FILE NO. 39277

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

TAMIM ALBASHIR

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT, TAMIM ALBASHIR

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal addresses an issue not previously directly addressed by this Court: the consequences of the constitutional remedy of a suspended declaration of invalidity of a substantive criminal provision in cases where, within the period of suspension, Parliament repeals and replaces the legislation found to be constitutionally invalid.

2. The Court of Appeal for British Columbia concluded that in cases where Parliament enacts remedial legislation and replaces the unconstitutional provisions in issue prior to the end of the suspension period, the declaration of invalidity never comes into effect, and therefore prosecutions may be initiated after the expiration of the period of suspension, and convictions entered, under unconstitutional *Criminal Code* provisions if the offending conduct took place during the period of suspension.

3. While the Court of Appeal found that the declaration of invalidity herein never came into effect by reason of the enactment of remedial legislation, the appellant's position is that it is immaterial whether remedial legislation has been enacted during the period of suspension, and once the suspension period ended the declaration of invalidity precluded convictions being entered under the unconstitutional law. To hold otherwise, the appellant submits, infringes a number of fundamental legal principles.

B. Statement of Facts

Legislative History

4. On December 20, 2013 this Court in its decision in *Bedford* found that three prostitution-related provisions of the *Criminal Code* violated s. 7 of the *Charter* and were of no force and effect: s. 210, the bawdy house provision; s. 212(1)(j), living off the avails; and, s. 212(1)(c), communication for the purpose. This Court found that s. 212(1)(j) was unconstitutionally

overbroad because it failed to distinguish between those who exploited or abused sex workers and those who increased their safety and security, such as "legitimate drivers, managers or bodyguards:"

> [142] . . . The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails of provision is therefore overbroad.

5. As the constitutional remedy, this Court struck down the impugned provisions in their entirety, concluding that "each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*" (para. 165). The declaration of invalidity was imposed on a suspended basis, as this Court held that immediate invalidity would leave prostitution "totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it," and that leaving prostitution entirely unregulated through an immediate declaration of invalidity "would be a matter of great concern to many Canadians" (at para. 167). This Court also expressed a concern that retaining the criminal prohibitions would lead to risk to sex workers, and would violate their constitutional right to security of the person (at para. 168). Balancing these competing considerations, this Court held that the declaration of invalidity would be suspended for one year, though that choice was "not an easy one" and "Neither alternative is without difficulty" (para. 169).

6. In response to this Court's decision in *Bedford,* Parliament enacted Bill C-36*, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford*, S.C. 2014, c. 25 (the "*Act*"). The *Act* received Royal Assent on November 6, 2014 and came into force on December 6, 2014.

7. The starting point of the new legislation is, for the first time in Canadian law, a general criminal prohibition of the obtaining of sexual services for consideration, s. 286.1. Parliament repealed s. 212, including s. 212(1)(j), and replaced the living off the avails offence that was the

subject of the suspended declaration, s. 212(1)(j), with a new offence prohibiting the obtaining of a "material benefit" from the sale of sexual services, s. 286.2.

8. The "material benefit" offence, s. 286.2, is similar to the old s. 212(1)(j) but is "slightly narrower" in that it enumerates exceptional circumstances where it will not be an offence for a person to obtain a material benefit (Hamish Stewart "The Constitutionality of the New Sex Work Law", 2016, 54-1, Alta L.R. 69 , at p.73). Under s. 286.2(4), the criminal prohibition in s. 286.2 has certain exceptions and does not apply to a person who receives a benefit in a number of enumerated circumstances. Those accused cannot, however, avail themselves of the exceptions in s. 286.2(4) if they have engaged in certain specified exploitative or criminal conduct, or received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

9. On December 20, 2014 the suspended declaration of invalidity expired. The simple question is what does this mean? Are the offences struck down in *Bedford* of no force and effect?

Procedural History

10. On December 22, 2016, after the enactment of the new remedial legislation and expiration of the suspension period, the appellant and two others were charged in a Direct Indictment with 18 counts of prostitution-related offences and one count of obstruction of justice. The various prostitution-related offences the appellant was charged with involved conduct that both pre-dated and post dated the *Bedford* decision. Counts 6 and 13 charged the appellant with "living off the avails" contrary to s. 212(1)(j) between March 15, 2014 and December 5, 2014: that is, the charges were under the avails provision that had been declared unconstitutional, and related to conduct alleged to have occurred within the one-year suspension period, with the time frame concluding a day before the new remedial *Code* provisions came into force. The appellant was also charged with three offences under the new remedial material benefit offence, s. 286.2, related to conduct alleged to have occurred commencing immediately after the remedial legislation was enacted.

11. The appellant and his co-accused, the appellant Mohsenipour, were tried in a judge-alone trial in the Supreme Court of British Columbia (Trial Reasons, at para. 3). The trial commenced on June 1, 2017 and the Crown closed its case on September 14, 2017.

12. After the Crown closed its case, the appellant and his co-accused applied to quash Counts 6 and 13 of the Indictment on the basis that the charging provision, s. 212(1)(j), had been declared unconstitutional in *Bedford.* They argued that they could not be convicted of the now-unconstitutional offences, and submitted that once the period of the suspended declaration came to an end, the declaration of invalidity had the usual retroactive effect. Thus, they argued, counts 6 and 13 should be quashed based on the principle in *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 that precludes conviction for unconstitutional offences.

