COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-026891-176
(500-17-048861-093)

DATE: AUGUST 18, 2017

CORAM: THE HONOURABLE ROBERT M. MAINVILLE, J.A.
MARIE-JOSÉE HOGUE, J.A.
PATRICK HEALY, J.A.

ATTORNEY GENERAL OF CANADA
APPELLANT – Defendant
v.
STÉPHANE DESCHENEAUX
SUSAN YANTHA
TAMMY YANTHA
RESPONDENTS – Plaintiffs
-and-
THE INDIAN REGISTRAR
IMPLEADED PARTY – Impleaded party
-and-
CHIEF RICK O'BOMSAWIN
NICOLE O'BOMSAWIN
CLÉMENT SADOQUES
ALAIN O'BOMSAWIN
JACQUES THÉRIAULT WATSON
on their own behalf and as the elected Council
representing the ABÉNAKIS OF ODANAK
CHIEF RAYMOND BERNARD
CHRISTIAN TROTTIER
KEVEN BERNARD
LUCIEN MILLETTE
NAYAN BERNARD
on their own behalf and as the elected Council
representing the ABÉNAKIS OF WÔLINAK

IMPLEADED PARTIES – Intervenors

-and-

Mtre SÉBASTIEN GRAMMOND

AMICUS CURIAE

JUDGMENT*

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[1] By leave, the Attorney General of Canada appeals from a judgment rendered orally on June 27, 2017 (transcribed on June 28, 2017) by the Superior Court, District of Montreal (The Honourable Chantal Masse) dismissing an application to extend the temporary suspension of the coming into effect of the conclusion set out in a judgment of the Superior Court dated August 3, 2015 (2015 QCCS 3555) declaring that paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* are of no force or effect.

[2] For the reasons of Mainville J.A., with which Hogue and Healy JJ.A. agree, **THE COURT:**

[3] **ALLOWS** the appeal;

[4] **SETS ASIDE** the judgment of June 27, 2017 of the Superior Court;

[5] **EXTENDS** to December 22, 2017 the temporary suspension of the coming into effect of the conclusion set out in the judgment of the Superior Court dated August 3, 2015 (bearing the neutral reference 2015 QCCS 3555) declaring that paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* are of no force or effect;

[6] **WITH** legal costs to the respondents and the impleaded parties/intervenors to be paid by the Attorney General of Canada.

ROBERT M. MAINVILLE, J.A.

MARIE-JOSÉE HOGUE, J.A.

PATRICK HEALY, J.A.

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* This judgment has been signed in French and English. Both versions are official.

Mtre Nancy Bonsaint
DEPARTMENT OF JUSTICE, CANADA
For the appellant and the impleaded party the Indian Registrar

Mtre David Schulze
DIONNE SCHULZE
Mtre Mary Eberts
For the respondents and the impleaded parties Chief Rick O'Bomsawin *et al.* and Chief Raymond Bernard *et al.*

Mtre Sébastien Grammond
UNIVERSITY OF OTTAWA
Amicus curiae

Date of the Hearing: August 9, 2017

REASONS OF MAINVILLE, J.A.

[7] The Attorney General of Canada ("AGC") appeals from a judgment rendered orally on June 27, 2017 (transcribed June 28, 2017) ("the June 27, 2017 judgment") by the Superior Court, District of Montreal (The Honourable Chantal Masse) ("trial judge" or "judge") dismissing its application for an extension of the temporary suspension of the conclusion set out in a judgment rendered by the Superior Court on August 3, 2015[1] ("the *Descheneaux* judgment"), declaring that paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act*[2] unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms*[3] ("the *Charter*") and are therefore of no force or effect.

[8] Kasirer J.A. granted leave to appeal on July 3, 2017,[4] and ordered that the appeal be fast-tracked and heard by preference on August 9, 2017. As a safeguard measure, he extended until the hearing the temporary suspension of the conclusion of constitutional invalidity rendered in the *Descheneaux* judgment. Given that the appeal was taken under advisement, the suspension was again extended until this Court's judgment.

BACKGROUND

[9] The *Constitution Act, 1867* grants the Canadian Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians".[5] Shortly after Confederation, Parliament adopted a variety of laws respecting Indians, including the first version of the *Indian Act*.[6] In many ways, these laws drew discriminatory distinctions on the basis of sex, notably with respect to Indian status. For example, a woman lost her status under the *Indian Act* if she married a man who was not a status Indian; children born of this union would not be recognized as Indians within the meaning of the *Act*. A man, however, maintained his status under the *Act* if he married a woman who was not a status Indian and conferred Indian status to his wife and to the children born of their union.

[10] Despite criticism, this statutory sex-based discrimination continued in various forms until 1985. When section 15 of the *Charter* came into effect in 1985, Parliament undertook a global reform of the rules respecting Indian status with the objective of eliminating most

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1 *Descheneaux c. Canada (Procureur général)*, 2015 QCCS 3555.
2 *Indian Act*, RSC 1985, c. I-5.
3 *Canadian Charter of Rights and* Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
4 2017 QCCA 1038.
5 S. 91(24) of the *Constitution Act, 1867*.
6 *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876 (39 Vict.), ch. 18.

of these forms of discrimination for the future ("the *1985 Act*").[7] The resulting act received Royal Assent on June 28, 1985, although section 23 of the *1985 Act* provided for its coming into force retroactive to April 17, 1985 – the date section 15 of the *Charter* came into effect.

