Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law

by

Grant Russell Hoole

A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.)

Faculty of Law
University of Toronto

© Copyright by Grant Hoole 2010
Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law

Grant Hoole

Master of Laws (LL.M.)

Faculty of Law
University of Toronto

2010

Abstract

The aim of this thesis is to provide an analytic framework for the governance of suspended declarations of invalidity in Canadian constitutional law. A suspended declaration is a remedial device by which a court strikes down a constitutionally invalid law, but suspends the effect of its order such that the law retains force for a temporary period. While introduced to Canadian law under circumstances of exigency, suspended declarations have grown to be used liberally by the courts, and the principles that previously confined them have been abandoned. As a result, constitutional rights – including those protected in the Charter of Rights and Freedoms – have sometimes been suspended without just basis. I propose a means to reverse this trend: by adopting proportionality, a core feature of the analytic method used to adjudicate limitations on Charter rights, as a remedial principle guiding the use of suspended declarations. Proportionality analysis is capable of navigating the features of remedial discretion engaged by suspended declarations, while reconciling the latter with Canada’s constitutional principles. I explain how the adoption of proportionality as a remedial principle would work in practice, drawing from the jurisprudence of South Africa’s Constitutional Court as an illustrative guide.
Acknowledgments

I would like to thank my thesis supervisor, Kent Roach, for his thoughtful guidance in the preparation of this thesis. Professor Roach was encouraging and insightful but allowed me to develop my ideas independently. His input greatly enriched my research and sharpened my arguments.

I was fortunate to complete two courses in constitutional law with Lorraine Weinrib during my graduate studies at the University of Toronto, both of which contributed to the ideas developed in this thesis. I am grateful for Professor Weinrib’s generosity with her time and for our conversations outside of class.

Finally, my greatest thanks are owed to my family, for their ongoing support, and to my partner, Suzanne Palko, who encouraged me to pursue graduate legal studies and was a patient and assiduous sounding board for ideas.
# Table of Contents

Acknowledgments ........................................................................................................ iii

Table of Contents ....................................................................................................... iv

1 Introduction and Overview ....................................................................................... 1

2 Origins, Evolution, and Problems Arising from Suspended Declarations of Invalidity ..................................... 3

   2.1 Definition and Early Case Law ............................................................................. 3

      2.1.1 The *Manitoba Language Reference* and Early Uses of Suspended
            Declarations ............................................................................................... 5

      2.1.2 Introduction of the *Schachter* Guidelines .................................................. 7

2.2 The Expanded Use of Suspended Declarations of Invalidity .................................. 11

2.3 The Problem of Inadequate Reasoning ................................................................. 19

      2.3.1 *Figueroa v. Canada* .................................................................................. 19

      2.3.2 *Fraser v. Ontario* .................................................................................... 24

      2.3.3 *Nguyen v. Quebec* .................................................................................. 26

      2.3.4 *Health Services v. British Columbia* ........................................................ 27

      2.3.5 Summary ..................................................................................................... 29

2.4 The Problem of Flawed Institutional Assumptions .................................................. 30

      2.4.1 *Corbiere v. Canada* .................................................................................. 30

      2.4.2 *Charkaoui v. Canada* .............................................................................. 35

      2.4.3 Summary ..................................................................................................... 39

2.5 The Problem of Injury to Charter Rights ............................................................... 40

      2.5.1 *R. v. Demers* ............................................................................................ 41

      2.5.2 *Charkaoui v. Canada* .............................................................................. 43

      2.5.3 Summary ..................................................................................................... 45

2.6 Positive Examples of Suspended Declarations of Invalidity .................................. 45

      2.6.1 Meaningful Interim Relief .......................................................................... 46
1 Introduction and Overview

Suspended declarations of invalidity have become a familiar feature of Canadian constitutional jurisprudence. Having originated as an exceptional remedy, enabling courts to temporarily suspend the effect of a declaration invalidating a law on constitutional grounds, a suspended declaration is now included in the majority of Supreme Court of Canada decisions in which the power of statutorily invalidation is utilized. As the usage of suspended declarations has grown, the justifications for their use have evolved. No longer are they reserved for instances of “emergency”, in which the invalidation of an unconstitutional law would result in imminent danger to the public. Rather, suspended declarations are now used to instantiate a particular conception of the proper roles of legislatures and courts. In that conception the courts primarily serve a declarative function, pronouncing instances in which statutes or regulations deviate from constitutional requirements. The work of devising a precise remedial solution is left to the legislatures.

The prominent, evolved usage of suspended declarations of invalidity has serious implications for Canadian constitutional law. For one thing, suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect. Moreover, on a systemic level, suspended declarations reinforce an operational separation of powers premised on institutional assumptions that are subject to criticism and debate.

My aim in this thesis is to critique the dominant mode in which suspended declarations of invalidity are used by Canada’s courts, and to propose an analytic framework that would render their use less damaging to the rights of individuals and more consistent with Canada’s constitutional principles.

I begin by documenting the origins of suspended declarations of invalidity, emphasizing the principled basis on which they were introduced to Canadian law. I then demonstrate how the recent proliferation of suspended declarations deviates from those principles, and produces a series of interrelated problems – a problem of inadequate judicial reasoning, a problem of flawed institutional assumptions, and a problem of injury to Charter rights. I attempt to explain how these problems arose, and why the original authorities on suspended declarations have come to
be neglected by the courts. This discussion establishes the need for a revised analytic framework governing the issuance of suspended declarations: one that reinforces commitment to the values of Canada’s constitution, but accommodates remedial challenges that may have been unforeseen at the time the original cases on suspended declarations were decided.

The second half of my thesis is devoted to developing such a framework. It rests upon an analogy between suspended declarations of invalidity and the limitation of rights by legislative action. From the perspective of a rights-holding individual, the effects of a declaration temporarily extending the operation of an unconstitutional law will often be equivalent to the outright limitation of a right. Canada’s constitution includes a framework for the limitation of rights recognized in the Canadian Charter of Rights and Freedoms. The essence of this framework is that rights may only be limited in the fulfillment of constitutionally legitimate objectives, narrowly tailored pursuant to a doctrine of proportionality. Constitutional integrity is thus preserved in the face of limiting rights, as both rights and their limitations are justified by common constitutional values. This framework is derived from a “postwar” model of rights protection, formally adopted in Canada with the entrenchment of the Charter. Suspended declarations of invalidity find their governing principles in the same source. Hence the analytical devices employed to verify the legitimate limitation of Charter rights are useful in defining a constitutional role for suspended declarations of invalidity. I thus advocate the adoption of proportionality as a remedial principle governing the issuance of suspended declarations.

The use of proportionality as such a remedial principle involves a re-reading of the foundational cases that gave rise to suspended declarations, notably the Supreme Court’s decisions in Reference re: Manitoba Language Rights, R. v. Swain, and Schachter v. Canada. It focuses attention on the animating principles of those cases and provides an intelligible standard by which the principles may be applied in novel circumstances, rather than confining courts to restrictive “categories” in which suspended declarations may be applied pursuant to the examples of earlier decisions.

---

2 [1985] 1 S.C.R. 721 [“Manitoba Language Reference”].
3 [1991] 1 S.C.R. 933 [“Swain”].
In the final section of my thesis, I draw from the jurisprudence of another country to illustrate how the use of proportionality as a remedial principle would work in practice. A comparison is made to the jurisprudence of South Africa’s Constitutional Court, which frequently employs suspended declarations but makes more express reference to considerations of proportionality in doing so. The South African case law thus provides a model remedial approach that could be adopted in Canada without disturbing the separation of powers or other constitutional commitments.

The promotion of proportionality as a remedial principle is not intended to eliminate suspended declarations of invalidity from Canadian jurisprudence. Proportionality does, however, command a rigorous analytic approach that requires any limitation (or, in this case, suspension) of constitutional rights to be consistent with the principles of a free and democratic society. It maintains the primacy of constitutionalism in the face of impingements on rights. The use of proportionality to guide judicial discretion regarding suspended declarations will thus necessarily result in a more circumspect role for the latter. That role is entirely consistent, however, with the commitments of Canada’s constitutional structure, as it concerns both the protection of individual rights and the institutional roles of legislatures and courts.

2 Origins, Evolution, and Problems Arising from Suspended Declarations of Invalidity

This section explains the nature of suspended declarations of invalidity, and describes their evolution from an exceptional remedy to a routine feature of constitutional adjudication. The result of this evolution is that suspended declarations are no longer moored to their original, governing principles. I attempt to explain why this has occurred, and to demonstrate the adverse implications for individual rights and for the sanctity of constitutional principles.

2.1 Definition and Early Case Law

Canada’s constitutional text makes no provision for suspended declarations of invalidity. Section 52 of the Constitution Act, 1982\(^5\) simply affirms the supremacy of the constitution relative to ordinary statutes: “The Constitution of Canada is the supreme law of Canada, and any

\(^5\) Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” On a plain reading of this provision, the invalidation of any law found to be *ultra vires* the constitution should be immediate. Indeed, this is the approach of Canada’s courts in many cases concerning the invalidity of statutes on *Charter* or division of powers grounds. It was exclusively the approach of the courts prior to the introduction of suspended declarations of invalidity to Canadian law by the Supreme Court in 1985. The latter point is worth emphasizing: in Canada’s history, many judicial decisions of profound consequence – such as the invalidation of legal restrictions on abortion,\(^6\) the elimination of barriers against the public dissemination of controversial religious views,\(^7\) the invalidation of a law enforcing a religiously-grounded day of rest,\(^8\) and the invalidation of evidentiary and procedural barriers to the defence of the criminally accused\(^9\) – were given immediate effect, allowing no grace period for either the legislatures or the public to “adjust”. Many of those decisions, although controversial at the time, are regarded now as hallmarks in the development of a fair and tolerant society. Unlike case law from earlier periods of Canada’s constitutional development, however, immediate declarations of invalidity are no longer the norm. Suspended declarations have emerged as the remedial instrument of choice in most cases involving the invalidation of unconstitutional laws, at least in the jurisprudence of the Supreme Court of Canada.

A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but “suspend” the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court’s declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.\(^{10}\)

---

\(^7\) *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 [“*Saumur*”].  
\(^8\) *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [“*Big M*”].  
\(^9\) See e.g. *R. v. Oakes*, [1986] 1 S.C.R. 103 [“*Oakes*”], striking down a reverse-onus provision of the *Criminal Code* that created a presumption of trafficking upon possession of a certain quantity of narcotics, and overturning the conviction of the accused.  
2.1.1 The Manitoba Language Reference and Early Uses of Suspended Declarations

The origins of suspended declarations lie in the Supreme Court’s 1985 decision in the *Manitoba Language Reference*. Upon finding that the Legislative Assembly of Manitoba had, for ninety-five years, ignored the constitutional requirement of the *Manitoba Act, 1870* that all provincial statutes be enacted in both official languages, the Court feared that an immediate declaration of invalidity would plunge the province into a state of lawlessness. Indeed, the immediate nullification of the offending statutes would not simply deny effect to virtually all provincial laws, but would undermine every state action, agency, public and private right constituted under those laws that could not otherwise be saved by the *de facto* doctrine or by *res judicata*. The result would be a “legal vacuum” inimical to the very rule of law. The Court accordingly fashioned a unique remedy. It held:

The Constitution will not suffer a province without laws. Thus, the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws prior to the date of this judgment, which are not saved by the *de facto* or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the rule of law preserved.

To summarize, the legal situation in the Province of Manitoba is as follows. All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force or effect.

All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing [in both official languages].

Suspended declarations of invalidity were thus introduced to Canadian law for the purpose of averting a constitutional crisis. Recognizing the extremity of this remedial measure, the Court emphasized both the “emergency” circumstances that necessitated it, and circumscribed the duration of the suspended declaration to only the “minimum period necessary” for the legislature

---

11 Supra note 2.
12 33 Vict., c. 3 (Can.).
14 Ibid. at 747.
15 Ibid. at 767.
16 Ibid. at 763.
to correct the constitutional defect. Although the Court did not impose a specific deadline by which the legislature was required to complete the translation and re-enactment of the impugned laws, it retained jurisdiction to hear petitions on the matter within 120 days of judgment.\footnote{Ibid. at 769.} The requirement that all future laws accord with the bilingual language requirements of the \textit{Manitoba Act, 1870} was enforced from the date of judgment.\footnote{Ibid. at 769.}

The usage of suspended declarations by Canada’s courts grew incrementally during the decade following the \textit{Manitoba Language Reference}. For the most part,\footnote{The use of suspended declarations during this period is well-documented elsewhere, and given only a summary treatment here. For a more detailed treatment, see Roach, \textit{Constitutional Remedies, supra} note 10 at paras. 14.1480 – 14.1790.} suspended declarations of invalidity were utilized to avert a harm that would be consequent upon the immediate invalidation of a law, consistent with the \textit{Reference}. Thus, in \textit{Dixon v. British Columbia},\footnote{Ibid. at 60.} the British Columbia Supreme Court invalidated a system of provincial electoral boundaries found to violated the \textit{Charter} right to vote, but suspended its declaration so that a functional electoral system would remain in place in the event of an election. The possibility that, in a system of parliamentary democracy, an election could be called at any time was found to constitute an “emergency” justifying a suspended declaration in line with the \textit{Manitoba Language Reference}.\footnote{R.S.C. 1985, c. C-46.} In \textit{R. v. Swain}, the Supreme Court of Canada issued a six-month suspension of its declaration that then s. 542(2) of the \textit{Criminal Code},\footnote{\textit{Dixon}, supra note 20.} which provided for the automatic detention of persons acquitted of criminal charges on the ground of insanity, violated ss. 7 and 9 of the \textit{Charter}. The Court reasoned that an immediate declaration of invalidity could result in potentially dangerous individuals being released into the public, and as such the suspended declaration was required to preserve public safety while Parliament crafted a more nuanced provision. Importantly, during the period of suspension, the Court imposed an interim regime limiting the detention of individuals to thirty days, subject to \textit{habeas corpus} review by a judge of the Superior Court. As in the \textit{Manitoba Language Reference}, the Court retained jurisdiction to hear applications regarding the extension of the suspension period or modification of the interim regime.\footnote{\textit{Dixon, supra} note 20.}
2.1.2 Introduction of the Schachter Guidelines

The Supreme Court’s next major application of a suspended declaration of invalidity arose in Schachter v. Canada.\textsuperscript{24} Although it will be evident in the review of more recent case law which follows that the courts have largely departed from the principles of Schachter, the case remains the Supreme Court’s most significant doctrinal pronouncement of standards intended to govern suspended declarations. In addition to being an authority on the usage of suspended declarations, Schachter is among the most important decisions in the Supreme Court’s canon on constitutional remedies generally.

Schachter concerned a challenge under s. 15 of the Charter to the federal government’s regime of parental benefits. The regime provided equal benefits to adoptive parents and to biological mothers, but not to biological fathers. The Court found that biological fathers were discriminated against by their exclusion from the regime, in contravention of s. 15 of the Charter. Nevertheless, having found that the impugned provisions could not simply be severed from the legislation or corrected by reading-in, the Court wished to avoid the denial of parental benefits to existing recipients, which would result from the immediate invalidation of the law. The Court accordingly opted to issue a suspended declaration, reasoning that this measure was justified when “striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant.”\textsuperscript{25} Writing for the majority of the Court, Chief Justice Lamer went on to introduce “guidelines” for the appropriate use of suspended declarations. The latter drew from the Court’s earlier decisions in the Manitoba Language Reference and Swain. Lamer C.J. held:

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted [when]:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

\textsuperscript{24} Supra note 4.
\textsuperscript{25} Ibid. at para. 79.
C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.26

Although these guidelines were not intended to be “hard and fast rules”,27 the Court nevertheless stressed that suspended declarations were to remain an exceptional remedy. Lamer C.J.’s reasons warrant quotation at length:

While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the legislature under s. 52.

A delayed declaration is a serious matter from the point of view of enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

Furthermore, the fact that the court’s declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

The decision whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.28

The Court’s circumscription of suspended declarations thus stemmed both from concern for the protection of Charter rights, and from a particular understanding of the jurisdictional role of courts. Regarding the latter, the Court observed that the decision to strike down a legislative provision is taken once a court has established that a constitutional defect cannot be cured by alternate means, such as reading-in, severance or reading-down, without disrupting the intent of

26 Ibid. at para. 85.
27 Ibid. at para. 86.
28 Ibid. at paras. 80-83 [emphasis added].
the legislature and thus overstepping the jurisdiction of the court. Having completed this inquiry, the decision as to whether a declaration of invalidity is to be immediate or suspended should, in the Court’s view, focus entirely on the interests of the public. Implicit in this reasoning is a delineation of the court’s jurisdictional role: the court is bound to respect the lawmaking prerogative of legislatures in selecting among remedial options, but this consideration terminates once a specific remedy, such as striking down, has been chosen. This is because the court will have already determined that striking down is “the least intrusive path” vis-à-vis the legislature’s jurisdiction. Further consideration of the court’s proper institutional role should not bear on the decision to issue a suspended declaration, because this consideration is addressed in the initial choice of remedy.

It is this aspect of the Court’s ruling in Schachter with which the subsequent case law is most at odds, despite the absence of any decision expressly overruling Schachter. As the discussion of cases below will make clear, the courts have tended to disregard the Schachter guidelines, instead justifying suspended declarations in reference to institutional considerations that fly in the face of Chief Justice Lamer’s cautioning remarks. The consequences have been severe for the enforcement of Charter rights: despite the temporary nature of suspended declarations, they nonetheless facilitate the continued infringement of the Charter and thus perpetuate the indignity suffered by Charter claimants. It is not at all clear that the institutional considerations evident in the recent case law justify these harsh effects.

Before turning to consider the more recent case law, one further aspect of the Court’s decision in Schachter warrants discussion. In addition to challenging the federal government’s regime of parental benefits on equality grounds, the plaintiff sought to recover damages for the benefits he felt he had been deprived under the regime. This relief was sought pursuant to s. 24(1) of the Charter, which states: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” The Court rejected this claim, reasoning that Parliament could opt to correct the inequality of the regime by adjusting the levels of parental benefits provided or by removing benefits altogether, hence it could not be held that the claimant was “entitled” to a specific financial recovery: “The remedial choice under s. 24 … rests on an assumption about which position the plaintiff would have been in [had there been no breach of the Charter]. However, I have already … determined that it cannot be assumed that
the legislature would have enacted the benefit to include the plaintiff.” The Court also stated the following with respect to the interaction of remedial powers under s. 52 and s. 24(1):

An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect.

These reasons suggest that an individual claimant should not be afforded a remedy that is at odds with the ultimate remedial disposition of an invalid law. In the case of Schachter, Parliament may have taken advantage of the suspended declaration of invalidity to eliminate its entire legislative regime of parental benefits, thus curing the inequality of excluding any particular group. Should the plaintiff have been awarded financial compensation under the terms of the old regime, he would effectively have received a “retroactive” remedy (that is, a remedy taking effect prior to the actual invalidation of the law) placing him in a better position than others affected by Parliament’s ultimate amendment of the regime. The result would be to cure one instance of inequality by fashioning an additional instance.

It is arguable that this aspect of the Court’s reasons in Schachter is limited to claims of underinclusiveness, where the s. 24(1) remedy sought concerns a monetary payment. Certainly, the Court saw fit to award interim relief in combination with a suspended declaration in Swain, by requiring that detentions reaching thirty days be subject to habeas corpus review. Ironically, given the tendency of subsequent cases to ignore Schachter’s pronouncement on the appropriate usage of suspended declarations, the Court’s declaration that s. 24(1) and s. 52 remedial combinations will be “rare” has been applied dogmatically in certain decisions, causing serious prejudice to Charter rights. In a later section, I consider the courts’ approach in this respect as one instance of injury to Charter rights that manifests in the currently dominant usage of suspended declarations.

---

29 Ibid. at para. 102.
30 Ibid. at para. 89.
31 The Court did not specifically not evoke s. 24(1) in providing this relief, but its power to issue a structural remedy (that is, one commanding the temporary implementation of a specific procedural regime) clearly flows from this provision: supra note 3.
After *Schachter*, and more specifically after Chief Justice Lamer completed his term on the Supreme Court of Canada, the occurrence of suspended declarations of invalidity in Canadian jurisprudence expanded prolifically. No doubt this expansion was owed in part to the increasing exercise of *Charter* rights by individual Canadians, bringing the courts into territory unforeseen at the time of the *Manitoba Language Reference* or even at the time of *Schachter*. It is not clear, however, that the subsequent approaches adopted by the courts enhanced the compatibility of suspended declarations with the principles of human dignity and individual rights upon which the *Charter* is based.

### 2.2 The Expanded Use of Suspended Declarations of Invalidity

The *Charter* fundamentally transformed the exercise of legislative power in Canada. The limits of that power were no longer derived simply from the jurisdictional purview of the respective levels of government, but from the sanctity of inherent rights attaching to individuals. Despite this transformation, however, during the first four years in which the *Charter* took effect – a period that saw momentous decisions such as *Hunter v. Southam*,32 *Big M*,33 *Oakes*,34 and *Morgentaler*35 – the Supreme Court of Canada did not issue a single suspended declaration in a *Charter* case.

Bruce Ryder has documented the growing use of suspended declarations since that time.36 From 1989-93 (a period that included *Swain* and *Schachter*) the Supreme Court issued a suspended declaration in 3 out of 22 *Charter* cases involving the nullification of an unconstitutional law.37 From 1994-98, suspended declarations were issued in 2 out of 12 such cases (17%).38 It was during the period of 1998 to 2003 that things took a major turn, with the Supreme Court issuing a suspended declaration in 8 of 14 nullification cases (57%).39 This trend has not abated. Since the publication of Ryder’s article in 2003, the Supreme Court has invoked the *Charter* to nullify

---

33 *Supra* note 8.
34 *Supra* note 9.
35 *Supra* note 6.
legislation in at least 11 cases, of which (73%) included the issuance of a suspended declaration.

Were the more recent Supreme Court decisions concerning suspended declarations to have remained true to the principles of *Manitoba Language Reference*, *Swain* and *Schachter*, we might infer that the present landscape of Charter litigation involves a high degree of danger to the public interest necessitating the avoidance of precipitous statutory invalidations. It is not clear, however, that the subject matter of recent Charter litigation is so different from its predecessors in this respect. Rather, what has occurred is a reorientation in the objectives motivating courts to utilize suspended declarations, which in turn has spurred their proliferation. As Ryder observes:

> The [Supreme] Court has placed the division of institutional responsibility objective at the fore of its consideration of suspended declarations of invalidity. If the Court chooses to issue an immediate declaration of invalidity, it is the Court’s ruling that establishes the new Charter-compliant legal status quo. A suspended declaration is often preferable, the Court has said, when the law could be brought into compliance with the Charter a number of different ways.

