exemption at issue in *Carter II* was the more limited "exemption from a suspension".

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[47] See generally *Ferguson*, *supra*, note.15. See also *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 149 (S.C.C.).

ii. The "Rule in *Schachter*"

Although the issue of exemptions from suspensions was addressed by the Court in *Schachter*, this is one area in which the Court's analysis has arguably not stood the test of time in the sense of offering a clear foundation to underpin and explain the Court's subsequent practice. In *Schachter*, Lamer C.J.C. explained that an individual remedy under section 24(1) will "not often be available" in conjunction with remedies under section 52(1) of the *Constitution Act, 1982*.[48] On its face, this rule suggests that exemptions from suspensions, which are individual remedies, flowing from the broad remedial discretion under section 24(1), are generally not available.

Although this aspect of the *Schachter* decision has been treated as creating a firm or categorical rule in some cases,[49] it is important to note that the "rule" was crafted in a benefits case and has mainly (though not exclusively) been applied in that context.[50] In other contexts, the Court has shown a greater willingness to grant exemptions from suspensions to ensure that successful litigants obtain the benefit of the judgment.[51] Indeed, in the criminal context, the contrary approach of exempting successful applicants from any period of suspension or temporary validity has been described as "the general rule established by the Supreme Court of Canada."[52] Whether or not it rises to the level of a general rule, there is clear precedent for exempting successful criminal law litigants from the effects of a temporarily valid law. Moreover, in cases where the Court has granted this form of relief, it has done so without any mention of *Schachter* or the remedial principles articulated in that case, seemingly taking it as self-evident that the successful criminal law

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[48] *Schachter*, *supra*, note 3, at 720.

[49] See, *e.g.*, *R. v. Demers*, [2004] S.C.J. No. 43, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 62-63 (S.C.C.), where the majority reasoned that the "rule in *Schachter*" precluded it from granting a temporary exemption in conjunction with its suspended declaration of invalidity. But see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at para. 23 (S.C.C.), in which the majority appears to have given the rule the opposite interpretation (*i.e.*, as establishing a general rule that individual relief *will* be available).

[50] See *Schachter*, *supra*, note 3; *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.). But see *Martin*, *supra,* note 15.

[51] See, *e.g.*, *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, 2003 SCC 34, [2003] 1 S.C.R. 835 (S.C.C.); *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] S.C.J. No. 47, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 47 (S.C.C.); *UFCW*, *supra*, note 19 (in which the Court quashed the Adjudicator's order that required the Union to comply with the legislation and, in so doing, effectively exempted the Union from the temporarily valid law); *Mackin*, *supra*, note 38, at para. 88.

[52] K. Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 2011) at 14.1769.1.

litigant — whose liberty is typically at stake — should take the benefit of the judgment notwithstanding the suspension of the declaration of invalidity.[53]

If we take the Court's practice as our guide, what emerges is something narrower than a near-categorical rule against combining remedies under section 52(1) with individual remedies under section 24(1). As a starting point, the rule may arguably be characterized as follows: individual remedies under section 24(1) *may* be available in conjunction with a suspended declaration of invalidity where: (1) the exemption is necessary to ensure that a successful litigant obtains a meaningful remedy having regard to the nature of the interest at stake; *and* (2) the claimant would likely benefit from any legislative response that is constitutionally open to the legislature. This narrower construction of the rule, in addition to reflecting more closely the Court's actual practice, is arguably more in line with the twin guiding principles of respecting the role of the legislature and the purposes of the Charter. This is so because it seeks to avoid granting individual relief that goes beyond what the legislature may ultimately do while at the same time vindicating the Charter rights of successful litigants where it is possible to do so within the court's institutional sphere.[54]

(b) The Approach in Carter II

i. The Quebec Exemption

The five-judge majority granted the Quebec exemption on the basis that (1) legislation governing medical assistance in dying had recently