[11] Given the intricacies of the rules themselves and of the transition from the prior discriminatory regime to a new regime aimed at eliminating discrimination, the *1985 Act*, despite its objective, created new forms of sex-based discrimination, as the Court of Appeal for British Columbia observed in the 2009 *McIvor* decision.[8] In some cases, the *1985 Act* allowed Indian status to be conferred on the descendants of an Indian grandfather but, in otherwise identical circumstances, did not confer such status to the descendants of an Indian grandmother.

[12] In response to the *McIvor* decision, in 2010 Parliament adopted the *Gender Equity in Indian Registration Act*[9] ("the *2010 Act*"). The *2010 Act* did not seek to resolve all the possible forms of discrimination that could flow from the *1985 Act*. Instead, Parliament adopted legislative provisions aimed at remedying sex-based discrimination respective to individuals identically situated to those identified by the Court of Appeal for British Columbia in *McIvor*.

[13] Other forms of sex-based discrimination flowing from the *1985 Act* were identified by the trial judge in the *Descheneaux* judgment rendered August 3, 2015. The discrimination flows from complex scenarios created by the convoluted nature of the *Indian Act* provisions relating to eligibility for registration in the Indian Register. For the purposes of this appeal, it is sufficient to note that the descendants of some Indian women cannot be registered as Indians or, in some cases, cannot be registered with the same right to confer status on their children, while the descendants of Indian men in the same situation can be registered in the Indian Register or can confer status to their children, as the case may be.

[14] The judge described as follows the groups she identified as subject to sex-based discrimination:[10]

> [TRANSLATION]
>
> - Individuals who have a single grandparent who is a female Indian, who lost her status by marriage, and whose parents were not both Indians, a group to which the plaintiff Stéphane Descheneaux belongs;
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> - Individuals whose parents were not both Indians and whose mother, being a child born out of wedlock to an Indian father and a non-Indian mother, was born

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7 *An Act to amend the Indian Act*, S.C. 1985, ch. 27.
8 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 [*McIvor*].
9 *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18.
10 *Descheneaux c. Canada (Procureur général)*, *supra*, note 1, par. 228.

without status (between September 4, 1951 and April 16, 1985, inclusively), a group to which the plaintiff Tammy Yantha belongs; and

- Girls born out of wedlock to an Indian father and a non-Indian mother, born without status, between September 4, 1951 and April 16, 1985 inclusively, and having one or more children with a non-Indian, a group to which the plaintiff Susan Yantha belongs.

[15] In light of these forms of discrimination that infringe section 15 of the *Charter*, the trial judge declared paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* of no force or effect, but suspended the effect of this declaration for a period of 18 months in order to provide Parliament with an opportunity to adopt remedial legislation. She also invited Parliament to scrutinize the *Indian Act* to identify and correct other forms of sex-based discrimination that could flow from the broader implications of her judgment.

[16] In response to the *Descheneaux* judgment, the Canadian government proposed a two-stage approach. First, the government announced its intention to table a bill to eliminate the discriminatory impacts identified by the trial judge, as well as other known sex-based inequities in matters of Indian registration. Second, the government announced its intention to undertake a more comprehensive review of the rules regarding Indian status, be it to eliminate other distinctions or to contemplate a more fundamental transformation of these rules; this review is to be carried out through a 12 to 18-month collaborative process with Aboriginal peoples that will be launched after the proposed legislative amendments have been adopted.

[17] Thus, on October 25, 2016, the Canadian government tabled a bill in the Senate entitled *An Act to amend the Indian Act (elimination of sex-based inequities in registration)* ("Bill S-3"), thereby taking the first step in its plan of action.

[18] The Senate committee that considered Bill S-3 heard testimony that led it to believe that other forms of sex-based discrimination would be perpetuated despite the adoption of Bill S-3 and that, with respect to the Bill, the government may not have respected its duty to consult Aboriginal peoples. The Senate committee therefore asked the government to request an extension of the suspension of the declaration of invalidity in order to allow it to respond to these concerns.

[19] On January 20, 2017, the trial judge granted the AGC's application for an extension, filed following the Senate committee's observations, thereby extending the suspension until July 3, 2017.[11]

[20] On June 1, 2017, Bill S-3 was adopted by the Senate with significant amendments aimed at completely eliminating any form of sex-based discrimination in the *Indian Act* rules relating to Indian status. The government opposed these amendments when the Bill

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[11] January 20, 2017 judgment (2017 QCCS 153).

was debated in the House of Commons. The government thus stayed the course set by its two-stage action plan, which also sought to eliminate other distinctions flowing from the rules conferring Indian status found in the *Indian Act*, but in a subsequent stage that would include broad consultations with Aboriginal peoples both on these matters and on more fundamental reforms.

[21] On June 21, 2017, the House of Commons adopted Bill S-3 without the amendments introduced by the Senate, sent the Bill back for consideration by the Senate, and adjourned until September 18, 2017. On June 22, 2017, the Senate adjourned to September 19, 2017 without voting on the version of Bill S-3 sent back by the House of Commons. Consequently, Bill S-3 cannot be adopted any earlier than autumn 2017, and then only if the Senate and House of Commons can agree on the same wording.