It will be recalled that in *Schachter*, the availability of multiple potential responses by Parliament to the Court’s declaration was considered relevant to the decision to deny s. 24(1) relief. It did not, however, weigh on the Court’s initial selection of remedy (striking down), or on its decision that the remedy should be temporarily suspended. By bringing these considerations into the

---


42. Ryder, *supra* note 36 at 275.
suspended declaration analysis, the courts refocus their inquiry on considerations of institutional role and capacity, and away from the primacy of the public interest.

Several Supreme Court decisions cited by Ryder are indicative of this trend. He notes, for example, that in the dissenting decision in *Egan v. Canada*, Justice Iacobucci “would have changed the definition of spouse in the *Old Age Security Act* to include same-sex couples through a combination of severance and reading in. He would have suspended the coming into force of the new definition for one year because it was an ‘issue of public policy’ on which ‘some latitude ought to be given to Parliament to address the issue and devise its own approach to ensuring that that the spousal allowance be distributed in a manner that conforms with the equality guarantees of the Charter.’” Similarly, writing for the majority in *Eldridge v. British Columbia*, Justice La Forest “held that it was appropriate to suspend the declaration ‘to enable the government to explore its options to formulate an appropriate response.’” Finally, in *Dunmore v. Ontario*, “rather than issuing an immediate declaration of invalidity that would have restored the collective bargaining rights of agricultural workers, Bastarache J. suspended the declaration of invalidity for 18 months to enable the legislature to decide on how it wished to respect those workers’ freedom of association.”

It should be evident that in each of these cases, an immediate declaration of invalidity would have posed no danger to the public, disruption to the rule of law, or deprivation of existing benefits to deserving individuals. It would, rather, have given immediacy to the equality rights of same-sex couples under old age security legislation, to the rights of the deaf to receive intelligible services in B.C. hospitals, and to the rights of agricultural workers to collectively organize. By necessity, such an immediate remedial disposition by the Court would also have altered the status quo “on the ground”, and impacted the range of policy choices available to government had it wished to respond legislatively to the decisions. This potential impact or constraint on government discretion, rather than concern for public harm, was what motivated the use of suspended declarations in these cases.

---

44 Ryder, *supra* note 36 at 278, citing *Egan*, *ibid.* at 623.
46 Ryder, *supra* note 36 at 279, citing *Eldridge*, *ibid.* at para. 96.
48 Ryder, *supra* not 36 at 279, citing *Dunmore*, *ibid.* at para. 66.
The case of *R. v. Guignard* provides a particularly helpful illustration of the Supreme Court’s departure from the original justifications for suspended declarations in the *Manitoba Language Reference* and *Schachter*. The case concerned the interaction between a municipal bylaw targeting visual pollution and an individual’s right under s. 2(b) of the *Charter*. Mr. Guignard had posted a sign on his property containing critical statements about his insurer. He challenged a municipal bylaw that penalized him for posting the sign, alleging infringement of his freedom of expression. The bylaw forbade the display of commercial signs in residential areas, and was enforced against Mr. Guignard on the premise that his sign constituted a form of advertisement that identified a commercial party, his insurer, by name. Speaking for a unanimous Court, Justice Lebel struck down the bylaw for overbreadth. His judgment emphasized the importance of the form of expression represented by Mr. Guignard’s sign:

[C]onsumers … have freedom of expression. This sometimes takes the form of “counter-advertising” to criticize a product or make negative comments about the services supplied. Within the limits prescribed by the legal principles relating to defamation, every consumer enjoys the right. … Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer’s “counter-advertising” assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.

“Counter-advertising” is not merely a reaction to commercial speech, and is not a form of expression derived from commercial speech. Rather, it is a form of expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.

Lebel J. went on to hold that the infringement of Mr. Guignard’s freedom of expression could not be justified under s. 1 of the *Charter*. Although the bylaw’s purpose of controlling visual pollution was legitimate, its effect on Mr. Guignard was arbitrary and disproportionate to the regulatory objective.

Despite finding in Mr. Guignard’s favour, however, the Court declined to strike down the bylaw outright, choosing instead to suspend its declaration of invalidity for six months. Lebel J.’s reasons on this point were brief:

---

49 [2002] 1 S.C.R. 472 (“*Guignard*”).
Given the importance of the zoning by-law in municipal land use planning and the risk of creating acquired rights, during a period in which there was a legal vacuum, which could be set up against a subsequent by-law, [the] relief must be tempered by suspending the declaration of invalidity for a period of six months, to give the municipality an opportunity to revise its by-law. It will no doubt be in the respondent’s interests to re-think the definition of “advertising sign”, in particular, and more clearly identify the real objectives of the bans imposed.\footnote{Ibid. at para. 32.}

It is rather an understatement to observe that the use of the term “legal vacuum” in this context strays considerably from its meaning in the \textit{Manitoba Language Reference}. The Court in \textit{Guignard} made no reference to the prior case law on suspended declarations or to the categories articulated in \textit{Schachter}. Clearly, the immediate invalidation of the bylaw would not have given rise to any of the concerning effects which those categories embrace. The Court nevertheless offered a vague assertion that the control of visual pollution was “important”, and that its remedy should avoid establishing acquired rights that might hamper the objectives of the municipality. This would suggest that the Court’s motivation in suspending its declaration was to assist the municipality in fashioning its own long-term remedial response to the Court’s ruling, free from the inconvenience of the immediate enforcement of s. 2(d) rights. Yet the Court’s reasons provide no account of the specific obstacles that might be created by an immediate declaration of invalidity, or more importantly, of why the prevention of those obstacles was of sufficient importance to justify the continued, temporary suspension of a \textit{Charter} right.\footnote{A vague reference to the possibility of “acquired rights” answers neither of these questions.} Noting this aspect of the decision, Ryder observes: “It now appears that almost any inconvenience associated with an immediate declaration of invalidity might lead the Court to temporarily suspend the operation of the \textit{Charter}.”\footnote{Ryder, \textit{supra} note 36 at 271.}

\textit{Guignard} is admittedly an easy target for criticism. Not all of the Canadian jurisprudence so clearly departs from the principles of \textit{Schachter} without stating a stronger basis for issuing a suspended declaration. Moreover, not all commentators on the expanded usage of suspended declarations view it in an entirely negative light. Sujit Chouhdry and Kent Roach suggest that

\begin{quote}
[The] unannounced, yet clear shift in the rationale for suspended declarations of invalidity is to be welcomed, albeit with some cautions and caveats. In our view, it fits into a conception of institutional relationships under the Constitution in which both legislatures and courts take joint responsibility for ensuring compliance with constitutional norms. The suspended declaration of invalidity
\end{quote}
can be viewed as a form of legislative remand, whereby unconstitutional legislation is sent back for reconsideration in light of the court’s judgment. At the same time, however, the court does not abdicate the responsibilities of judicial review. It formulates a remedy that will come into effect should the legislature not enact constitutional legislation by the court’s deadline.55

Similarly, Peter Hogg, Allison Bushell Thornton et al. view the expanded use of suspended declarations as sitting well with their “dialogue theory” of the interaction between courts and legislatures.56 That theory responds to critiques of so-called “judicial activism” by pointing to the features of Canadian constitutionalism that enable ready legislative responses to and constraints upon judicial decisions.57 The authors state the following with respect to suspended declarations:

We conclude that the idea of dialogue has been influential in guiding the courts in their increasing use of suspended declarations of invalidity. A purpose of the suspension, and often the only purpose, is to enable the legislature to respond directly to a holding of invalidity. The court recognizes that a range of corrective laws is possible, and that the legislature is better placed than the court to select the appropriate remedy. Although an unconstitutional law is maintained in force for a short time, the Charter is still respected, because if no new law is enacted by the time the period of suspension ends, the declaration of invalidity takes effect. If a new law is enacted in response to the holding of invalidity, that law must comply with the Charter.58

Thus, while commentators take different views on the desirability of the courts’ evolved approach to suspended declarations, there is general consensus that the dominant, contemporary approach is motivated primarily by institutional considerations. That is, Ryder, Hogg et al., Choudhry and Roach each observe a transformation in which the courts have moved away from the categories in Schachter, choosing instead to enforce a particular conception of institutional role: that it is the role of the legislature to craft remedial solutions to a judicial declaration of invalidity, and that the courts should enable the legislature in this task by using suspended declarations as an instrument of remand.

Assumptions about the respective roles of courts and legislatures must be approached with a careful, critical eye. It is one thing for courts to utilize suspended declarations when they feel genuinely unable to devise an appropriate remedial solution to a constitutional infraction, owing, for example, to their lack of policy expertise or resources. In Dixon, McLachlin C.J.B.C. (as she then was) noted the propriety of allowing the legislature to determine the precise features of a new system of electoral boundaries; indeed, this consideration supplemented her concern that an immediate declaration of invalidity could precipitate an electoral crisis, and justified the issuance of a suspended declaration. Remand of remedial issues to the legislature in such a case, although departing from the strict categories of Schachter, may nevertheless honour the public interest to the extent that the latter is served by an optimal “institutional division of labour.” The same may be true in cases where the policy implications flowing from a declaration of invalidity are exceedingly complex, demanding administrative resources and expertise that exceed the capacities of the courts. This has been the case with some decisions concerning Aboriginal rights, where the judicial enforcement of certain rights can have ripple effects upon others that are difficult to reconcile without detailed deliberation or consultation with the communities affected. In such instances, a suspended declaration may serve the dual purpose of insulating certain rights against adverse effects while facilitating the legislature in a complex policy task.

The considerations animating such cases differ, however, from the simple assumption that legislatures possess a constitutional prerogative to devise the remedy following a declaration by the courts, indeed that it would be inappropriate for courts to impose immediate remedies themselves. The latter assumption mirrors the jurisprudence of some countries, such as Great Britain, where courts are limited to providing only declaratory relief in matters of constitutional rights. Canada has adopted an expressly different constitutional structure. It is important to stress that immediate declarations of invalidity were, until recently, a familiar feature of Canadian constitutional jurisprudence, both in respect of Charter litigation and the division of powers cases that preceded it. Unless the very propriety of the courts’ use of this power is to be

59 Supra note 20.
60 This language is borrowed from Roach, Constitutional Remedies, supra note 10 at para. 14.1650.
61 See my discussion of the Supreme Court’s decisions in Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 [“Corbiere”] and McIvor v. Canada (Registrar of Indian and Northern Affairs) (2009), 206 D.L.R. (4th) 193 [“McIvor”], infra.
overturned – a constitutional shift that would warrant considerable moment – then the remand of remedial discretion to the legislature should require specific justification. That is, there should be reasons relating to the particular facts of each case explaining why a suspended declaration is justified as a tool of remand.

In the following sections, I update the work of Ryder by reviewing the usage of suspended declarations in Supreme Court jurisprudence since 2003. I also consider a limited number of trial and appellate court decisions in which suspended declarations have been utilized. This review suggests that serious problems persist in the use of suspended declarations. The first type of problem relates directly to the concern outlined above: that courts evoke an institutional assumption commanding remand of remedial discretion to the legislatures, without providing a genuine explanation as to why the assumption is warranted. I refer to this as a problem of “inadequate reasoning”, owing to the failure of the courts to provide real, satisfactory reasons conveying the merits of remand. The second type of problem is closely related to the first: it concerns cases in which the courts are more successful in stating substantive reasons for remand, but where those reasons prove to be defective. I refer to these as cases of “flawed institutional assumptions”. Finally, while all misuses of suspended declarations offend constitutional rights by enabling their unwarranted temporary suspension, in certain cases this offence is especially pronounced. I refer to these as cases of “injury to Charter rights”, which include cases in which suspended declarations may actually be justified, but where the courts have failed to take available steps to minimize their harsh consequences.

It should be borne in mind that the above problems are interrelated, and do not describe distinct compartments. A case that suffers from inadequate reasoning may also display flawed institutional assumptions and fail to ensure appropriate protection for Charter rights. Although the cases considered below are presented under headings for which they are particularly illustrative, I also show their linkages to related problems in the use of suspended declarations.

---

62 One Supreme Court decision included in my review, Corbiere, precedes 2003. Although decided in 1999 and mentioned in Ryder’s survey of the pre-2003 case law, I have given particular attention to this case because it is uniquely illustrative of the problem of flawed institutional assumptions, discussed below.
2.3 The Problem of Inadequate Reasoning

The absence of adequate reasons justifying the use of a suspended declaration is the most pervasive problem evident in recent case law. The problem has been especially pronounced in the jurisprudence of the Supreme Court, although it is not confined to decisions at that level. The following cases demonstrate the problem.

2.3.1 Figueroa v. Canada

The problem of inadequate reasoning is well-illustrated by the Supreme Court’s 2003 decision in Figueroa v. Canada. Figueroa concerned a challenge to provisions of the Canada Elections Act which limited “registered party” status to political parties fielding candidates in at least 50 federal ridings. Parties not meeting this definition were denied certain benefits, including the right to issue tax receipts for political donations, the right of candidates to transfer unspent election funds to their parties (rather than remitting the funds to the federal government), and the right of candidates to list party affiliation next to their names on election ballots. The applicant, the leader of the Communist Party of Canada, challenged the 50 candidate threshold on the basis that it infringed s. 3 of the Charter, which provides: “Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” A majority of the Court agreed, finding that the barriers which the threshold imposed against electoral participation by marginal parties were at odds with the Charter:

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

The Court went on to systematically dismiss each of the federal government’s attempts to justify the threshold under s. 1, finding that in each case, no rational connection lay between the

---

63 Supra note 40.
65 Figueroa, supra note 40 at para. 8.
66 Ibid. at para. 58.
threshold and the s. 1 arguments proffered by the Crown. These were: (i) that the threshold improved the effectiveness of the political process (by ensuring cost-efficacy of public financing of political parties); (ii) that the threshold protected the integrity of the electoral financing regime; and (iii) that the threshold ensured the electoral process was able to deliver viable outcomes (by favouring majority governments). The stridency with which Justice Iacobucci dismissed these arguments warrants quotation at length. Concerning the first argument, he held:

I agree that legislation that seeks to encourage individual citizens to donate funds to political parties advances a pressing and substantive objective. However, it is not the validity of legislation that encourages individual citizens to donate funds to political parties that is in question. Legislation that prevents certain political parties from issuing tax receipts or retaining unspent election funds does not encourage individual citizens to donate funds to political parties, but, rather, actively discourages the members and supporters of those parties from making such contributions. There is no connection whatsoever between the 50-candidate threshold and the objective of improving the electoral process through the public financing of political parties.

In respect of the restriction on the right of candidates to transfer unspent election funds to the party and to list their party affiliation on the ballot papers, it is impossible to discern any connection whatsoever between the threshold requirement and the objective of ensuring the cost-efficiency of public financing. In neither instance is the benefit being made for the purpose of encouraging individual citizens to donate funds to political parties.

At first glance, it might appear that the restriction on the right of political parties to issue tax receipts for donations received outside the election period is rationally connected to the objective of ensuring the cost-efficiency of the public financing regime. After all, each tax credit issued does reduce the country’s tax revenues. Nonetheless, it is important to note that the threshold requirement has no impact whatsoever upon the potential overall burden of the tax credit scheme on the public purse. Even with the threshold in place, it is still possible for every citizen to obtain the full $500 tax credit that is available in respect of donations to political parties. … The connection between legislation that has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective of ensuring the cost-efficiency of the tax credit scheme is tenuous at best. Moreover, the government has provided no evidence to substantiate its claim that the threshold actually improves the cost-efficiency of the tax credit scheme. It is thus my conclusion that the rational connection test has not been satisfied.

Concerning the second argument:

---

67 Ibid. at para. 61.
68 Ibid. at paras. 64-68 [emphasis added].
[T]here is no merit whatsoever to the claim that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. … [A] political party need not nominate candidates in 50 electoral districts in order to play a meaningful role in the electoral process.

…

The government has also failed to demonstrate that the threshold prevents third parties or lobby groups from nominating candidates for the sole purpose of obtaining the right to issue tax receipts for donations received outside the campaign period. … [T]here are a substantial number of obligations that a registered party must comply with, such as submitting audited financial statements, audited financial transactions returns and audited election expenses returns. Absent evidence indicating that these requirements are not sufficient to prevent third parties from seeking registered party status for the sole purpose of abusing the tax credit system, there is no basis for concluding that the 50-candidate threshold actually advances the objective of preventing the misuse of the electoral financing regime.69

Finally, Justice Iacobucci delivered his most ardent rebuke in response to the third argument:

It is the respondent’s submission that majority governments provide more effective governance than governments that consist of coalitions between or among various political parties. …

Articulating the objective of the legislation in this manner is extremely problematic. In order to advance this objective, the legislation must interfere with the right of individual citizens to play a meaningful role in the electoral process to such an extent that it increases the likelihood that candidates nominated by national parties will be elected, thereby decreasing the likelihood that candidates nominated by regional or marginal parties will be elected. Legislation enacted for the express purpose of decreasing the likelihood that a certain class of candidates will be elected is not only discordant with the principles integral to a free and democratic society, but, rather, is the antithesis of those principles. Consequently, it is difficult to accept that the objective of ensuring that the electoral process results in a particular outcome is sufficiently pressing and substantial to warrant the violation of a Charter right.70

The Court went on to hold that even if the encouragement of majority governments could be recognized as a pressing and substantial objective, the government had failed to provide any evidence establishing a rational connection between that objective and the 50-candidate threshold.

That the federal government failed to establish a rational connection between the 50-candidate threshold and its justificatory arguments under s. 1 – indeed, that it failed even to tender a minimal evidentiary record in support of those arguments – is highly significant to the remedial

69 Ibid. at paras. 75-76 [emphasis added].
70 Ibid. at paras. 79-80 [emphasis added].
disposition of the case. One would think that a legislative provision found, after exhaustive reasons, to make no rational contribution to any legitimate purpose, could be struck down immediately without fear of adverse consequence. Yet this was not the result of the Court’s ruling. Instead, the Court found the impugned provisions to be constitutionally invalid, but held: “The declaration of unconstitutionality is suspended for twelve months in order to enable the government to comply with these reasons.”

No additional reasons were given in support of the suspended declaration.

There are several possible explanations for the Court’s decision to suspend its declaration of invalidity in *Figueroa*. For one thing, the federal government had already begun the process of amending the impugned legislation to impose only a 12-candidate threshold. Without deciding upon the legitimacy of this amendment, the Court may have wished to allow the legislative process to run its course. This would have been the de facto result, however, even if the Court had given its decision immediate effect. The only difference would have been that prior to the enactment of the revised law, no candidate threshold would have been in place. To understand why the Court may have wanted to avoid this result, we must question what the implications could have been of eliminating the candidate threshold altogether. The Court alludes briefly in its reasons to the fact that the matters complained of by the applicant – the inability to issue tax receipts, transfer excess funds to the party, or list party affiliation on ballots – were not the only consequences of being denied “registered party” status. Registered parties also benefited from “the right to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote.”

The immediate invalidation of the candidate-threshold would have enabled all newly-qualified registered parties to access these benefits that were not the subject of the litigation, and thus not included in the Court’s analysis. Perhaps the Court felt that some harm could lie in this effect. It is also possible that the Court was concerned for possible unfairness that might result from immediately enabling newly-qualified parties to obtain registered status, only to have it taken away by future legislative amendment; or that the potential for such unfairness might create an undue political obstacle to future legislative action. The problem is that none of these

72 *Ibid.* at para. 3.
explanations were given, let alone given in a manner that stated why they were of such importance to justify continued suspension of a constitutional right.

The concurring reasons of Justice Lebel may shed some light on why the Court opted to issue a suspended declaration. While Lebel J. agreed with the disposition of the case, he took issue with aspects of Iacobucci J.’s reasoning that he perceived to overstep the judicial sphere:

In suggesting that the motive behind the legislation may itself be illegitimate, the Court risks unduly expanding the scope of judicial review of the design of the electoral system. I would sound a note of caution against blurring the distinction between the respective roles of the Court and the legislature in dealing with a question which, while it certainly has legal dimensions, is also profoundly political. Within certain boundaries, which it is the responsibility of the judiciary to delineate, balancing competing democratic values and choosing between the various species of democratic electoral systems primarily fall within the domain of political debate and of the legislative process. These boundaries should be viewed as fairly broad. They allow a good deal of latitude within which the people, through their elected lawmakers, may choose rules and institutions that enhance certain aspects of the democratic right to meaningful participation and to diminish others.

The Charter mandates that whatever system is adapted must respect the right of each individual to meaningful participation. But we should be circumspect about defining that right too inflexibly, lest legitimate political debate on the issues be impeded. The possibility of dialogue between the courts and legislatures on the meaning of the right to vote may be unduly constrained if this Court declares that certain values, even though they have long been part of our political tradition, must be excluded from consideration in the interpretation and application of s. 3 of the Charter.73

In the face of these cautioning remarks, and given the otherwise robust nature of the majority’s judgment, the Court may simply have wished to moderate the tenor of its decision by issuing a suspended declaration (lest it be accused of engaging in activism over a politically contentious issue).

In sum, we cannot know why the Court issued a suspended declaration in Figueroa, because the Court did not tell us. The desire to give the government “time to comply” with the judgment is no explanation, because compliance would have been the de facto result of immediate invalidation – the government would have been left with a constitutionally legitimate statute, the invalid portion having been struck down. Instead, the government was given license to maintain unconstitutional restrictions against the Charter rights of citizens for a further year. This result is

73 Ibid. at paras. 182-83.
not trifling. It meant that during the suspension period (which, as it turned out, included a federal election, leading to the formation of a minority government no less!) marginal political groups and the citizens who supported them were deprived of their full rights to participate in the political process. At worst, Figueroa contributed to the continued suppression of those rights without legitimate basis. At best, the Court failed to explain how that suppression was justified.

