

Achieving Reasonable Accommodation through Constitutional Remedies

Jennifer KOSHAN*

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* Associate Professor, Faculty of Law, University of Calgary, Calgary, Alberta. The author wishes to thank Kristy Williams, LL.B. expected 2010 (University of Calgary), for research assistance.

INTRODUCTION

The Supreme Court of Canada's recent decision in *R. v. Ferguson*¹ is arguably one of its most important decisions on constitutional remedies since *Schachter*.² *Ferguson* deals specifically with constitutional exemptions,³ and closes the door to that remedy in the context of mandatory sentencing provisions that violate the *Charter*'s guarantee against cruel and unusual punishment. But are constitutional exemptions still available in other contexts? And if so, should courts use this remedy in situations where a claimant seeks reasonable accommodation from discriminatory laws or government acts? More generally, what remedies will best achieve reasonable accommodation?

This paper will argue that *Ferguson* likely precludes constitutional exemptions outside the context of mandatory minimum sentences, as the Court's reasons for judgment transcend that context. In particular, the Court's stated reasons for reluctance to use constitutional exemptions—previous case law, intrusion on the role of legislatures, the remedial scheme of the *Charter*, and the rule of law—apply with equal force in the context of reasonable accommodations. Generally speaking, remedies that deal head on with discriminatory laws and government acts, such as reading in, severance and striking down, are to be preferred. In my view, these remedies are superior to constitutional exemptions in that they take equality rights and reasonable accommodation seriously, and stand to

¹ [2008] 1 S.C.R. 96.

² *Schachter v. Canada*, [1992] 2 S.C.R. 679.

³ For an excellent overview of the use of this remedy, see Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 1994) at 14-27 – 14-36.2. See also Peter Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000) 11 N.J.C.L. 411 and Morris Rosenberg & Stéphanie Perrault, “Ifs and Buts in *Charter* Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002) 16 Sup. Ct. L. Rev. (2d) 375.

benefit others whose personal characteristics are shared with those of the *Charter* claimant.

While I argue that constitutional exemptions are generally inappropriate to remedy equality based violations of the *Charter*, there are two exceptions to this argument. First, exemptions might still serve as temporary remedies in the case of suspended declarations of invalidity to ensure that individual claimants and those in their class achieve *Charter* justice without delay. Second, exemptions should be considered a valid remedy in the case of government actions (as opposed to laws) that violate equality rights.

I. THE NATURE OF CONSTITUTIONAL EXEMPTIONS, REMEDIES AND REASONABLE ACCOMMODATION

Before embarking on a discussion of the availability and utility of constitutional exemptions and other remedies in the context of reasonable accommodation, it is necessary to establish some definitions. *Ferguson* was concerned with constitutional exemptions granted as personal remedies under s. 24 of the *Charter* where a law is upheld but not applied to a particular individual so as to cure a constitutional violation in his or her particular case.⁴ As noted by the Court, the argument in these cases is that the law “is constitutional in most of its applications [but] generates an unconstitutional result in a small number of cases, [and] it is better to grant a constitutional exemption in these cases than to strike down the law as a whole.”⁵ This category of constitutional exemptions, referred to as “broad” by Sankoff, is to be distinguished from a “narrow” category where exemptions are used to provide an immediate remedy to the *Charter* claimant where an unconstitutional law is struck down and a suspended declaration of invalidity is granted.⁶ While *Ferguson* dealt primarily with the first type of exemption, the second is also relevant in the reasonable accommodation context, and will be discussed below. Section 24 remedies stand in contrast to those granted under s.52 of the *Constitution Act, 1982*, which requires that unconstitutional laws be declared of no force or effect to the extent of inconsistency with the

⁴ See *Ferguson*, *supra* note 1 at para. 37.

⁵ *Ibid.* at para. 38.

⁶ Sankoff, *supra* note 3 at 415. See also Rosenberg & Perrault, *supra* note 3 at 376, who call these remedies “constitutional exemptions” and “ancillary exemptions” respectively.

constitution. Striking down, severance, and reading in are the most common remedies granted under s.52.⁷

Second, the notion of reasonable hypotheticals often arises in cases considering constitutional exemptions. Reasonable hypotheticals are employed by the Court to permit consideration both of the circumstances in the case at hand and in other cases that might reasonably arise in similar circumstances. Where a law does not violate the *Charter* in the circumstances of the claimant, but might do so “in reasonable hypothetical circumstances as opposed to far-fetched or marginally imaginable cases,” a breach of the *Charter* might still be found.⁸ Reasonable hypotheticals typically come into play at the stage of determining whether there is a rights violation, and have been primarily applied in cases alleging cruel and unusual punishment under s.12 of the *Charter* in the context of mandatory minimum sentences.⁹ Reasonable hypotheticals have also been referenced by the Supreme Court outside the s. 12 context.¹⁰ The idea underscoring reasonable hypotheticals—that it is important to consider not only the circumstances of the *Charter* claimant, but also of other individuals in similar circumstances—is well established in *Charter* jurisprudence.¹¹ Reasonable hypotheticals thus confirm that an analysis of how to effectively remedy *Charter* rights violations should attempt to achieve reasonable accommodation for all members of an affected group.¹²

A final concept requiring definition for the purposes of this paper is that of reasonable accommodation. Reasonable accommodation developed in the human rights context, and was traditionally associated with adverse effects discrimination. Until the case of *British Columbia*

⁷ See *Schacter*, *supra* note 2.

⁸ See *R. v. Goltz*, [1991] 3 S.C.R. 485 at 506. A reasonable hypotheticals analysis was not put forward by the claimant in *Ferguson*, *supra* note 1.

⁹ See for example *R. v. Smith*, [1987] 1 S.C.R. 1045; *Goltz*, *ibid.*; and *R. v. Morrissey*, [2000] 2 S.C.R. 90.

¹⁰ See for example *R. v. Mills*, [1999] 3 S.C.R. 668 and *R. v. Sharpe*, [2001] 1 S.C.R. 45.

¹¹ See for example *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where it was held that no one can be convicted under an unconstitutional law even if their own *Charter* rights are not directly at issue.