13. The Crown's position was that the counts should not be quashed as the declaration of invalidity never came into effect because Parliament had enacted corrective legislation before the suspension expired. The Crown submitted that the effect of the suspension of invalidity in *Bedford* was that the law was valid for one year, and if the offence were committed within that year, charges could be laid even after the expiration of the period of suspension, and convictions entered.

14. The trial judge made findings of fact necessary to support convictions on Counts 6 and 13. He found that the appellant headed an escort service where the three complainants, KC, SC, and NV., provided sexual services to clients for money. He found that the appellants rented the premises, arranged and paid for advertisements, and provided transportation, supplies, and security. He further found that the appellants collected the proceeds from the escort service and paid the complainants after taking a percentage of the profits.

15. The trial judge quashed Counts 6 and 13. He held that the *Bedford* suspension of invalidity expired when Parliament enacted the corrective legislation, which rendered the old unconstitutional offence "non-existent." There was thus no basis upon which jurisdiction could be maintained over an accused on that charge (Trial Reasons, at para. 356). He held that the expiration of the suspension of invalidity meant that it had its usual retroactive effect: "[a]s uncomfortable as

the result may be, the effect of a suspended declaration in this case is clear: it operates retroactively once the suspension period expires" (Trial Reasons, at para. 373).

16. The trial judge noted that this Court in *Bedford* could have, but did not, craft a suspended declaratory remedy that would allow for the prosecution of exploitative pimps but exempt "legitimate" associates of sex trade workers who enhanced the safety and security of sex workers (Trial Reasons, at para. 372). The trial judge observed that the striking down of the provision in its entirety contrasted with the remedy granted in *Carter v. Canada (A.G.),* 2015 SCC 5, where the suspended declaration carved out the constitutional infirmities. He concluded that nothing remained of s. 212(1)(j), and it could not form the basis for a valid charge against the Appellants (para. 356).

17. The trial judge convicted the appellant of the remaining counts on the Indictment.

18. The Crown appealed the trial judge's decision to quash the counts. In a separate appeal, the appellant has appealed his convictions on the remaining counts.

19. Before the British Columbia Court of Appeal the Crown argued that the trial judge erred in law in quashing the counts. The appellant submitted on appeal that the trial judge properly quashed the counts and that, once remedial legislation was enacted in 2014, the old offence of s. 212(1)(j) ceased to have any application and the appellant could not be convicted of that offence. The appellant submitted that it had been open to the Crown to charge the appellant with the new s. 286.2 offence related to conduct alleged during the suspension period.

20. The Court of Appeal allowed the Crown appeal from the quashing of the counts, and substituted convictions for the appellants under s. 212(1)(j) of the *Code.*

21. Bennett J.A., for the Court, observed that the crux of the appeal rested on the "relationship between a suspended declaration of invalidity and the passing of remedial legislation prior to the expiration of the suspension period, in the context of the criminal law" (C.A. Reasons, at para. 75).

22. Bennett J.A. reasoned that the decision in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 was determinative. She held that if the legislator failed to enact "constitutionally compliant laws" prior to the expiration of the suspension period, then, according to *Hislop,* "the declaration will come into effect and render the impugned provision(s) *ab initio"* (para. 80). Bennett J.A. held that *Hislop* allowed for this result: if "the constitutionally impugned offence is replaced with remedial legislation within the period of the suspension, conduct captured by the former iteration of the offence is prosecutable. In other words, the retroactive effect of a suspended declaration of invalidity is pre-empted by the passing of remedial legislation." The Court held that an interpretation to the contrary would lead to "absurd results," including impunity for offences committed while the law was still valid (para 90).

23. Bennett J.A. further held that the appellant could not have been prosecuted under the new remedial "material benefit" offence for conduct prior to its enactment as such prosecution would be contrary to the "bedrock principle of criminal law that an individual cannot be found guilty of an offence not known to law at the time of the act or omission," and would contravene s. 11(g) of the *Charter.*

24. The Court of Appeal set aside the quashing of the two counts, substituted convictions and imposed sentences of two years' imprisonment on Count 6 and three years' imprisonment on Count 13, to run concurrently with the sentences imposed on the two s. 286.2 offences (C.A. Reasons, at para. 93). The Court granted the appellant an extension of time to appeal Counts 6 and 13 in order to join them with the outstanding appeals of the convictions on the other counts (C.A. Reasons, at para. 94).

PART II – QUESTIONS IN ISSUE

25. The appellant submits that:

A. This court has jurisdiction to hear this appeal as of right;

B. Foundational principals of constitutional and criminal law demonstrate that suspended declarations of invalidity have a temporal limit and presumptive retroactive effect upon their expiry;

C. The Court of Appeal erred in finding *Hislop* is determinative of the issue herein;

D. The appellant's conduct is not a proper focus of the analysis;

E. The Court of Appeal's finding that enactment of remedial legislation results in the declaration of constitutional invalidity never taking effect amounts to legislative encroachment on the core jurisdiction of s. 96 courts.

PART III - STATEMENT OF ARGUMENT

A. This Court has jurisdiction to hear this appeal as of right

26. Through correspondence dated October 26, 2020 the parties were invited to provide submissions addressing this Court's jurisdiction to hear this appeal as of right pursuant to s. 691(2)(b) of the *Criminal Code.*

27. Section 691(2)(b) provides for an appeal as of right to this court where an acquittal is set aside and the Court of Appeal below enters a verdict of guilty. The appellant submits that in substituting an conviction on the counts quashed by the trial judge, the Court of Appeal's decision was tantamount, for the purpose of appellate jurisdiction, to setting aside an acquittal and entering a verdict of guilty.