2.3.2  **Fraser v. Ontario**

The Court of Appeal for Ontario’s 2008 judgment in *Fraser v. Ontario*\(^7^4\) suffers from similar inadequacy. *Fraser* concerned a challenge to Ontario’s *Agricultural Employees Protection Act, 2002*\(^7^5\) (“AEPA”), which was enacted following the Supreme Court’s decision in *Dunmore* affirming the right of agricultural workers to collectively organize. The AEPA provided for the right of agricultural workers to form employees’ associations, to assemble, and to make representations to their employers through the employees’ associations.\(^7^6\) It also prohibited employers from interfering with such activity.\(^7^7\) It did not, however, impose an obligation on employers to bargain with employees’ associations.\(^7^8\) Relying on the Supreme Court’s recent decision in *Health Services & Support-Facilities Collective Bargaining Association v. British Columbia*,\(^7^9\) where it was held that s. 2(d) of the Charter embraced the right to collectively bargain, the applicants in *Fraser* claimed that their collective bargaining rights had been infringed. The Court of Appeal agreed with the applicants, and struck down the AEPA for violating s. 2(d). However, the court also suspended its declaration, with Chief Justice Winkler holding:

> I would suspend this declaration of invalidity for 12 months from the date of these reasons to permit the government time to determine the method of statutorily protecting the rights of agricultural workers to engage in meaningful collective bargaining. This is not a situation where there is only one appropriate response to this decision. It is up to the legislature to assess the options, taking into account constitutional, labour relations and other factors, and design a constitutionally accepted model. The declaration of invalidity is suspended in recognition that such a process takes time.\(^8^0\)

\(^7^4\) *Fraser v. Ontario (A.G.),* 92 O.R. (3d) 481 ["Fraser"].
\(^7^5\) S.O. 2002, c. 16.
\(^7^6\) *Fraser,* supra note 74 at para. 23.
\(^7^7\) *Ibid.*
\(^7^8\) *Ibid.* at para. 28.
\(^7^9\) *Supra* note 40.
\(^8^0\) *Fraser,* supra note 74 at para. 139.
The court’s reasons for issuing a suspended declaration were thus more fulsome than in Figueroa: the court acknowledged that several options existed to cure the constitutional defect, that “constitutional, labour relations, and other factors” weighed on those choices and, by implication, that the legislature was better suited than the court to navigate the options. Furthermore, the court acknowledged that this process would “take time”, and we may infer that the suspended declaration was intended to assist the legislature in taking the time it needed without obstacle or disruption.

This is not an entirely satisfying explanation, however. The legislature can always choose among remedial options by enacting a new statute even following an immediate declaration of invalidity. Giving immediacy to the rights of agricultural workers to collectively organize would not have changed this fact, although it would have changed the political and social landscape in which the legislature was forced to operate. These changes – the consequences of an immediate declaration of invalidity – would have been the focus of a complete explanation as to why a suspended declaration was justified. We know from the s. 1 analysis in Fraser that although the AEPA had a pressing and substantial objective – the protection of the family farm, and accommodation of the unique economic characteristics of farm enterprises81 – the impugned provision bore no rational connection to this objective. As such, its temporary preservation cannot be justified in reference to the objectives of the Act: no injury can flow to the purported benefactors of a provision when the provision does not rationally serve their interests to begin with.

Rather, we must look for some other danger: that the immediate invalidation might have created de facto collective bargaining rights, for example, which exceeded what the constitution required and created impediments to a more nuanced response by the legislature. A complete justification for the suspended declaration would have defined this concern, and then explained why it was of sufficient importance to justify continued suspension of the Charter right. Instead, the court simply stated a proposition that it is “up to the legislature” to correct the defective legislation, without attempting to justify that proposition in reference to the particular facts of the case. As with Figueroa, it is discomfiting to think that Charter rights – in this case, the rights of

81 Ibid. at 122.
particularly vulnerable people – would be withheld for one year based on an assumption when we do not know whether the assumption is accurate or justified.

2.3.3  **Nguyen v. Quebec**

The Supreme Court’s 2009 decision in *Nguyen v. Quebec* provides a further illustration of inadequate reasoning. *Nguyen* concerned a challenge under s. 23(2) of the *Charter* to Quebec’s *Charter of the French Language*. The latter statute is intended to promote the French language in Quebec, and includes provisions that ensure the majority of Quebec’s residents receive public education in French-language schools. The statute nevertheless contains exceptions permitting the attendance of English-language schools for individuals so entitled under s. 23(2) of the *Charter*. In 2002, the statute was amended to address the problem of parents temporarily enrolling their children in unsubsidized, private English-language schools in order to benefit from an exemption allowing those children to then transfer into the public, English-language school system. The amended provisions stipulated that time spent in unsubsidized private schools would not be taken into account in assessing eligibility for public, English-language education, nor would time spent receiving English-language education pursuant to special authorization by the province (for example, in cases of learning disability). The Court upheld the applicants’ objections to these provisions, finding that the latter violated s. 23(2). While the Court recognized that the promotion of the French language was a legitimate objective which might justify limitations to *Charter* rights, the impugned provisions went too far by posing an absolute prohibition that failed to account for the unique educational needs of individual children:

> Bill 104 rules out any consideration of a child’s educational pathway in an unsubsidized English-language private school. No account whatsoever is to be taken of the duration and circumstances of that pathway or of the nature and history of the educational institution in which the child was enrolled. The prohibition against taking this into account is total and absolute. … [T]his legislative response seems excessive in relation to the seriousness of the identified problem and its impact on school clientele and, potentially, on the situation of the French language in Quebec.

---

82 Supra note 40.
83 R.S.Q., c. C-11.
84 *Nguyen, supra* note 40 at para. 42.
The Court nevertheless suspended its declaration of invalidity for one year “because of the difficulties this declaration of invalidity may entail” and “to enable Quebec’s National Assembly to review the legislation.”

As with Figueroa and Fraser, the Court in Nguyen stated a proposition rather than providing an explanation. It alluded to “difficulties” that would arise upon an immediate invalidation, but did not define what those difficulties were, how the suspended declaration averted them, and why their aversion was of sufficient importance to displace immediate vindication of a constitutional right. While the Court expressly acknowledged “the dangers that the unlimited expansion of [unsubsidized private schools] could represent for the objectives of preserving and promoting the French language in Quebec”, it also found that a relatively small number of Quebec residents were actually taking advantage of this loophole to secure a place for their children in English-language public schools. Thus, it is not at all clear that the provision needed to be preserved as an interim safeguard while the legislature crafted a replacement – a justification that would have been cognizable to the Schachter guidelines. We are left to speculate what other harm might have resulted from the immediate invalidation so as to warrant its suspension.

2.3.4 Health Services v. British Columbia

Finally, the problem of inadequate reasoning is evident in the Supreme Court’s decision in Health Services Support – Facilities Subsector Bargaining Association v. British Columbia. Health Services concerned a challenge to the Health and Social Services Delivery Improvement Act, a statute introduced by the British Columbia government in 2002 to control the escalating cost of health care delivery in the province. The Act enabled the managers of health care institutions to reorganize their labour force using measures that might otherwise have been impeded by collective agreements and bargaining rights. The applicants, representing certain health sector employees, charged that the legislation violated their members’ rights under s. 2(d) of the Charter. The Court supported this allegation, finding that the Act prohibited the inclusion.

---

85 Ibid. at para. 46.
86 Ibid.
87 Ibid. at para. 43.
88 Ibid. at para. 42.
89 Supra note 40.
90 S.B.C. 2002, c. 2.
of certain employment matters in future collective agreements, and thus infringed the applicants’ rights to collectively bargain. The Court held:

It is true that the government was facing a situation of exigency. It was determined to come to grips with the spiraling cost of health care in British Columbia. This determination was fueled by the laudable desire to provide quality health services to the people of British Columbia. Concerns such as these must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(d) obligation to preserve the processes of good faith negotiation and consultation with unions.

The difficulty, however, is that the measures adopted by the government constitute a virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation. The absolute prohibition on contracting out in s. 6(2), as discussed, eliminates any possibility of consultation. Section 6(4) puts the nail in the coffin of consultation by making void any provision in a collective agreement imposing a requirement to consult before contracting out. Section 9, in like fashion, effectively precludes consultation with the union prior to laying off or bumping.

We conclude that ss. 6(2), 6(4) and 9 of the legislation constitute a significant interference with the right to bargain collectively and hence violate s. 2(d) of the Charter.91

The Court nevertheless suspended its declaration of invalidity in the case, providing only the following brief reasons: “[W]e suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision.”92

As with the cases considered above, the Court in Health Services failed to articulate what the “repercussions” of its declaration of invalidity might be, why the legislature required insulation against those repercussions, and why the latter should be given greater priority than the immediate enforcement of a Charter right. Admittedly, the legislation was enacted to address “exigent circumstances” in controlling the costs of provincial health care. It is important to note, however, that the legislation was enacted to address that concern in 2002, and had already taken effect for five years by the time of the Court’s decision in 2007. Although the Court acknowledged that it was “logical” to assume that the Act contributed to diminishing health care costs, the evidentiary record tendered by the government was inconclusive on this point.93 Accordingly, there was no basis to conclude that the immediate invalidation of the Act would have caused harm to the public by way of precipitating a funding crisis in health care. It is more

---

91 Health Services, supra note 40 at paras. 134-36.
92 Ibid. at para. 168.
93 Ibid. at para. 149.
plausible that the situation would have simply reverted to the pre-2002 status quo (although improved somewhat, one assumes, by the fiscal savings enabled by enforcing the Act from 2002-2007). Thus, it would appear that an apprehension of public harm (at least in the form of a funding crisis in healthcare) was not the “repercussion” the Court sought to avoid in issuing its suspended declaration. We are left to speculate as to what other potential consequences the suspended declaration was intended to avert.

2.3.5 Summary

When courts issue suspended declarations on the basis that “it is up to the legislature” to cure a constitutional defect (Fraser), or “to enable the government to comply” with a decision (Figueroa), or to “enable the National Assembly to review the legislation” (Nguyen), or to “allow the government to address the repercussions of this decision” (Health Services), fundamental questions are left unanswered. Each of these statements conveys the implicit proposition that the immediate invalidation of a law is less desirable than remand of remedial decision-making to the legislature. None of them, however, explain why. None of them explain why the scenario that would result from an immediate invalidation of the impugned law is undesirable, either in terms of an intelligible harm to the public, or in terms of an obstacle that would be created to legislative discretion in crafting a reply. Moreover, none of them explain why it should be left to the legislature, rather than the courts, to devise the remedial solution to a declaration of invalidity. Finally, none of them explain why the benefits secured by a suspended declaration should be given greater priority than the immediate vindication of Charter rights.

One suspects, reading the preceding cases, that the courts may not have thought deeply about the justifications of remand; that rather, the courts acted on a simple presumption about their own institutional limits and the relative jurisdiction and capacity of the legislatures. In Part 3, I consider the core precepts of Canada’s constitutional model to suggest that the courts’ apparent presumption misconceives those precepts. I note for present purposes that at the very least, the cases mark a serious, unacknowledged departure from the principles of Schachter, Swain and the Manitoba Language reference, which required the courts to justify suspended declarations in reference to an intelligible public harm that would result from immediate invalidation. Perhaps more significantly, they mark a departure from the status quo that prevailed in Canada until the past decade: that a law found to be in violation of the constitution immediately loses its force and
effect. Given the significance of this transformation, one would expect the courts to provide sound, articulate reasons justifying their evolved approach. Yet the courts have failed to do so.

2.4 The Problem of Flawed Institutional Assumptions

The preceding cases suggest the emergence of a widely-held judicial presumption in favour of delegating remedial decision-making to the legislatures, using the suspended declaration as an instrument of remand. I have argued that the cases failed to offer reasons explaining, let alone justifying, such a presumption. There are, however, cases in which the basis of remand is made more explicit; where the courts convey more expressly what they consider to be the limits of their institutional role, the potential consequences of an immediate statutory invalidation, and the benefits secured by furbishing a suspended declaration. These reasons enable a richer evaluation of the courts’ decisions. However, as the discussion below demonstrates, even with improved reasoning, the courts are prone to flawed institutional assumptions that can undermine the very purpose of suspended declarations.

2.4.1 Corbiere v. Canada

The paramount example of a court issuing a suspended declaration based on express institutional considerations is the Supreme Court’s decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs).* Corbiere concerned a challenge to then s. 77(1) of the *Indian Act,* which restricted the right to vote in First Nations band elections to band members who were “ordinarily resident” on a reserve. The applicants were members of the Batchewana Band who lived off reserve, and claimed that their exclusion from Band elections violated their right to equality under s. 15 of the Charter. The Supreme Court found in favour of the applicants, holding that off-reserve Band members constituted a group analogous to those listed under s. 15, that their exclusion from Band elections violated their right to equality, and that the criteria of residency arbitrarily limited the applicants’ rights based upon a characteristic central to their identities.

The remedial disposition of the case, however, presented the Court with a challenge. The applicants in *Corbiere* sought immediate vindication of their *Charter* rights, either via the

---

94 *Supra* note 61.
95 R.S., 1985, c. I-5.
invalidation of the impugned legislation or the issuance of a constitutional exemption under s. 24(1). The Court’s finding that s. 77(1) of the *Indian Act* violated the *Charter* affected all First Nations bands, not just the band of which the applicants were members, and accordingly the invalidation of the section would have far-reaching effects. One concern presented to the Court was that s. 35(1) of the *Constitution Act, 1982*, which affirms the aboriginal and treaty rights of aboriginal peoples, might protect the practices of certain bands in establishing election criteria based on residency. For this reason, the Federal Court of Appeal had granted the applicants a constitutional exemption, wishing to avoid the disturbance of possible s. 35(1) rights by the invalidation of the impugned law. The Supreme Court rejected this approach, holding that the constitutional illegitimacy of s. 77(1) of the *Indian Act* and the assertion of rights under s. 35(1) of the constitution were separate issues.\(^\text{96}\) The Court was specifically concerned that the claimants of equality rights not be forced to bring separate *Charter* actions in respect of every aboriginal band in Canada.\(^\text{97}\) Nevertheless, the Court also faced the prospect that the outright invalidation of s. 77(1) would create a new, de facto regime of voting that might not be suited to the characteristics of every First Nations community. Finally, the Court was concerned that a more nuanced remedial approach, such as “reading-in” a constitutionally legitimate application of s. 77(1), would engage the Court in policy questions outside its jurisdiction and talents.

In response to these concerns, the Court opted to utilize a suspended declaration. It struck down s. 77(1) of the *Indian Act*, but suspended the effect of its declaration for 18 months to enable Parliament to “consult” with First Nations communities in devising a new legislative scheme. The reasons of Justice L’Heureux Dubé gave detailed attention issues of institutional capacity, evoking the metaphor of “dialogue” between the respective branches of government:

> In my opinion, it would be inappropriate for this Court to “read in” to the Act voting rights for non-residents so that they would be voters for certain purposes but not for others. This would involve considerable detailed changes to the legislative scheme. Designing such a detailed scheme, and choosing among various possible options, is not an appropriate role for the Court in this case.

> There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. … The principle of democracy underlies the Constitution and the

\(^{96}\) *Corbiere, supra* note 61 at para. 112.

\(^{97}\) *Ibid.*
Charter, and is one of the important factors guiding the exercise of a court’s remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. In P.W. Hogg and A.A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Things After All)” … the authors characterize judicial review as a “dialogue” between courts and legislatures. The remedies granted under the Charter should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process. …

The above principles suggest, in my view, that the appropriate remedy is a declaration that the words “and is ordinarily resident on the reserve” in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months. The suspension is longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of different groups affected.98

The Court went on to reject the applicants’ request that they be granted an immediate constitutional exemption to mitigate the effect of a suspended declaration on their rights. In the Court’s view, the granting of an exemption in combination with a suspended declaration would convolute the voting practices of the Batchewana Band since Parliament might enact a replacement to s. 77(1) that deviated from the granting of full voting rights to off-reserve members (the result that would be achieved by a constitutional exemption).99

The Court acknowledged that the issuance of a suspended declaration was a “serious matter” which enabled an unconstitutional state of affairs to continue for a temporary period.100 but observed that any concerns for the violation of individual equality rights during the suspension period could be raised by fresh litigation.101 This aspect of the Court’s decision is somewhat puzzling, given its earlier expressed desire to avoid further litigation that might be prompted by granting a constitutional exemption without a concurrent declaration of invalidity.

Nevertheless, on its face Corbiere is a different type of case than those suffering from the problem of inadequate reasoning. Here, the Court envisioned that a complex remedial solution was needed to address the problem of accommodating voting rights of off-reserve band members, taking account of the characteristics of different communities and the interaction of

---

98 Ibid. at paras. 115-118 [citations omitted].
99 Ibid. at para. 124.
100 Ibid. at 119.
101 Ibid. at 121.
Charter and aboriginal rights. Simply striking down the impugned legislation would not produce the nuanced solution that the Court felt was required, yet attempting such a solution by reading-in or otherwise manipulating the legislative scheme would engage the Court in questions of policy that it felt exceeded its jurisdictional limits. The suspended declaration was used to support a process of deliberation that the Court felt the legislature needed to undertake – a process that could be frustrated by a new legal status quo should the Court give immediate effect to its declaration of invalidity. By recognizing the gravity of the suspended declaration, the Court made clear that it considered the beneficial effects of suspension to outweigh its adverse consequences. The Court’s reasons in Corbiere were thus ultimately guided more by the pursuit of an ideal remedy, a value that resonates with the public interest, than by considerations of deference to the legislature.

Unfortunately, the actual results of remand to the legislature did not accord with the Court’s intentions. As Kent Roach observes, more than seven months passed before the government announced a response to the decision, prompting the Assembly of First Nations (AFN) to declare that “[the government] took 7 months out of what is already a tight time-frame to implement a national decision with far-reaching implications. This is unfortunate, given the AFN presented an action plan less than a month after the decision came down. After this long delay, we see the resources are minimal both in terms of time and funding.” The response announced by the federal government involved two stages, the first of which comprised a series of consultations with four national aboriginal groups (who were in turn expected to consult their national membership), and the second involving the introduction of new regulations allowing off-reserve band members to vote in band elections by mail-in ballot, taking effect upon the expiry of the 18 month period set by the Court. The federal government also assisted in providing training to certain bands to implement the revised election procedure. Notably, the federal government did not engage in a more complex consultation process concerning the s. 35(1) issues raised

---

102 For example, if the affirmation of universal voting rights for all off-reserve band members in every aboriginal community subsequently prevented (for reasons of fairness or political resistance) the modification of those voting rights to accord with the aboriginal rights of specific communities.
104 Roach, “Remedial Consensus”, ibid. at 245.
105 Ibid.
before the Court, nor concerning other matters that the Court anticipated might bear on a reformed voting policy, such as the differentiation in voting rights between reserve and non-reserve residents with respect to issues that affected only one group.\footnote{106}

The latter point is significant. It means that the new electoral regime instantiated by the government – allowing all off-reserve band members to vote in band elections – was the same as what the de facto result of the Court’s immediate invalidation of s. 77(1) of the \textit{Indian Act} would have been. The only differences were that the government designated mail-in ballots to be the method of voting, and provided certain First Nations communities with training assistance. And, of course, off-reserve band members had to wait an additional 18 months before being able to exercise their rights.

Additionally, the equality disputes which Justice L’Heureux Dubé anticipated might occur during the suspension period did, in fact, arise, with several groups initiating “satellite litigation” to prevent the enforcement of the impugned portion of the \textit{Indian Act} during the period of suspension.\footnote{107} Rather than having their rights vindicated, these litigants had their claims dismissed on the basis that the government’s consultation process was underway, and should not be disturbed.\footnote{108}

Roach draws from \textit{Corbiere} to suggest that courts should, in some circumstances, retain supervisory jurisdiction over \textit{Charter} cases following a declaration of invalidity.\footnote{109} While the courts might delay the effect of such declarations, their retention of supervisory authority would provide an incentive for parties to move forward in crafting remedies, and provide an accessible venue for the resolution of interim concerns and disputes. Of central concern is the cost of litigation to rights claimants. It is prohibitive and unjust, Roach suggests, to force legitimate claimants to launch fresh actions to vindicate rights that are already embraced by a court’s declaration, but which the government is slow to fulfill.

While the retention of supervisory jurisdiction may have improved the remedial outcome in \textit{Corbiere}, a more fundamental conclusion might be drawn from the federal government’s
response to the Court’s decision. Specifically, it is not clear that the institutional assumptions underlying the remand of remedial decision-making to the government in *Corbiere* were well-founded. Ultimately, the government did not enact a regime that was more nuanced than what would have resulted from an immediate declaration of invalidity by the Court. The government appeared to take advantage of the delayed declaration to delay its consultation with communities, which ultimately did not lead to the resolution of uncertainty in aboriginal voting practices or the creation of policy consensus. No greater evidence is provided of this than the occurrence of “satellite” litigation within the period of the suspended declaration, forcing further individuals to seek (unsuccessfully) the meaningful vindication of their rights in the courts.

It is intriguing to speculate what the effects of a more robust remedial disposition would have been. Had the Court not suspended its declaration of invalidity, all off-reserve members of aboriginal bands would have become immediately entitled to vote in band elections. It would have become immediately incumbent upon bands to devise means of enabling this right – for example, by mail-in ballot or remote polling stations. Some bands may have been prompted to bring court applications to assert special s. 35(1) rights limiting the extension of their voting systems. The federal government may have been required to enact reply legislation, and to have done so on a fast-tracked basis. To be sure, the immediate enforcement of the Court’s decision would have created circumstances of uncertainty and administrative complication. It is not clear, however, that the latter would have been worse than the effects of the Court’s delayed declaration. What is certain is that an immediate declaration would have brought immediate, enforceable vindication to the rights of the *Charter* claimants and other, similarly situated individuals. Those individuals – for whom the costs of accessing justice are the most burdensome – would likely not have to had to initiate fresh litigation to enforce their rights. Rather, the costs of administrative adjustment or of the initiation of further court proceedings would have been borne by those responding to the Court’s declaration – the federal government and aboriginal bands – a seemingly appropriate allocation given the deeper pockets of these parties and their situation on the “losing” side of the *Charter* claim.