¹² Indeed, Sankoff argues that constitutional exemptions “clash” with reasonable hypotheticals analysis; see Sankoff, *supra* note 3 at 432-33. See also Robert Frater, “The Sharpe Edge of the Corbiere Wedge: Are ‘Reasonable Hypotheticals’ Still Reasonable?” (1999) 25 C.R. (5th) 307. Frater suggests that the two concepts might be reconciled based on the size of the affected group.

(*Public Service Employee Relations Commission*) v. *BCGSEU*,¹³ standards that had an adverse impact on a protected group were not themselves challenged, but simply subject to the accommodation of members of the group to the point of undue hardship.¹⁴ Only standards that were directly discriminatory were subject to scrutiny in terms of their *bona fides* and reasonable necessity, and to potentially being struck down.¹⁵ In *Meiorin*, the Supreme Court abandoned this distinction, holding that even in cases of adverse effects discrimination, standards must be subject to the following test once a *prima facie* case of discrimination is found:

1. the standard must be adopted for a purpose rationally connected to the requirements of the law or policy;
2. the standard must have been adopted in an honest and good faith belief that it was necessary to the fulfilment of that requirement; and
3. the standard must be reasonably necessary to the accomplishment of the legitimate purpose. This includes a demonstration that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship.¹⁶

Reasonable accommodation is thus a component of determining whether a standard (including a law) should be upheld as reasonably necessary.¹⁷

The Court's reasoning for abandoning the distinction between adverse affects and direct discrimination has many facets, but several points are important here. First, the Court critiqued the ways in which the traditional distinction resulted in different remedies, and the tendency of

¹³ [1999] 3 S.C.R. 3 [*Meiorin*].

¹⁴ See for example *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

¹⁵ See for example *Ontario (Human Rights Commission) v. Borough of Etobicoke*, [1982] 1 S.C.R. 202.

¹⁶ *Meiorin*, *supra* note 13 at para. 54. See also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*].

¹⁷ See also Stéphane Bernatchez, "Accommodements raisonnables et gouvernance: le rôle du juge, au-delà de l'interprétation et de la création du droit à l'égalité," in this volume, who argues that reasonable accommodation becomes part of the norm rather than an exception to the norm.

adjudicators to frame a particular case as adverse effects or direct discrimination in order to justify a particular remedy.¹⁸ Second, the Court questioned any rationale for maintaining the distinction based on numbers alone:

[T]he argument that an apparently neutral standard should be permitted to stand because its discriminatory effect is limited to members of a minority group and does not adversely affect the majority of employees is difficult to defend. The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground.¹⁹

Further, the size of the affected group may not be fixed, and it may constitute a majority of the affected persons in some cases. Third, the traditional approach of distinguishing between so called neutral rules and those that were seen as directly discriminatory may reinforce dominant norms and maintain illegitimate standards, thereby entrenching systemic discrimination.²⁰

Meiorin also confirmed the importance of interpreting human rights and *Charter* cases consistently.²¹ True to this aspect of the case, *Meiorin* has been applied by the Supreme Court in a number of *Charter* cases since 1999. Notably, in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*,²² the Court held that chronic pain sufferers were deprived of a consideration of their individual needs for workers compensation, contrary to the dictates of *Meiorin*. The relevant sections of the regulations were found to be of no force or effect under s. 52 of the *Constitution Act 1982*. In *Multani v. Commission Scolaire Marguerite-Bourgeoys*,²³ a majority of the Supreme Court imported the concept of reasonable accommodation into the minimal impairment analysis under s. 1 of the *Charter*, finding that in the circumstances of the case, an absolute prohibition against wearing a kirpan at school could not be justified. The Court found that because the claimant no longer attended the school in

¹⁸ *Meiorin*, *supra* note 13 at paras. 28, 30–31.

¹⁹ *Ibid.* at para. 33.

²⁰ *Ibid.* at paras. 36, 39–41.

²¹ *Ibid.* at paras. 48–49. See also *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at para. 83, Abella, J. in dissent.

²² [2003] 2 S.C.R. 504.

²³ [2006] 1 S.C.R. 256 [*Multani*].

question, the appropriate remedy was to declare null the school board's decision prohibiting him from wearing his kirpan under s. 24(1) of the *Charter*.²⁴

These cases are also important for demonstrating that reasonable accommodation will arise under the *Charter* not only in cases involving s.15 equality rights, but also in cases where group-based fundamental freedoms are at play, and in benefits cases as well as cases involving burdens. For the purposes of this paper, I will confine my use of the term reasonable accommodation to those situations where there is discrimination or adverse treatment on the basis of grounds protected under the constitution, even though the term is sometimes used more broadly in other contexts.²⁵

Fundamentally, then, the notion of reasonable accommodation may require the abolishment or re-crafting of particular standards—i.e. laws and other government actions—in order to achieve equality.

II. CONSTITUTIONAL EXEMPTIONS AND REASONABLE ACCOMMODATION AFTER *FERGUSON*

A. CASES PREDATING *FERGUSON*

In *Ferguson*, the Supreme Court of Canada considered the availability of constitutional exemptions in cases where claimants assert that the application of mandatory minimum sentences would violate their right against cruel and unusual punishment. Before embarking on a discussion of *Ferguson*, it is useful to review the approach of courts to constitutional exemptions in the reasonable accommodation context before that case, which was unequivocal at best.

In *Miron v. Trudel*, a majority of the Supreme Court considered and rejected a constitutional exemption from legislation excluding common law couples from standard auto insurance benefits, and chose a reading in remedy under s. 52 instead.²⁶ In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, a case involving Aboriginal voting rights, the Court unanimously rejected both broad and narrow constitutional

²⁴ *Ibid.* at para. 82.

²⁵ This would include enumerated and analogous grounds protected under s. 15(1) of the *Charter*, as well as Aboriginal status protected under s. 35.