28. This Court has repeatedly held that the quashing of an indictment is equivalent to an acquittal for the purposes of appellate jurisdiction: *Lattoni and Carbo v. The Queen*, [1958] S.C.R. 603; *R. v. Sheets*, [1971] S.C.R. 614; *Cheyenne Realty Ltd. v. Thompson*, 1974 CanLII 4 (S.C.C.), [1975] 1 S.C.R. 87; *R. v. Holmes*, 1983 CanLII 1827 (Ont. C.A.); *R. v. Jewett,* 1985 CanLII 47 at 38. Thus, where a court of appeal overturns a trial level decision quashing a count and substitutes a conviction, the "acquittal" requirement of s. 691(2) is satisfied.

29. In allowing the appeal, the Court of Appeal exercised its powers under s. 686(4)(b)(ii), which empowers an appellate court to "enter a verdict of guilty." In overturning the quashing of the Counts, the Court of Appeal entered convictions: in other words, verdicts of guilty. Had the parties

not agreed the appropriate sentences for the offences in counts 6 and 13 were periods of imprisonment concurrent with sentences already imposed, the matter would have been remitted to the trial court for sentencing.

30. The order in issue thus gives rise to an "as of right" appeal under s. 691(2)(b) of the *Criminal Code.* As Justice Martin explained in *R v. Li* "the phrase 'enters a verdict of guilty' includes making an order that sets aside a permanent stay where that order is tantamount to entering a verdict of guilty, thus securing the purpose of this provision, which is to ensure that an accused person has one level of appeal to raise a question of law arising from their conviction." (*R. v. Li*, 2020 SCC 12, *R. v. Magoon,* 2018 SCC 14 at 38). The right to appeal in such circumstances was also described by Doherty J.A. as follows in the decision in *R. v. Charley,* 2019 ONCA 726 (at para. 117):

> Section 686(4)(b)(ii) allows the court to "enter a verdict of guilty". That language is awkward when the Crown appeal is not from an acquittal, but instead from an order staying proceedings after a finding of guilt. Just as with the reference to "acquittal" in s. 686(4) must be read purposively to include orders imposing permanent stays of proceedings, the phrase "enter a verdict of guilty" should be read to include making an order that sets aside a permanent stay and affirms a finding of guilt made in the trial court: see R. v. Pearson, [1998] 3 S.C.R. 620, at para. 16.

B. Foundational principals of constitutional and criminal law establish that suspended declarations of invalidity have a temporal limit and presumptive retroactive effect upon their expiry

i. Section 52 remedies: foundational principles

31. Section 52(1) of the *Constitution Act, 1982* provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency. This Court held in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, that the "undoubted corollary" to the fundamental principle of constitutional law set out in s. 52 is that "no one can be convicted of an offence under an unconstitutional law" (para. 38).

32. This Court has held that while courts cannot insist on "perfect justice," those affected by an unconstitutional law ought to have a right of redress because of the "grave nature of constitutional infringements" (*R. v. Thomas,* [1990] 1 S.C.R. 713; *Hislop,* at para. 83 *per* Lebel and Rothstein JJ. and at para.158 *per* Bastarache J.).

33. As described by Professor Roach, "[c]onstitutional remedies are matters of considerable importance. Constitutional law expresses the most fundamental restraints and obligations of governments. Violations of constitutional rights are a serious matter both for those who suffer from the violation and the public in general" (quoted in *Hislop, per* Bastarache J. at para. 158).

34. Declarations of constitutional invalidity of legislation pursuant to s. 52(1) are generally presumed to be retroactive. This result flows from the theory that the legislature never had the authority to enact unconstitutional law and therefore a declaration of constitutional invalidity "involves nullification of the law from the outset" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55-2, as cited in *Hislop* at para. 83). This is known as the "Blackstonian" or "declaratory" approach to constitutional law, and is expressed in the very language of s. 52(1) of the *Constitution Act* (*Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at 82-83, 86; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.R. 504, per Gonthier J., at para. 23; P.W. Hogg, *Constitutional Law of Canada,* Vol. 2 at 58-2).

35. Section 52 of the Constitution Act, 1982 thus targets the unconstitutionality of laws in a direct non-discretionary way: laws **are** of no force or effect to the extent that they are unconstitutional. The mandatory language of s. 52(1) suggests an intention of the framers of the Constitution that unconstitutional laws are to have no effect to the extent of their unconstitutionality (*Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212 at 232(a)-(f); *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Ferguson*, 2008 SCC 6).

36. Under the so-called "declaratory" approach, s. 52(1) remedies are fully retroactive because the legislature never had the authority to enact the unconstitutional law in the first place. The purpose of the retroactive effect of the declaratory approach is to give those affected by an unconstitutional law the right of redress. As this Court held in *Hislop,* "[i]f the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past" (at para. 83).

ii. Section 52 remedies: suspended declarations of invalidity

37. A suspended declaration of invalidity is a substantial departure from the declaratory approach. The power of the court to order such a remedy is not found in the Constitution, but is rooted in the rule of law. It was first recognized in *Re Manitoba Language Rights,* 1985 CanLII 33 (S.C.C.) in which a finding that Manitoba had breached its constitutional obligation to enact legislation in both French and English meant that almost all of the province's laws were constitutionally invalid. This Court held that the declaration of invalidity would be postponed "for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty." (at 84) The justification provided was to provide Manitoba the time required to re-enact its laws in French and English as otherwise the province would face "chaos and anarchy."