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[53] See, *e.g.*, *R. v. Guignard*, [2002] S.C.J. No. 16, 2002 SCC 14, [2002] 1 S.C.R. 472 (S.C.C.); *R. v. Bain*, [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91 (S.C.C.); *Swain*, *supra*, note 27 (granting a stay of proceedings). See also *R. v. Rose*, [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262, at para. 58 (S.C.C.), *per* Binnie J., dissenting; *Wakeling v. United States of America*, [2014] S.C.J. No. 72, 2014 SCC 72, [2014] 3 S.C.R. 549, at para. 149 (S.C.C.), *per* Karakatsanis J., dissenting. In both *Rose* and *Wakeling*, the issue of exemptions did not arise for the majority because it found no Charter violation. Cases involving government action (as opposed to legislation) are also worth noting, though it must be acknowledged that the considerations may play out differently in such cases (*e.g.*, because intrusion into the legislative sphere will not be at issue if no legislative action is not required to address the constitutional defect): see, *e.g.*, *R. v. Feeney [Application]*, *supra*, note 31 (explaining that the "transition period will have effect throughout Canada but will have no application to the disposition that has been made or is to be made of the present case"); *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190 (S.C.C.) (in which the accused was acquitted despite the 30-day suspension of the declaration concerning the informational component of the s. 10(b) right to counsel).

[54] See *Hislop*, *supra*, note 10, at para. 108 (explaining that retroactive relief for a claimant in a s. 15 benefits case will not often be available because of the range of options open to the legislature to correct the problem and because "...[i]n our political system, choosing between those options remains the domain of governments").

come into force, and (2) the Attorneys General did not oppose Quebec's request. The dissenting judges would have declined to grant the Quebec exemption on the basis that it was not necessary because of a directive, issued by the Quebec Minister of Justice to the Director of Criminal Prosecutions, not to prosecute any physicians who act in accordance with the Quebec law. Accordingly, the dissent reasoned, an exemption would "neither [add] to nor [take] away from whatever clarity existed in ... Quebec" when the provincial law came into force.[55]

ii. The Individual Exemptions

On the issue of individual exemptions, the majority held that an exemption from the temporarily valid prohibition could be granted during the period of the extension to individuals outside Quebec on application to a superior court. The majority explained that it would be unfair to further prolong the suffering of those "who meet the clear criteria" set out in *Carter* and that the need to obtain judicial authorization during the interim period would ensure "compliance with the rule of law" and provide "an effective safeguard against potential risks to vulnerable people."[56] It further explained that granting the individual exemptions would address concerns of fairness and equality arising from the granting of the Quebec exemption.

The dissenting judges would have declined to grant the individual exemptions, which they characterized as a "constitutional exemption". Citing *Carter*, they explained that such a remedy would "would create uncertainty, undermine the rule of law, and usurp Parliament's role" and that "[c]omplex regulatory regimes are better created by Parliament than by the courts." What is interesting about this explanation is that the passage they cite from *Carter* did not appear in the Court's discussion of whether to grant exemptions from the suspension, but in its earlier discussion responding to the British Columbia Court of Appeal's suggestion of upholding the law but issuing a stand-alone constitutional exemption. On the issue of exemptions from the suspension, the Court in *Carter* simply explained that it was "not a proper case for creating such an exemption mechanism" because Ms. Taylor had passed away and none of the remaining litigants were seeking a personal exemption.[57]

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55 *Carter II*, *supra*, note 2, at para. 10.
56 *Id.*, at para. 6.
57 *Carter*, *supra*, note 1, at para. 129.

iii. Discussion

What can be said about the exemptions granted by the majority is that both are, to varying degrees and for somewhat different reasons, novel. As suggested above, the rationale for exemptions from suspensions has typically been framed as ensuring that the successful litigant obtains the benefit of the ruling. Consistent with this rationale, exemptions have in most cases been limited to the specific parties before the Court.[58] In contrast, both of the exemptions in *Carter II* serve the much broader objective of eliminating the unconstitutional effects of the temporarily valid law in general — not just for the successful litigants.

