SCC Court File Nos. 39277 and 39278

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

BETWEEN:

TAMIM ALBASHIR

(39277)
APPELLANT

-and-

KASRA MOHSENIPOUR

(39278)
APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

-and-

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ATTORNEY GENERAL OF ONTARIO,
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INTERVENERS

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Section 212(1)(j) of the *Criminal Code of Canada*[1] was intended to "target pimps and the parasitic, exploitative conduct in which they engage": *Bedford v. Canada (Attorney General)*[2]. However, this Court held that the provision was overbroad because it deprived prostitutes of their security of the person in a way unconnected with the law's objective. The law failed to distinguish 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)": *Bedford*, para. 142. The provision was not justified under s. 1 of the *Charter of Rights and Freedoms*.

2. The three provisions challenged in *Bedford* were found to be constitutionally infirm and, because those provisions were significantly intertwined, this Court determined that the best remedy was to allow Parliament, should it choose to do so, to devise a new approach to regulating prostitution - an exercise which this Court acknowledged to be "complex and delicate": *Bedford*, para. 165. In light of these considerations, this Court ultimately chose to suspend the declaration of invalidity for a period of one year. Parliament took the Court up on its offer – it enacted a new regime regulating prostitution before the expiry of the suspension of the declaration of invalidity.

3. The appellants engaged in a sustained course of conduct, found by the trial judge to be parasitic and exploitative, commencing during the period of the suspension and continuing well past the enactment of the new regime. These appeals ask specifically if the appellants, having managed to evade detection during the period of the suspension, are immune from prosecution for an offence which was illegal when it was committed and remains illegal today. To answer this question, this Court must address the effect of remedial legislation enacted before the expiry of a suspension of a declaration of invalidity.

4. The respondent submits that the Court of Appeal did not err in finding that the retroactive effect of a suspended declaration of invalidity is pre-empted by the passing of remedial legislation. Nor did the Court of Appeal err in finding that a contrary result would be absurd. After all, if an

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[1] R.S.C. 1985, c. C-46.

[2] [2013] 3 S.C.R. 1101, para. 137 citing *R. v. Downey*, [1992] 2 S.C.R. 10, p. 32.

accused need only to ensure that they cannot be prosecuted before the expiry of the suspension period, then there is virtually no point to suspending the declaration at all. If not to ensure that the law remains in force during the period of the suspension, then what purpose does the suspension of the declaration serve?

5. If, as the appellants argue, they could not be prosecuted once the period of the suspension expired, regardless of the date the offence was committed, the suspension would be, in effect, a nullity. An accused still in the judicial system would have the benefit of the retroactive effect of the declaration of invalidity[3]. An accused charged during the period of suspension but not yet been convicted at expiry, or an accused who has been charged and convicted during the period of suspension who has an active appeal, would be entitled to the benefit of the declaration and either could not be convicted or their conviction could not be maintained. Moreover, an accused whose crime has not been discovered during the period of suspension will have been permitted to act with impunity even if the offence was not discovered, for example, because the accused threatened or extorted the complainants such that they were too afraid to report the crimes. How could this be anything but absurd? Regulation without the ability to enforce is pointless. Such a result is entirely inconsistent with the rule of law and the true purpose of suspending a declaration of invalidity.

6. The suspension of a declaration of invalidity gives Parliament the opportunity to act to remedy the constitutionally infirm aspects of the law. When Parliament repeals the impugned provision during the period of suspension, the declaration of invalidity never comes into effect. If Parliament does not enact remedial legislation during the period of the suspension, then the declaration of invalidity is effective as of the date of expiry of the suspension. Where that occurs, the declaration has a retroactive effect and the law is void *ab initio* in the same way it would be had there been no suspension: *Canada (Attorney General) v. Hislop*, para. 92.[4]

7. The appellants were not convicted under an unconstitutional law. The suspension of the declaration of invalidity permits the continuation of the law despite its constitutional defects: *Hislop*, para. 89. In other words, during the period of the suspension the law is deemed to be constitutional. Moreover, a law is only unconstitutional to the extent that it is inconsistent with

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[3] *R. v Wigman*, [1987] 1 S.C.R. 246, pp. 257-8; *R. v Thomas*, [1990] 1 S.C.R. 713, p. 716.

[4] [2007] 1 S.C.R. 429.

the provisions of the Constitution.[5] The law the appellants were convicted under was only unconstitutional in its unintentional overreach. The appellants' conduct, as found by the trial judge, was the very conduct the law was enacted to combat – the parasitic and exploitative conduct of pimps. That aspect of the law, the criminalization of that conduct, was not found to be inconsistent with the Constitution. No injustice occurred. The appellants' conduct was unlawful at the time the offence was committed, remained unlawful when they were convicted, and remains unlawful today. Accordingly, the respondent submits that the appeals should be dismissed.