38. Subsequently, in *Schachter v. Canada*, [1992] 2 S.C.R. 679, this Court articulated three circumstances where a suspension of a declaration of invalidity may be appropriate. A suspended declaration of invalidity was said to be "clearly appropriate" if an immediate declaration of invalidity: (1) "poses a potential danger to the public"; (2) "threatens the rule of law"; or, (3) "would deprive deserving persons of benefits without providing them to the applicant." This Court held that the effect of the remedy was to "delay the effect" of the declaration (*Schachter* at p. 716).

39. The appellant submits that these seminal decisions make evident that a suspended declaration of invalidity is a delay to the ***presumptive retroactive*** nature of the constitutional remedy. A suspended declaration of invalidity is not a purely prospective remedy. Rather, it ***temporarily*** limits the retroactive effect of a constitutional remedy so as to provide Parliament with time to enact legislation to cure the constitutional defect identified. This is made clear in the majority's reasons in *Schachter* at 716. It was also addressed by Bastarache J. in his concurring reasons in *Hislop*:

> 159 …. the normal retroactive effect of judgments may need to be tempered in certain circumstances in order to protect other legitimate interests (see Choudhry and Roach, at pp. 209-11). The use of transition periods and suspended declarations of invalidity are accepted ways of **temporarily limiting the retroactive effect** of constitutional remedies in order to prevent legal vacuums and introduce new procedural requirements. **They are not evidence of the Court operating outside of the Blackstonian paradigm**, but rather a recognition that in certain circumstances other legitimate interests may require retroactivity to be limited.

(emphasis added)

40. The generally retroactive nature of constitutional remedies and the manner in which suspended declarations operate was further described by Bastarache J. in his concerning reasons in *Hislop*:

> 140 The general norm of retroactivity has been reaffirmed many times by this Court. In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, the finding that the Province of Manitoba has been constitutionally required since 1890 to enact its laws both in English and in French applied not only for the future, but also retroactively to all of its laws that had been enacted in English only since 1890. **The declaration of invalidity was suspended in order to preserve the rule of law, but there was no doubt that a finding of unconstitutionality applied retroactively**. In *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, a violation of s. 15(1) of the *Charter* was cured by reading the excluded group into the legislation, a remedy that applied retroactively. In *R. v. Hess*, 1990 CanLII 89 (SCC), [1990] 2 S.C.R. 906, the Court severed an offending portion of the *Criminal Code*, R.S.C. 1985, c. C-46, and ordered a new trial on the basis of the provision as amended even though, strictly speaking, it was not the law of the land when the alleged crime had been committed. These cases are only examples, but they confirm that retroactivity of a constitutional remedy granted under s. 52(1) is the norm in our constitutional jurisprudence, not the exception.

41. While Lamer C.J. cautioned in *Schachter* that suspended declaration of invalidity are not a remedial panacea, they have been applied with limited consideration of their meaning and effects, particularly in the criminal law context (*Schachter* at 716).

42. Principles related to suspended declarations of invalidity, or as they are referred to in *Schachter,* "delayed declarations," have developed through case authorities that have primarily related to positive rights in the context of benefit-conferring legislation. Such legislation is forward-looking and targets rights that have not yet vested. Remedial legislation enacted in response to a finding of unconstitutionality in such cases typically has as its focus social and budgetary concerns, and is not constrained by the principles in *R. v. Big M Drug Mart*. Social and budgetary concerns that animate remedial legislation in the social welfare realm are largely inapplicable to the criminal law, which is necessarily backwards-looking and concerned with past actions and their consequences.

iii. Section 52 remedies: unconstitutionality of criminal law provisions

43. Accused persons who are "still in the judicial system" receive the benefit of a finding of legislative unconstitutionality: *R. v. Wigman,* [1987] 1 S.C.R. 246; *R. v. Sarson,* [1996] 2 S.C.R. 223. An accused will be considered "still in the judicial system" when, following their conviction, they have filed an appeal, filed an application for leave to appeal, or where an extension of time to do so has been granted: *R. v Thomas*, [1990] 1 S.C.R. 713.

44. Convictions under provisions found to be unconstitutional remain valid in cases where the accused is out of the system at the time the finding of unconstitutionality is made, and as this Court noted in its decision in *Wigman,* courts cannot insist on "perfect justice."

45. The "in the judicial system" requirement developed by this Court strikes a balance between the principle of finality in criminal proceedings and the principle expressed in *R. v. Big M Drug Mart* that there should not be convictions for unconstitutional offences. The underlying premise is that all of those facing prosecution *from the time of a declaration of invalidity onward* enjoy the benefit and may not be convicted under the unconstitutional law. Convictions could thus not be entered against the appellant, on application of these principles, save for the finding made by the Court of Appeal that the declaration of invalidity never came into existence - a finding the appellant says is erroneous.

46. It is submitted that the reasoning of the Court of Appeal below represents a departure from the conventional approach to declarations of invalidity in the criminal law context, where the starting point is the law does not allow for convictions to be entered for those "in the judicial system" for an offence that has been found to be unconstitutional.