### 2.4.2 *Charkaoui v. Canada*

An ironic consequence of the Court’s remand of remedial decision-making to the federal government in *Corbiere* was that it contributed to the occurrence of future litigation it was
intended to forestall. The same may turn out to be true of the Supreme Court’s more recent decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*. Charkaoui concerned a challenge under s. 7 of the *Charter* to Canada’s regime of security certificates, which permit the detention and possible deportation of non-citizens on the basis of their alleged danger to national security. Under the regime, individual certificates are subject to confirmation by a judge. The individuals who are subject to the certificates are not, however, entitled to disclosure of the evidence on which the certificates are based. The applicants in *Charkaoui* successfully challenged this aspect of the regime as violating their right to security of the person. In the course of its reasons, the Court noted several means by which the sensitive information underlying the certificates could be protected from disclosure while simultaneously affording the individuals a full answer and defence. These included, *inter alia*, the appointment of special counsel to review sensitive disclosure materials, undertaking not to share the information with the individuals, but for the purpose of advocating in their behalf. Several models were canvassed by the Court, ranging from Great Britain’s “special advocate” system, to the practices utilized in Canadian commissions of inquiry concerning national security subjects. The existence of these alternatives led the Court to conclude that the infringement of the applicants’ s. 7 rights could not be justified, as less restrictive means existed to fulfill the government’s interest in confidentiality. Rather than striking the regime down outright, however, the Court suspended its declaration “in order to give time to Parliament to amend the law.” The suspension was to take effect for one year.

Like the cases considered earlier concerning the problem of inadequate reasoning, *Charkaoui* contains scant explanation for the Court’s use of a suspended declaration. The Court did not, for example, suggest that immediate invalidation of the security certificate regime would result in the release of potentially dangerous individuals into the public. We can safely infer, however, that considerations of institutional role were central in the Courts’ analysis. The Court canvassed

---

110 Supra note 40.
111 See discussion at paras. 70-84 of the Court’s ruling, *ibid*.
113 See *e.g.* *ibid.* at para. 79.
115 Had the Court offered such an explanation, it might have reconciled well with the standard set by *Swain*. However, as discussed in the next section, the Court’s use of a suspended declaration would have remained problematic, because unlike *Swain*, it was not combined with interim relief that mitigated the harsh consequences of suspension.
a number of less-impairing alternatives that Parliament might consider in enforcing its security certificate regime, then remanded the issue to Parliament to craft a long-term solution. Implicit in the Court’s decision was the assumption that Parliament is better suited to select among the alternate regimes that would result in a lesser impairment of Charter rights. Unfortunately, a review of the effects of the Court’s decision casts doubt on the veracity of that assumption.

The legislative response to Charkaoui, Bill C-3, was highly problematic. Despite the one-year timeframe imposed upon Parliament by the Court’s decision, the government did not introduce a first draft of the Bill until eight months after the decision. Subsequent deliberation about the Bill was less than ideal:

Serious concerns have been raised about both the process and the substance of the government’s response to Charkaoui. There was little apparent consultation before Bill C-3 was introduced into Parliament on October 22, 2007. The Bill was debated in the Commons Public Safety and National Security committee for only six days, with four of those days being allocated to non-governmental witnesses. … The Bill was debated over eight days in the House of Commons but over only two days in the Senate as the deadline for the suspension of the declaration approached. The Bill was only given first reading in the Senate on February 6, 2008 and was passed on February 12, 2008, less than two weeks before the Court’s declaration of invalidity would take effect. After having held hearings for one day in a marathon 10-hour session, the Special Senate Committee on Anti-Terrorism law pointedly commented that it “would have appreciated more time to reflect upon all aspects of this bill and the views of those concerned, given the life-altering effects that security certificates have on those named in them, and the reflection the process has on Canadian society and values.”

The outcome of this process was what Roach terms a “minimalist” response to the Court’s decision. Parliament enacted a special advocate system for the review of confidential information underlying security certificates, but selected the least robust of the models considered by the Court. In the scheme enacted by Parliament, special advocates could review any confidential material provided by the Crown to the judge overseeing a certificate hearing, but could not discuss the material with individual detainees or with any other parties (such as

---

116 An Act to amend the Immigration and Refugee Protection Act, S.C. 2008, c. 3
118 Roach, “Bill C-3”, ibid. at 283.
119 Ibid. at 288.
expert consultants) without leave of the judge.\textsuperscript{120} Moreover, the special advocates were limited in their ability to seek disclosure of additional materials possessed by the Crown – their rights were limited to only those materials that would be viewed by the judge, as opposed to all materials potentially relevant to giving a full defence. Again, the only recourse against this restriction was leave of the judge.

The Court’s decision to remand remedial decision-making to Parliament thus had a counterintuitive effect, in that Parliament enacted a scheme that remanded a host of administrative decisions back to the courts (both to the judges who conduct security certificate hearings, and to those performing judicial review on appeal).\textsuperscript{121} This would seem to belie Parliament’s presumed institutional capacity in crafting nuanced policy responses in matters of national security, or at least Parliament’s own confidence in the exercise of that capacity. As in the case of Corbiere, the parties who bear the greatest cost of a decision-making approach that remands contentious issues to the courts are the Charter claimants themselves – already, in most cases, society’s most vulnerable members – rather than the government.

We can again hypothesize about the effects that would have resulted from a more robust judicial remedy. Suppose the Court had not delayed its declaration, and utilized its power under s. 24(1) to require that until Parliament enacted a constitutionally satisfactory regime, each individual subjected to security certificate proceedings was entitled to a special advocate according to one of the more robust models. By so acting, the Court would have posed no barrier to a legislative reply by Parliament, even an urgent reply should Parliament have considered the Court’s disposition to be ill-conceived. More realistically, the Court would have established a functional regime and enabled Parliament to take an open-ended, non-urgent approach to devising more comprehensive legislation. Meanwhile, the individual applicants would have received vindication of their rights, and the potential for re-litigation at their initiation (or the initiation of other, similar situated individuals) would have been minimized.

These scenarios are admittedly speculative, but the crucial point is that they involve no greater uncertainty or overt indicators of social cost than what actually resulted from the Court’s

\textsuperscript{120} Ibid. at 284.
\textsuperscript{121} Ibid. at 349.
suspended declaration. At least in the hypothetical scenario introduced here, the costs of administrative inconvenience and reform are more likely to be borne by the government rather than by existing or future Charter claimants.

2.4.3 Summary

Corbiere and Charkaoui both illustrate a counterintuitive result of remand of remedial decision-making to legislatures. Rather than making full use of their administrative and human resources to craft sophisticated, comprehensive responses to constitutional declarations by the courts, there is a risk that legislatures will do only the minimal amount necessary to achieve constitutional compliance. The motivations for a minimalist approach may vary. In the case of Corbiere, it appears as though Parliament may have taken advantage of the suspended declaration simply to delay the correction of defective legislation, failing to use the suspension period to initiate more robust consultations. In Charkaoui, the minimalist approach may have had more to do with the minority position of the federal government at that time, and the difficulty of building Parliamentary consensus on controversial matters of national security (which in turn enhanced the attraction of more modest legislative aims).

Perhaps it should come as no surprise that governments, having enacted constitutionally invalid legislation to begin with, will wish to minimize subsequent amendments to their work. In any case, the most important insight to draw from Corbiere and Charkaoui is that the use of suspended declarations as instruments of remand can inflict unintended costs upon existing and future Charter claimants. Not only are those individuals forced to accept the continued suspension of their rights, they bear the costs of initiating future Charter actions when a minimalist legislative response fails to comprehensively satisfy the dictates of the Constitution. Often these individuals are already the most marginalized members of society, financially and otherwise. This allocation of remedial burden is skewed, and directly contradicts the goal of engaging citizens in the process of democratic “dialogue”.

It will be recalled that several commentators believe the expanded use of suspended declarations reconciles well with a “dialogic” relationship between the courts and legislatures. Yet when dialogue theory is evoked as a descriptive metaphor for the relationship between courts and
legislatures, it challenges us to recall that legislatures always have the ability to reply to judicial declarations. The possibility of legislative reply can militate for or against a suspended declaration, depending on the particular facts of a case. The challenge for the courts is to consider what the effects of an immediate declaration of invalidity might be, and to weigh those against both the prospective benefits and the prejudices that will result from suspension. No doubt in some cases, this will be a challenging exercise, with the prospect of reasonable disagreement about which option a court should select. However, the cases considered in this section demonstrate that the possibility of the legislatures bringing their particular administrative and human resources to bear on a problem does not, in itself, support a presumption that they will supply better remedial solutions than the courts.

2.5 The Problem of Injury to Charter Rights

Injury to Charter rights is the most embracing of the problems arising from the present usage of suspended declarations of invalidity. In all of the cases considered so far, the justifications for suspended declarations have been cast into doubt. A suspended declaration issued without adequate justification is inherently offensive to constitutional principles, as it permits the unwarranted suspension of those principles to be preserved. In the case of Charter rights, it permits an unjust or unnecessary extension of a Charter violation at the expense of vindicating individual rights. Thus, in Figueroa the applicants suffered the continued denial of their right to full participation in Canada’s political process; in Fraser and Health Services, the applicants suffered continued suppression of their right to collectively bargain. As cases like Corbiere and Charkaoui demonstrate, suspended declarations may also contribute to an unjust allocation of the burden of Canada’s Charter commitments, as marginalized individuals and groups are forced to bring incremental litigation in response to a minimalist legislative approach, escalating both the time and cost of instilling Charter compliancy in Canada’s laws.

---

122 See Richard Haigh and Michael Sobkin, “Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts”, (2007) 45 Osgoode Hall L.J. 67. Haigh and Sobkin point out that “dialogue” is intended as a descriptive metaphor that captures the dynamic interaction of courts and legislatures. It is not intended as a prescriptive metaphor – that is, one commanding a particular approach to judicial review. When the metaphor is applied prescriptively by the courts – for example, to justify deference to the legislature – it leads to confusing and inconsistent outcomes. For this reason, Haigh and Sobkin caution against the liberal evocation of “dialogue” references in court judgments.
This section is concerned with an overt example of injury to Charter rights – the dogmatic refusal to combine suspended declarations with interim relief under s. 24(1) of the Charter – which starkly illustrates the consequences that may be suffered by rights-claimants within a period of suspension. The Supreme Court’s decision in R. v. Demers\textsuperscript{123} provides a useful starting-point for this discussion.

2.5.1 R. v. Demers

Demers concerned an accused individual who suffered from downs syndrome, and who had been found mentally unfit to stand criminal trial. At the time, the Criminal Code imposed a complex procedure for the management of the mentally unfit accused. Upon a finding of unfitness, either a court or a review board was required to conduct a disposition hearing to determine whether, and under what conditions, the accused should be detained.\textsuperscript{124} A review board could not order the unconditional discharge of the accused, however, and was required to reconvene once every year to determine whether a change in the accused’s condition warranted a revision to its disposition.\textsuperscript{125} The Crown was required to appear before a court every two years to demonstrate that a prima facie case was still maintained against the accused.\textsuperscript{126}

The result of this regime was that permanently unfit accused persons could remain in the criminal justice system indefinitely. An accused remanded to a review board would be continually subjected to an annual hearing before the board even if he or she would never become capable of standing trial, and even if he or she posed no danger to the public. The only possible relief was that the Crown might abandon the case, a matter entirely outside of the accused’s hands. The Court accordingly found the regime to offend s. 7 of the Charter:

In our view, [the regime] fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society’s interest in bringing accused persons to trial cannot be accomplished, nor can society’s interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court[.] … [T]he failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear

\textsuperscript{123} Supra note 40.
\textsuperscript{124} Ibid. at para. 10.
\textsuperscript{125} Ibid. at para. 11.
\textsuperscript{126} Ibid. at para. 12.
Moreover, the Court found that the regime could not be justified under s. 1 of the Charter. As the regime offended the Charter for overbreadth, it was incapable of meeting the standard of minimum impairment imposed by s. 1.128

Applying Schachter, the Court opted to suspend its declaration of invalidity in Demers for 12 months to enable Parliament to amend the offending Criminal Code provisions. Its concern was that an immediate invalidation of the regime would create a legal “lacuna” resulting in the release of dangerous persons into the public.129 The Court also observed that Parliament was better suited to effect “complicated and consequential amendments” to the legislation than the Court.130 The Court declined, however, to provide an interim remedy such as a stay of proceedings to the accused during the period of its suspended declaration. Citing Schachter’s treatment of the interaction between s. 52 and s. 24(1), the Court found that “This rule precludes courts from granting a s. 24(1) individual remedy during the period of suspended invalidity. … In our view, there is no reason to revisit the wisdom of the Schachter rule in the present case. There is no evidence that the government acted in bad faith or abused its powers.”131

The difference between the relief sought in Schachter and the accused’s request for interim relief in Demers, however, is that the former concerned a monetary award that might have convoluted the legislature’s chosen remedy, placing the individual claimant in an advantageous position relative to others under a scheme of social benefits. Demers, on the other hand, concerned the enforcement of a substantial right to personal security and procedural fairness. The Court’s own reasons underscored the significance of this infringement, noting that individuals maintained in the criminal justice system “will be subject to anxiety, concern and stigma because of the criminal proceedings that hang over them indefinitely.”132 The result of the Court’s suspended declaration was that individuals who had been found to pose no danger to the public, and to be permanently incapable of standing trial, continued to be subjected to the stigma and anxiety of

127 Ibid. at para. 55.
128 Ibid. at para. 46.
129 Ibid. at para. 58.
130 Ibid.
131 Ibid. at para. 62.
132 Ibid. at para. 54.
the criminal system for a further year. It is not at all clear how affording these individuals interim relief would have undermined Parliament’s long-term remedial solution or posed any prejudice to the public. Roach has aptly summarized the inadequacy of this result:

The new rule in Demers can deprive a successful Charter applicant of an effective and meaningful remedy for the duration of the suspended declaration of invalidity. It puts judges in an unnecessary and difficult position of either not suspending a declaration of invalidity when necessary to protect public safety and to allow Parliament to enact comprehensive reforms or of denying the successful accused of a meaningful remedy.

... Although it is understandable why the court might want to suspend the declaration of invalidity, it cannot be right to detain or restrain a person who is not a danger to the public for a year under an unconstitutional law. 133

Fortunately, the accused in Demers was not detained but had been released under certain conditions. Nevertheless, the Court’s decision to suspend its declaration did not provide him with immediate relief from the anxieties and stigmas of prosecution, nor did it provide relief to similarly situated individuals or to those who faced the more severe circumstances of detention. 134

2.5.2 Charkaoui v. Canada

Charkaoui can also be taken as an example of the injury inflicted on Charter rights when courts decline to combine s. 52 and s. 24(1) remedies. In an alternate hypothetical disposition to the case, the Court might have suspended its declaration of invalidity, but provided immediate relief to detainees under the security certificate regime by imposing an interim right to special counsel. This would have protected existing interests under the regime, such as public safety (although that interest was not evoked in the Court’s reasons on the suspended declaration). Although the matter was not considered in Charkaoui, such an approach would require overcoming the reluctance to combine s. 52 and s. 24(1) remedies. The absence of such a remedy had disturbing implications. The most severe consequence of the security certificate regime then in place was

---

134 Justice Lebel offered a powerful dissent in the case. He criticized the majority for its “slavish adherence to the rule in Schachter” (supra note 40 at para. 97), and emphasized that “Corrective justice suggests that the successful applicant has a right to a remedy” (ibid. at para. 101). In the result, Justice Lebel would have issued a suspended declaration, but required that all permanently unfit accused who did not pose a danger to the public were entitled to a stay of proceedings within 30 days of being found unfit (ibid. at para. 107).
that a certificate, upon judicial confirmation, could become a deportation order and result in the deportation of individuals to jurisdictions practicing torture. It is not clear that the Court’s decision in Charkaoui imposed any safeguard against this consequence arising during the period of its suspended declaration.

The irony of the courts’ reluctance to combine s. 52 and s. 24(1) remedies is that it extends, at least in Demers, from a stringent application of Schachter when the courts have been content to depart from Schachter when deciding to issue a suspended declaration in the first place. Chief Justice Lamer’s decisions in other cases, such as Swain and Rodriguez v. Canada,135 should make clear that he did not intend a “hard-and-fast” application of the reservations he expressed in Schachter about combining s. 52 and s. 24(1) remedies. Swain, it will be recalled, similarly concerned the apprehension that an immediate declaration of invalidity would result in the release of dangerous individuals into the public. Nevertheless, the Court issued only a six month suspension (as opposed to 12 months in Demers); provided an automatic right for detainees to habeas corpus following a detention of 30 days; and allowed either party to apply to the Court for variation of its order should any problems arise during the period of suspension.136 In Rodriguez, Chief Justice Lamer was at pains to limit the scope of his earlier statement in Schachter that s. 52 and s. 24(1) remedies would rarely be combined. Having found in his dissenting reasons that the criminal prohibition against physician assisted suicide violated the Charter, Lamer C.J. held that a suspended declaration combined with a constitutional exemption was the appropriate remedial disposition of the case. He observed that “[t]he cases to date are unclear on the precise status and rights of persons subject to the law during a period of suspension”,137 and considered a constitutional exemption to be appropriate in order to uphold the principle that “[t]o create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.”138

---

136 Swain, supra note 3.
137 Rodriguez, supra note 135.
2.5.3 Summary

The cases conveying problematic instances of suspended declarations – whether due to inadequate reasoning, flawed institutional assumptions, or injury to Charter rights – might all be criticized as affirming rights without providing meaningful, correlative remedies. This is not to minimize the force of a purely declarative remedy, even when the latter has delayed effect. To be sure, declaration that a right has been infringed is a powerful and important remedy in itself: it signifies clearly that the government has done something wrong, vindicates the claimants’ complaint and behooves the government to undertake corrective measures not just for the complainant but for others in a similar position. From the perspective of societal transformation, judicial declarations may even be the most powerful form of constitutional remedy. Nevertheless, when the reasons for suspending a declaration of invalidity are not clearly set-out, or when they rest on flawed assumptions or fail to include adequate safeguards against their harsh effects, it is impossible to escape the impression that complete, satisfactory justice has been denied to the successful claimant. In the final section of this Part, I return to the relationship between rights and remedies to discuss the unique challenges confronting courts in the exercise of remedial discretion, and how those are manifest in the decision to issue a suspended declaration.

It is first important, however, to complete the present review of case law by acknowledging that the picture is not all bad – by noting a few recent decisions in which the courts have made principled and just usage of suspended declarations. These cases too will help illuminate the unique remedial dilemmas considered in the conclusion to this Part.

2.6 Positive Examples of Suspended Declarations of Invalidity

Not all recent usages of suspended declarations raise the problems of inadequate reasoning, flawed institutional assumptions, or injury to Charter rights, and not all decisions that exhibit these problems are entirely negative. There are reasons for optimism in some recent decisions of Canada’s trial and appellate courts, and in certain decisions of the Supreme Court of Canada. In the review below I note examples of cases in which the courts have successfully mitigated the effects of suspended declarations by providing meaningful interim relief to claimants; provided more fulsome and principled reasons for issuing a suspended declaration; and, in one instance, legitimately denied a suspended declaration where one was requested by the federal government.
2.6.1 Meaningful Interim Relief

The Supreme Court’s decision in *Nguyen* was criticized earlier for falling victim to the problem of inadequate reasoning. Nevertheless, while the decision is not perfect, it did take the positive step of providing meaningful, immediate relief to the applicants in spite of the suspended declaration. The Court ordered that one applicant’s child be granted immediate access to English-language public education, while the other’s case be remitted to the Ministry of Education to decide based on principles affirmed by the Court. *Nguyen* thus averts the dogmatic application of the “rule in Schachter” by integrating declarative and structural relief, and honours the principles of *Swain* and of Lamer C.J.’s dissenting reasons in *Rodriguez*. It certainly signifies an improvement upon the Court’s failure to take an equivalent approach in *Demers* and *Charkaoui*, where the *Charter* infringements concerned were potentially more severe.

The British Columbia Supreme Court’s recent decision in *PHS Community Services Society v. Canada* also marks a positive departure from the courts’ reluctance to combine declarative and structural relief. *PHS* concerned a *Charter* challenge to provisions in Canada’s *Controlled Drugs and Substances Act* which prohibited the possession and trafficking of narcotics. The applicants, who comprised a community group and two users of the Insite safe injection clinic in Vancouver, alleged that the provisions imposed a threat of criminal penalty for the activities that took place at Insite – specifically, the provision of clean needles and medical supervision to individuals injecting heroin. In the applicants’ view, this violated the s. 7 rights of those who relied upon Insite for medical supervision and treatment. Justice Pitfield found in favour of the applicants. In striking down the impugned provisions of the *CDSA*, he opted to suspend the effect of his declaration for one year, but granted “users and staff at Insite, acting in conformity with the operating protocol now in effect, a constitutional exemption from the application of ss. 4(1) and 5(1) of the *CDSA*.“

Unfortunately, like *Nguyen*, *PHS* suffers from the problem of inadequate reasoning, as Justice Pitfield did not explain the basis for the suspended declaration (we might safely infer, given the

139 Supra note 40 at para. 47.
140 Ibid.
142 Ibid. at para. 159.
obvious importance of restrictions against illegal drug consumption and trafficking in broader society, that an apprehension of public harm informed the suspension). Nevertheless, the case serves as a positive example of how s. 24(1) relief, such as a constitutional exemption, can be combined with declarative relief to minimize the prejudice of a suspended declaration.  

2.6.2 Fulsome Reasons and Sound Institutional Assumptions

The 2009 decision of the Court of Appeal for British Columbia in *McIvor v. Canada (Registrar of Indian and Northern Affairs)* provides a strong example of a fulsome, principled justification for a suspended declaration of invalidity. *McIvor* concerned a challenge to s. 6 of the *Indian Act*, which regulates the entitlement of individuals to register as “Indians” for the purposes of the Act. In 1985, the Act was amended to eliminate certain discriminatory qualities. Specifically, provisions barring women from retaining Indian status after marrying non-Indian men, and provisions limiting the transmission of Indian status to children based on non-Indian matrilineal heritage, were removed, and individuals previously excluded under those provisions had their Indian status restored. However, the amendments had the unintended consequence of maintaining differential treatment of certain individuals who, owing to maternal Indian parentage, could not transmit Indian status to their children in the same manner as those with paternal Indian parentage. The court thus found the impugned sections of the Act to violate the applicants’ equality rights. While the provisions had a pressing and substantial objective (indeed, they were needed to affirm the Indian status of deserving individuals under the regime), they did not minimally impair the rights of those whose ability to transmit Indian status was arbitrarily limited.