²⁶ [1995] 2 S.C.R. 418.

exemptions in favour of a severance remedy under s. 52, but it did allow for the possibility of narrow exemptions in appropriate circumstances.²⁷ Similarly, in *Rodriguez v. British Columbia (Attorney General)* the dissenting justices would have granted a narrow constitutional exemption under s. 24(1) of the *Charter*, exempting the claimant (and potentially others in her class) from the suspension of invalidity imposed on the prohibition against assisted suicide, which was found to violate ss. 7 and 15 of the *Charter*.²⁸

In other cases in the reasonable accommodation context, the Court has granted what might be considered constitutional exemptions without using this language. This is true of the remedy in *Multani*, discussed earlier, where a school policy prohibiting the wearing of a kirpan was declared null in respect of the claimant under s. 24 of the *Charter*.²⁹ It is also true of *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,³⁰ where the remedy—ordering legal funding for a woman in a child welfare case—could be seen as a constitutional exemption from a policy limiting such funding.³¹ According to this reasoning, *Eldridge v. British Columbia (Attorney General)* could also be seen as a case involving an exemption from the exclusion from a benefit. There, the Supreme Court granted a declaration ordering the government to provide sign language interpreters “where necessary for effective communication in the delivery of medical services.”³²

It appears then that in Supreme Court decisions before *Ferguson*, constitutional exemptions were not favoured in cases dealing with laws that required reasonable accommodation, although they were granted in cases involving government policies requiring accommodation. This distinction will be returned to later in this paper.

Notwithstanding the arguable lack of clarity on the availability of constitutional exemptions from the Supreme Court, a number of lower courts have considered this remedy to achieve reasonable accommodation

²⁷ [1999] 2 S.C.R. 203.

²⁸ [1993] 3 S.C.R. 519, Lamer C.J.C.

²⁹ *Multani*, *supra* note 23 at para. 82.

³⁰ [1999] 3 S.C.R. 46.

³¹ Roach makes this argument *supra* note 3 at 14-32.3. This interpretation is interesting, as it extends the applicability of exemptions from the typical scenario involving a burden (or mandatory law, as in *Seaboyer*, *infra* note 54) to what is essentially a benefit.

³² [1997] 3 S.C.R. 624 at para. 96.

in a range of circumstances. One category of cases examines the use of constitutional exemptions in the context of the mandatory firearms prohibitions issued under the *Criminal Code* upon conviction for certain offences. In *R. v. Chief*, for example, a constitutional exemption was granted from the mandatory firearm prohibition for an Aboriginal person who made his living as a trapper.³³ The relevant section of the *Criminal Code* was found to violate s. 12 of the *Charter*, and the appropriate remedy was seen to fall under s. 24(1) of the *Charter*, namely an exemption of the application of the mandatory prohibition for Mr. Chief.³⁴ Some courts have followed *Chief*,³⁵ while others have refused to do so.³⁶ What this category of cases shows is the potential for a class-based exemption from a mandatory sentence resting on a ground protected by the *Charter*—i.e. for reasonable accommodation on the basis of Aboriginal status in circumstances where the accused makes his or her living as a hunter or trapper.³⁷ On the other hand, such accommodation could also be achieved by reading in an exception under s. 52 for this

³³ [1990] 1 W.W.R. 193 (Y.C.A.).

³⁴ *Ibid.* at 202. The Yukon Territory Court of Appeal also suggested that an exemption from the firearms prohibition would be available for “a very small segment of Canadian society which naturally and sensibly are required, for one reason or another, to possess and sometimes use firearms in their daily lives.”

³⁵ See for example *R. v. Iyerak*, [1991] 2 C.N.L.R. 135 (N.W.T.S.C.); *R. v. Nester* (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.); *R. v. McGillivray* (1991), 62 CCC (3d) 407 (Sask. C.A.).

³⁶ See for example *R. v. Kelly* (1990), 80 C.R. (3d) 185 (Ont. C.A.) and *R. v. Nixon* (1991), 63 C.C.C. (3d) 428 (B.C.C.A.). Neither case involved Aboriginal offenders, rather convicted police officers who argued that access to firearms was necessary for employment purposes. Employment status has not yet been recognized by a majority of the Supreme Court as a protected ground. See *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016. See also *R. v. Johnson* (1994), 91 C.C.C. (3d) 21 (Y.C.A.), where the Yukon Territory Court of Appeal distinguished *Chief*, *supra* note 33, on the facts of the case.

³⁷ For an article broadly supporting constitutional exemptions from mandatory minimum sentences for Aboriginal peoples, see Larry Chartrand, “Aboriginal Peoples and Mandatory Sentencing” (2001) 39 Osgoode Hall L.J. 449. Chartrand cites s. 718.2(e) of the *Criminal Code* in support of this argument. For other cases considering constitutional exemptions for Aboriginal peoples from mandatory sentences, see *R. v. King*, (2007), 221 C.C.C. (3d) 71 (Ont. Ct. J.), where an exemption from a mandatory sentence for impaired driving was allowed, and *R. v. Boissoneau*, 2006 ONCJ 561, 75 W.C.B. (2d) 338, where an exemption was not permitted in similar circumstances.

class, or by striking the section down and leaving it to Parliament to re-craft it in accordance with the *Charter*.³⁸

A second category of cases examines constitutional exemptions from the application of particular offences—more specifically, for possession of marijuana under the *Controlled Drugs and Substances Act* on the basis that the marijuana is medically necessary. An exemption from this offence was granted by the trial court in *R. v. Parker* for the class of persons “possessing or cultivating marihuana for their ‘personal medically approved use.’”³⁹ However, this remedy was overturned on appeal, where the Ontario Court of Appeal struck down the prohibition, suspended the declaration of invalidity for 12 months, and exempted Parker from the suspension.⁴⁰ More recently, in a case decided after *Ferguson*, the B.C. Supreme Court considered the constitutionality of the prohibitions against possession and administration of drugs under the *Controlled Drugs and Substances Act* in the context of Vancouver’s safe injection site, *Insite*.⁴¹ The Court found that these prohibitions contravened s.7 of the *Charter* notwithstanding that the federal government had enacted a temporary exemption under the legislation for *Insite*.⁴² Rather than grant a broad constitutional exemption, however, the Court declared the offending sections of the legislation of no force or

³⁸ As noted by Roach, *supra* note 3 at 14-30, the *Criminal Code* was later amended to make the firearms prohibition discretionary, and an explicit exemption from an order may be made for hunters, trappers and those requiring firearms for their employment (citing what is now ss. 110 and 113 of the *Criminal Code*, R.S.C. 1985, c.C-46 (as amended)).

³⁹ (1997), 12 C.R. (5th) 251 (Ont. Ct. J.), cited by the Ontario Court of Appeal in *R. v. Parker* (2000), 49 O.R. (3d) 481 at para. 7.