[22] Thus, on June 26, 2016, the AGC requested that the trial judge extend the suspension of the declaration of constitutional invalidity for another six months. The respondents and the impleaded parties/intervenors supported this request.

[23] The trial judge refused to grant the extension for the reasons set out in the June 27, 2017 judgment.

THE JUDGMENT UNDER APPEAL

[24] The June 27, 2017 judgment is largely based on a prior June 20, 2017 judgment in which the trial judge dismissed another application for an extension of the suspension of the declaration of invalidity, accompanied by transitional measures, submitted on June 15, 2017 by the respondents and the impleaded parties/intervenors. The June 20, 2017 judgment is incorporated [TRANSLATION] "in its entirety"[12] into the June 27, 2017 judgment.

[25] In the June 20, 2017 judgment, the trial judge held that the current state of the parliamentary process did not allow her to conclude that Bill S-3 would be adopted before the expiry of the suspension of the declaration of invalidity.[13] The judge also noted that in previous telephone conferences with counsel, she had raised the possibility that remedial legislation would not be adopted before the expiry of the suspension.[14] The judge had then encouraged the parties to devise transitional measures for the affected individuals given that all possible eventualities had to be considered if the deadline was not respected. Nevertheless, no transitional measures were submitted to her.

[26] In this context – basing herself on the Supreme Court of Canada's decision in *Carter*[15] which held that the suspension of a declaration of invalidity of a law is an extraordinary measure – the trial judge concluded it would be inappropriate to extend the suspension which

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12 June 27, 2017 judgment, par. 2.
13 June 20, 2017 judgment (2017 QCCS 2669), par. 17.
14 *Ibid.*, par. 19.
15 *Carter v. Canada*, 2016 SCC 4, [2016] 1 S.C.R. 13, par. 2 [*Carter*].

had already lasted 23 months.[16] She added that [TRANSLATION] "the only remaining option"[17] for obtaining an extension would be for the AGC to devise transitional measures, the effects of which [TRANSLATION] "would be permanent" and whose [TRANSLATION] "provisions would have to be consistent with the act that will eventually be adopted."[18] In her June 20, 2017 judgment, the judge thus dismissed the respondents' and intervenors' application for an extension, reserving to the parties the possibility of addressing anew the court jointly to seek approval of a transitional measure coupled with a request for an extension.[19]

[27] Mere days later, on June 26, 2017, the AGC herself requested an extension of the suspension of the declaration of invalidity. The trial judge dismissed this application the very next day. She noted that the AGC was, in effect, asking her to sit on appeal of her judgment of June 20, 2017.[20] She added that nothing in the evidence tendered by the AGC allowed her to reconsider that judgment.[21]

[28] The judge highlighted, moreover, that despite the imminent expiry of the suspension, neither the AGC nor Parliament had implemented transitional measures to mitigate the impacts an extension would have on the affected individuals, namely the members of the groups she had identified in the *Descheneaux* judgment as being subject to sex-based discrimination. She made several critical comments in this respect which led her to dismiss the AGC's application:[22]

> [TRANSLATION]
>
> [9] If the exceptional and particularly innovative solution proposed by the undersigned in her decision of June 20th is not realistic (or, rather, is no longer so given the two houses of Parliament have adjourned until September, barring a recall), be it for political, strategic, legal or other reasons – justified or not –, and if neither the Attorney General of Canada nor the legislative bodies have other solutions to put forward or to implement themselves (the notwithstanding clause, a law giving effect to the judgment or other more creative and innovative solutions), the declaration of invalidity will come into effect on July 4, 2017, the day after the extension expires.
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> [10] Courts are not and should not be the only ones bearing the responsibility of innovating to protect fundamental rights and the rule of law, even if they hold a central role as guardians of the Canadian Constitution. More can be done when all institutions cooperate and where there is agreement that measures be taken. This

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16 June 20, 2017 judgment, *supra*, note 13, par. 47.
17 *Ibid.*, heading 4 before par. 61.
18 *Ibid.*, par. 61.
19 *Ibid.*, par. 65-66.
20 June 27, 2017 judgment, par. 1.
21 *Ibid.*, par. 4.
22 *Ibid.*, par. 9-12.

> is the view that the Court took the liberty of expressing in its decision of June 20, 2017.
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> [11] It bears repeating: even if the Court granted what the Attorney General of Canada describes as a "final" extension, she is not in a position to guarantee that the current situation will not simply reoccur, in exactly the same way, six months from now.
>
> [12] Whether or not the Court is *functus officio* is of no importance. All things considered and in any event, in light of the principles outlined in the decision rendered on June 20th, the circumstances would still not allow for an extension of the suspension of invalidity.
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> [Internal references omitted.]

THE PARTIES' POSITIONS

[29] Counsel for the AGC acknowledges the remarkable work the trial judge has accomplished for many years in this file. She adds that she understands the reasons that motivated the trial judge to refuse a second extension. Nevertheless, the AGC submits that the trial judge was overly strict in her application of the legal principles relevant to suspending the effects of a declaration of invalidity and failed to distinguish the particular context of the *Carter* decision from that of the present case. In particular, the judge would have not given sufficient weight to the public interest by failing to consider that the immediate invalidity of the impugned legislation would create a legal void and would result in denying rights and benefits to many individuals who would otherwise be entitled, all without conferring any rights or benefits to those forming part of the groups identified in the *Descheneaux* judgment.