47. With respect to suspended declarations of invalidity of criminal law provisions, courts have generally taken as self-evident that the accused before the court who obtains the finding that legislation is unconstitutional should enjoy the benefit of the finding of unconstitutionality even where a suspended declaration of invalidity is the remedy granted. This illustrates some of the conceptual difficulties with the remedy.

48. In *R. v. Guignard*, 2002 SCC 14, the accused was charged with a bylaw offence for erecting a sign that criticized a local business. He challenged the by-law on the basis that it infringed his freedom of expression as guaranteed by s. 2(b) of the *Charter*. This Court agreed and struck down the provision, ruling that the declaration of invalidity be suspended for six months. However, this Court entered an acquittal of the appellant by reason of the constitutional invalidity of the law. The constitutional source of the remedy, given that the finding of invalidity was suspended, was not analyzed.

49. Similarly, in *R. v. Bain*, [1992] 1 S.C.R. 91 the accused successfully challenged the constitutionality of jury selection provisions, ss. 563(1) and (2) of the *Criminal Code*. The accused had been acquitted at trial and on appeal to the provincial appellate court a new trial had been ordered. On appeal to this Court the court declared the provisions invalid, and ordered the declaration of invalidity be suspended for six months. Notwithstanding the suspension of the declaration of invalidity, the appellant enjoyed the benefit of that remedy as the acquittal was restored.

50. In *R. v. Canfield*, 2020 ABCA 383 the accused were charged with possession of child pornography that had been discovered following searches of their electronic devices at the border. The Alberta Court of Appeal struck down the search provision, s. 99(1)(a) of the *Customs Act,* as it purported to authorize unrestricted searches of electronic devices at the boarder in violation of Section 8 of the *Charter.* Concerned that immediately invalidating the provision authorizing such searches would pose a danger to the public, the Court of Appeal suspended the declaration of invalidity for one year. The Court nonetheless provided the appellant with the benefit of the finding that s. 99(1)(a) was unconstitutional, and held that the search of the accused's electronic devices had not been authorized by law, leading to a finding of s. 8 *Charter* breach and exclusion of the evidence (at paras. 110-115, 116).

51. Notably, in such cases, involving accused who successfully challenge the constitutionality of a criminal law provision where a suspended declaration of invalidity is then granted, the mechanism by which the remedy is both suspended and yet somehow applicable to the accused before the court, notwithstanding the suspension, is not made clear in the analysis. It is not the case

that the remedial source is in the nature of an individual remedy pursuant to 24(1), as this Court in *Schachter* indicated that remedy was generally unavailable during a suspension period (*Schachter*; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (S.C.C.); although in *R. v. Demers,* 2004 SCC 46*,* an individual 24(1) remedy was granted).

52. Had the finding of unconstitutionality of the provisions in issue not been made in the *Bedford* case but rather made herein, then precedent suggests the appellant would have enjoyed the benefit of that result notwithstanding that a suspended declaration was imposed.

53. There are very few case authorities in the criminal law context that consider the effect of the constitutional remedy of a suspended declaration of invalidity on accused who were not the parties that challenged the constitutionality of the legislation.

54. In *R. v. Ackman,* 2017 MBCA 78 the Manitoba Court of Appeal upheld a post-*Bedford* conviction for living on the avails of prostitution under a provision found in *Bedford* to be unconstitutional. The Court held that when the remedial material benefits offence under s. 286.2 came into force it pre-empted *Bedford*'s declaration of invalidity from taking effect. This was the same reasoning followed by the Court of Appeal herein.

55. In *R. v. L.R.S.*, 2016 ABCA 307, on the other hand, the Crown conceded that convictions under *Criminal Code* provisions for living on the avails of prostitution that were entered one month after this Court's decision in *Bedford* should be overturned because the provision was subsequently held to be unconstitutional in *Bedford,* even though that issue had not been raised by the two appellants, and the appeal was allowed with respect to those counts on that basis.

56. Similarly, in *R. v. A.S.,* 1998 CanLII 14610 (Ont. C.A.), the appellant had been convicted of a number of sexual offences involving his step-son that took place between 1991 and 1993. Among those convictions were those pursuant to s. 159 of the *Criminal Code* which criminalized engaging in anal intercourse, except in limited circumstances. By the time the accused in *R. v. A.S.* appealed his conviction that section had been struck down by the Ontario Court of Appeal in *R. v. M. (C.),* (1995), 98 C.C.C. (3d) 481 (Ont. C.A.) as infringing s. 15 of the *Charter* . On appeal, the

Crown conceded the s. 159 conviction could not stand as the offence was now unconstitutional, but contended that the Court of Appeal could simply amend the indictment to charge a different offence under s. 683(1)(g) of the *Criminal Code.* In rejecting that argument Finlayson J.A. concluded "the appellant was convicted of an unconstitutional offence, one that he should not have been charged with in the first place because it did not exist at law. No cure is available because the matter goes to the very jurisdiction of the court" (at para. 7).