⁴⁰ *Ibid.* at para. 210. The Court declined to grant an exemption from the suspension for all persons requiring marijuana for medical purposes, finding that this was contrary to the limits on narrow exemptions outlined in *Corbiere*, *supra* note 27 at para. 208. Following this decision, the federal government enacted the *Medical Marijuana Access Regulations*, SOR.2001-227, but these were struck down in part in *R. v. Hitzig* (2003), 171 C.C.C. (3d) 118 (Ont. C.A.) for failing to adequately implement an exemption for medical marijuana. Amended regulations were subsequently considered in *R. v. Long* (2007), 88 O.R. (3d) 143 at para. 6, where the Ontario Court of Justice held that “reading in an obligation to provide reasonable access to eligible persons would be the most appropriate remedy. However, only a Superior Court has that declaratory power.” The Court dismissed the charges against Long.

⁴¹ *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661, 293 D.L.R. (4th) 392. The case is on appeal to the British Columbia Court of Appeal.

⁴² The Court was troubled by the “unfettered nature of the discretion to exempt,” and the fact that the exemption was made for a “scientific purpose” rather than a “medical purpose” (*ibid.* at para. 155).

effect, suspended the declaration for approximately 13 months, and “in accordance with” *Ferguson*, granted “users and staff at Insite, acting in conformity with the operating protocol now in effect, a constitutional exemption” from the legislation in the interim.⁴³

All of these cases could be seen as examples of reasonable accommodation on the basis of disability, given the connection between addictions and disability. Lower court cases have also considered constitutional exemptions to accommodate disability outside the criminal realm. For example, in a number of cases cited by Lepofsky, constitutional exemptions were granted from limitations periods that could not be complied with on account of the disability in question.⁴⁴

Other cases have reviewed the propriety of constitutional exemptions from mandatory laws that offend the *Charter*'s guarantees respecting religion. In *Hutterian Brethren of Wilson Colony v. Alberta*, the Alberta Court of Queen's Bench considered an exemption to remedy a violation of ss.2(a) and 15(1) of the *Charter* created by a mandatory drivers license photograph for members of the Hutterite faith.⁴⁵ The Court found that *Corbiere* precluded the use of broad constitutional exemptions in this case, and declared the offending regulation of no force or effect. This remedy was upheld by a majority of the Alberta Court of Appeal.⁴⁶ Similarly, in *R. v. Badesha*, a Sikh man challenged Ontario's

⁴³ *Ibid.* at paras. 158–59.

⁴⁴ David Lepofsky, “The *Charter*'s Guarantee of Equality to People with Disabilities – How well is it Working?” (1998) 16 Windsor Yb. Access Just. 155, citing *Speerin v. North Bay (City of)* (1991), 5 O.R. (3d) 492 (Ont. Ct. (Gen. Div.)); *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 29 C.R.R. (2d) 336 (Nfld. C.A.).

⁴⁵ [2006] 8 W.W.R. 190 (Alta. Q.B.).

⁴⁶ *Hutterian Brethren of Wilson Colony v. Alberta*, [2007] 9 W.W.R. 459 (Alta. C.A.). In dissent, Slatter J.A. found that the violations of religious freedom and religious equality were justified under s.1 of the *Charter*. In a decision released in July, 2009 a majority of the Supreme Court of Canada (per McLachlin, C.J.C.) agreed with Slatter J.A. that the violation of s. 2(a) of the *Charter* could be justified under s. 1 and questioned the role of reasonable accommodation in the context of legislative actions (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37). Dissenting JJ. Abella, LeBel and Fish found that the violation of s. 2(a) could not be justified under s. 1, and would have suspended the invalidity of the mandatory photograph requirement for one year “to give Alberta an opportunity to fashion a responsive amendment” (at para. 177). For a comment on this case, see Jennifer Koshan, “Security Trumps Freedom of Religion for Hutterite Drivers” *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (10 August 2009), online: Ablawg <<http://ablawg.ca/2009/08/10/security-trumps-freedom-of-religion-for-hutterite-drivers/>>.

Highway Traffic Act for requiring that riders of motorcycles wear helmets. While the Court ultimately found that this violation of s.2(a) was justified under s. 1 of the *Charter*, it also raised concerns about constitutional exemptions in such a case, noting that this remedy would perpetuate the risks that the helmet law was intended to prevent for the claimant.⁴⁷

Some lower court cases thus suggest that constitutional exemptions might be appropriate to achieve reasonable accommodation in some circumstances, both within and outside the criminal realm. More commonly, however, courts apply s.52 remedies of striking down or reading in, recognizing the need to effect a remedy that goes beyond the circumstances of the claimant.

Returning to *Ferguson*, a more detailed examination of the Court's reasons is apposite to a consideration of whether constitutional exemptions should be granted in future cases where that remedy is sought in the reasonable accommodation context.

B. THE REASONS FOR DECISION IN *FERGUSON*

Having found that there was no violation of s.12 in the circumstances of the case, the Court's treatment of constitutional exemptions in *Ferguson* is *obiter*, but is of course of great interest.

According to the Court, constitutional exemptions should not be available in cases involving mandatory minimum sentences based on four considerations: (1) previous case law; (2) intrusion on the role of Parliament; (3) the *Charter's* remedial provisions; and (4) the rule of law.⁴⁸ Writing for a unanimous Court, Chief Justice McLachlin seems careful to confine the judgment to the context of mandatory minimum sentences. For example, she states that: "a constitutional exemption is not an appropriate remedy *for a mandatory minimum sentence* that results in a sentence that violates s. 12."⁴⁹ Later, she "conclude[s] that constitutional

⁴⁷ 2008 ONCJ 94, 168 C.R.R. (2d) 164. According to the Court at para. 28, "It would thus appear that it is probable that in granting this exemption we are not just talking about increasing a remote risk of death, we may well be talking about something approaching a certainty that the proposed exemption will, now and in the future, lead to a death or deaths in this Province each year. These are deaths that could have been avoided through the use of alternate modes of transportation or a helmet" [emphasis in original].

⁴⁸ *Ferguson*, *supra* note 1 at para. 40.