[30] The respondents and the impleaded parties/intervenors support the AGC's application. In their view, not only would the declaration of invalidity have immediate impacts that would benefit no one, but it is also appropriate to allow Parliament the time to carry out all the legislative housekeeping necessary to resolve identifiable instances of discrimination, and not just those revealed in the *Descheneaux* judgment.

[31] The *amicus curiae*, for his part, argues that the AGC did not discharge her burden of demonstrating an exceptional circumstance preventing Parliament from legislating and which would justify granting the extension. In his view, the current parliamentary impasse is not an exceptional circumstance contemplated by *Carter*. On the contrary, he submits that the coming into effect of the declaration of invalidity would be a powerful incentive for Parliament to act, while a further extension would have the opposite effect and simply prolong the legislative impasse. With respect to the arguments based on the legal void and the public interest, the *amicus curiae* is of the opinion that the declaration of invalidity will have no significant impacts, explaining that certain administrative arrangements could

be contemplated to prevent undue impacts on the individuals who currently benefit from the *Indian Act* and on the respondents and any other similarly situated individuals.

ANALYSIS

The standard of review and relevant analytical factors

[32] This appeal concerns a refusal to extend the suspension of a judicial declaration of constitutional invalidity of a legislative provision. It seems that this is the first time that a Canadian appellate court has been called upon to decide an appeal of this nature; a careful consideration of the standard of review and of the relevant analytical factors is therefore required.

[33] A declaration that an unconstitutional law is of no force or effect flows from subsection 52(1) of the *Constitution Act, 1982*:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> **52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

[34] Despite the imperative nature of this provision, the Supreme Court of Canada has held that, where compelling reasons justify doing so, a court may suspend a declaration of constitutional invalidity to provide legislative bodies with an opportunity to adopt remedial legislation.[23] Such suspension forms part of the constitutional remedies that a court may grant.[24] Indeed, the purpose of the suspension is precisely to allow legislative bodies, acting at the entreaty of the courts, an opportunity to implement an appropriate constitutional remedy by way of legislation.

[35] It follows that the standard of review for an appeal from a decision suspending a declaration of constitutional invalidity, or extending such a suspension, should be the same as that which applies to an appeal from any other constitutional remedy. That standard was set out by the majority of the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*[25]: the appellant must demonstrate that the constitutional remedy – here the refusal to extend the suspension of the declaration of constitutional invalidity – is not "appropriate and just in the circumstances".[26]

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23 *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 715 [*Schachter*].
24 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, par. 43.
25 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3.
26 *Ibid.*, par. 50.

[36] Although this standard was set out in the context of an appeal from a *Charter* remedy,[27] it may be transposed to an appeal from the suspension of a declaration of constitutional invalidity made pursuant to subsection 52(1) of the *Constitution Act, 1982* or to an appeal from an extension of such a suspension. It was this standard of review which was implicitly applied in *R. v. Smith* to discard the suspension of a declaration of invalidity ordered by the Court of Appeal for British Columbia in a case concerning the use of marijuana for medical purposes.[28]

[37] Suspending a declaration of constitutional invalidity of a law is a serious and extraordinary measure because it allows unconstitutional legislation to remain in effect and for a state of affairs found to be contrary to the standards embodied in the *Charter* to continue for the duration of the suspension, thereby violating the constitutional rights of the affected individuals.[29] Extending such a suspension is even more problematic.[30] Thus, a heavy burden rests upon the AGC to demonstrate exceptional circumstances[31] or compelling reasons[32] justifying the extension.

[38] What then are the relevant factors for this analysis?

[39] Taking into account the particularities of constitutional litigation and the range of possible legislative responses to a declaration of constitutional invalidity, an application for an extension of a suspension must be analyzed in light of the particular circumstances of each case. Nevertheless, the four factors identified below can be drawn from the few judicial precedents on this question. These are not the only factors that may be considered. These factors are neither exhaustive nor cumulative; it is rather the weighing of these factors, taking into account the particular circumstances of each case, that will determine whether an extension is justified. Consequently, even if the application for an extension does not satisfy one of these factors, a court may still grant or dismiss the application after weighing all the factors.

[40] The first factor is whether or not a change in circumstances justifies the extension. In *Carter*,[33] for example, the fact that Parliament had been dissolved for general elections was found by the Supreme Court of Canada to be a sufficient change in circumstances justifying the extension of the suspension of the declaration of the constitutional invalidity of paragraph 241(*b*) and section 14 of the *Criminal Code.*[34]

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27 Where rights guaranteed by the *Charter* have been violated or infringed, subsection 24(1) allows a court of competent jurisdiction to order a remedy that is appropriate and just in the circumstances.

28 *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, par. 32-33.

29 *Schachter v. Canada*, *supra*, note 23, p. 716.

30 *Carter v. Canada (Attorney General)*, *supra*, note 15, par. 2.

31 *Ibid.*

32 *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, par. 52

33 *Carter v. Canada (Attorney General)*, *supra*, note 15.

34 *Criminal Code*, R.S.C. 1985, c. C-46.