The legislative scheme in *McIvor* was exceedingly complex, and engaged reliance interests on the part of a broad field of individuals on whom it conferred Indian status. Like *Schachter*, the

---

143 Ultimately, Justice Pitfield’s remedial disposition of *PHS* was obviated on appeal, with the Court of Appeal for British Columbia holding that Insite was exempted from the impugned provisions of the *CDSA* by the doctrine of inter-jurisdictional immunity: *PHS Community Services Society v. Canada (A.G.)*, 2010 BCCA 15 (leave to appeal to the Supreme Court of Canada granted June 24, 2010).
144 *Supra* note 61.
145 *Supra* note 95.
146 See discussion in *McIvor*, *supra* note 61 at paras. 4-11.
147 See *ibid.* at paras. 44-45.
constitutional breach lay in underinclusiveness, and thus was prone to correction by a range of options. Accordingly, the court opted to issue a suspended declaration of invalidity in order to preserve those interests while the legislature corrected the scheme. Its reasons were detailed:

The legislation at issue has now been in force for 24 years. People have made decisions and planned their lives on the basis that the law as it was enacted in 1985 governs the question of whether or not they have Indian status. The length of time that the law has remained in force may, unfortunately, make the consequences of amendment more serious than they would have been in the few years after the legislation took effect.

Contextual factors, including the reliance that people have placed on the existing state of the law, may affect the options currently available to the Federal government in remediining the Charter violation. It may be that some of the options that were available in 1985 are no longer practical. On the other hand, options that would not have been appropriate in 1985 may be justifiable today, under s. 1 of the Charter, in order to avoid draconian effects.

I cannot say which legislative choice would have been made in 1985 had the violation of s. 15 been recognized. I am even less certain of the options that the government might choose today to make the legislation constitutional. For that reason, I am reluctant to read new entitlements into s. 6 of the Indian Act. I am even more reluctant to read down the entitlement of the comparator group, especially given that it is not represented before this Court. In Schachter v. Canada … the Supreme Court of Canada discussed situations in which the appropriate remedy is a declaration of invalidity that is temporarily suspended. …

[Quotation omitted] …

It seems to me that this reasoning is apt to the case at bar. It would not be appropriate for the Court to augment [the claimant’s] Indian status, or grant such status to his children; there is no obligation on the government to grant such status. On the other hand, it would be entirely unfair for this Court to instantaneously deprive persons who have had status since 1985 of that status as a result of a dispute between the government and the plaintiffs. In the end, the decision as to how the inequality should be remedied is one for Parliament.

… Accordingly, I would declare [the impugned provisions] to be of no force and effect, pursuant to s. 52 of the Constitution Act, 1982. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation and make it constitutional.150

These reasons provide an excellent illustration of how institutional considerations can be reconciled with a principled application of Schachter. Applying Schachter, the court’s focus was on potential harm that might be inflicted on the public by an immediate declaration of invalidity – the disruption to reliance interests of individuals whose Indian status depended upon the

150 Ibid. at paras. 157-61.
existing regime. This motivation was complemented by the fact that correction of the legislation required expertise that exceeded the capability of the court, and the exercise of policy-discretion that stepped beyond the court’s institutional role. The court thus provided a comprehensive account of the factors militating in favour of a suspended declaration. In its desire to protect existing rights and to sponsor an optimal remedial amendment, the public interest was paramount in the court’s concerns. Prejudice to the successful Charter claimants was comparatively minimal: they would have to wait to receive a substantial change in their legal entitlement under the court’s decision, but this delay was a function of properly allowing the legislature to determine what the content of that entitlement should be.

The events following the Court of Appeal’s decision in McIvor generally affirm the assumptions about institutional role that the court set out in its remedial analysis. The court retained jurisdiction to hear further motions by either party, and in March, 2010 heard a motion by the Attorney General seeking to extend the suspension period by three months.151 The court considered evidence filed by the Attorney General which accounted for the time it had taken to prepare a legislative reply to the court’s original decision, and concluded: “We are satisfied that the appellants have been diligent in moving forward with legislative amendments and that there have not been undue delays in the process.”152 Among the factors considered by the court was the fact that it took the federal government time to review the original decision and to decide whether to seek leave to appeal, and that the government did commence a process of consultation with Aboriginal communities shortly following its decision not to seek leave.153 The court noted that “in the context of a minority government, inter-party consultation on legislation can lead to some delays in the legislative process”, and that a draft version of an amendment to the impugned legislation had been presented to the House of Commons by the time of the motion.154 Notably, the successful claimants in McIvor did not oppose the extension of the suspended

151 See McIvor v. Canada (Registrar of Indian and Northern Affairs), 2010 BCCA 168.
152 Ibid. at para. 10.
153 Ibid. at paras. 4-5.
154 Ibid. at paras. 3 and 8. More controversially, the Court also observed that a draft of the new legislation had been prepared as early as December 2009, but that “Unfortunately, it was not possible to proceed with the draft bill in a timely manner, as Parliament was prorogued on December 30, 2009, and a new session did not commence until March 2, 2010” (ibid. at para. 7). While the 2009 prorogation of Parliament was a highly controversial exercise of the Prime Minister’s executive powers, it would appear that the administrative branch of government acted responsibly by preparing draft legislative in accordance with the timeframe imposed by the court, and that the Attorney General acted in a timely manner to seek an extension as soon as Parliament reconvened.
declaration, but rather asked that the court order that their grandchildren be granted immediate registration and status under the *Indian Act*.\(^{155}\) The court declined this remedy, for reasons mirroring *Schachter*: Parliament had a range of options for curing the constitutional defect, and providing an immediate benefit to the claimants that might ultimately be denied to those similarly situated would produce an inequity.\(^{156}\)

The fact that a suspended declaration of invalidity in *McIvor* appears to have produced a more satisfying resolution than in *Corbiere* may be due to the fact that the federal government has simply shown better faith in promptly replying to the former decision. However, the fact that the court issued a shorter suspension period (by 6 months) and retained jurisdiction to hear further motions from the parties should not be understated, especially given that the legislative scheme and competing rights in *McIvor* were, if anything, more complex than in *Corbiere*. Neither the shorter suspension period nor the retention of jurisdiction *McIvor* impinged the policy discretion of Parliament in crafting reply legislation (and thus the underlying purpose of remand was fulfilled), yet the careful calibration of the court’s declaration to require expediency helped ensure that Parliament’s discretion was exercised in a timely, responsive manner.

### 2.6.3 Principled Denial of a Suspended Declaration of Invalidity

Finally, it is worthwhile to note at least one recent and important decision in which Supreme Court denied a suspended declaration. In *Canada (A.G.) v. Hislop*,\(^{157}\) the Court considered a challenge to certain provisions of the *Canada Pension Plan*\(^{158}\) which had recently been amended to extend benefits to the surviving, same-sex partners of deceased individuals. The amendments followed the Court’s earlier decision in *M. v. H.*\(^{159}\), which found the exclusion of same-sex partners from spousal support to be in violation of s. 15 of the *Charter*, prompting the reform of numerous statutes to enable equal access for gay and lesbian people to public and private benefits.\(^{160}\) The *CPP* amendments, however, did not permit surviving same-sex partners to claim

---


\(^{157}\) [2007] 1 S.C.R. 429 [“*Hislop*”].

\(^{158}\) R.S.C. 1985, c. C-8 [“*CPP*”].


\(^{160}\) The Court’s decision in this case was not without controversy. While striking down the offending legislative provisions, the Court suspended its declaration, and the subsequent legislative amendments responding to the Court’s decision were given only prospective effect. Hence the claimant in the case, and those similarly situated, were denied spousal support payments despite the favourable ruling because their separations occurred prior to the
benefits unless their spouse had died on or before a particular date, and set a limit on retroactive claims for relief. Neither of these restrictions applied to opposite-sex spouses. The Court found these restrictions to violate s. 15 of the Charter, and to not be justified under s. 1. In denying the federal government’s request that the Court suspend its declaration, the majority held:

[A] temporary suspension of the declaration of invalidity is not appropriate in the present case. As Lamer C.J. noted in Schachter… such suspensions are “serious matter[s] from the point of view of enforcement of the Charter” because they allow an unconstitutional state of affairs to persist. Suspensions should only be used 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. None of these factors are present in the case at bar.161

The Court thus reaffirmed the standard from Schachter that absent a discernable harm consequent upon the immediate invalidation of a law, judicial declarations should take immediate effect.162 The problem, which by now should be clear, is that the Court has not taken this approach consistently; hence its affirmation of the principles from Schachter, while laudable on the facts of the case, contradicts the outcome of contemporaneous decisions in which suspended declarations were issued in clear departure from the latter authority. The law governing suspended declarations is thereby further convoluted.

2.6.4 Summary

Cases that highlight positive uses of suspended declarations face the same challenges as those cases displaying inadequate reasons, flawed institutional assumptions, and injury to Charter effective date of the amended law: see discussion in Choudhry and Roach, supra note 55 at 205-206. (The claimant in M. v. H. was nevertheless satisfied by the private resolution of her support claim: see ibid. at 206, note 9).

161 Hislop, supra note 157 at para. 121.

162 Despite the Court’s principled application of Schachter to deny temporary suspension of its declaration of invalidity, it nevertheless declined to grant the full retroactive payment of CPP benefits sought by the claimants. The Court was concerned that a fully retroactive remedy would be unfair to the government, given that the recognition of same-sex rights was a relatively recent “change in the law” to which the government had responded in good faith by enacting the amendments under review (see discussion in ibid., paras. 81-134). This disposition is odd, given that the amounts sought by the claimants were those that their deceased partners had contributed to the pension plan, which would have naturally been granted to them had they been in opposite-sex relationships; in other words, the government might have anticipated the need to pay-out these sums from the fund, such that now being able to retain the amounts created something of a “windfall.” For this reason, Hislop might still be criticized as establishing a right without a remedy.
rights. In every case, the courts are forced to contemplate the potential effects of an immediate declaration of invalidity, not just on the parties to a dispute but on broader society, and by association, the courts must consider the limits of their own jurisdiction and abilities to craft comprehensive responses to these challenges. Sometimes, those potential effects will weigh in favour of a suspended declaration, as the original case law and some of the more recent decisions considered in this section demonstrate. However, the courts should also give express attention to the prejudicial effects of a suspended declaration, balancing these against the prejudice inflicted by an immediate declaration. That is, the mere presence of a problem or inconvenience arising from an immediate declaration should not create an automatic assumption favouring suspension.

In the next section, I distill the core elements of the remedial dilemmas evident in the issuance of suspended declarations, and establish the basis for the analytic framework introduced in the following Part.

### 2.7 Suspended Declarations and the Dilemmas of Remedial Discretion

Each time a court contemplates the use of a suspended declaration, it faces a common set of questions. It will be clear from the review above that the courts do not always succeed in giving express or deliberate attention to these questions, which are sometimes subsumed by ill-founded assumptions. Nevertheless, I suggest that the following are questions that should arise when judges face the decision whether to issue an immediate or a suspended declaration of invalidity:

- Will harm to the public flow from an immediate declaration of invalidity, either in the form of one of the “categories” summarized in Schachter or in some other form? Can that harm be averted by issuing a suspended declaration?

- Are there multiple options for curing the constitutional defect identified by the court? If so, does an immediate declaration of invalidity impose one of those options at the expense of others? Will an immediate declaration create impediments to the legislature crafting future laws that might improve the remedial situation by a more nuanced reply?

- If any of the above factors militate in favour of a suspended declaration, is it possible to provide the claimants with immediate relief via conditions built-into the s. 52
declaration or via the discretionary powers of s. 24(1)? Can such relief be extended not just to the claimants, but to similarly situated individuals? If such relief is provided, will it inflict any injury in the terms of Schachter or in some other form? Will it frustrate the ability of the legislature to craft an optimal remedy via reply legislation?

Considering the above questions, it is perhaps understandable that the courts have departed from the categories outlined in Schachter. Schachter acknowledged the possibility that a suspended declaration would be appropriate where multiple options existed for the legislature to cure an invalid law, but required additionally that immediate invalidation threaten to erase the benefits of existing recipients under the legislative scheme. Otherwise, the Schachter categories focus purely on issues of public harm – imminent danger to the public or to the rule of law – without regard to the possible constraints an immediate declaration might impose upon long-term remedial discretion. A case such as Corbiere, for example, poses a challenge to the principles from Schachter because the adverse consequences it identifies – the convolution of Aboriginal rights in relation to a Charter right – cannot easily be categorized as a deprived benefit, public danger, or injury to the rule of law. Similarly, the possibility that immediate invalidation might create an obstacle to a subsequent, optimal remedy that requires legislative fashioning – for example, by establishing acquired rights that cannot easily be removed for reasons of fairness – is not readily accommodated under Schachter, because the latter cautions against considerations of institutional role in determining the propriety of a suspended declaration.

However, it is important to recall that the Supreme Court in Schachter did not intend for the categories to stand as hard-and-fast rules. What animated each category was a concern to protect an important public interest or avert a public harm. If the courts in subsequent cases had focused on these underlying principles, rather than feeling bound strictly to the categories of Schachter, they might have continued to draw meaningful guidance from the case.

Roach suggests that the courts have adopted two divergent approaches to suspended declarations of invalidity, with some judges struggling to fit all suspended declarations into the Schachter categories (what he calls “rule-based” remedial discretion), and others simply ignoring Schachter and issuing suspended declarations with little or no principled explanation (what he terms
“strong” remedial discretion). The cases reviewed above suggest that the latter approach has come to dominate. Roach argues that the courts should instead focus on core principles governing the remedial exercise – a middle path between the two extremes. I agree, but argue that Schachter remains relevant to this enterprise.

Schachter’s core principles of protecting the public interest and averting public harm are capable of embracing the remedial dilemmas outlined above. To be sure, some of those dilemmas probe the respective roles of the courts and legislatures, entering territory that Chief Justice Lamer cautioned was irrelevant to the issuance of a suspended declaration. But it is important to recall the context in which Chief Justice Lamer made these remarks – that they followed his earlier direction that courts strive to preserve legislative intent through remedies other than invalidation, resorting only to the latter when this was impossible. It would appear that Lamer C.J. felt that concern for the legislature’s lawmaking prerogative was accounted for at this earlier stage, and that accordingly, the subsequent decision whether or not to suspended a declaration of invalidity should not be influenced by concern over institutional deference. When courts consider that their own institutional capacities prevent them from crafting an optimal remedy, or that an immediate declaration of invalidity would create a state of affairs that inhibits the legislature from pursuing such a remedy, the animating concern is not really deference, but concern for an ideal solution to the constitutional infraction. The latter, clearly, is cognizable as a public interest, and the impediments and uncertainties produced by an immediate declaration – for example, unpredictable impacts on related rights, as in the Aboriginal cases – are cognizable as forms of public harm. The extension of the Schachter principles to embrace these cases is perhaps a purposive re-reading of the dictates of that case, but it hardly stretches them beyond reason.

To be clear: when considering whether or not to issue a suspended declaration, I suggest that courts may consider their own limited institutional capacity to craft ideal remedies and the relative institutional strengths of the legislatures. The courts may legitimately demarcate the limits of their capacity based on jurisdiction – for example, concluding that a robust remedial disposition would be tantamount to creating a new policy scheme, and thus trench on legislative jurisdiction – or based simply upon the courts’ relative weakness navigating the competing

---

interests and uncertain consequences of a declaration of invalidity. However, the public interest must underlie this analysis; the courts must be able to say (and indeed, their reasons should state expressly) that unless a suspended declaration is used, the pursuit of an optimal remedy will be frustrated. For this reason, purely institutional considerations will never completely justify suspended declarations – a court should not be able to say “the legislature is best-suited to craft a reply to this declaration, and therefore the declaration should be suspended.” This is because the legislatures always have the ability to respond to declarations of invalidity, even when the latter are immediate; absent special circumstances, they should not need the suspension of a court’s declaration (and its consequent suspension of constitutional rights) to enable them in this task. It is only when those special circumstances arise – a serious impediment to legislative discretion that will be produced by an immediate declaration, or a constitutionally intolerable harm consequent upon immediate invalidation – that a suspended declaration may be justified. This again brings us into the terrain of public interest and the aversion of harm: the public interest arises in the pursuit of an optimal remedy, the impediments to which (or any other adverse consequences inflicted by an immediate invalidation) can be understood as forms of public harm. Accordingly, when institutional considerations bear on the issuance of suspended declarations, they will always be combined with considerations of the public interest if the adverse effects of a suspended declaration are to be truly justified.

A brief recapitulation of cases that have made principled use of suspended declarations helps to clarify these concepts. In Dixon, the court’s belief that it was not institutionally suited to devise a new system of electoral boundaries blended with its concern for the public interest: the interest in an ideal electoral system, and the interest in averting the crisis of eliminating one electoral regime without enacting an immediate replacement. These concerns outweighed the imperative of giving immediacy to the Charter right to vote, and thus justified suspension. Similarly, in McIvor, the Court’s incapacity to devise a nuanced policy scheme for the transmission of Indian status blended with the concern that the immediate invalidation of the existing scheme would harm existing rights. These concerns outweighed the imperative of giving immediate enforcement of the equality rights of the claimants. Because of the delayed enforcement of the claimants’ rights in Dixon and McIvor, neither of the claimants received perfect remedies, but this divergence from perfection was justified by priorities consonant with the public interest.
I noted earlier that suspended declarations of invalidity may sometimes be criticized as establishing a right without a remedy. This criticism is potentially unfair, because in the exercise of remedial discretion courts are required to balance the interests of parties other than those to the immediate dispute, and when those interests are accounted for, perfect vindication of an impinged right may not be possible. *Dixon* and *McIvor* are both illustrative of this fact. Indeed, the necessity of accounting for parties other than those to the dispute is an endemic feature of constitutional litigation, where judicial decisions impact broad societal interests and not just the private affairs of disputing parties. Owen Fiss suggests that in the adjudication of constitutional questions, judges are not just the arbiters of individual disputants, but officials charged with giving meaning to public values: “[the judge] is a public officer; paid for by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political agencies to enforce and create society-wide norms, and perhaps even to restructure institutions, as a way, I suggest, of giving meaning to our public values.”

Public values include those expressed in the constitution, such as equality and fairness, that take tangible form when enforced by judges. Yet their enforcement is felt throughout society, posing a distinct challenge to the judge at the remedial stage – to “be certain that the full range of [societal] interests is vigorously represented”, but “not turn his back on the constitutional claim or deny an effective remedy because each and every individual affected will not or cannot meaningfully participate in the suit.”

In the construction of a remedy, a judge thus faces distinct considerations from those that arise in determining the scope and limits of a right. This distinction may be overt or it may be subtle. In *Swain*, for example, the Court rejected the federal government’s attempt to justify the automatic detention of mentally insane acquitees as a measure necessary to protect the public interest. The *s. 1* limitations analysis informed the Court that the measure adopted by the government

---

165 *Ibid.* at 41. Abram Chayes takes a similar view. He describes America’s civil rights era as marking the advent of “public law litigation”, and like Fiss, notes that public law or constitutional cases engage courts in remedial questions that go beyond the rectification of disputes between isolated parties: “In public law litigation, the dominant form of relief is prospective and affirmative rather than compensatory. … To be sure, the purpose of the decree is to rectify a course of conduct that has been found to abridge rights asserted by the plaintiffs. But the trial judge has broad discretion to elaborate remedial arrangements in response to the particular characteristics of the situation and the parties before him”: Abram Chayes, “Foreward: Public Law Litigation and the Burger Court” (1982-1983) 96 Harv. L. Rev. 4 at 46. See also Abram Chayes, “The Role of the Judge in Public Law Litigation” (1975-1976) 89 Harv. L. Rev. 1281.
overreached its aim, and was thus an illegitimate limitation on the right to personal security. Nevertheless, at the remedial stage, the concern for public harm justified a suspension of the Court’s declaration of invalidity. The Court’s guiding consideration was subtly different than under the limitations analysis: while an abstract concern for public harm was not sufficient to justify an overriding limitation on a Charter right, an imminent concern for public harm (the apprehension that danger would result from the immediate release of insane acquitees) justified the remedial tool of suspension. The Court can be seen as protecting an innocent third party – the public – from unfair prejudice resulting from the resolution of a constitutional complaint between the claimant and the government.

Paul Gewirtz refers to the consideration of third party interests at the remedial stage as a process of “interest balancing” – the balancing of a claimed constitutional right against the interests of those parties affected by its enforcement.\(^\text{166}\) Importantly, he notes that not all third party costs will justify the attenuation of a remedy. Some “costs” reflect legitimate public values (to borrow the language of Fiss), while others do not:

Interest Balancers reject the view that a remedy’s costs may never justify limiting a remedy; they must still decide, however, which costs are allowed to limit a remedy, and how much limiting effect to give those costs. Even under Interest Balancing, some costs must be altogether unbalanceable – that is, they will not be permitted to weigh at all against remedial effectiveness. An example of a cost that should be unbalanceable in formulating a remedy is the “cost” of interfering with white racists’ preferences to stay away from blacks because of their race. The objection to recognizing these costs is not simply that doing so would interfere with remedial effectiveness; if it were, all costs would be unbalanceable. Rather, the rejection of these costs is rooted in their relation to the right. The preferences of white racists are ignored not because such preferences are deemed offensive but because they involve an objection to the right itself. This clarifies the relevant distinction between different remedial costs: costs of the right, which are the costs imposed in order to move from the current situation to the end state vision embodied by the right itself; and transitional costs of remedies for violations of the right, which are the costs imposed in order to move from the current situation to the end state. The former should always be unbalanceable; an objection to the right is not an interest that may count as an independent value to be weighed against furnishing a fully effective remedy. But objections to transitional remedial burdens should at least be balanceable.\(^\text{167}\)

---


\(^{167}\) Ibid. at 606. This aspect of Gewirtz’s thesis is nuanced. Drawing from the context of racial desegregation in the United States, Gewirtz posits that each right (e.g. the right to equality) involves an ideal “end state” (e.g. desegregation) which the remedy is intended to achieve. However, resistance to either the right or to the remedy – including illegitimate resistance (such as a racist attack on the right) – might have to be accounted for in
Gewirtz goes on to state that in order to justify attenuation of a remedy, a cost must not simply be legitimate, but must manifest to a particular degree: “If a cost is deemed balanceable, the remaining question is whether it is sufficiently weighty to justify limiting a remedy. In general terms, a particular remedy may be rejected under Interest Balancing if its costs ‘outweigh’ or ‘exceed’ the remedial effectiveness it produces.”