57. The appellant submits that there is no principled reason why a finding of unconstitutionality of criminal legislation should apply differently to an accused advancing the claim of unconstitutionality versus other accused "in the judicial system" at the time the finding is made, whether the remedy involves a suspended declaration or not. Difficulties arise when suspended declarations are involved because conceptually the remedy is a difficult fit with the substantive criminal law. Indeed, the very determination of whether one is "in the judicial system" may become a vexing one by reason of the suspension of the declaration.

iv. Suspended declarations of invalidity of substantive criminal law provisions have retroactive effect

58. In cases where a criminal law is found to be unconstitutional, and the remedy is not suspended, the declaration has the usual retroactive effect, commencing immediately. While this Court has not directly addressed the question of what becomes of unconstitutional substantive criminal law once the suspension period of a suspended declaration of invalidity expires, it is submitted that there exists no principled reason why when substantive criminal law is struck down pursuant to s. 52(1) of the *Constitution Act,* and a suspended declaration of invalidity imposed, that retroactivity of the remedy should not commence from the date the suspended declaration ends. It is submitted that the remedy must have effect as of the date the Court stipulates it has effect, regardless of whether the remedy is delayed.

59. This interpretation of the effect of a suspended declaration, which was accepted by the trial judge below, is consistent not only with the jurisprudence reviewed herein, but also with the rule of law generally and the values that inform it: "certainty, accessibility, intelligibility, clarity and

predictability." (*R. v. Ferguson,* 2008 SCC 6; *Reference re Secession of Quebec,* 1998 CanLII 793 (S.C.C.)).

60. The appellant submits that when remedial legislation is enacted within a period of suspension, the temporal application of the new law is for Parliament to determine. But where, as here, Parliament enacts no transitional provisions and the new legislation is entirely silent on the temporal application of the new law, the old unconstitutional law cannot be said to continue to apply. Rather, the declaration of invalidity is presumed to have the usual retroactive effect once the suspension expires. The appellant submits that the effect of the suspended declaration of invalidity imposed in *Bedford* was to give **temporary** life to s. 212(1)(j) and allow the unconstitutional offence to live for a time, until the one year suspension period came to an end.

61. The appellant submits that through application of underlying principles articulated by this Court, the effect of the suspended period of invalidity must be that the suspension, or delay, placed on the declaration of invalidity ceases to have any effect upon expiry of the suspension period, and the mandatory language of s. 52(1) of the *Constitution Act* operates from the moment the suspension period ends to void the impugned legislation.

62. If the Court of Appeal's decision is not overturned and the trial judge's finding restored, then it cannot be said that the present status of prosecutions under s. 212(1)(j) is clear, predictable or intelligible. Rather, notwithstanding the provision is unconstitutional, prosecution under s. 212(1)(j) for conduct pre-dating the end of the suspension period may continue in perpetuity, or perhaps only until such a time as the *successor provision* may be found to be unconstitutional. The latter qualification arises from the language of the Court of Appeal: the Court finds that it is the enactment of the replacement "constitutionally compliant" *Code* provisions that somehow allows for post-suspension prosecution under the old, unconstitutional law (para. 80). It is submitted that in the criminal law context this linking of the ability to prosecute and to enter convictions under a repealed and unconstitutional provision with the existence or non-existence of a successor provision, and with the constitutionality of that successor legislation, creates additional indeterminacy and incoherence.

C. The Court of Appeal erred in finding *Hislop* is determinative of the issue herein

63. The Court of Appeal held that the decision of this Court in *Hislop* "squarely" addresses the issue in this case (C.A. Reasons, at para. 80). The Court of Appeal reasoned that application of principles in *Hislop* led to the conclusion that the effect of Parliament's repealing and replacing the provisions impugned in *Bedford* was to preserve s. 212(1)(j) forever and override the usual retroactive effect of the Court's striking down of an unconstitutional law. Accordingly, analysis of *Hislop* is necessary.

64. In *M. v. H.*, 1999 CanLII 686 (S.C.C.), [1999] 2 S.C.R. 3, this Court struck down the definition of spouse in the *Family Law Act*, R.S.O. 1990, c. F.3, as contrary to s. 15 of the *Charter*. The declaration of invalidity was suspended for six months to allow for enactment of remedial legislation. The federal government then amended certain federal legislation to address the constitutional deficiency. The *Hislop* appeal involved a constitutional challenge to remedial amendments made to the *Canada Pension Plan t*o recognize same-sex conjugal relationships for the purpose of survivor pension entitlement under the *CPP* that were enacted in response to *M. v. H*. The federal remedial legislation made the payment provisions partially retroactive, allowing for payments of survivor pensions to partners of the survivors commencing July 2002, when the legislation came into force. The payment provisions were not, however, fully retroactive to 1985, when the *Charter* came into force.

65. The claimants in *Hislop* challenged the remedial payment provisions because they were not fully retroactive. On appeal to this Court, it was held that the claimants were effectively seeking retroactive *Charter* relief under s. 52(1) of the *Constitution Act*. Such remedy, this Court held, would clash with Parliament's remedial response, which had been to make the payment provisions only partially retroactive. This Court found that this was a matter for Parliament to decide, based on a balancing of social and budgetary considerations, and that it was not for the courts to impose a fully retroactive remedy under s. 52(1), as that "might prove highly disruptive in respect of government action" (para. 101).

66. In the context of social welfare legislation, as was in issue in *Hislop,* the result is consistent with underlying principles: a court does not have jurisdiction to extend benefits to those who would otherwise be left out of a constitutionally-unsound benefit regime.

67. However, the analysis in *Hislop* is of limited applicability to the issue herein.

68. First, *Hislop* involved a constitutional challenge to the remedial legislation and did not concern the criminal law. In the context of criminal law *Hislop's* strict application conflicts with the principle in *R. v. Big M Drug Mart* – that no one can be convicted under an unconstitutional law. That principle has no application in the context of governmental benefits legislation and was not considered in *Hislop.* It is submitted that in the criminal context fundamental principles require that suspended declarations of invalidity have their usual retroactive effect once the suspension period expires.