[41] A second factor relates to the circumstances which led to the initial suspension of the declaration of invalidity to verify whether these still weigh in favour of the suspension. These circumstances may include the need to avoid threatening the rule of law,[35] to avoid a potential danger for the public,[36] or to otherwise mitigate the effects of the declaration on the public, notably where the law is deemed unconstitutional because it is under-inclusive and its invalidity would deprive deserving individuals of benefits without providing benefits to those whose rights have been violated.[37] Indeed, as Chief Justice Lamer noted in *Schachter*, deciding whether it is appropriate to suspend a declaration of invalidity is largely dependent on the effect this declaration will have on the public.[38] The same reasoning applies *a fortiori* to deciding whether the suspension should be extended.

[42] A third factor concerns the likelihood that remedial legislation will be adopted. Suspending a declaration of constitutional invalidity rests upon the fundamental premise that legislative bodies will necessarily adopt remedial legislation during the suspension period. Where they fail to act within the timeframe, it is necessary to verify whether or not that premise is still valid. Thus, it is necessary to ascertain whether it is reasonable to believe that legislative bodies will indeed adopt remedial legislation during the extension of the suspension.[39]

[43] A fourth factor concerns the administration of justice. As the suspension of a declaration of constitutional invalidity allows unconstitutional legislation to have continued effect in violation of the Canadian Constitution, despite the contrary principle set out in subsection 52(1) of the *Constitution Act, 1982*, an undue extension of the suspension could shake the public's confidence in the administration of justice and in the ability of the courts to act as guardians of the Constitution. This is why such suspensions are generally short in duration and are only issued where they are justified by compelling circumstances.

Change in circumstances

[44] In this case, the trial judge concluded that no change in circumstances justified a second extension.

[45] In the *Descheneaux* judgment, the trial judge had already taken into account the anticipated federal elections – in fact held in the autumn of 2015 – in setting the 18-month period for the initial suspension of the declaration of invalidity.[40] Although the judge subsequently extended the suspension by five months, until July 3, 2017, this was on the

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35 *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, p. 758.
36 *R. v. Swain*, [1991] 1 S.C.R. 933, p. 1021.
37 *Schachter v. Canada*, *supra*, note 23, p. 715-717, 719.
38 *Ibid.*, p. 717.
39 See, by analogy, the decision of the Constitutional Court of South Africa in *Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others*, [2005] ZACC 18, par. 46.
40 *Descheneaux c. Canada (Procureur général)*, *supra*, note 1, par. 232 and judgment of June 20, 2017, *supra*, note 13, par. 44.

basis of the AGC's representations that circumstances had changed. In her judgment granting the first extension of the suspension, the trial judge indeed acknowledged the AGC's justification that it was now necessary to consult with Aboriginal peoples.[41]

[46] However, in its application for a second extension, the AGC failed to explain why these consultations had not resulted in the adoption of remedial legislation nor what new and compelling circumstances justified a renewed extension. In fact, the AGC did not submit to the trial judge any convincing explanation with respect to a change in circumstances justifying an additional six-month extension; the AGC simply noted that Bill S-3 could not be adopted before the expiry of the suspension on July 3, 2017 given that Parliament had adjourned until September 2017.[42] Neither does the AGC address the issue of changed circumstances in her memorandum on appeal.

[47] Consequently, it can only be concluded that no change of circumstance justifies the application for an extension. Rather, the delays incurred in adopting remedial legislation are largely attributable to the inability of the political actors to agree in a timely fashion on what approach to take. This is unfortunate. However, this inability is not a new and compelling circumstance which can justify on its own the extension of the suspension of the declaration of invalidity. Therefore, the appeal cannot succeed simply upon on the basis of a change in circumstances.

The effects of the declaration of invalidity on the public

[48] The second factor, the effects of the declaration of invalidity on the public, strongly motivated the judge to grant the first extension of the suspension of the declaration of invalidity until July 3, 2017.[43] Does this factor justify a second extension?

[49] The trial judge does not extensively discuss this factor in the judgment under appeal, noting that she was reassured by the *amicus curiae* that the impacts resulting from the expiration of the suspension would be minimal. The judge in fact attached the observations of the *amicus curiae* as a schedule to her judgment of June 20, 2017.

[50] The observations of the *amicus curiae* were therefore a determining factor in the trial judge's decision to dismiss the application for a second extension, given that the judge had noted that it was precisely the impacts of the declaration of invalidity on the public that had led her to order the initial suspension of the declaration of invalidity in the *Descheneaux* judgment and which convinced her to extend that suspension until July 3, 2017.[44] Reassured by the *amicus curiae*, the judge therefore set aside that issue in her analysis.

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41 Judgment of January 20, 2017, *supra*, note 11, par. 12.

42 *Requête en prolongation de la suspension de la prise d'effet d'une déclaration d'inopérabilité par le procureur général du Canada*, par. 5-7 (Appellant's Memorandum [A.M.] p. 589).