⁴⁹ *Ibid.* at para. 13.

exemptions should not be recognized as a remedy *for cruel and unusual punishment imposed by a law prescribing a minimum sentence.*⁵⁰

Without wading into the debate about the scope of the decision in *Ferguson*,⁵¹ the question is whether the Court's reasons for denying constitutional exemptions for mandatory minimum sentences also militate against using this remedy in other contexts, including that of reasonable accommodation.

i. PREVIOUS CASE LAW

In *Ferguson*, the Court states that its first consideration, a review of previous case law, indicates that the “weight of authority ... is against” constitutional exemptions in other contexts where mandatory laws are at play.⁵² Mandatory laws are defined as those which Parliament intended to apply in a mandatory fashion, without discretion.⁵³ This includes the laws under consideration in cases such as *Seaboyer*, where the *Criminal Code*'s rape shield provisions were under attack, and *Osborne*, where the law prohibited public servants from engaging in political work.⁵⁴

Interestingly, the Court does not mention *Rodriguez* in its reasons in *Ferguson*, even though this could be seen as another example of a case involving a mandatory law (prohibiting assisted suicide). In *Rodriguez*, the dissenting justices who found a *Charter* violation would have permitted a constitutional exemption of the “narrow” kind—i.e. to exempt the claimant (and others in her class) from the temporary suspension of the remedy. Importantly, however, the mandatory law itself would have been struck down, as it violated the *Charter* rights of persons with

⁵⁰ *Ibid.* at para. 74. See also the Court's language at paras. 48, 52, 57.

⁵¹ Steve Coughlan argues that while the applicability of constitutional exemptions beyond the mandatory minimum sentence context is still open, it should be extended to other violations of s. 12 and the *Charter*; see “The End of Constitutional Exemptions” (2008) 54 C.R. (6th) 220. Paul Calarco reads *Ferguson* as broadly doing away with constitutional exemptions in *Charter* cases; see “*R. v. Ferguson*: An Opportunity for the Defence” (2008) 54 C.R. (6th) 223. Lower courts have also begun to weigh in on this question; see for example *Loughlin v. Murdoch*, 2008 ABCA 215 at para 9, where Côté J. stated that “individual constitutional exemptions are no longer possible.”

⁵² *Ferguson*, *supra* note 1 at paras. 47–48.

⁵³ *Ferguson*, *ibid.* at para. 45, citing *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 628.

⁵⁴ *Seaboyer*, *ibid.*; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

physical disabilities unable to commit suicide themselves.⁵⁵ In *Ferguson* the Court does cite the analogous case of *Corbiere* as “consistent with” the idea that constitutional exemptions should not be available in cases involving mandatory laws.⁵⁶ *Corbiere*, like *Rodriguez*, considered an exemption from a temporary suspension of invalidity. It also considered broad constitutional exemptions, finding that in the circumstances of the case—a prohibition against voting in band elections for non-resident members of bands under the *Indian Act*—the law affected a wider group than the claimants, necessitating a s. 52 remedy rather than an exemption.⁵⁷ *Rodriguez* and *Corbiere* both involve scenarios that fit the definition of reasonable accommodation as noted earlier—they consider claimants who seek to be relieved of the application of the law based on grounds protected under the *Charter*. This suggests that the Court would not be inclined to grant constitutional exemptions to achieve reasonable accommodation based on its interpretation of the existing jurisprudence, at least as far as mandatory laws are concerned.

What about cases where laws granting benefits are at issue? In *Miron v. Trudel*, a majority of the Court found discriminatory the exclusion of common law spouses from benefits available under insurance legislation in the event of automobile accidents. The majority said the following about the suggestion that a constitutional exemption might be an appropriate remedy:

Assuming the Court were inclined to grant the appellants an exemption from the 1980 legislation and insurance policy provisions, the question remains of how it could do so without creating further inequities between the appellants and others in their situation who have been denied benefits. To avoid this, any constitutional exemption would have to be extended to all similar families. This in turn would require formulation of general criteria of eligibility, thus involving the court in the very activity which would have led it to eschew “reading up” the 1980 statute in

⁵⁵ *Rodriguez*, *supra* note 28.

⁵⁶ *Ferguson*, *supra* note 1 at paras. 46–47.

⁵⁷ *Corbiere*, *supra* note 27 at paras. 22–23. See also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 at para. 56, where the Court stated that “constitutional law should apply fairly and evenly, so that all similarly situated persons are treated the same.” While the term “similarly situated” is regrettable given the Court’s efforts to distance itself from the formal equality paradigm that this language evokes, the point about the proper scope of a constitutional remedy is nevertheless valuable.

conformity with the terms legislated in 1990. Yet to deny such persons a remedy would be to perpetuate the effects of a discrimination which the Court has found to violate the *Charter* when the obvious remedy—the payment of the benefits that should have been paid—remains available.⁵⁸

In the end, the majority imposed a reading in remedy to include common law spouses within the scope of the legislation.⁵⁹ Thus it appears that there are concerns in cases involving both mandatory and benefit-conferring laws in terms of granting constitutional exemptions, often related to the problems presented by individual remedies where other members of an affected group exist.

In contrast stand the cases of *Multani*, *Eldridge* and *New Brunswick (Minister of Health and Community Services) v. G.(J.)*. As noted earlier, the remedies in these cases could be seen as akin to constitutional exemptions. Unlike the cases examined to this point, *Multani*, *Eldridge* and *G.(J.)* involve discriminatory government actions rather than laws, leaving a s.52 remedy unavailable. This category of cases will be explored further below.

ii. LEGISLATIVE INTENT

The Court's second consideration in *Ferguson* is the intrusion that constitutional exemptions have on the role of Parliament. The argument here is that in a case involving a mandatory minimum sentence, "the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended."⁶⁰ While the same criticism could be levelled against remedies such as severance and reading in, the Court notes that these remedies should only be granted where they would not impose an "inappropriate intrusion into the legislative sphere."⁶¹ Only in cases where it can be assumed that the legislature would have passed the law with the revisions contemplated by the court should such a remedy be granted—otherwise, the law must be struck down. In the case of mandatory minimums, the

⁵⁸ *Miron v. Trudel*, *supra* note 26 at para. XCIX.