In the case of the Quebec exemption, the practical effect was to create an immediate carve-out from the temporarily valid federal law for all Quebec residents who were eligible under the provincial legislation. In the case of the individual exemptions, the practical effect was to create a judicially controlled carve-out from the temporarily valid prohibitions for individuals who fit within the parameters of the *Carter* declaration. While it is true that access to the individual exemption required judicial authorization, it is equally true that by virtue of its breadth and scale, the exemption largely neutralized the suspension.[59]

The majority's desire to grant some form of relief during the period of the extension is understandable in light of the serious impacts of the law and the nature of the interests at stake. Notable in this regard is the fact that the extension might have operated to forever deprive individuals who died during the transitional period of the right that had been recognized in *Carter*. The fact that the extension could have the effect of denying justice altogether for some individuals, rather than simply delaying it, likely figured heavily in the majority's analysis.

Nevertheless, the logic of the resulting situation is in tension with the Court's decision and reasoning in *Carter*. As discussed earlier, the primary consideration underpinning the suspension was the Court's conclusion that the difficult task of crafting a constitutionally compliant scheme was properly one for Parliament. The task was recognized to be a difficult one not only because it required the development of a "complex

[58] For a notable counter-example, see *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.), in which Lamer C.J.C., dissenting, would have granted a class-based exemption much like that in *Carter II*.

[59] By way of analogy in the context of interlocutory remedies, see *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] S.C.J. No. 6, [1987] 1 S.C.R. 110, at para. 81 (S.C.C.) (explaining that exemptions from a law can, by virtue of their precedential effect, be transformed into wholesale suspensions of the law).

regulatory regime"[60] but, more fundamentally, because it involved the balancing of a number of competing Charter-protected interests.[61]

This same point was picked up by the dissenting judges in *Carter II*, who noted the "complexity of the issues that surround the fundamental question of when it should be lawful to commit acts that would otherwise constitute criminal conduct" and the "profound moral and ethical dimensions" of that question.[62] The majority viewed the matter differently, evidently considering the parameters of the *Carter* declaration to be sufficiently clear and the requirement for judicial authorization sufficient to address any risks to vulnerable people or rule of law concerns.[63]

As has been argued by others, the contours of the *Carter* declaration were in many respects lacking in precision with the result that lower courts interpreting the declaration would be put in the position of fleshing out the parameters of the exception on an *ad hoc* basis.[64] Because the individual exemptions were broadly available to *anyone* — as opposed to being restricted to an individual litigant — they arguably set the stage for transferring to courts, at least on a temporary basis, the task that the Court in *Carter* had suggested was one for Parliament.[65] To the extent that the individual exemptions start to look like a variation of reading-in or reading-down during the transitional period, they have the potential to raise the same concerns of inappropriate intrusion into the legislative sphere.

On the other hand, there is merit to the majority's suggestion that the requirement for judicial authorization does significant work — both in terms of acting as a safeguard and in terms of alleviating some of the institutional and rule of law concerns. This is because people have to go to Court to get approval in advance and because courts on exemption applications are simply deciding whether or not the applicant falls within the "constitutional minimum" identified in *Carter*. This is not to say that there is no incursion into the legislative sphere — particularly in light of the

[60] *Carter*, *supra*, note 1, at para. 125.
[61] *Id.*, at paras. 95, 98.
[62] *Carter II*, *supra*, note 2, at para. 14.
[63] *Id.*, at para. 6.
[64] M. Plaxton, "Carter's Remedial Smokescreen" (July 16, 2015), online: *Policy Options* <http://policyoptions.irpp.org/2015/07/16/carters-remedial-smokescreen/>. See also M. Plaxton, "The Supreme Court of Canada's controversial decision to extend the laws which make physician assisted-suicide illegal was riddled with inconsistencies and loopholes" (January 21, 2016), online: *Policy Options* <http://policyoptions.irpp.org/2016/01/21/what-happened-in-carter-2/>.
[65] *Carter*, *supra*, note 1, at paras. 98, 125-126.

nature of both the issue and the declaration in *Carter*, but that the incursion may be sufficiently mitigated by virtue of its temporary nature provided that restraint is exercised in the interpretation of the original ruling.