B. Statement of Facts

(i) Counts and Timeframes

8. The Crown proceeded by way of direct indictment sworn December 22, 2016: *Appellant's Record* ("*AR*"), pp. 127-130. The following charts set out the counts and timeframes in relation to each complainant:

Counts Relating to K.C.		
Count	***Criminal Code* Section**	**Dates**
6	212(1)(j)	between March 15, 2014 and December 5, 2014
7	212(1)(h)	between March 15, 2014 and December 5, 2014
8	286.2(1)	between December 6, 2014 and April 16, 2016
9	286.3(1)	between December 6, 2014 and April 16, 2016
10	279.01(1)	between August 1, 2014 and April 16, 2016
11	279.02(1)	between December 6, 2014 and April 16, 2014

[5] *Constitution Act, 1982*, s. 52(1).

12[6]	212(1)(d)	between April 15, 2014 and December 5, 2014
19	139(2)	between April 23, 2016 and August 2, 2016

Counts Relating to S.C.		
Count	***Criminal Code* Section**	**Dates**
13	212(1)(j)	between May 15, 2014 and December 5, 2014
14	212(1)(h)	between May 15, 2014 and December 5, 2014
15	286.2(1)	between December 6, 2014 and August 31, 2015
16	286.3(1)	between December 6, 2014 and August 31, 2015
17	279.01(1)	between May 15, 2014 and August 31, 2015
18	279.02(1)	between December 6, 2014 and August 31, 2015

9. The appellants were also charged with offences against a third complainant, N.V., between May 15, 2013 and July 1, 2014 and December 26, 2015 to January 23, 2016. N.V. was under the age of eighteen at the time of the offences and, therefore, no charge under s. 212(1)(j) was laid.

(ii) Procedural History

10. The trial proceeded before a judge sitting alone and the evidence was heard over 28 days commencing on June 8, 2017 and continuing on dates in June, July and September of 2017. Mr. Mohsenipour filed a Notice of Application seeking to quash counts 6 and 13 on October 11, 2017[7], after the evidentiary portion of the trial was complete. That application was heard on December

[6] This count was alleged against Mr. Albashir and Mr. Alameddin only. Mr. Alameddin was charged on the same Indictment but was not tried with the appellants.

[7] *AR*, p. 131.

21, 2017. Mr. Albashir did not make separate submissions or file an application but joined in the application. The trial judge delivered his Oral Reasons for Judgment on January 29, 2018 addressing both his reasons for conviction and his reasons on the application to quash counts 6 and 13.[8]

11. The respondent appealed the decision to quash counts 6 and 13[9] and that appeal was heard on December 10, 2019. The Court of Appeal granted the Crown's appeal on June 8, 2020. The appellants each filed Notices of Appeal to this Court on August 6, 2020 (Mr. Mohsenipour) and August 7, 2020 (Mr. Albashir).[10]

(iii) Relevant Facts

12. The trial judge gave lengthy reasons addressing the facts in this case. The precise nature of the allegations and conduct are not directly relevant to these appeals. However, it is relevant that the trial judge found that the appellants, for the purposes of making money, recruited girls and young women to work for them as prostitutes and that the appellants exercised control over them, directed them, and exploited them to finance their own lifestyles: *Oral Reasons for Judgment,* para. 30.[11]

(iv) Reasons of the Trial Judge – British Columbia Supreme Court

13. As previously noted, the trial judge issued his reasons for conviction at the same time as he gave his reasons quashing counts 6 and 13. The trial judge first addressed his reasons for conviction.

14. With respect to count 6, the count alleging that the appellants lived on the avails of the prostitution of K.C., the trial judge concluded that the elements of the offence were made out.[12]

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[8] *AR,* pp. 1-189.

[9] The appellants are appealing their convictions. That appeal has not yet been heard.

[10] *AR,* pp. 206-209.

[11] *AR,* p. 14.

[12] *Oral Reasons for Judgment*, paras. 196-199, *AR,* p. 51.

The trial judge reached the same conclusion in respect of count 13 which alleged that the appellants lived on the avails of the prostitution of S.C.[13]

15. The trial judge similarly convicted the appellants of the successor provision (s. 286.2(1) of the *Criminal Code*), receiving a material benefit knowing that it was obtained by or derived directly from the commission of an offence under s. 286.1 (obtaining sexual services for consideration) in relation to both K.C. and S.C. (counts 8 and 15 respectively).[14]

16. With respect to the application to quash counts 6 and 13, the trial judge granted leave despite the application having been made well after the appellants had entered pleas.[15] With respect to the merits of the application, the trial judge held, relying on *Hislop*, that, absent a court specifically stating that a declaration will apply prospectively only, a suspended declaration of invalidity has a delayed retroactive effect. Once the suspension expires, the law will always have been unconstitutional.[16]

17. The trial judge acknowledged the language used by this Court at para. 92 of *Hislop*, stating that "if the legislature fails to comply with the Court's order within the period of suspension, the Court's declaration would apply retroactively". However, he determined that although that language "appear[s] to suggest" that a suspended declaration of invalidity only has retroactive effect if remedial legislation is not passed, such a conclusion would not be consistent with the distinction between purely prospective remedies and simply delayed retroactive remedies.[17]

18. The trial judge also held that s. 43 of the *Interpretation Act* is intended only to ensure that a repeal makes prospective changes in the law and not to continue in force an unconstitutional law.[18]

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[13] *Oral Reasons for Judgment*, paras. 267-268, *AR*, p. 66.