These observations resonate with the questions outlined at the beginning of this section. Suspended declarations of invalidity constitute an attenuation of a particular remedial outcome (an immediate vindication of the infringed right). The possible effects of an immediate declaration of invalidity – including forms of social harm, or practical impediments to an optimal remedial disposition by the legislature – can be understood as costs that must be balanced against the interest in giving immediate effect to the right. The challenge lies in discerning which considerations or costs are legitimate, and once that threshold is met, whether they manifest to such a degree as to justify temporary suspension of the right.

In the next Part, I propose an analytic method that meets these challenges. The method I propose is one that is already familiar to the courts, because it is the same as that which they apply to evaluate the legitimate limitation of Charter rights. Although developed in the latter context, the method is calibrated to discern between constitutionally legitimate and illegitimate values that compete with rights, and to balance the respective force of rights with those competing values. These qualities make it ideally suited to accommodating the distinct concerns that arise in the exercise of remedial discretion concerning suspended declarations.

devising the remedy so that the remedy is made maximally efficient in pursuing its end state. This accounting is not intended to legitimate the resistance, but to practically enable the fulfillment of the right. For the purposes of this paper, I have chosen to emphasize Gewirtz’s more straightforward distinction between legitimate and illegitimate third party costs, and to characterize the former as being costs that reflect constitutional values. I feel justified in doing so because, fortunately, Canada has not suffered the trenchant social resistance to racial equality and other rights annunciated in the Charter that manifested in the United States’ tortured experience with racial desegregation. In sum, I believe the political culture of Canadian society is sufficiently receptive to Charter rights that illegitimate resistance to them will rarely assume such a scale that remedies must be attenuated by it in the interests of facilitating more gradual social change toward the end state envisioned by a right.

\textsuperscript{168} Ibid. at 607.
3 Proportionality and the Limitation of Charter Rights

The preceding Part described the evolution of suspended declarations of invalidity from their origin in the *Manitoba Language Reference* to the present day. It demonstrated that suspended declarations have grown away from their original foundations, which focused judicial analysis on the public interest, to become an instrument of remedial delegation to the legislature. As a consequence of this trend, the present usage of suspended declarations generates problems of inadequate reasoning, flawed institutional assumptions, and injury to Charter rights. A unifying feature of these consequences is that they involve the application of suspended declarations without just foundation. The result is intrinsically harmful to Canada’s constitution. As s. 52 states, “the Constitution is the supreme law of Canada.” The suppression of its dictates, even temporarily, for reasons that are inadequate, ill-conceived or simply unprincipled, is inimical to the Constitution’s primary character. Moreover, the consequences to individual rights are real. The cases considered above concern individuals whose Charter rights have already been infringed by invalid legislative acts. It is unjust that they should suffer continued violation without clear and legitimate foundation.

The latter observation invites an analogy to the limitation of Charter rights. The effects of limiting a Charter right, and of temporarily extending the violation of a right by virtue of a suspended declaration, are equivalent in terms of the experiences of individuals suffering such violations; the only difference is that one state of affairs is permanent while the other is temporary. That distinction may have some significance when the harm suffered as a result of a violation is not particularly severe, but it rapidly loses significance as the violation becomes more substantial, as in cases like *Demers, Rodriguez, Swain*, and *Charkaoui*. Of course, Canada has a developed juridical approach to justifying the limitation of Charter rights in the form of the *Oakes* test, which applies s. 1 of the Charter. Given the similarity in effect between rights-limitations and suspended declarations of invalidity, it is surprising that the analytic approach governing the former has not been considered in terms of its relevance to the latter. That is the aim of this Part. Having suggested an equivalency in effect between suspended declarations and the limitation of Charter rights, I intend to demonstrate that the principles underpinning the s. 1 limitations analysis are equivalent to the principles originally animating suspended declarations. A foundation will thus be established for adapting a core feature of limitations analysis – the principle of proportionality – to respond to present problems in the usage of suspended
declarations, and to address the unique dilemmas that the courts face in the exercise of their remedial discretion.

First, it is necessary to explain the purpose and character of s. 1 by situating it within Canada’s commitment to a “postwar” model of rights protection.

3.1 Origins and Underpinnings of the Postwar Model

Constitutionally recognized, judicially enforceable rights assume central importance in Canada’s system of governance. Canada is not alone in this respect: an entrenched Bill of Rights, and the alignment relationships between citizens, courts, and legislatures that it entails, reflect Canada’s embrace of a constitutional approach taken by many countries following the end of the Second World War. The birth of fascism in countries that were previously democratic, possessing parliamentary systems of government, ostensibly independent judiciaries, and checks and balances between the various branches of the government, gave cause for democratic countries to reflect on the fragility of their legal and political institutions. Lorraine Weinrib has commented: “The rise of totalitarian regimes and the resulting wars demonstrated, in far too many contexts, the fragility of democratic institutions and the inadequacy of the rule of law. Unspeakable atrocities, breaches of the most basic norms of civil society, were not merely the product of lawlessness; they were also the products of accepted processes endorsed by judges.”

The postwar model emerged as a response to this reality. It placed the individual, endowed with basic human rights, at its centre, and conceived the institutional roles of courts, legislatures and the executive in terms of the protection and fulfillment of those rights. Individual rights were thus established as safeguards against the recurrence of totalitarianism. The result was a realignment of the relationship between the individual and the state.

---


171 Ibid. at 704: “Rights guarantees have emerged as the favoured instrument by which to protect the basic structure of constitutional democracy. These guarantees establish new institutional roles that have the effect of reconstructing the relationship between the state and the individual as citizen and right holder.”
Canada did not embrace the postwar model of constitutionalism suddenly. Indeed, its full maturation in that model did not occur until the adoption of the Charter in 1982. Nevertheless, the legal and jurisprudential transformations that began to occur in democratic countries around the world during the 1950s and 1960s – emblematized in the American struggle for civil rights\textsuperscript{172} – resonated in Canada as well. Although Canada did not yet possess a written Charter, the issues brought by citizens to its highest Court, combined with the enlightened disposition of certain of that Court’s judges, produced an early jurisprudence of civil rights in this country that established the core principles later to be adopted in the Charter.

Justice Ivan Rand was perhaps the principle architect of the “Implied Bill of Rights” decisions that marked this change,\textsuperscript{173} and his judicial and extra-judicial writings help illuminate the animating principles of the postwar model. In a lecture to the University of Toronto Faculty of Law in 1951, Justice Rand offered the following summation of human progress, in which he viewed individual freedom to be a driving imperative:

\begin{quote}
[The] evolutionary processes through the aeons of time have brought forth man instinct with an imperative to be free: free in speculations and beliefs; free in the communication of ideas; free in an equality of social privileges and opportunities; free in a voice in government; free in equality before the law; free ideally within self-willed limitations. All of this follows as the corollary of a volitional social personality, from which in turn we derive the validity of self-respect and individual dignity.\textsuperscript{174}
\end{quote}

In Rand’s view, the imperative to be free was an inherent human characteristic, and its social manifestation took on discernable forms: freedom of expression, freedom to participate in government, and freedom as an equal citizen before the law. As an “immanent” quality, the imperative for freedom preceded the state, and it’s reciprocal recognition and affirmation was essential to an individual’s dignified social existence. From this, Rand posited law both as a

\textsuperscript{172} See e.g. Lorraine E. Weinrib, “The postwar paradigm and American exceptionalism” in Sujit Choudhry, ed., The Migration of Constitutional Ideas (Cambridge: Cambridge University Press, 2006) at 84. Weinrib observes that “the postwar constitutional conception came to frame the thought and practice of the Warren Court, which in turn influenced the constitutional jurisprudence of many other countries” (ibid. at 87). While the influence of the postwar paradigm took permanent hold in those other countries, it ultimately weakened in the United States, as “it ceded to the competing constitutional conception that regards the US constitution as indigenous, historically fixed, and textually circumscribed – and therefore exceptional” (ibid.).

\textsuperscript{173} See Weinrib, “Age of Rights”, supra note 170 at 711, note 22. For examples of judgments from the Implied Bill of Rights period, see Saumur, supra note 7; Roncarelli v. Duplessis, infra note 177; and Boucher v. the King, [1950] 1 D.L.R. 657.

regulator of individual freedoms in interaction with one another, and as a limitation against the state impinging on those freedoms. Law was both an enabler and a safeguard:

[1]n the delimitation of the scope of action of men, there is a basic difference between treating law as a restriction upon individual freedom and treating freedom as a concession abstracted from the absolutism of the community. Whatever may have been the order of development, freedom is an immanent potentiality, which, in emergence, carries the insignia of its own primacy.

The positive law as the conservator of that freedom, but at the same time the guardian of the general security within which it must be exercised, becomes then the arbiter of the areas of it that are to be maintained inviolate or from which accommodation to the general need is to be exacted. It is the regulator of interferences with the cohesive forces of society, and its concessions to the general good, justified by experience and required for survival in a creative vigour through the constrained dynamism of desires, may be taken to be its chief object.\footnote{Ibid. at 4.}

Embedded in Rand’s description of human freedom is an understanding of freedom’s limits. Rand viewed law as a regulator of social interactions in the service of freedom, which necessarily entails the enforcement of “concessions to the general good, justified by experience and required for survival.” Freedom requires a framework of “general security from which it must be exercised.” The limitation of specific, individual instances of freedom may thus be necessary to maintain a society in which an equal right to freedom is universally held. Again, law intercedes as the regulator of human freedoms in the service of the common good, but also as freedom’s defender against the excesses of authority. The latter characteristic distinguishes the rule of law from mere authoritarianism. Judges, in Rand’s view, stood both as arbiters of the interaction of individual freedoms and as guardians against undue infringement of those freedoms by the state:

The point at which individual action threatens the general security or at which the public benefit is outweighed by injury to private interests is the point at which the courts will declare the boundaries of freedom. The cultivated perception of these interests, the trained appreciation of their relation to the social objectives of government, and disciplined judgment in weighing them, are the guarantees of judicial guardianship.

These delineations can be made only in an administration of what we call the rule of law. It is not sufficient to define freedoms: they must be secured to every citizen without preference or discrimination. The rule of law is to be contradistinguished from the rule of man’s despotism; it is the rule of the objective standard of reason as contrasted with the subjective standard of the individual; it is the rule of principle as against expediency. It admits of no
concession or compromise. From the realities of each situation as they are revealed by the understanding, it crystallizes in pronouncement and takes its place among permanencies.

Under that rule the freedoms must be defended against social authority. 176

Justice Rand’s views on human freedom, citizenship, the rule of law, and the role of judges were evident in *Rocarelli v. Duplessis*, 177 a decision still regarded as one of the Supreme Court’s landmark pronouncements on civil rights. *Rocarelli* concerned a civil suit launched by a restaurant owner against the Premier of Quebec, alleging that the Premier had interfered with the administration of liquor licenses in the province by directing that the plaintiff’s license be rescinded. The plaintiff was a sympathizer of Jehovah’s Witnesses, and had provided bail to several individuals who had been detained for the public promotion of their religious views.

The Court upheld the plaintiff’s suit, finding that the Premier had abused his authority by overstepping a legitimate regulatory process to exact retribution against the plaintiff. In reasons echoing his extra-judicial writing, Rand J. set out why such an exercise of power was constitutionally forbidden:

> In public regulation of this sort there is no such thing as absolute and untrammeled ‘discretion’, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative act can without express language be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of a statute. … To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. … The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power. 178

The Court’s decision in *Rocarelli* reflects the essence of the postwar model. The decision at once announces an “implied public duty” to the individual – to respect the fundamental and preeminent freedoms to which the individual is entitled – while prescribing that limitations on those freedoms must be lawful, that is, that they must be constitutionally authorized. The Premier was found liable in the case because his exercise of power exceeded the scope of constitutional authorization – a scope determined not by a written Bill of Rights, but by the

---

176 Ibid. at 8.
178 Ibid. at 140-41.
preeminent freedoms of the individual that impose boundaries against the exercise of official power.

Ultimately the Supreme Court would come to disavow an approach to constitutional interpretation that read an “Implied Bill of Rights” into the nation’s constitutional framework. Nevertheless, the fundamental rights and freedoms defended in judgments such as Roncarelli were ultimately reinvigorated and constitutionally enshrined in the Charter. So, too, was the requirement that limitations to rights be lawfully prescribed and constitutionally legitimate, a commitment affirmed in s. 1 of the Charter:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.

I now turn to the particular significance of that provision.

3.2 Section 1 of the Charter

The wording of s. 1 is precise and deliberate. Several alternate formulations of the provision were considered and rejected during the development of the Charter. Janet Hiebert notes that during the earliest ruminations about an entrenched Bill of Rights, documented in a 1968 Ministry of Justice policy paper prepared under then Justice Minister Pierre Trudeau, a comprehensive limitations clause was not even contemplated. Rather, Trudeau preferred that a Bill contain no statement of limitations whatsoever, believing the judiciary could be trusted to develop responsible limits to rights.

Ultimately, this view proved to be politically unpalatable, particularly among provincial governments reluctant to cede legislative supremacy over their areas of jurisdiction. Concern for the impact of entrenched rights on legislative power necessitated the inclusion of a limitations provision in the Charter. Thus, as federal-provincial negotiations for a Canadian Charter became more advanced during the early 1980s, the federal government proposed the following formulation of the limitations clause:

---

181 Ibid.
182 Ibid. at 109.
The *Canadian Charter of Rights and Freedoms* recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.\(^{183}\)

The tolerance for “generally accepted” limits on rights evident in this draft was a capitulation to the provincial governments’ desire retain a broad ambit of legislative sovereignty. Had it been adopted, the imperatives of legislative sovereignty might have overridden the sanctity of individual rights enunciated in the early jurisprudence of the postwar period. The formulation came under attack, however, during hearings before the Special Joint Senate and House of Commons Committee on the Constitution, conducted over several months in 1980. The public character of these hearings helped reinforce the importance of constitutional rights by providing a forum for rights-seeking individuals and groups to share their lived experiences.\(^{184}\) Ultimately, public support for the *Charter* overcame provincial opposition. The final formulation of the limitations clause set a stringent standard: it required that limitations to the enumerated rights be “prescribed by law” and “demonstrably justified”, placing the burden on the government to establish the necessity of limitations, and established the “principles of a free and democratic society” as a benchmark for justification. The unfettered freedom of legislatures to govern according to “generally accepted” standards of parliamentary sovereignty was expressly rejected.

The adoption of the *Charter* and the s. 1 limitation clause brought Canada fully within the postwar model of constitutional rights protection. The requirement that limitations on rights accord with the principles of a “free and democratic society” affirmed that rights and limitations flow from the same source – that they both ultimately serve to protect and enhance the same preeminent values. In its first major treatment of s. 1, the Supreme Court reinforced this view:

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against

\(^{183}\) *Ibid.*

which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.185

Under the postwar model, the people, not parliament, are sovereign, endowed with rights that affirm their preeminent freedoms and dignity. Legislatures, of course, retain a wide ambit of power, but any limitations they impose upon Charter rights must be justified by the underlying, sovereign interest of the people. Moreover, the state itself owes a duty to recognize and protect rights, including protection through the instrument of judicial review.186 As Weinrib observes: “The postwar model does not simply negate state power. It delineates the institutional mechanisms that transform a system of legislative supremacy into a system of constitutional supremacy.”187

When one considers the significant restrictions erected against unjust limitations on Charter rights under Canada’s constitutional model, the offence of permitting the temporary suspension of such rights without sound justification becomes plain.

### 3.3 The Oakes Test and Proportionality

A central precept of Canadian constitutional litigation is that once a party has demonstrated the violation of his or her Charter rights, the onus shifts to the government defendant to prove that the violation is justified. The Supreme Court set out its analytic method for testing the veracity such justifications in R. v. Oakes. The so-called Oakes test reflects the commitments of the postwar model of rights protection, in that it requires limitations to accord with the same values as rights – to operate in conjunction with rights in the advancement and protection of a free and democratic society.

The Oakes test is nuanced and demanding, comprising two components.188 The first component concerns legality, the requirement that limitations on rights be “prescribed by law”. This demands that limitations be effected through the official, transparent lawmaking institutions of the state, and thus guards against the arbitrary use of executive or administrative power.189 The

---

185 Oakes, supra note 9 at para. 64 [emphasis added].
186 See Weinrib’s description of the three tenets of constitutional government in “Age of Rights”, supra note 170 at 701.
187 Weinrib, “Paradigm Lost”, supra note 184 at 131.
188 See discussion in Weinrib, Paradigm Lost, supra note 184 at 127.
189 Ibid.
second component concerns legitimacy, the requirement that limitations reflect the values of a free and democratic society. This entails a sequential inquiry known as proportionality analysis.

The Supreme Court has set out the stages of proportionality analysis as follows:

(1) Is the legislative objective which the measures limiting an individual’s rights or freedoms are designed to serve sufficiently pressing and substantial to justify limiting those rights and freedoms?

(2) Are the measures chosen to serve that objective proportional to it, that is:
   a. Are the measures rationally connected to the objective?
   b. Do the measures impair as little as possible the right and freedom in question; and
   c. Are the effects of the measures proportional for the objective identified above?  

Under the first stage of proportionality analysis, a measure limiting a right must be shown to have a valid object: a pressing and substantial goal that warrants interference with the Charter. The benchmark for justification is that the goal accord with the values of a free and democratic society. The goal of protecting public safety, for example, might justify the use of a particular criminal law measure despite impinging on Charter rights, whereas the goal of promoting racial differentiation, being inimical to the values of freedom and democracy, would not.

A valid object having been shown, the second stage of the proportionality test is engaged – that the measure incorporate valid means. The means must be tailored “rationally” to fit the objective, meaning that they should actually further the objective. Moreover, they must impair the right to only the minimum extent necessary to meet their goal. A pressing and substantial objective pursued through overbroad or arbitrary measures thus will not pass the second stage of the test.

Finally, under the third stage of proportionality, the means (or more specifically, the effect of those means on the right) must be proportionate to the importance of the objective that they serve. This final step (“proportionality stricto sensu”) does not simply balance a constitutional

---

190 Summarized in Schachter, supra note 4 at para. 44.
right against a legitimate, competing purpose; it balances the *specific limitation of the right* against the *specific furtherance of the purpose* accomplished by a measure.\(^{191}\)

Proportionality analysis is considered by some scholars to be an elemental norm in modern constitutionalism, requiring both legislatures and courts to engage in a continual balancing exercise between the affirmation of rights and the furtherance of legitimate state priorities.\(^{192}\) David Beatty states:

> The fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every constitution by virtue of their status as the supreme law within a nation state. … Without a principled way of reconciling the competing interests and values that are part of every case, a constitution would quickly become encrusted in a jurisprudence of confusion and contradiction and the courts would themselves become one of the ‘naked power organs’ they were meant to suppress. The idea that a constitution could exist without some standard of proportionality is a logical impossibility. It serves as an optimizing principle that makes each constitution the best it can possibly be.\(^{193}\)

Others take a more limited view of proportionality as simply an analytic tool that, despite its wide adoption among the courts of constitutional democracies, “does not, in itself, produce substantive outcomes.”\(^{194}\) Alec Stone Sweet and Jud Mathews state:

> [Proportionality] is a doctrinal construction: it emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice. For our purposes, it is a decision-making procedure and an “analytical structure” that judges employ to deal with tensions between two pleaded constitutional “values” or “interests.”\(^{195}\)

The correct view of proportionality likely lies between these two extremes: proportionality *is* a judically-crafted analytic device (albeit one with a deep and trans-jurisdictional history), but it is a device calibrated to the fulfillment of a specific constitutional objective and, as such, contributes a particular substantive outcome. This outcome is that the limitation of rights, when justified, is always justified by values that are themselves of a constitutional order – values

---

193 *Ibid.* at 163 [citations omitted].
195 *Ibid.* at 74-75 [citations omitted].
reflective of the interests and priorities of a free and democratic society. The limitations
analysis, and the proportionality component that it subsumes, excludes all other objects and
means as being subservient to the primacy of the protected rights. A coherent, circular, and self-
referential framework of constitutional governance is thus established.

3.4 **Proportionality and Suspended Declarations of Invalidity**

I argued earlier that suspended declarations of invalidity inflict an equivalent effect upon
individuals as the outright limitation of their rights. It is now possible to deepen that
comparison. Not only do suspended declarations work an equivalent effect as the limitation of
rights, the early decisions giving rise to suspended declarations appear to have been guided by
the same core constitutional commitments that are reflected in the s. 1 limitations analysis. In
other words, those cases developed an approach to suspended declarations that paralleled the
defining features of proportionality. A subsequent departure from that approach thus connotes a
departure from the central commitments of Canada’s constitutional model. However, by
recognizing the affinity between the early authorities on suspended declarations and the s. 1
limitations analysis, a foundation may be laid to adapt proportionality as an analytic method
capable of resolving contemporary problems in the use of suspended declarations.

3.4.1 **Revisiting the Manitoba Language Reference**

A re-reading of the *Manitoba Language Reference* bears out its affinity to the commitments of
the postwar model. Finding itself constitutionally compelled to strike down a vast body of law,
the Court could derive no direction from the written text of the Constitution as to how it might
avert the obvious injury this would inflict on the public. Accordingly, the Court relied upon
unwritten constitutional principles to devise a solution, an approach reminiscent of that adopted
in the “Implied Bill of Rights” judgments considered earlier. The Court cited *Roncarelli* to hold
that “The rule of law is a fundamental postulate of our constitutional structure.”\(^1\)

It then went on to define what the rule of law entailed:

> The rule of law, a fundamental principle of our Constitution, must mean at least
two things. First, that the law is supreme over officials of the government as
well as private individuals, and thereby preclusive of the influence of arbitrary
power. Indeed, it is because of the supremacy of law over the government, as

\(^1\) *Manitoba Language Reference*, supra note 2 at 750.
established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. … According to Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89: “… the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.”

This understanding of the rule of law resonates with Rand J.’s earlier description of law serving as both a check against the arbitrary use of state power and as a regulator of the freedoms of individuals, creating the security needed for a free society to function. Drawing from this understanding, the Court announced:

> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of the Constitution. The Constitution, as Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set-out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

The importance of the rule of law as a constitutional principle was what justified the suspension of invalidity in the *Manitoba Language Reference*. To have not suspended the invalidity of the impugned laws, the Court would have expended one constitutional principle in the service of another. What is essential in this observation is that, like the limitations analysis, the service of a pressing and substantial constitutional objective justified the temporary suspension of invalid laws. This is underscored by the Court’s characterization of the situation as one of “emergency”, and its reliance on international case law concerning the doctrine of necessity to justify its temporary suspension. The Court expressed the essence of this case law as follows: “The doctrine of necessity is not used in these cases to support some law which is above the constitution; it is instead used to ensure the unwritten but inherent principle of rule of law which must provide the foundation for any constitution.”