43 Judgment of January 20, 2017, *supra*, note 11, par. 30-31.

44 Judgment of June 20, 2017, *supra*, note 13, par. 48.

[51] The *amicus curiae* was appointed by the judge on June 6, 2017 to shed light on the effects of the extension of the suspension on individuals and groups not party to the proceedings. Given that the AGC, the respondents and the impleaded parties/intervenors all supported extending the suspension of the declaration of invalidity, the *amicus curiae* was, to some degree, obliged to argue the opposite view, in order to provide the judge with the benefit of a true adversarial debate. He played the same role on appeal. As the trial judge highlighted,[45] the *amicus curiae* produced high-quality submissions. If I express disagreement with some of his submissions, this should not be taken as a critique of the *amicus curiae*, but rather results from his burden to submit positions contrary to those expressed by the other parties.

[52] It is noteworthy that the vast majority of individuals listed on the Indian Register (roughly 90% of the more than 960,000 individuals listed) are registered pursuant to one or another of the provisions which the *Descheneaux* judgment declared unconstitutional.[46] The expiration of the suspension of the declaration of invalidity of paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* will not immediately affect the status of these individuals in light of the definition of "Indian" set out at section 2 of the *Indian Act*: "means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian - *Personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être*." Consequently, as long as individuals are in fact listed on the Indian Registry pursuant to the Act, they continue to be "Indians" under the Act.

[53] On the other hand, these individuals will be confronted with the threat of potential removal from the Indian Register should the suspension of the declaration of invalidity expire before remedial legislation is adopted. Indeed, sooner or later, these individuals will be confronted with the possibility of removal from the Indian Register since it is far from certain that they would be able to invoke an acquired right to registration under a statutory provision which has been declared unconstitutional.

[54] In his observations to the trial judge and in his memorandum on appeal[47] the *amicus curiae* submits that the judgment of the Court of Appeal for British Columbia in *Marchand v. Canada (Registrar, Indian and Northern Affairs)*[48] could ensure the continued registration of the individuals affected by the declaration of invalidity. Nothing could be less certain. The *Marchand* decision did not concern registration in the Indian Register pursuant to an unconstitutional provision, but rather dealt with the legislative intent of Parliament to grant acquired rights to those already registered on April 17, 1985

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45 *Ibid.*, par. 3.

46 Sworn Statements of the Indian Registrar, Nathalie Nepton, June 16, 2017 (par. 4) and June 27, 2017 (par. 4) (A.M. p. 491 and p. 608).

47 *Observations of the amicus curiae*, June 17, 2017, p. 34-35 (A.M., p. 61-62); Memorandum of the *amicus curiae* dated July 25, 2017, par. 34.

48 *Marchand v. Canada (Registrar, Indian and Northern Affairs)*, 2000 BCCA 642.

when paragraph 6(1)(*a*) of the *Indian Act* came into force. It is difficult to apply *Marchand* to the present circumstances.

[55] The *amicus curiae* further submits that the loss of rights flowing from the declaration of constitutional invalidity should not be a determining factor in deciding whether to extend the suspension given that the loss would only be temporary, in light of the intentions expressed by the Senate and the House of Commons in Bill S-3 to adopt measures that would confirm Indian status under the *Indian Act* to those would lose or be deprived of that status as a result of the declaration.[49]

[56] I do not share these assurances. I recognize that it is likely that the Bill will be adopted – and I will come back later to this point – along with transitional measures designed to remedy any loss of rights, but I cannot be certain of this. Without such certainty, it is not appropriate to set aside the factor relating to the effects of the declaration of invalidity on the public.

[57] It is reasonable to believe, as the *amicus curiae* suggests, that the Registrar will not start deleting names from the Indian Register (as subsection 5(3) of the *Indian Act* allows) as soon as the suspension of the declaration of invalidity expires. However, it cannot be reasonably excluded that a third party would commence judicial proceedings to this end before remedial legislation is adopted, thereby opening Pandora's Box.

[58] Furthermore, it is not inconceivable that a third party could seek to deprive an individual affected by the declaration of invalidity of the right to vote in a band election held between the expiry of the suspension and the adoption of remedial legislation, or would seek to contest the validity of such an election invoking the illegal and unconstitutional registration of the electorate.

[59] Other problems could arise.

[60] Consequently, given the uncertainty surrounding the status of roughly 90% of the individuals registered in the Indian Register that would arise as a result of the coming into effect of the declaration of constitutional invalidity, only remedial legislation can provide full protection for these individuals. The alternative is legal uncertainty with troubling consequences, at least during the interim period leading to the adoption of remedial legislation.

[61] The immediate impacts resulting from the expiration of the suspension of the declaration of invalidity without remedial legislation must also be taken into account. Those most affected would be individuals not yet registered in the Indian Register but who would have had the right to be registered pursuant to the provisions declared

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[49] *Observations of the amicus curiae*, June 17, 2017, p. 34-36 (A.M. p. 61-63); Memorandum of the *amicus curiae* dated July 25, 2017, par. 34; Bill S-3, *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*, 42nd Leg. (Can), 1st session, 2017, sections 4 to 8 and 15.

unconstitutional. The evidence shows that most new registration applications would be affected; new applications generally concern young children whose registration is sought shortly after birth.[50] Some adults would also be affected, but in lesser numbers.