69. Secondly, unlike in *Hislop,* Parliament, in enacting new *Criminal Code* provisions in response to *Bedford,* was silent on the temporal effect of the new legislation. In *Hislop* the limited retroactive effect was explicit in the remedial legislation.

70. Furthermore, in any event the Court of Appeal misapprehended the decision in *Hislop* in finding that the decision reflects a principle of law that the mere fact of the passing of remedial legislation within a suspension period automatically pre-empts the retroactive effect of a suspended declaration of invalidity. The passages in *Hislop* relied on by the Court of Appeal are far too limited, nuanced and equivocal to support the interpretation placed on them. Principles of constitutional jurisprudence develop incrementally and through careful consideration of underlying principles, jurisprudence, and balancing of interests. Especially given that what was in issue in *Hislop* was benefit-conferring legislation, the Court of Appeal erred in finding that that the decision effectively overturned the entire body of law reflecting the Blackstonian approach, to say nothing of *R. v. Big M Drug Mart* principles.

71. It is submitted that the Court of Appeal erred in interpreting *Hislop* as support for a result that is entirely inconsistent with foundational constitutional principles. The analysis of the Court

of Appeal illustrates the remarkable incoherence in the jurisprudential principles related to suspended declarations of invalidity, and the absence of clarity concerning their effect, particularly in the criminal law context. This is illustrated in *Quebec (Procureur general) v. D'Amico*, 2015 QCCA 2138, a decision concerning the status of provincial regulations enacted in response to this Court's decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, with respect to medical assistance in dying. The motions judge had determined that while the suspended declaration of invalidity declared in *Carter* was in effect, s. 241(b) of the *Criminal Code* remained in force and this rendered the new provincial regulations inoperative on application of the federal paramountcy doctrine. The Court of Appeal determined that paramountcy had no application because the doctrine requires a conflict between **two valid laws** and the federal *Criminal Code* provisions were **invalid** as a result of *Carter*, finding:

> [34] In light of *Carter*, there is no doubt that the provisions of section 14 and paragraph 241(b) of the *Criminal Code* are constitutionally invalid federal legislative provisions insofar as they prohibit medical aid in dying.
>
> [35] It is true that the coming into effect of this declaration of invalidity has been suspended for 12 months. Nevertheless, as recognized by Lamer C.J., dissenting on the merits in *Rodriguez*, "during the period of a suspended declaration of invalidity...the provision is both struck down and temporarily upheld" (emphasis in original), which makes constitutional exemptions possible where circumstances are amenable. Lamer C.J. also recognized that "the legislation subjected to a suspended declaration of invalidity will not necessarily be left operative in all of its violative aspects...during the period of the suspension".

D. The appellant's alleged conduct is not a proper focus of the analysis

72. The Court of Appeal anchored its decision in part on the appellant's allegedly "parasitic" conduct. Bennett J.A. held (at para. 86):

> The parasitic, exploitative conduct engaged in by the respondents cannot be immune to criminal liability simply because it occurred during the suspended declaration of invalidity and for which charges were laid after. Mr. Mohsenipour and Mr. Albashir lived on the avails of prostitution when it was illegal to do so. That conduct continues to be illegal. By imposing a suspension of its declaration of invalidity, the Court extended the life of the law.

73. The appellant submits that, as the trial judge rightly held, this Court in *Bedford* could have but did not, craft a suspension which would allow for the prosecution of exploitative pimps as opposed to "legitimate" people who enhanced the safety and security of sex workers (Trial Reasons, at para. 372).The trial judge observed that such a remedy had, for example, been imposed in *Carter v. Canada (A.G.),* 2015 SCC 5, but had not been imposed in *Bedford* (para. 372).

74. Furthermore, the reasoning of the Court of Appeal is flawed because the principle in *R. v. Big M Drug Mart* has "nothing to do" with the *Charter* rights of the accused, as it is the "nature of the law, not the status of the accused, that is in issue." In *R. v. Nguyen*, 1990 CanLII 89 (S.C.C.), McLachlin J. (as she then was) observed that a constitutional defect may be raised in the defence of a criminal charge even if the accused is arguing that the law violated the rights of others.

75. Similarly, in *R. v. Wholesale Travel Group*, 1991 CanLII 39 (S.C.C.), a corporation was permitted to argue that absolute and strict liability offences violated s. 7, despite the fact that their status as a corporate defendant precluded them from having such rights themselves This was only just, as no person can be convicted under an invalid law.

76. It is thus immaterial whether or not the appellant was a "parasitic pimp" or a legitimate bodyguard. The law *itself* is at issue, not the conduct of the accused.

77. Furthermore, in finding that prosecution and conviction under the unconstitutional law is constitutionally permissible so long as the conduct in issue occurred within the period of suspension, the Court of Appeal has opened the door for all who may have violated the unconstitutional provision to be prosecuted and convicted. In other words, if the Court of Appeal is correct then the Crown may prosecute tomorrow a "legitimate driver or bodyguard" for violating s. 212(1)(j) during the suspension period.