---

197 Ibid. at 749.
198 Ibid. at 750-51 [emphasis added].
199 Ibid. at 766 [emphasis added].
declaration in this context and the limitation of rights is thus clear: both accord with the overriding aim of maintaining constitutionally, of honouring the principles of a free and democratic society.

The affinity between the Court’s suspended declaration of invalidity in the *Manitoba Language Reference* and the s. 1 limitations analysis is also supported by the length of the suspended declaration. The Court expressly declined the suggestion that its suspended declaration be fixed to expire at a certain date; rather, it held that the declaration would be suspended for only “the minimum period of time necessary for translation, re-enactment, printing and publishing of [the offending] laws.” 200 Meanwhile, all enactments of the provincial legislature subsequent to the date of judgment were to adhere to the bilingual language requirements or to have no effect. 201 One might infer from the precision with which the Court crafted the temporal character of the suspension an intent to minimally impair the constitutional rights affected, namely the rights of francophone Manitobans to access provincial laws and regulations in their preferred language.

I suggested above that in navigating remedial options, courts face dilemmas that are distinct from those concerning the scope and limits of a right. The *Manitoba Language Reference* helps to clarify this distinction, but also to illustrate how those distinct considerations nevertheless engage unifying principles. The *Reference* did not concern a Charter challenge, but its focus on for minority language rights invites a parallel to the types of issues brought before the courts under the Charter. If we were to imagine what justifications the Manitoba government might have offered under the Oakes test for the rights-infringements engaged by the *Reference*, these would necessarily be framed in terms of the purposes of the individual impugned laws. That is, a law purporting to regulate traffic in the province would be justified relative to the importance of this objective; a law concerning the protection of the family farm would be justified relative to that objective, and so on. In weighing the merits of a suspended declaration, the Court is not so much concerned with the individual objectives of each impugned law (the focus of s.1 analysis), but with the unpalatable effect of an immediate declaration on a distinct interest: the rule of law, and the public good that depends upon it. Still, while the Court faces distinct considerations when assessing the right and assessing the remedy, those considerations are motivated by a

---

common concern for honouring the principles of a free and democratic society. The analytic utility of proportionality as a tool for reconciling competing interests to this objective can thus be extended to both stages of the Court’s deliberation.

3.4.2 Revisiting Schachter

Viewed through the lens of the postwar model, the Supreme Court’s decision in Schachter also takes on renewed significance. A striking feature of Schachter is that the majority decision of the Court suggests the Oakes test can provide guidance in the selection of constitutional remedies. Lamer C.J. observed for the Court that when a statutory provision fails the “pressing and substantial objective” stage of Oakes, it will “almost always be the case” that the provision should be struck down under s. 52 (the patent unconstitutionally of the provision forbids its preservation).202 The same will generally be true when the means employed by the provision are not rationally connected to its objective.203 However, when the provision pursues a pressing and substantial objective using rational means, but fails the minimal impairment or proportionality stricto sensu tests, less intrusive remedies, such as reading-in or severance, may be warranted so as not to trammel the constitutionally legitimate qualities of the provision.204 In this analysis, the goal of preserving the purposes and intent of the legislature and the goal of preserving constitutionality are mutually reinforcing: the remedial disposition, guided by Oakes, strives to preserve the legislature’s objectives to the extent that doing so also honours the constitution. As such, Schachter already contains a powerful example of proportionality being utilized as a remedial principle guiding the discretion of the Court.

Moreover, the postwar model places the Schachter categories in a new light. Clearly, those categories serve to define instances in which the harm inflicted by an immediate declaration of invalidity outweighs its beneficial effect. The content of the categories – injury to the rule of law, public harm, and the deprivation of benefits to deserving persons – clearly align with the values of a free and democratic society. Chief Justice Lamer also cautioned that the categories were not intended to constitute a closed list. Accordingly, there is good reason to look past the Schachter categories to focus on their underlying preoccupation: the public interest in

202 Schachter, supra note 4 at para. 45.
203 Ibid. at para. 46.
204 Ibid. at 49.
maintaining values central to a free and democratic society. The balancing of these priorities against the imperative of giving immediate effect to constitutional rights is exactly the type of analysis commanded by proportionality. It thus makes sense that Lamer C.J. would warn against referring to separation of powers considerations in issuing a suspended declaration: it is the interests of the public that suspended declarations are intended to service, not the interests of the legislature.

3.4.3 Revisiting Swain

Finally, Swain reconciles well with the postwar model of rights protection. The Court in that case faced legislation whose purpose accorded with the principles of a free and democratic society: the protection of the public against potentially dangerous individuals who are mentally insane. The legislation overreached, however, in requiring the automatic detention of all mentally insane acquitees without distinction, an arbitrary provision that offended the principles affirmed in s. 1. At the stage of remedy, the Court developed a means of reconciling the interest in public safety with the priority of protecting the dignity and personal security of the criminally acquitted. While the s. 1 analysis and the remedial disposition in Swain both involved protecting the public against danger, as discussed above, the considerations at these stages of analysis were subtly different: the s. 1 analysis concerned a generalized fear that mentally insane acquitees might commit further offences, leading in turn to an overbroad provision commanding automatic detention; the concern at the remedial stage was specific and imminent, and the resulting remedy closely tailored to impair acquitees’ rights to only the minimum extent necessary to protect public safety. The hallmarks of proportionality are thus evident in the remedial disposition of Swain as well.

3.4.4 The Unifying Principles of Rights and Remedies

It is perhaps obvious to point out, following this discussion of the Manitoba Language Reference, Schachter and Swain, that suspended declarations have an important role to play in the postwar model. This is because the analytic stages that courts go through in determining the existence of a Charter violation do not, in themselves, account for the consequences that might flow from a declaration of invalidity. In other words, the arguments offered by the government under s. 1 in attempt to justify the limitation of a right will not necessarily address all issues that the court must account for in devising a remedy. Yet the latter issues bear no less on the
principles of a free and democratic society, as the preceding cases demonstrate. It is for this reason that proportionality analysis can be of vital assistance to remedial decision-making; indeed, I suggest that the hallmarks of proportionality are already evident in the originating case law on suspended declarations.

It is also obvious, at this point, why suspended declarations issued without clear justification are injurious to the commitments of the postwar model. When the courts fail to justify suspended declarations in terms that accord with the principles of a free and democratic society, they risk subsuming those principles to purely utilitarian concerns, such as minimizing inconvenience to the legislature. Gewirtz alludes to this concern in his distinction between legitimate and illegitimate interests that might bear on a court’s remedial construct; he stresses that although legitimate interests might justify modification of a remedy,

the social benefit of the right and the interest in undoing effects of its violation must be given exceptional weight in the balance; otherwise the Constitution’s allocation of rights would be subject to a de novo utilitarian reevaluation in particular cases. This weighing places a significant burden of justification on any decision to accept a cost tradeoff and sacrifice some achievable remedial effectiveness.\(^{205}\)

Proportionality analysis is uniquely suited to ensuring that the interests considered in remedial balancing are both legitimate and of sufficient weight to justify temporary displacement of a right.

The criticism could, of course, be made that it is unfair to treat remedial delegation to the legislature as “subsuming the principles of a free and democratic society”, since the legislature is itself a democratic institution equally capable of promoting those principles as the courts. The latter observation is true, but the legislature always possesses its democracy-enhancing ability to enact new legislation regardless of whether a declaration is delayed or immediate. To reiterate the argument presented in Part 2, something more should be required to justify suspension, such as an imminent harm or a legitimate apprehension that an immediate declaration would stultify the legislature in performing its democratic role – both concerns that reconcile with the public interest. But to simply suggest that the legislature is institutionally better-suited than the courts to devise remedies, and that courts should be limited to declarative relief, misconceives the role

\(^{205}\) Gewirtz, “Remedies and Resistance”, supra note 166 at 607.
of courts in answering public complaints and concerns by giving meaning to public values. The latter responsibility requires that rights and remedies be enforced in a unified, mutually sustaining manner. As Fiss states:

Rights and remedies are but two phases of a single social process – of trying to give meaning to our public values. Rights operate in the realm of abstraction, remedies in the world of practical reality. A right is particularized and authoritative of meaning. It can exist without a remedy … The right would then exist as a standard of criticism, a standard for evaluating present social practices. A remedy, on the other hand, is an effort of the court to give meaning to a public value in practice. A remedy is more specific, more concrete, and more coercive than the mere declaration of a right; it constitutes the actualization of the right.

… Yet it is also important to recognize that the meaning of a public value is a function – a product or consequence – of both declaration and actualization. Rights and remedies jointly constitute the meaning of the public value. … A constitutional value such as equality derives its meaning from both spheres, declaration and actualization, and it is this tight connection between meaning and remedy, not just tradition, that requires a unity of functions. It requires that the decision about remedy be vested in the judge, the agency assigned the task of giving meaning to the value through declaration. A division of functions, a delegation of the task of actualization to another agency, necessarily creates the risk that the remedy might distort the right, and leave us with something less than the true meaning of the constitutional value. Both sources of meaning must be entrusted to the same agency to preserve the integrity of the meaning-giving enterprise.\(^{206}\)

In the next section, I set-out in express terms how I believe proportionality analysis can be employed by the courts to give meaning to public law values as they concern suspended declarations of invalidity, thus ensuring a unity in principle between the judicial approach to rights and to remedies.

### 3.5 Proportionality Analysis and Suspended Declarations of Invalidity

Drawing from the *Manitoba Language Reference, Swain* and *Schachter*, it is possible to formulate a proposal of how proportionality could be expressly employed as an analytic method guiding the use of suspended declarations of invalidity. In deciding whether to issue a suspended declaration, I propose that a court ask itself:

- Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose? Is there a rational connection between the purpose and a suspended declaration?

\(^{206}\) Fiss, *supra* note 164 at 53.
• What impact on Charter rights will arise from the issuance of a suspended declaration, and is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective?

• Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on Charter rights?

The first analytic step would require the court to state the possible consequences of an immediate declaration of invalidity, and to explain why those consequences should be avoided. As indicated above, the court’s concerns at this stage will be different than under the “pressing and substantial objective stage” of the s. 1 analysis; whereas the latter concerns justification for the impugned law, the court will now be concerned with justification for temporary suspension, which engages a host of unique considerations. These may be that an immediate declaration of invalidity will inflict a harm of the type contemplated in the Schachter categories. Or it may be that immediate invalidation will inflict a harm unforeseen by Schachter, such as prejudice to Aboriginal rights that are incidentally affected by the Charter. Or it may be that immediate invalidation will erect barriers to the legislature crafting an optimal response to the court’s declaration, and thus prejudice the public interest in a sound, long-term remedial solution. The latter justification is the most nuanced, as it will require the court to explain why legislative discretion is hindered by an immediate declaration of invalidity – that is, why the legislature’s ordinary power to legislate in the face of an immediate declaration is inadequate. For this reason, I have grouped the “rational connection” stage of proportionality analysis within the first step: by asking if there is a rational connection between the suspended declaration and its purpose, courts will be forced to confront the possibility that suspension does nothing (or very little) to enhance the breadth of remedial options available to the legislature in reply. Accordingly, it will not be sufficient for the court to speak in abstractions or to offer mere propositions about its role vis-à-vis the legislature. The court will be required to explain why it cannot provide an adequate, immediate remedy; why the legislature is better-suited to this task; and why the legislature must be enabled through the specific instrument of a suspended declaration.

By requiring the court to speak in the language of a “pressing and substantial objective”, the first stage of proportionality analysis reinforces the underlying focus of the Manitoba Language
Reference, Swain and Schachter on the public interest. It would immediately solve the problem of inadequate reasoning evident in cases such as Figueroa, Fraser, Nguyen, and Health Services, where the courts simply offered institutional propositions without attempting to convey specific concerns of a pressing and substantial character that justified the suspension of an immediate remedy.

The second step in proportionality analysis would require the court to expressly recognize that suspended declarations inflict injury to constitutional rights – to define the nature of that injury and to consider, in light of it, whether other alternatives exist to fulfill the pressing and substantial objective defined at the first stage. Should such alternatives not exist, the “minimal impairment” criteria would nevertheless impel the court to consider a host of measures that might diminish the harshness of a suspended declaration, for example: imposing a tight deadline on the suspended declaration; imposing conditions upon the suspended declaration; retaining supervisory jurisdiction throughout the period of suspension; or employing s. 24(1) remedies in combination with the suspended declaration. A principled foundation would thus be established to move past dogmatic adherence to the so-called “rule in Schachter” which limits the combination of declarative and structural remedies, and to provide meaningful interim relief that insulates individuals against the negative effects of suspended declarations. Thus the applicants in cases such as Demers and Charkaoui would receive a remedy more consonant with their constitutional rights. In a case such as Nguyen, the court might be forced to consider if an interim remedy can be imposed to protect the rights of other individuals affected by the impugned law, not just those who brought Charter claims before the court.

The final step of proportionality analysis would require the court to balance the specific benefit secured by the suspended declaration against the specific injury it inflicts to constitutional rights. More than simply reiterating the analytic focus of the first two stages, proportionality *stricto sensu* demands that the court’s analysis be exact: it is not enough that suspension serve a generally laudable purpose; the court must articulate a real, specific objective that displaces the real, anticipated consequences of suspension for constitutional rights. Former Israeli Supreme Court President Aharon Barak has commented about the third stage of proportionality:

> [It] is the very essence of proportionality. The first two steps … focus on means to realize the objective. To be sure, they examine the limitation of the right, but if there is a rational connection between the attainment of the objective and the limitation of the right, and if there is no other, less drastic means that can attain
the objective, the limitation of the right fulfills the first two steps. The third step, however, is of a different character. … It recognizes that not all means with a rational connection to the objective that are the least drastic possible ones do, in fact, justify the realization of the objective. The ends do not justify all means. There is a moral limit which democracy cannot surpass.207

In evoking a “moral limit which democracy cannot surpass”, President Barak reminds us of the central purpose of proportionality analysis: to ensure that impingements on rights accord with the principles of a “free and democratic society”. The final stage of proportionality analysis secures this requirement. It serves as a final safeguard by ensuring that the court states the goal of suspension in specific terms that reconcile with similarly specific recognition of the consequences to individual rights.

In sum, proportionality would provide a flexible, nuanced analytic lens through which to weigh the considerations involved in the issuance of a suspended declaration. It would allow departure from the categories of Schachter but not departure from the constitutional principle that underlies them. Indeed, proportionality would serve to reconcile suspended declarations with the postwar commitments of Canada’s constitutional structure. The result would be not just beneficial in theory, it would enhance the practical enforcement of individual constitutional rights, and ensure that their temporary suspension is only justified by imperatives in the public interest.

Finally, the analytic approach presented by proportionality would have the advantage of being familiar to the courts, being used already in the s. 1 limitations analysis. The Supreme Court has already impliedly affirmed proportionality as a remedial principle by highlighting the relation of the Oakes test to the remedial choices in Schachter. A recent decision of the Northwest Territories Court of Appeal offered the following interpretation of the words “just and appropriate” as they appear in s. 24(1) of the Charter, suggesting they command a form of interest balancing reminiscent of that described earlier by Gewirtz:

The phrase “just and appropriate” in the circumstances implies a degree of proportionality and linkage between the wrong and the remedy granted.

Searching for justice involves balancing the interests of the aggrieved individuals with the state’s authority to act in the best interests of its citizens. … In some cases, a just remedy may be deleterious to the interests of the majority. However, if two remedies would be equally effective, justice requires the

207 Barak, “Proportional Effect”, supra note 191 at 380 [emphasis added].
This statement resonates with the use of proportionality promoted in this Part, not just because it promotes balancing between the vindication of a right and the incidental effects of a remedy upon others, but because it conceives of the government’s institutional role as being the protection of the public interest, thus maintaining the centrality of the latter to remedial analysis.

In sum, the use of proportionality as a remedial principle should not be entirely foreign to the courts’ existing practice. Its familiarity will hopefully help to instill its legitimacy in guiding judicial discretion concerning suspended declarations of invalidity.

4 Proportionality in Practice: Suspended Declarations of Invalidity in South Africa

My proposal to adopt proportionality as a remedial principle guiding the use of suspended declarations might be critiqued as complicating the judicial task. It is certainly easier for courts to delegate remedial decision-making to the legislature based on simple assumptions of institutional role and capacity. I have suggested how those assumptions may be flawed, and can produce consequences that offend constitutional principle. I have also shown that proportionality analysis is an existing, familiar feature of Canadian constitutional jurisprudence that could be readily adapted to the task of governing suspended declarations; indeed, its central features are already evident in the case law from which suspended declarations first arose.

In this section, I buttress my defence of the operability of proportionality analysis by looking to the example of a foreign jurisdiction. Like Canada, South Africa is a constitutional democracy in the postwar model, albeit one in which that model has emerged in response to the recent trauma of apartheid rather than the Second World War. Suspended declarations of invalidity also feature prominently in the constitutional jurisprudence of that country. While proportionality is not used by South Africa’s courts to govern the issuance of suspended

---

209 Following the trauma of apartheid, South Africa looked to the example of countries such as Germany that had adopted entrenched Bills of Rights as safeguards against the recurrence of fascism. This included adoption of the limitations analysis and the principle of proportionality subsumed within it. For an excellent discussion of South Africa’s postwar model of rights protection, and of early court judgments that pre-dated the end of apartheid but foreshadowed a later commitment to human rights, see Lorraine E. Weinrib, “Sustaining Constitutional Values: The Schreiner Legacy” (1998) 14 S. Afr. J. on Hum. Rts. 351.
declarations in the express, deliberate manner outlined above, certain case law from that country
does bear the core features of proportionality, requiring that suspended declarations be justified
by pressing objectives, balanced relative to their adverse effects, and combined with interim
relief so as to minimize prejudice to rights. A review of illustrative cases from South Africa thus
serves to illustrate how the adoption of proportionality as a remedial principle might work in
practice, and to demonstrate that the results are both intelligible and constitutionally sound.

4.1 Background to the South African Case Law

The use of suspended declarations of invalidity in South Africa is condoned by constitutional
text. Section 172 of the Constitution of the Republic of South Africa, 1996 states:

1. When deciding a constitutional matter within its power, a court
   a. must declare that any law or conduct that is inconsistent with the
      Constitution is invalid to the extent of its inconsistency; and
   b. may make any order that is just and equitable, including
      i. an order limiting the retrospective effect of the declaration
         of invalidity; and
      ii. an order suspending the declaration of invalidity for any
          period and on any conditions, to allow the competent
          authority to correct the defect.

Surprisingly little has been written about the origins of this provision, or the merits of suspended
declarations as they are used in South African constitutional law. Stuart Woolman et al., in their
text The Constitutional Law of South Africa, remark simply that the judicial power to suspended
a legal invalidation is “eminently sensible”. Oddly, the very presence the provision is at odds
with the recommendation of a 1991 Report of the South African Law Commission on
prospective constitutional models for the country:

Should legislation be declared invalid by a court decision, a transitional period
before Parliament can rectify the situation would necessarily follow. It is argued
that this transitional period could be marked by public uncertainty and
undesirable conduct. The argument continues that declarations of nullity should
not have immediate effect, but should only come into operation after the
legislature has had the opportunity to rectify the Act. …

The Commission finds this solution unacceptable. Logically and in terms of
juridical morality it is untenable that legislation which has been declared
unconstitutional … would still have legal effect and be permitted to infringe
upon fundamental rights and freedoms until the legislature decides otherwise, or

---

even for a certain period of time. Such a system could be abused and result in
civil resistance.\textsuperscript{212}

Despite this contrary statement, it would appear that suspended declarations play an important role in South African constitutional law. This role stems from a unique dialectic introduced by the transition from apartheid to democracy – namely, that the latter involved a vast body of apartheid-era laws remaining “on the books” in the new democratic South Africa, despite their now being viewed as legally and morally illegitimate. In \textit{Executive Council of Western Cape Legislature and Others v. the President of the Republic of South Africa and Others},\textsuperscript{213} the Constitutional Court applied s. 98 of the 1993 Interim Constitution,\textsuperscript{214} which permitted the issuance of suspended declarations “in the interests of justice and good government”, explaining:

\begin{quote}
The powers conferred on the Courts by s 98(5) and (6) \cite{Constitution of the Republic of South Africa Act 200 of 1993} are necessary powers. When the Constitution came into force there were many old laws on the statute book which were inconsistent with the Constitution. If all of them were to have been struck down and all action under them declared to be invalid, there would have been a legislative vacuum and chaotic conditions. Section 98(5) and (6) enable the Court to regulate the impact of a declaration of invalidity and avoid such consequences.\textsuperscript{215}
\end{quote}

In other words, suspended declarations of invalidity were felt necessary in the South African context because it was anticipated that many apartheid-era laws would be struck down during the transition to democracy, creating potential legal lacuna in important areas of public life should the courts not have the power to temper the effects of such declarations. Suspended declarations of invalidity were thus introduced to South African constitutional law for reasons that mirror the Canadian approach, albeit under more extreme and immediate post-apartheid conditions. In both countries, the originating concern that was without suspended declarations, judicial findings of constitutional invalidity could result in fundamental disruption to the rule of law. Both countries thus exhibit fidelity to the rule of law as a positive state – one requiring legal regulation of important fields of public life lest the absence of laws undermine the central commitments of the Constitution.

In the review below, I emphasize two features of the South African cases that help demonstrate their affinity to proportionality analysis in the issuance of suspended declarations of invalidity.

\textsuperscript{213} 1995 (4) SA 877 (CC) \cite{Western Cape}.
\textsuperscript{214} \textit{Constitution of the Republic of South Africa Act 200 of 1993}, s. 98(5),(6) \cite{Interim Constitution}.
\textsuperscript{215} \textit{Western Cape, supra} note 213 at 107.
The first is an emphasis on expressly stating the objectives of a suspended declaration, and balancing the importance of those objectives against the adverse affects that will result to constitutional rights. The second feature is a willingness to employ creative and flexible remedial measures that minimize the harsh consequences of suspended declarations. I suggest that these qualities taken together – balancing of a pressing objective against its adverse effects, and striving to minimize impairment to rights – bear the hallmarks of proportionality.