⁵⁹ See also *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, where the Supreme Court declined to order a constitutional exemption in a benefits case. This was to avoid a retroactive remedy, however.

⁶⁰ *Ferguson*, *supra* note 1 at para. 50.

⁶¹ *Ibid.* at para. 51, citing *Schacter*, *supra* note 2.

Court finds that constitutional exemptions would clearly subvert Parliament's intention to remove discretion from the sentencing process, and are thus inappropriate.⁶²

How does this consideration apply to cases involving reasonable accommodation? By definition, these cases entail a finding of discrimination or violation of a fundamental freedom that is grounds-based. In such cases, it is arguable that if the legislature was aware of the discriminatory impact of its law, it should be assumed that it would have crafted the law without such an impact. This line of thinking was used in *Vriend* to support a reading in remedy to Alberta's human rights legislation, which unconstitutionally excluded protection against discrimination on the basis of sexual orientation.⁶³ If reading in is consistent with the imperative of avoiding undue intrusion into the legislative sphere, then the same should be true of constitutional exemptions in some cases.

This begs the question, however—why would a court not grant a reading in or severance remedy rather than a constitutional exemption? Particularly in cases where equality considerations are at play, these remedies have the advantage of providing relief to all members of the affected class. *Miron* is one such example. Another example is presented by the cases involving firearms prohibitions under the *Criminal Code*, noted earlier. These cases would arguably have been appropriate ones for a reading in remedy, as it could be assumed that had Parliament known of the discriminatory impact of the prohibition on Aboriginal hunters and trappers, it would have created a legislative exception for this group. Reading in and severance avoid the need to apply for a constitutional remedy on a case by case basis, an important consideration from the standpoint of access to justice (as will be elaborated upon below).

Care must also be taken not to accord too much weight to the intentions of the legislature in the reasonable accommodation context. For example, what if it cannot be safely assumed that the legislature would have passed a law without its discriminatory elements if it had known of these effects? Again the case of *Vriend* comes to mind, where in spite of the Supreme Court's holding, the Alberta government has avoided the remedy granted by the Court by failing to amend its human

⁶² *Ferguson*, *supra* note 1 at para. 55.

⁶³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, cited in *Ferguson*, *supra* note 1 at para. 65. The Court also cites *R. v. Sharpe*, *supra* note 10, but that case did not involve a grounds-based accommodation.

rights legislation even to this day.⁶⁴ We must not forget that the courts' role is to be the guardian of *Charter* rights. While expressions of deference to the legislature have become commonplace, we must avoid allowing deference to become a shield behind which judges can avoid responsibility for difficult outcomes.⁶⁵ Legislative intent must also be assessed through the lens of the *Meiorin* case. That case sought to abolish the distinction between direct and adverse effects discrimination, and should have sent a strong message to lawmakers that they must consider the potentially discriminatory impacts of their laws before they are passed.⁶⁶ If they fail to do so, or do so in any event, governments should not be entitled to rely on legislative intent to block equality-promoting remedies. This point also relates to rule of law considerations, to be discussed below.

On the other hand, if consideration of legislative intent weighs against a reading in or severance remedy, the alternative will be to strike the law down and leave it to the legislature to cure the constitutional defect. This will accord the same benefit to the group that a reading in remedy or broad constitutional exemption would have offered, provided that a suspension of the declaration is not superimposed. In such cases, there may be continuing scope for narrow constitutional exemptions, as I will return to later.

Overall, then, the consideration of legislative intent continues to be an important basis for deciding upon an appropriate remedy in a given case. Even if constitutional exemptions are not precluded outside the context of mandatory minimums based on this consideration, reading in, severance or striking down may be preferable remedies for achieving reasonable accommodation.

⁶⁴ See Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14. See also Linda McKay Panos, "Vriend Ten Years Later" *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (5 May 2008), online: Ablawg <<http://ablawg.ca/2008/05/21/vriend-ten-years-later/#more-137>>.

⁶⁵ See for example Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2005-6) 31 *Queen's L.J.* 731.

⁶⁶ See also Rosenberg & Perrault, *supra* note 3 at 401, who argue that "exemptions are, in practice, an invitation for sloppy legislation."

iii. REMEDIAL SCHEME OF *CHARTER*

The Court's third consideration in *Ferguson* was the proper interpretation of s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982*. Here, the Court confirmed that s. 24(1) should be restricted to remedies that are required to fix unconstitutional acts of government committed under constitutional legal regimes.⁶⁷ Put another way, s.24(1) permits personal remedies necessitated on the facts of the case. Section 52 is to be used where the law itself is the source of the constitutional violation, and it provides remedies even where the claimant does not personally experience the unconstitutional effects of the law.⁶⁸ The Court's allocation of different remedial powers to each of these sections is grounded upon basic principles of interpretation. The wording of s. 52 is clearly to the effect that unconstitutional laws are of no force or effect to the extent of the inconsistency. If the broad language of s. 24 were also to encompass remedies that relate to the constitutionality of the law itself, that would render s. 52 superfluous.⁶⁹ Accordingly, since constitutional exemptions relate to the law itself rather than its application by government actors, this remedy is not available under s. 24. Nor is it available under s. 52, which requires that the law be struck down rather than upheld and not applied.

This reasoning would seem to preclude constitutional exemptions in situations where reasonable accommodation from the effects of a law is sought. In such cases, the constitutional problem relates to the law itself, so the appropriate remedy must be found under s. 52 rather than s. 24. Many of the examples cited above—*Corbiere*, *Rodriguez*, *Miron* and the firearms, drug and religion cases—are ones where the source of the violation was the law itself, such that a s. 52 remedy was required in order to accommodate the claimants' circumstances (via reading in, severance or striking down).

However, there are other cases, such as *Eldridge*, *G.(J.)* and *Multani*, where s. 24 remedies were granted to achieve accommodation. In all cases, the source of the violation was government acts rather than laws, so according to the Court's reasoning in *Ferguson*, s.52 remedies were unavailable. This category of cases will be considered in the next section, as the scope of remedies typically granted in such cases may

⁶⁷ *Ferguson*, *supra* note 1 at para. 60.

⁶⁸ *Ibid.* at para. 59.

