

Suspended Declaration

When a court [declares a law to be unconstitutional](#) it is 'struck down' and thus, is no longer enforceable. As that law no longer exists, an intolerable gap in the law can sometimes be created. This occurred in 2015 when the Supreme Court found the laws prohibiting physician-assisted death to be unconstitutional.

To prevent this 'intolerable gap', the courts may suspend a declaration for a short period of time: typically six months to a year.[\[1\]](#) This allows the law to remain in force while the government works to create a constitutionally valid replacement.

Re Manitoba Language Rights was the first case in which the Supreme Court suspended a declaration.[\[2\]](#) In that case, the Court held that the *Manitoba Act* of 1870 required all Manitoba laws to be translated into French.[\[3\]](#) Since few of the province's laws had actually been translated, the Court declared most of Manitoba's laws to be invalid, but suspended the declaration, as an emergency measure, so that the government would have time to translate them.

Since *Re Manitoba Language Rights*, the Supreme Court has provided guidelines for suspending a declaration in cases where having it take effect immediately would:

1. Pose a danger to the public
2. Threaten the rule of law, or
3. Result in the deprivation of benefits from deserving persons.[\[4\]](#)

The courts however have not closely followed these guidelines in subsequent cases.[\[5\]](#) The general trend is for courts to respect the legislative role of government, by suspending their declarations when there is a range of policy options that the government needs to consider in order to draft a replacement law.[\[6\]](#) For example, the Supreme Court suspended a declaration striking down existing anti-prostitution laws as "immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it."[\[7\]](#) Courts prefer to suspend a declaration and allow Parliament to come up with its own solution when there are significant taxpayer funds at stake.[\[8\]](#)

This means, however that courts frequently suspend declarations where a declaration taking effect immediately would not harm the rule of law.[\[9\]](#) This is controversial. By suspending a declaration, a court declares that even though a law violates the supreme law of Canada - the *Constitution* - it will nevertheless allow it to be enforced for a period of time. It is unclear what gives the courts legal authority to do this.[\[10\]](#)

[\[1\]](#) Peter W Hogg, Patrick J Monahan & Wake K Wright, *Liability of the Crown*, 4th ed

(Toronto: Thomson Reuters, 2011) at 43.

[2] *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 SCR 721, 19 DLR (4th) 1 .

[3] *Re Manitoba Language Rights*, *supra* note 2 at para 156.

[4] *Schachter v Canada*, [1992] 2 SCR 679 at 719, 93 DLR (4th) 1.

[5] Hogg, Monahan & Wright, *supra* note 1 at 43.

[6] Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 2015) (loose-leaf revision 26) at 14-85.

[7] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 167.

[8] *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 114, 3 SCR 381.

[9] Kent Roach, "Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity" 35 UBC L Rev 211, 219.

[10] *Re Manitoba Language Rights*, *supra* note 2 at paras 97-107.