### 4.1.1 Balancing Objectives and Effects

The *Western Cape* case provides a useful starting point for considering the use of suspended declarations in South Africa. The case concerned a constitutional challenge to power vested in the President by the *Local Government Transition Act*.216 Shortly after South Africa’s first national, multi-racial election in 1994, a complex administrative system was established pursuant to the *Act* to define local electoral boundaries, processes and apparatus of government. The *Act* also empowered the President, with the approval of special committees of the Senate and National Assembly, to effect amendments to the *Act* by proclamation. In one instance, the President utilized the power to alter the composition of a local Executive Council tasked with the determination of an electoral boundary. The proclamation was challenged as falling outside the President’s constitutional authority.

The Constitutional Court upheld the challenge, finding that the *Act* effected an invalid delegation of Parliamentary power to the President, enabling his decree to side-step the legislative process. Accordingly, the Court found that the offending portion of the legislation should be struck down. The difficulty with such a declaration, however, was that the President’s power of decree had already been used widely, and its invalidation would nullify much of the preparatory work that had gone into local elections to be held within weeks of the judgment. The postponement of the elections would have been socially devastating in the context of South Africa’s recent transition to democracy, as Chaskalson P. observed:

> We must take judicial cognizance of the fact that the local government elections are of national importance and that the establishment of democratic local governments is widely seen as being necessary for reconstruction and development to proceed at a grass roots level.

---

216 *Local Government Transition Act 209 of 1993.*
An order which would in effect disrupt the functioning of transitional local government structures and prevent the elections from being held would not, in my view, be in the interests of good government. It could lead to increased tension in areas where the inhabitants are anxious to democratize their local structures.\[^{217}\]

In the circumstances, the Court opted to suspend its declaration of invalidity for 5 weeks, during which time it was expected that Parliament would ratify the constitutionally defective proclamations so that the upcoming elections could proceed.\[^{218}\]

In reaching its decision, the Court explicitly balanced the consequences of a suspended declaration against the consequences of immediately striking down the provision. It noted that the prejudice of a suspended declaration to the applicants was minimal; indeed, none of the parties to the constitutional challenge wanted to delay the election.\[^{219}\] As such:

Weighing this limited potential prejudice as far as the applicants are concerned against the much greater prejudice to local government generally, and the holding of elections in particular, which will result if the proclamations are declared invalid with immediate effect, it seems clear that ‘justice and good government’ require that Parliament be given the opportunity, if it wishes to do so, to remedy the situation. It will then be for Parliament to decide what, if any, action should be taken in the circumstances brought about by the declaration that [the impugned provision] is inconsistent with the Constitution. This is pre-eminently a decision for Parliament and not for the Court.\[^{220}\]

The Court thus fashioned a remedy that enforced constitutional requirements, took express account of the public interest, and honoured the legislative prerogative of government. It did not, however, provide the legislature with a suspended declaration of unlimited duration. Rather, it tailored the length of the declaration to the minimum time that Parliament would require to ratify the invalid proclamations so that the elections could proceed. In other words, it tailored the duration of the suspended declaration to the public interest that gave it justification, not to the preferences of Parliament. The Court’s decision placed Parliament in a position of urgency: either it cure the constitutional defect on a short timeframe, or face the consequences of allowing a system of electoral institutions to become invalidated despite their immense public importance. The Court stressed: “Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the

\[^{217}\] Western Cape, supra note 213 at paras. 109-110.

\[^{218}\] Ibid. at para. 115.

\[^{219}\] Ibid. at para. 112.

\[^{220}\] Ibid.
time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme.”

Considering the context of social upheaval in which the Court reached this decision, the more forgiving disposition of Canada’s courts to constitutional infractions by legislatures (evidenced by generous suspended declarations intended “to give the legislature time” to correct defects) appears quite timorous.

*Western Cape* has been described as hailing the emergence of an “independent Court, making its decisions without fear or favour.” For his part, President Nelson Mandela “responded to the court’s judgment with characteristic statesmanship by praising the Constitutional Court’s judgment and observing that ‘this judgment is not the first, nor the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance.’” Rather than precipitating a crisis, the Court’s decision prompted the South African Parliament to craft a “near-consensus solution” within the timeframe provided, albeit one that required a special re-convening of Parliament during its period of recess.

*Western Cape*’s express balancing of the adverse consequences of a suspended declaration against its beneficial effects is mirrored in several other decisions of the Constitutional Court. For example, in *Coetzee v. Government of the Republic of South Africa*, Sachs J. held that “the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect, than would be the case if the measure were kept functional pending rectification.” Similarly, in *J & Another v. Director General, Department of Home Affairs & Others*, Goldstone J. held: “the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of

---

226 1995 (4) SA 631 (CC) at para. 76. Woolman et al. describe Justice Sachs’ reasons as foretelling the approach of the Constitutional Court “for the next 13 years”: *supra* note 211 at 9-115.
In their text, *The Bill of Rights Handbook*, Currie and de Waal state: “The possible detrimental effects of immediate invalidation must be compared against the detrimental effects of continued operation of the unconstitutional law or conduct. This involves a prediction. The court must determine whether a declaration of invalidity with immediate effect would result in a situation that is more inconsistent with the Constitution than the existing situation.”

The balancing of the consequences of a suspended declaration against the consequences of an immediate declaration of invalidity would thus appear to play a prominent role in the South African case law.

### 4.1.2 Minimizing Impairment to Rights

Just as the South African case law exhibits a concern to balance the justifications for suspended declarations against their adverse effects, so too does it display a willingness to employ creative remedial measures that help minimize those effects during a period of suspension.

In *Moseke v. Master of the High Court*, the Constitutional Court faced a potential crisis in the administration of estates of black South Africans who had died without wills. An apartheid law, the *Black Administration Act*, had provided that such estates could be administered only by magistrates, and specifically precluded their administration by a Master. White South Africans faced no such restriction. The survivors of Mr. Moseke, a black man who had died intestate, sought to have his estate administered by a Master. When the Master declined jurisdiction, the applicants brought a constitutional challenge to the law. Due to an omission in the applicants’ pleading, the High Court considered only the constitutionality of the provision stipulating that black estates be administered by a magistrate; it did not consider the provision barring the administration of those estates by a Master. Accordingly, only the first of the two provisions was struck down. When the matter was referred to the Constitutional Court for

---

227 2003 (5) SA 621 (CC) at para. 21. Woolman et al. describe the Court’s statement as setting-out “the main elements of the test” for the issuance of a suspended declaration: *supra* note 211 at 9-116.


229 See Stuart Woolman et al., *supra* note 211 at 9-115ff.

230 Woolman et al. observe that the power to combine suspended declarations with interim remedies is utilized frequently by South Africa’s courts, and advocate the expansion of this practice as a means of “vindicat[ing] rights without interfering with other remedial goals”: *supra* note 211 at 9-123 and 9-126.

231 2001 (2) SA 18 (CC) [“Moseke”].

232 Act 38 of 1927.

233 *Moseke*, *supra* note 231 at para. 7.
confirmation, an “unanticipated and drastic effect” of the High Court’s order was discovered: it left no regime in place for the administration of the estates concerned, as it deprived magistrates of jurisdiction while Masters still faced the statutory bar. This potentially left as many as 66,000 estates without a forum for administration. The Court thus faced the dual necessity of addressing a patently discriminatory statute while devising a solution to the legal lacuna created by the High Court’s order.

The Court decided to strike down both provisions in the offending statute, but to suspend its declaration of invalidity concerning the jurisdiction of magistrates. The suspension was necessitated by the inability of the Master’s system to absorb the immediate transfer of all estates that were previously within magisterial jurisdiction. A legal lacuna was thus averted. Nevertheless, the Court could not ignore the offensiveness of the provision maintained by the temporary suspension. The Court observed: “It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution.”

Nevertheless:

Complete rationalization of such anachronistic laws … will take time, as it involves both practical problems of administration and difficult policy questions relating to the achievement of equality in our culturally diverse and pluralistic society. … How then, may we cleanse our statute book of all traces of a law which was a pillar of ‘the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice’, while at the same time preventing undue dislocation and hardship?

The solution devised by the Court was to impose an interim remedy in combination with the suspended declaration. It held that, during the period of suspension, the term “must” in the offending provision should be read as “may”, thus permitting the survivors of intestate black South Africans to elect between the administration of an estate by a magistrate or a Master. It was felt that this option would not “flood” the Master’s system, as enough individuals would continue to opt for the ready accessibility of the magistrate’s court.

---

234 Ibid. at para. 9.
235 Ibid. at para. 14. It was reported to the Court that in 1999, the year preceding the case, 66,000 estates were administered by magistrates pursuant to the impugned law.
236 Ibid. at para. 21.
237 Ibid. at para. 26.
238 Ibid. at para. 27.
The Court thus crafted a sophisticated remedy that left long-term, complex matters of policy to the legislature, averted the precipitation of a legal crises, and provided immediate, meaningful relief to individuals whose constitutional rights had been unjustly violated. The result in Moseneke demonstrates that both remedial precision and constitutional principle are honoured when suspended declarations of invalidity are mitigated by interim relief.

The case of Dawood & Another v. Minister of Home Affairs & Others239 similarly illustrates the potential of combining suspended declarations with interim relief. Dawood concerned a challenge to South Africa’s system of providing immigration permits to the spouses of South African citizens. In order for the spouses of South African citizens to reside in South Africa while awaiting immigration permits, they were required to first obtain temporary permits. The legislation provided no guidance to immigration officials as to when such permits were to be granted or denied. Accordingly, several individuals faced the denial of temporary certificates for seemingly arbitrary reasons. The Constitutional Court held that the legislative regime violated the constitution: by failing to set-out criteria governing the discretion of immigration officials, the regime inflicted arbitrary results on individuals and their families, impeding unified spousal life and imposing financial and emotional hardships that violated the right to human dignity.240

As the constitutional defect was one of omission, the Court could not readily cure the defect by severing portions of the legislation or reading-in a permissible meaning.241 Moreover, the Court felt that it was not well-placed to make policy decisions concerning the precise criteria needed to guide the discretion of immigration officials in the future:

It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, is primarily a task for the legislature and should be undertaken by it. There are a range of possibilities that the legislature may adopt to cure the unconstitutionality. For example, the legislature may decide that it is not necessary for foreign spouses of persons permanently and lawfully resident in South Africa to possess valid temporary residence permits while their applications for immigration permits are being processed. Another alternative would be for the legislature to provide an exhaustive list of circumstances that it considers would permit an official justifiably to refuse to

239 2000 (3) SA 936 (CC) [“Dawood”].
240 Ibid. at para. 39.
241 Ibid. at para. 61.
grant a temporary permit. There are almost certainly other alternatives as well.\textsuperscript{242}

This position was likely accentuated by the fact that a legislative review of the impugned statute was already underway.\textsuperscript{243}

The Court thus decided to issue a suspended declaration of invalidity lasting two years, leaving the task of devising a comprehensive, constitutionally compliant policy regime to the legislature.\textsuperscript{244} This did not divert the Court, however, from the necessity of providing meaningful relief to the applicants: “Given the Court’s power to make an order that is just and equitable in terms of s. 172(1)(b) of the Constitution, we should ensure that appropriate relief is provided to the successful litigants in this case, and to those litigants who are situated similarly to those litigants in the meantime.”\textsuperscript{245} Accordingly, the Court imposed a form of interim structural relief, devising its own guidelines that were to govern the discretion of immigration officials until a new legislative scheme was in place:

The relief we afford is the only relief that we can identify that would protect constitutional rights adequately pending the amendment or replacement of the Act. It is in the form of mandamus and requires immigration officials … when exercising the discretion conferred upon them … in relation to [individuals seeking temporary permits], to take into account the constitutional rights of such people and to issue or extend temporary permits to such people unless good cause exists to refuse to issue or extend such permits. Good cause, for instance, would be established were it to be shown that the issue or extension of a permit, even for the temporary period until the immigration permit application has been finalized, would constitute a real threat to the public. Good cause to refuse to issue or extend such permits would also exist if the applicants fail within a reasonable time to lodge a complete application for an immigration permit.

It is true that in providing a test of “good cause” for the exercise of … discretions, this Court is providing guidance to the decision-makers as to how to exercise their powers. This is occasioned by the need to avoid further unjustifiable limitation of constitutional rights pending Parliament’s amendment or replacement of the legislative provisions found to be unconstitutional. This route seems the best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other.\textsuperscript{246}

\begin{flushright}
\textsuperscript{242} Ibid. at para. 63-64.
\textsuperscript{243} Ibid. at para. 65.
\textsuperscript{244} Ibid.
\textsuperscript{245} Ibid. at para. 66.
\textsuperscript{246} Ibid. at paras. 67-68 [emphasis added].
\end{flushright}
Two features of the Court’s reasons are striking. The first is that, unlike Moseneke, the Court’s recognition of superior jurisdiction and institutional capacity in the legislature vis-à-vis the creation of a remedy was not buttressed by the further concern that public harm would result from an immediate declaration of invalidity. On its face, the remedial delegation was justified purely by the Court’s belief that the legislature was institutionally better-suited to correct the defective policy. In light of this justification, however, the Court crafted an even bolder interim remedy than in Moseneke: it imposed a mandamus order requiring administrative decision-makers to show cause in the denial of temporary permits to the spouses of South African citizens. While this may seem an extreme exercise of judicial authority, it should be borne in mind that the legislature retained the prerogative to craft reply legislation at its will, including on an urgent basis, should it find the Court’s interim solution disquieting.

I argued earlier that purely institutional considerations should never justify suspended declarations of invalidity – that such considerations must always be buttressed by concern that some injury will flow to the public interest from the immediate invalidation of a law. Dawood might accordingly be critiqued by asking why a two-year suspension was necessary to enable the legislature to exercise its remedial discretion; in other words, why the legislature’s intrinsic capacity to respond even to an immediate invalidation was insufficient to produce an appropriate institutional division of labour. It is intuitive that the outright invalidation of the legislation in Dawood may have produced an intolerable lacuna, given that the legislation governed the admission of new individuals to South African citizenship – a matter of vial public interest. Thus the Court in Dawood may simply have failed to provide complete reasons justifying the suspension. Interestingly, however, the Court offered the following statement concerning the propriety of suspended declarations where multiple curative options exist to respond to a constitutional infraction: “Where, as in the present case, a range of possibilities exists, and the Court is able to afford effective interim relief to the affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured.”247 While this statement approaches a purely institutional justification for a suspended declaration, it contains an important caveat: that such a justification is sound when the Court is able to provide effective interim relief to affected individuals. By implication, purely

247 Ibid. at para. 64.
institutional considerations do not, in themselves, justify suspended declarations; rather, suspended declarations are justified by a combination of those considerations and the ability to eliminate the immediate harm of a constitutional violation via interim measures. Woolman et al. interpret Dawood to suggest that

The existence of legislative choice on its own should not ... justify suspension where continued validity would have an ongoing deleterious effect on the applicant’s constitutional rights. In such circumstances, other concerns must justify a suspension – such as the possibility of service disruption or the need to protect the threatened rights.  

This reinforces the position that the public interest, not institutional considerations, is the underlying benchmark governing the issuance of suspended declarations, ensuring their compatibility with the principles of a free and democratic society.

4.2 Lessons from the South African Case Law

This preceding review should not be taken to suggest that South Africa’s courts employ suspended declarations in a universally superior fashion to their Canadian counterparts. The cases presented above were selected for their positive qualities, and certainly a comprehensive review of the South African authorities may reveal instances of the same problematic usage of suspended declarations evident in Canada. Nevertheless, the cases are important in that they establish themes: there does appear to be strong precedent in the South African case law that courts should expressly consider the adverse effects of suspended declarations prior to their issuance; that they should assess whether this adversity is justified by a legitimate need for suspension; and that they should craft interim remedies that give meaningful, immediate protection to constitutional rights. These features are the hallmarks of proportionality.

It is noteworthy that under both South Africa’s Interim and Final Constitution, the judicial power to issue a suspended declaration is qualified by the requirement that such an order further “justice and good government” or be “just and equitable”, respectively. The cases considered in this section suggest that when applying those criteria, South Africa’s courts have reinforced values very similar to those reinforced in Canada when courts seek to reconcile limitations upon

---

248 Supra note 211 at 9-119.
249 As noted previously, there is an unfortunate dearth of academic writing about suspended declarations of invalidity in the South African context. While this cannot be taken to suggest that the use of suspended declarations in that country is unproblematic, it does seem to imply that the remedy is generally uncontroversial.
Charter rights with the principles of a “free and democratic society”. That this approach works functionally in the remedial decision-making of South Africa’s courts, confronted as they are with the challenges of a newly democratic society recovering from a deeply troubled past, bodes well for its adoption in Canada, where the rule of law tradition is deep and stable.

5 Conclusion

I have proposed that proportionality be adopted to provide an analytic framework governing the use of suspended declarations of invalidity in Canadian constitutional law. The features of that framework are familiar to Canada’s courts: they derive from the courts’ existing approach to the limitation of Charter rights, and more importantly from the principles of Canadian constitutionalism that this approach reflects and affirms. The central feature of Canada’s constitution is its commitment to human dignity in the form of Charter rights. The limitation of those rights requires justification by objectives that possess their own legitimate constitutional force. Their temporary suspension should require no less a justification.

The early authorities on suspended declarations in Canada, notably the Manitoba Language Reference, Swain and Schachter, provided an analytic foundation that accorded with the principles of Canadian constitutionalism. Unfortunately, as subsequent cases departed from the “categories” established by these early decisions, the more important principles underlying the categories were lost. Rather than focusing on the public interest, the contemporary analytic approach to suspended declarations focuses on the remand of remedial authority to the legislature, a justification foreign to the original purpose of suspended declarations and at odds with the precepts of Canada’s constitutional model. While occasionally aligning with the public interest, the use of suspended declarations to delegate remedial tasks to the legislatures has had predominantly harmful effects. It has produced a problem of analytic incoherency, exacerbated flawed institutional assumptions that impose undue costs on Charter claimants, and caused unnecessary injury to Charter rights, particularly where the denial of interim remedies under s. 24(1) of the Charter is concerned. The effects suffered by individual citizens as a consequence of these problems are equivalent to the outright limitation of their Charter rights, yet they do not benefit from the rigor of the s. 1 limitations analysis when suspended declarations are judicially imposed.
An improved analytic framework for suspended declarations must address the reasons for their expanded usage while remaining true to constitutional principle. Proportionality provides such a framework. It embraces the institutional considerations that weigh on the courts’ exercise of remedial discretion without undermining the principles that both empower and command courts to enforce rights; it focuses judicial analysis on the public interest, requiring that the reason for a suspended declaration be stated in these terms, and balanced against the imperative of giving immediate vindication to constitutional rights. In so doing, proportionality analysis reconciles suspended declarations with the principles of a free and democratic society. As such, I argue that in determining whether or not to issue a suspended declaration, a court should ask:

- Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose? Is there a rational connection between the purpose and a suspended declaration?
- What impact on Charter rights will arise from the issuance of a suspended declaration, and is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective?
- Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on Charter rights?

The courts do not face a steep learning curve in adopting proportionality analysis to govern suspended declarations. They can draw from their own rich experience applying s. 1. Moreover, they may draw from the example of South Africa’s Constitutional Court to understand the functionality of this approach.

The analytic model I propose will not result in the removal of suspended declarations from Canadian constitutional jurisprudence, nor is it intended to. It will, by necessity, lead to a more limited usage of suspended declarations, and provoke the courts to issue bolder remedies in the form of increased immediate declarations of invalidity and creative new evocations of s. 24(1) of the Charter. That is entirely appropriate in a stable constitutional democracy such as Canada, possessing both a central commitment to rights and a sophisticated institutional apparatus to enable legislative reply to judicial rulings. Safeguarding constitutional rights and the rule of law requires occasional bold, immediate measures by judges. Those who would shrink from this responsibility would do well to remember the words of Justice Rand, who observed: “In the
execution of the judicial task, no attribute is more significant and essential than that of courage."  

250 Rand, supra note 174 at 8.
References

Statutes (Canada)

Act to Amend the Immigration and Refugee Protection Act, S.C. 2008, c. 3
Agricultural Employees Protection Act, S.O. 2002, c. 16
Canada Elections Act, R.S.C. 1985, c. E-2
Charter of the French Language, R.S.Q., c. C-11
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Criminal Code, R.S.C. 1985, c. C-46
Indian Act, R.S. 1985, c. I-5.
Manitoba Act, 1870, 33 Vict., c. 3 (Can.)

Statutes (South Africa)

Black Administration Act, Act 38 of 1927
Constitution of the Republic of South Africa Act 108 of 1996 (final Constitution)
Constitution of the Republic of South Africa Act 200 of 1993
Local Government Transition Act 209 of 1993

Case Law (Canada)

Boucher v. the King, [1950] 1 D.L.R. 657 (S.C.C.)
Chaoulli v. Quebec (A.G.), 2005 SCC 35
Coetzee v. Government of the Republic of South Africa,
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203
Fraser v. Ontario (A.G.), 92 O.R. (3d) 481 (Ont. C.A.)
Fédération Franco-Ténoise v. Canada (A.G.), 2008 NWTA 6
McIvor v. Canada (Registrar of Indian and Northern Affairs) (2009), 306 D.L.R. (4th) 193 (B.C. C.A.) (leave to S.C.C. denied)
McIvor v. Canada (Registrar of Indian and Northern Affairs), 2010 BCCA 168
PHS Community Services Society v. Canada (A.G.), 2010 BCCA 15 (leave to appeal to S.C.C. granted)
Saumier v. City of Quebec, [1952] 2 S.C.R. 299
Case Law (South Africa)

Dawood & Another v. Minister of Home Affairs & Others, 2000 (3) SA 936 (CC)
J & Another v. Director General, Department of Home Affairs & Others, 2003 (5) SA 621 (CC)
Executive Council of Western Cape Legislature and Others v. the President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC)
Moseneneke v. Master of the High Court, 2001 (2) SA 18 (CC)

Secondary Materials

Assembly of First Nations, News Release, “AFN National Chief Expresses Concern about the Government’s Approach to Implementing Supreme Court Corbiere Decision” (17 December 1999)

Abram Chayes, “The Role of the Judge in Public Law Litigation” (1975-1976) 89 Harv. L. Rev. 1281
Owen M. Fiss, “Forward: The Forms of Justice”, (1979) 93 Harv. L. Rev. 1
Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75


Kent Roach, Constitutional Remedies in Canada (Aurora: Canada Law Book, 1994)

Kent Roach, Editorial, 49 Crim. L.Q. 253