⁶⁹ *Ibid.* at para. 66, citing *Seaboyer*, *supra* note 53.

present concerns with the rule of law and one of its tenets, access to justice.

iv. RULE OF LAW

The Court's final consideration in *Ferguson* was the rule of law. According to the Court, constitutional exemptions present several difficulties in mandatory minimum sentencing cases that violate rule of law principles, including "certainty, accessibility, intelligibility, clarity and predictability."⁷⁰ The concern here is that if exemptions are granted, laws will remain on the books, and only be dealt with on a case by case basis as unconstitutional applications are litigated. This is a concern that goes beyond mandatory minimums, and would negate the availability of constitutional exemptions from laws that are discriminatory as well. In cases where reasonable accommodation from inequality-producing effects of laws are at issue, there is a similar need to ensure that persons know what the law is and gain the benefit from a finding that the law is unconstitutional when applied to persons in their "well-defined class."⁷¹ To hold otherwise would be to require a case by case assessment of constitutionality and create a barrier to the exercise of rights.⁷² This is a particular concern in the equality context given the cancellation of funding to the Court Challenges Program in September 2006.⁷³

As argued above, constitutional exemptions may also fail to require governments to take the responsibility to remedy defective laws, a concern noted in *Ferguson* and *Meiorin*. The rule of law includes the notion that the law is binding on governments, and this should be seen to include the obligation to take equality rights into account in crafting legislation, failing which the law will be of no force or effect to the extent of the inconsistency. As noted by Chief Justice McLachlin in *Ferguson*, "[b]ad law, fixed up on a case-by-case basis by the courts, does not accord

⁷⁰ *Ferguson, ibid.* at para. 69.

⁷¹ *Ibid.* at para. 70.

⁷² *Ibid.* at para. 72. See also Sankoff, *supra* note 3.

⁷³ For a defence of the program, see Larissa Kloegman, "A Democratic Defence of the Court Challenges Program" (2007) 16 Const. Forum Const. 107. Funding was restored to the language rights component of this program in 2008 following an out of court settlement of litigation by the "Fédération des communautés francophones et acadienne."

with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.”⁷⁴

Some commentators have argued that constitutional exemptions might be justified if the size of the affected group is quite small.⁷⁵ However, I contend that any use of constitutional exemptions for laws that are discriminatory on the basis of protected grounds should be avoided in favour of s.52 remedies, no matter how small the group. This accords with the observation in *Meiorin* that even small groups may be protected under the *Charter*, and require relief that takes their equality interests seriously.

A remaining issue for s.52 remedies is whether, in cases where the court suspends the remedy, a constitutional exemption might be used to give immediate effect to the *Charter* litigant as considered in *Corbiere* and *Rodriguez*. This issue also has rule of law implications, as noted by Lamer, C.J. in *Schacter*: “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.”⁷⁶ One concern with the narrow exemption approach is expressed by Choudry and Roach, who argue that exemptions from suspended declarations create horizontal equality problems for those who did not bring the claims forward but must wait to receive the benefit of the ruling.⁷⁷ This concern could be addressed by ensuring that the narrow exemption was sufficiently wide to include other members of the affected class, as in *Rodriguez*.⁷⁸ Although in that case it was still left up to individuals to apply for an exemption, the safety considerations that necessitated that approach are relatively unique. In other cases, where the members of the affected class are clear, they arguably should be entitled to an exemption from the suspended declaration of invalidity along with the *Charter* claimant(s).

⁷⁴ *Ferguson*, *supra* note 1 at para. 73.

⁷⁵ Frater, *supra* note 12, puts forward this argument, although recognizing that it may not be particularly compelling. See also Roach, *supra* note 3 at 14-32.3, 14-35.5, who seems to support constitutional exemptions in “exceptional cases.”

⁷⁶ *Schachter*, *supra* note 2 at 716. See also Carissima Mathen, “Mandatory minimum sentences: Do they achieve justice?” (2008) 27(46) *Lawyers Weekly* 7 at 7.

⁷⁷ Sujit Choudry & Kent Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003) 21 *Sup. Ct. L. Rev.* (2d) 205 at 246.

⁷⁸ *Rodriguez*, *supra* note 28, where the dissenting justices granted an exemption for “all persons who are or will become physically unable to commit unassisted suicide.”

It also bears mention that suspensions should only be granted where they fall into one of the categories noted in *Schachter* and recently confirmed in *Hislop*: “where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant.”⁷⁹ Courts have not always articulated the rationale for suspensions since *Schachter*, and as noted in that case, simply allowing the legislature time to decide how to remedy an unconstitutional law is not a sufficient basis for a suspension.⁸⁰ A more deferential approach to suspensions of invalidity may reduce the need for narrow exemptions. If narrow exemptions do persist as an interim constitutional solution, I agree with Coughlan that we may wish to call this remedy by another name to avoid confusion with broad constitutional exemptions.⁸¹

Overall, then, the reasons in *Ferguson* militate against the use of constitutional exemptions to achieve accommodation in the case of unconstitutional laws, and in favour of s.52 remedies such as striking down, severance and reading in. Can the same be said about unconstitutional government actions?

III. CONSTITUTIONAL EXEMPTIONS AND GOVERNMENT ACTIONS

As noted earlier, there is a category of cases that raises different considerations, and that is cases involving unconstitutional government actions that require accommodation of equality interests. In these cases, there will be no law to declare “of no force or effect,” so s.24(1) rather than s.52 remedies are appropriate. Under s.24, a purposive approach is required, entailing remedies that are “responsive” to the rights violation and “effective” in curing it.⁸²

To return to the cases discussed earlier, the remedies granted in *Eldridge*, *Multani* and *G.(J.)* can be seen as having provided reasonable accommodation to differing degrees under s.24. At one end of the spectrum, accommodation was quite broadly conferred in *Eldridge*, as the

⁷⁹ *Hislop*, *supra* note 59 at para. 121, citing *Schachter*, *supra* note 2 at 719. See also *Vriend*, *supra* note 63 at para. 179, where a suspension was rejected.

⁸⁰ Choudry & Roach, *supra* note 77 at 232.

⁸¹ Coughlan, *supra* note 51 (although he does not suggest a new name).

⁸² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 24.