[62] These individuals will be deprived of the rights flowing from their status as Indians under the *Indian Act* and they could be refused access to specific programs for Indians, notably Health Canada's *Non-Insured Health Benefits Program* for First Nations and Inuit, as well as the *Post-Secondary Student Support Program* of Indigenous and Northern Affairs Canada.[51]

[63] Consequently, Aboriginal children who are not already registered in the Indian Register run a real risk of losing access to the *Non-Insured Health Benefits Program* when they reach one year of age.[52] The same is true for adults who may be admissible to the *Post-Secondary Student Support Program* but who may be unable to access that program if they cannot register in the Indian Register after the declaration of invalidity comes into effect. Administrative measures could be contemplated to alleviate these program accessibility issues, however the difficulties with developing and implementing such administrative measures should not be underestimated, especially where the measures would seek to extend program benefits to individuals ineligible to receive them pursuant to a judicial declaration of constitutional invalidity.

[64] While the coming into effect of the declaration of invalidity may imperil the rights of many individuals and restrain access to multiple federal programs, it is worth noting that no benefit will flow to the individuals who are the victims of the discrimination identified by the trial judge in the *Descheneaux* decision. Indeed, even if the declaration of invalidity comes into effect, this would not entitle these individuals to acquire Indian status under the *Indian Act* nor make them eligible to federal programs for Indians.

[65] In these circumstances, the effect of the declaration of invalidity on the public weighs strongly in favour of extending the suspension of the declaration of invalidity.

The prospect of remedial legislation

[66] The trial judge concluded that it was unlikely that remedial legislation would be adopted during the second requested extension period. She qualified the legislative process as an "impasse" opposing the House of Commons and the Senate.[53] To explain her refusal to extend the suspension, she referred to doctrinal comments concerning the

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50 Sworn Statements of the Indian Registrar, Nathalie Nepton, June 16, 2017 (par. 5 to 12) and June 27, 2017 (par. 6-7) (A.M., p. 491-492 and 609).

51 Sworn Statements of the Indian Registrar, Nathalie Nepton, June 16, 2017 (par. 11) and June 27, 2017, (par. 8) (A.M., p. 492 and 609).

52 Sworn statement of Heather Hudson (Director of Program Policy and Planning Division of the Non-Insured Health Benefits Program for the First Nations and Inuit Branch of Health Canada), June 15, 2017, (par. 15-22) (A.M., p. 372-374).

53 June 27, 2017 judgment, par. 3(14).

appropriate judicial response where it is demonstrated that a legislative body is incapable of adopting remedial legislation.[54]

[67] This conclusion flows largely from the portrayal of the facts by the parties. Indeed, before the trial judge, the respondents, the impleaded parties/intervenors and the *amicus curiae* all made insistent submissions that a political [TRANSLATION] "tug of war" between the government and the Senate had led to an "impasse" in the legislative process.[55]

[68] Is there really a legislative impasse? I believe not. Fresh evidence submitted to the Court by the respondents and the impleaded parties/intervenors indicates that it was at the request of the Canadian government that Bill S-3 (as adopted by the House of Commons) was not put to a Senate vote before the summer recess of Parliament.[56] The Bill's adoption was thus simply set back to the autumn of 2017 rather than being abandoned as a result of a legislative impasse.

[69] In any event, the evidence further reveals that the two versions of Bill S-3 – the one adopted by the House of Commons and the one adopted by the Senate – seek to render eligible for registration in the Indian Register all the individuals who are members of the groups identified by the trial judge in the *Descheneaux* judgment. Thus, if Bill S-3 has not yet been adopted in its final form, this is certainly not as a result of a political disagreement regarding the inclusion of these individuals in the *Indian Act*.

[70] The delay in adopting the remedial legislation rests rather on the treatment of other distinctions that may still remain in the *Indian Act*: the government proposes a process of broad consultations with Aboriginal peoples, while the Senate favours a legislative amendment having immediate effect.

[71] For the purposes of this appeal, it will suffice to note that the government's decision not to bring Bill S-3 to a final Senate vote prior to the summer recess does not compel the conclusion that there is a legislative impasse. It is reasonable to believe that the parliamentary debate will resume this autumn and that the Bill will then be brought to a Senate vote. It is premature to conclude that Parliament will be unable to adopt remedial legislation, in one form or another, in the very near future.

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54 June 20, 2017 judgment, par. 39 and 41, citing Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (loose-leaf) (Toronto: Canada Law Book), p. 14-92.4.

55 *Amended Plaintiff's and Intervenors' Application for Further Extension of Suspension of Declaration of Invalidity*, June 19, 2017, par. 45-50 under the heading "The foreseeable impasse" (A.M., p. 575-578); *Observations of the amicus curiae*, June 17, 2017, p. 41 (A.M., p. 68): [TRANSLATION] "[t]he political reality, to which the Court cannot turn a blind eye, is that we are witnessing a tug of war between the government ... and the Senate ..."; E-mail from the *amicus curiae* to the trial judge, June 27, 2017 (A.M., p. 24): "... the impasse in which the legislative process finds itself...".

56 Written statement of Senators Lillian Eva Dyck, Dennis Patterson and Murray Sinclair, June 22, 2017.

The administration of justice

[72] The trial judge rightly noted that [TRANSLATION] "constitutional rights are not commodities that can be suspended indefinitely".[57] There are limits as to how long suspensions of declarations of constitutional invalidity may last. These limits must be respected so as to, notably, maintain the confidence of the public in the administration of justice and in the capacity of the courts to act as guardians of the Constitution.