The Quebec exemption was in one sense the more novel of the two remedies because, in practical terms, it completely negated the effect of the suspension within the Province of Quebec.[66] On the other hand, despite its sweeping scope, the Quebec exemption arguably avoided the main concerns associated with the individual exemptions. The regulatory regime served both to address the risks that had been recognized by the Court and to substantially mitigate concerns about inappropriate intrusion by the judiciary into the legislative sphere. Although the legislative response to which the exemption gave effect was Quebec's and not Parliament's, the fact remains that a comprehensive set of rules governing eligibility for medical assistance in dying and the scope of permissible conduct had been developed in a systematic and transparent way by legislators, rather than courts. Also relevant, from the perspective of respecting institutional roles, is the fact that the Attorneys General, including the Attorney General of Canada, did not object to the exemption.

What remains to be seen is whether the novel approach to exemptions reflected in the majority reasons was a function of the specific interests at issue in the case, or whether it signals a change in the Court's thinking about the exemptions from temporarily valid laws. What can be said is that the Quebec exemption was a function of a truly exceptional set of circumstances — including most notably the fact that Quebec had been working on the issue for a number of years and had, as a result, legislation in place. As such, it does not necessarily signal a shift in approach and seems unlikely to have much in the way of precedential effect. The significance of the individual exemptions is more difficult to assess. Although there may have been compelling reasons for granting this form of relief under the circumstances, *Carter II* nevertheless raises the possibility that the Court is reimagining not only the role of exemptions and suspensions but also some of the more basic precepts about the respective roles of courts and legislatures that underpin the current approach to Charter remedies.

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[66] It is true that the suspension remained relevant and applicable in respect of conduct that was *not* permitted under the Quebec legislation (which remained subject to the temporarily valid criminal prohibitions). However, the fact remains that the exemption had the effect of legalizing medical assistance in dying (in accordance with the terms of the provincial legislation) within the province of Quebec.

III. CONCLUSION

Undoubtedly, hindsight and additional decisions will prove far more useful in assessing the ultimate significance and impact of *Carter II* than a parsing of the short judgment can do. However, read against the backdrop of the Court's prior practice in relation to extensions and exemptions, *Carter II* suggests one (or both) of two things — the need for greater discussion of and clarity in the principles that underpin these remedies and the possibility that the Court is revisiting its approach to Charter remedies more generally. The basic contention of this article is that the foundational principles articulated in *Schachter* — interpreted in light of the Court's subsequent practice and with a few minor alterations — have the potential to provide needed clarity on the issues of suspensions, extensions and exemptions.

The question of whether a declaration of invalidity should be suspended — or a suspension extended — is one that ultimately serves the principle of respect for the role of the legislature but that is properly to be assessed on the basis of the effect on the public of the coming into force of the declaration. Where judicial amendment is not appropriate, the result of the striking down remedy will sometimes be to strike beneficial parts of the law together with the problematic parts. These are the sorts of cases that can leave an undesirable gap in the law, and in which a suspension can be a practical and appropriate response. In such cases, the availability of a suspension furthers the principle of respect for the role of the legislature because without it, consideration of the effect of the gap in the law would overwhelm the more fundamental remedial analysis contemplated in *Schachter*.

By contrast, the question of whether a suspension should be coupled with an exemption — normally for the successful litigant but potentially for a broader class of individuals — is one that should be assessed in light of the *Schachter* principles. Accordingly, exemptions may not be appropriate where they would represent an inappropriate intrusion on the rule of the legislature, such as where they would operate to grant relief that the legislature is not constitutionally required to provide. In other cases, however, exemptions can temper the potentially harsh effects of a suspension and can further the principle of respect for the purposes of the Charter by vindicating and respecting the Charter rights of successful litigants (and potentially others).