78. The appellant notes that no *Charter* right entitles an accused to be tried under a more favorable law when the law changes (see, *R. v. Bengy,* 2015 ONCA 397, at paras. 64, 65). Thus if the decision of the Court of Appeal is upheld then the only safeguard against a legitimate bodyguard being prosecuted and convicted of a s. 212(1)(j) offence for conduct in the period of suspension would be the exercise of prosecutorial discretion (see, *R. v. Anderson,* 2014 SCC 41).

This Court has consistently held that courts cannot and should not rely on prosecutorial discretion to avoid an unconstitutional or unjust result (see, *R. v. Smith,* [1987] 1 S.C.R. 1045; at 1078 and *R. v. Nur,* 2015 SCC 15 at paras. 85-92).

79. The appellant submits that his alleged conduct ought not to form part of the analysis herein, and the Court of Appeal erred in factoring that conduct into its analysis.

E. The Court of Appeal's finding that enactment of remedial legislation results in the declaration of constitutional invalidity never taking effect amounts to legislative encroachment on the core jurisdiction of s. 96 courts

80. The Court of Appeal's finding that the enactment of remedial legislation presumptively overrides the Court's finding of the unconstitutionality of the legislation it replaces is concerning as well from the perspective of the core jurisdiction of the superior courts. Applying the reasoning of the Court of Appeal, had Parliament not enacted remedial legislation then the appellant could not have been convicted of the offence as once the period of suspended declaration ended the offence became unconstitutional, and it is solely the enactment of constitutionally-compliant *replacement* legislation prior to the expiration of the suspension period that is said to have presumptively resulted in the declaration of invalidity becoming incapacitated. The mere fact of enactment of the replacement legislation is said to bring this about, rather than any explicit legislative terms.

81. Superior courts' core jurisdiction must be free of legislative encroachment, and legislation that intrudes upon that core jurisdiction may be struck down: *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (S.C.C.), [1995] 4 S.C.R. 725, para. 44; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, 1996 CanLII 259 (S.C.C.), [1996] 1 S.C.R. 186 at para. 56.

82. The core jurisdiction of the superior courts has been held to include the following elements: the preservation of the rule of law; the exercise of a superintending and reforming power over the provincial courts of inferior jurisdiction and provincial public bodies; the scrutiny of the constitutionality of legislation; the resolution of disputes on issues of private and public law; and, the oversight of its own procedure: *In the matter: Reference to the Court of Appeal of Quebec*

pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure, 2019 QCCA 1492 , para. 72

83. The effect of the Court of Appeal's decision is to undermine the critical jurisdiction of the s. 96 courts to scrutinize the constitutionality of legislation, as it found that the mere fact of legislative enactment of replacement remedial legislation presumptively eliminates findings of unconstitutionality, such as that in *Bedford,* and allows for prosecution and conviction, including of the appellant, under laws that have been found unconstitutional by a s. 96 court. It is submitted that any such impacts of remedial legislation, whether they be explicit in the language of the remedial legislation or, as here, are claimed to be a presumptive consequence of the legislation, improperly encroach on the core jurisdiction of the superior courts.

84. Thus the interpretive principle that that Court of Appeal derived from its reading of *Hislop* improperly infringes on core jurisdiction and must be rejected. The overturning of the quashing of the counts and the entering of convictions, in the face of the s. 96 court's finding of unconstitutionality, improperly infringed on the core jurisdiction of the s. 96 Courts and must be overturned on that basis, alone.

85. If the Court of Appeal is correct, nothing precludes successful prosecution at any time in the future of "legitimate drivers, managers, or bodyguards" (*Bedford,* at para. 148) under the old unconstitutional offence for conduct alleged to have been committed during the one-year period of suspension.

Conclusion

86. It is submitted that foundational principals of constitutional and criminal law outlined above establish that suspended declarations of invalidity have a temporal limit and presumptive retroactive effect upon their expiry. This analysis demonstrates clearly that suspended declarations of invalidity are ill suited to remedying constitutional invalidity in the substantive criminal law and should be imposed rarely in that context.

87. The suspension imposed by this court in *Bedford* expired on December 20, 2014 rendering s. 212(1)(j) of the Criminal Code void. The appellant could not be convicted of the offence in issue once the suspended declaration of invalidity expired. That Parliament had enacted remedial legislation in the interim was immaterial. The trial judge correctly quashed the convictions for s. 212(1)(j) offences and the Court of Appeal was wrong to overturn that decision. The trial judge rightly found that the unconstitutional law in s. 212(1)(j) did not survive, that it was "non-existent" and therefore the appellant could not be tried and convicted of that old unconstitutional offence. He properly quashed the counts.

88. Furthermore, the result, and the interpretive principles that were applied to reach that result, amounted to improper interference with the core jurisdiction of the s. 96 courts to scrutinize constitutionality of legislation, and must be overturned.

PART IV – COSTS

89. The appellant does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

90. The appellant asks that the appeal be allowed and the trial judge's decision quashing the counts be restored.

PART VI – SUBMISSIONS ON IMPACT OF PUBLICATION BAN

91. There is a publication ban prohibiting publication of names of certain police officers and the identities of the complainants herein. The appellant does not anticipate that the judgment of this Court will require identification of the names of police officers. The complainants have been identified by their initials in the courts below and therefore there should be no impact on the Court's reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: November 18, 2020

Marilyn Sandford QC
Eric Purtzki
Alix Tolliday
Counsel for the Appellant, Tamim Albashir

PART VII – TABLE OF AUTHORITIES

Jurisprudence	**Para(s)**
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