[73] The suspension of a declaration that a legislative provision is constitutionally invalid does not usually exceed 12 months, except where specific circumstances justify extending the limit to 18 months: (*Carter v. Canada (Attorney General)*[58] (12 months, subsequently extended by 4 months); *Canada (Attorney General) v. Bedford*[59] (12 months); *Nguyen v. Quebec (Minister of Education, Recreation and Sports)*[60] (12 months); *Confédération des syndicats nationaux v. Canada (Attorney General)*[61] (12 months); *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*[62] (12 months); *Figueroa v. Canada (Attorney General)*[63] (12 months); *Trociuk v. British Columbia (Attorney General)*[64] (12 months); *Corbière v. Canada (Minister of Indian and Northern Affairs)*[65] (18 months); *Eurig Estate (Re)*[66] (6 months).

[74] In this case, the suspension of the declaration of constitutional invalidity now exceeds 24 months and the AGC seeks to extend it to 29 months. A suspension of this duration certainly risks imperiling the public's confidence in the ability of the courts to ensure that the Constitution is respected and upheld. In this context, the concerns expressed by the trial judge in her judgments of June 20 and 27, 2017 are entirely legitimate.

[75] Even in *McIvor*, the total duration of the suspension of the declaration of invalidity of similar *Indian Act* provisions was 22 months. The Court of Appeal for British Columbia set the initial suspension at 12 months.[67] It was then extended a first time, for three months.[68] Considering the delay in adopting remedial legislation resulting from prolonged parliamentary debates, the suspension was extended a second time, by under seven

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57 June 27, 2017 judgment, par. 8.
58 *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Carter v. Canada (Attorney General)*, *supra*, note 15.
59 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.
60 *Nguyen v. Quebec (Minister of Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 S.C.R. 208.
61 *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511.
62 *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.
63 *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912.
64 *Trociuk v. British Columbia (Attorney General)*, *supra*, note 24.
65 *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
66 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565.
67 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra*, note 8, par. 166.
68 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 168, par. 19.

months.[69] The remedial legislation that responded to *McIvor* – the *2010 Act* referred to above – was ultimately adopted by Parliament and received Royal Sanction well before the second extension expired.

[76] The delays incurred to date in adopting remedial legislation are very significant; they certainly exceed what can be deemed as reasonable, given the applicable precedents. These delays may be perceived as an injustice by those who have now been waiting more than two years for a legislated remedy to end the discrimination judicially identified on August 3, 2015. In this context, and taking into account the fiduciary duties of the federal government with respect to Aboriginal peoples, before requesting another extension of the suspension it was incumbent on the AGC to seriously consider concrete interim administrative measures available to the government so as to mitigate this discrimination, at least in part, during the extension. However, despite the trial judge's repeated requests, the AGC proposed no measure whatsoever – be it temporary, transitional or permanent – to mitigate the impacts of the additional extension on those individuals who form part of the groups identified in the *Descheneaux* judgment.

[77] Moreover, as the *amicus curiae* rightly highlights, repeated extensions of the suspension of a declaration of constitutional invalidity at the request of political actors could lead to political bargaining in order to secure the political consensus required to adopt legislative provisions that respect the Constitution. Without concluding that this is the case in this instance, courts must be wary of such developments and should avoid them at all cost.

[78] Consequently, the administration of justice weighs heavily against extending the suspension of the declaration of invalidity.

Weighing the factors

[79] Were it not for the impacts on the public of the coming into effect of the declaration of invalidity before remedial legislation is adopted, I would have proposed to the Court to dismiss the appeal, given the unacceptable delays that have been incurred and the absence of administrative measures mitigating the impacts of a second extension. The trial judge's decision to deny a second extension of the suspension is therefore entirely legitimate and easily understandable.

[80] However, contrary to what was presented to the trial judge in the proceedings before her, the impacts on the public are very real and are not insignificant.

[81] Moreover, although the length of the suspension here exceeds that in *McIvor*, it must also be acknowledged that the *Descheneaux* judgment was initially appealed. After the general elections held in the autumn of 2015, the new government discontinued the appeal on February 22, 2016 and rather undertook to bring about the necessary

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[69] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 338.

legislation to comply with the judgment. As a result, Parliament has in fact had 18 months to adopt remedial legislation since the discontinuance of the appeal.

[82] In this context, the appeal should be allowed and the suspension extended so that Parliament may complete the legislative process surrounding Bill S-3 as soon as it reconvenes. The overall length of the suspension should not exceed 22 months following the discontinuance of the appeal of the *Descheneaux* judgment, bringing the actual delay for adopting remedial legislation into line with that allowed in *McIvor*. Any further delay strikes me as neither appropriate nor just.

[83] Since the suspension of the declaration of invalidity will be extended, it is necessary to point out that the Constitution does not impose an obligation of means but an obligation of result, as section 52 of the *Constitution Act, 1982* clearly sets out. This imperative applies to Parliament and not only to the courts. In light of this imperative, the time for Parliament to act is now ending.

CONCLUSIONS

[84] For these reasons, I propose that the Court allow the appeal and extend to December 22, 2017 the suspension of the declaration of invalidity of paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* set forth in the *Descheneaux* judgment. In light of the special circumstances, the AGC should assume the legal costs of the respondents and the impleaded parties/intervenors, both in appeal and in first instance.

ROBERT M. MAINVILLE, J.A.