Court essentially ordered the government to provide funding for sign language interpretation “where necessary for effective communication in the delivery of medical services.”⁸³ At the other end of the spectrum, in *Multani* the Court granted an individual remedy to the *Charter* claimant, namely a declaration that the school board’s decision prohibiting him from wearing his kirpan to school was unconstitutional.⁸⁴ In the middle lies *G.(J.)*, where the Court granted an order that the government should have provided the claimant with state-funded counsel for her child welfare hearing, and left it open to trial judges “to order state-funded counsel on a case-by-case basis when necessary to ensure the fairness of the custody hearing.”⁸⁵ Whether these remedies are called constitutional exemptions or not they did achieve some measure of accommodation, but did they go far enough?

In *Multani*, for example, the Court could have declared that the school board’s zero tolerance weapons policy was unconstitutional in the case of all those wearing kirpans for religious reasons. In *G.(J.)*, the Court could have followed *Eldridge* and declared the legal aid policy itself unconstitutional. These remedies would have gone further towards upholding the principle that all affected persons in the class discriminated against should benefit from a ruling of unconstitutionality. To fail to grant broad remedies in these cases leaves it to individuals to bring forward their claims for exemption from (or perhaps inclusion in) government actions on an ad hoc basis, and violates the spirit of the *Meiorin* decision and rule of law concerns around access to justice. As confirmed in *Meiorin*, government actions must themselves be subject to scrutiny and remedial action under the *Charter*. Otherwise, the persistence of discriminatory government actions may reinforce dominant norms, maintain illegitimate standards, and entrench systemic discrimination.

⁸³ *Eldridge*, *supra* note 32 at para. 96. The precise terms of the remedy were a declaration that the failure to provide sign language interpreters was unconstitutional, and a direction to the government “to administer the *Medical and Health Care Services Act* ... and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1)” (at para. 95). The Court also suspended the declaration for 6 months without justifying the suspension on one of the *Schachter* grounds.

⁸⁴ *Multani*, *supra* note 23 at para. 82.

⁸⁵ *G.(J.)*, *supra* note 30 at para. 102. Because the hearing had already taken place, the remedy was framed in terms of what the Court would have granted (see paras. 52–53).

On the other hand, the second consideration in *Ferguson*, legislative (or government) intent may present some concerns in cases of this kind. For example, in *G.(J.)* the Court declined to grant the directive noted above by stating that this “would run contrary to Sopinka J.’s admonition in *Osborne* ... to ‘refrain from intruding into the legislative sphere beyond what is necessary.’”⁸⁶ While courts must not “fashion remedies which usurp the role of the other branches of governance,” they must also be mindful that “[d]eference ends ... where the constitutional rights that the courts are charged with protecting begin.”⁸⁷

The Court arguably got this balance right in *Eldridge*, as the remedy meets the test from *Doucet-Boudreau*: it “vindicate[s] the rights of the [claimants] while leaving the detailed choices of means largely to the executive.”⁸⁸ The broad declarations of invalidity called for above in *Multani* and *G.(J.)* would have had the same result by leaving it to the school board and New Brunswick government, respectively, to develop new policies accommodating the interests of the members of the affected groups.

More generally, in cases involving government actions and s.24 remedies, courts could apply the same caution used in s.52 cases where reading in or severance is sought, and determine whether the government would have acted as it had if it had known that its actions were unconstitutional. As argued above, it should be difficult to conceive of cases where governments would fail to provide reasonable accommodation in the face of findings that their actions were discriminatory. If exemptions are not found to be appropriate, government actions could be declared unconstitutional, similar to striking down under s. 52. Consideration should also be given to making such declarations under s.24 subject to monitoring by the courts for compliance with the dictates of the *Charter*.⁸⁹ Monitoring may be necessary because of the fact that declarations of invalidity do not have the same force for government actions as they do for unconstitutional laws.

⁸⁶ *G.(J.)*, *ibid.* at para. 102 [footnotes omitted]. See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 157: according to the majority in rejecting a s. 24(1) remedy, “We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants.”

⁸⁷ *Doucet-Boudreau*, *supra* note 82 at paras. 34, 36.

⁸⁸ *Doucet-Boudreau*, *ibid.* at para. 69.

⁸⁹ A similar remedy was upheld in *Doucet-Boudreau*, *ibid.*

In the end, and regardless of what they are called, remedies under s. 24 of the *Charter* may go some way towards achieving reasonable accommodation in the case of government actions, but only where courts craft remedies that are as broad as the groups adversely affected.

CONCLUSION

As the most recent constitutional remedies cases from the Supreme Court, *Ferguson* has much to say about such remedies beyond the narrow context of constitutional exemptions in mandatory minimum sentencing cases. Applying the Court's considerations to the reasonable accommodation context, reading in, severance and striking down under s. 52 continue to be the most appropriate remedies for grounds-based violations that flow from the law. Where the Court considers a suspension of one of those remedies to be appropriate in the circumstances (and these circumstances should be narrow), an exemption from the suspension may be necessary to avoid prolonging the rights violation and to provide accommodation without delay to all members of the affected group. For rights violations that flow from government actions rather than laws, constitutional remedies (including exemptions) awarded to all members of the affected group should be considered as a means of achieving reasonable accommodation. These remedies require governments and courts to take responsibility for equality, and avoid access to justice problems and undue use of the courts' resources presented by a case by case approach.

Some challenges remain. Class-based remedies must avoid essentializing group members, and allow for the possibility that there are differences within as well as between groups.⁹⁰ Such remedies must also allow for the possibility of intersectionality and recognize that some persons will be affected by laws or government actions in multiple, interconnected ways based on varying aspects of their identities. The nuances of intersecting inequalities may make group-based accommodations complicated and difficult to envision and apply, but recognition of this reality is critical for both s.24 and s.52 remedies. As I have argued previously, interveners have a continuing role to play in assisting courts with arguments about how equality considerations impact upon group members differently, and in making concrete the sometimes

⁹⁰ See Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37.

abstract legal questions that are raised by reasonable accommodation and constitutional remedies.⁹¹

⁹¹ Jennifer Koshan, “Dialogue or Conversation? The Impact of Public Interest Interveners on Judicial Decision Making” in Patricia Hughes & Patrick Molinari, eds., *Participatory Justice in a Global Economy: The New Rule of Law* (Montréal: Themis, 2004) at 233.