[14] *Oral Reasons for Judgment*, paras. 206-209 and 271-273, *AR*, pp. 53 and 67.

[15] *Oral Reasons for Judgment*, paras. 313-315, *AR*, p. 76.

[16] *Oral Reasons for Judgment*, para. 345, *AR*, pp. 81-82.

[17] *Oral Reasons for Judgment*, paras. 346-347, *AR*, p. 82.

[18] *Oral Reasons for Judgment*, paras. 375-379, *AR*, pp. 88-89.

19. Having found that the offences in counts 6 and 13 were proven beyond a reasonable doubt, the trial judge granted the application and quashed both counts.

(v) Reasons on Appeal – British Columbia Court of Appeal

20. Bennett J.A., writing for the court, held that the application should properly have been for a remedy pursuant to s. 24(1) of the *Charter* as the objection was to the validity of the law under which the charges were brought.[19]

21. She framed the issue on appeal as whether the appellants could be convicted of an offence that was declared unconstitutional when the offence occurred during the suspension period. While recognizing that this Court has historically endorsed the Blackstonian retroactive approach to s. 52 declarations in which the law is treated as if it never existed, Bennett J.A. also recognized that this Court has seen fit to allay that effect by utilizing a variety of remedies including suspended declarations of invalidity, explicit provisions that the declaration have prospective effect only, and the use of transition periods. She concluded that declarations are generally retroactive but not necessarily so. She contrasted that with the presumptively prospective effect of legislation in the criminal context.[20]

22. Bennett J.A. found that *Hislop* directly addressed the issue before her, namely whether the enactment of remedial legislation prior to the expiration of the suspension period pre-empts the retroactive effect of the declaration. She further adopted the reasoning of the Manitoba Court of Appeal in *R. v. Ackman*[21], where the court held that the suspended declaration of invalidity did not take effect because Parliament had enacted corrective legislation in the circumstances of an accused charged during the suspension period for offences committed before this Court's decision in *Bedford* but whose trial had not commenced until after the expiration of the suspension period.[22]

23. The rule of law, Bennett J.A. found, also justified the prosecution of the offences as a valid regime was in place at the time they were committed. To render the provisions unenforceable for

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[19] *Reasons for Judgment (CA)*, paras. 53-54, *AR*, pp. 102-103.

[20] *Reasons for Judgment (CA)*, paras. 57-62, *AR*, pp. 103-105.

[21] 2017 MBCA 78.

[22] *Reasons for Judgment (CA)*, paras. 77-83, *AR*, pp. 110-111.

conduct committed during the period of the suspension would run afoul of this Court's objective in suspending the declaration of invalidity in *Bedford* to avoid the deregulation of prostitution. Further, the successor provision, s. 286.2, sets out a range of exceptions to address the concerns expressed by this Court in *Bedford* regarding the failure to distinguish between those who exploited prostitutes and those who increased their safety and security. As the appellants' conduct was found by the trial judge to have been exploitative, they would not fall within the exceptions enumerated in s. 286.2. Thus, they were not entitled to a constitutional exemption.[23]

24. Finally, Bennett J.A. concluded that the respondents could not have been charged under s. 286.2 for conduct that preceded the enactment of that section relying on both s. 11(g) of the *Charter* and 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.[24]

PART II – QUESTIONS IN ISSUE

A. Issues

25. Several issues have been raised in these appeals. Justice Moldaver invited the parties to address the issue of this Court's jurisdiction; each of the appellants raises numerous issues and the respondent stated a constitutional question. The respondent will first set out each of the issues and then address its position on the relevant issues.

Issues raised by the Court

(a) Justice Moldaver invited the parties to address this Court's jurisdiction to hear these appeals as of right, in particular whether quashing certain counts on an indictment because they are unconstitutional is tantamount to an acquittal as required by s. 691(2)(b) of the *Criminal Code* (Albashir issue A, Mohsenipour issue 1);

Issues raised by Mr. Albashir

(b) Suspended declarations of invalidity have a temporal limit and presumptive retroactive effect upon their expiry (Albashir issue B);

(c) The Court of Appeal erred in finding *Hislop* determinative of the issue herein (Albashir issue C);

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[23] *Reasons for Judgment (CA),* paras. 84-87, *AR*, pp. 111-112.

[24] *Reasons for Judgment (CA),* para. 88, pp. 112-113.

(d) The appellant's conduct is not a proper focus of the analysis (Albashir issue D);

(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 (Albashir issue E);

Issues raised by Mr. Mohsenipour

(f) Suspended declarations of validity should be presumed to have a delayed retroactive effect, and the passage of remedial legislation enacted within the period of suspension has no bearing on the onset or effect of the declaration (Mohsenipour issue 2);

(g) The presumption of delayed retroactive effect achieves an appropriate balance between competing legal objectives (Mohsenipour issue 3);

(h) The proper remedy in this case is to quash the counts (Mohsenipour issue 4); and

Constitutional Question stated by the respondent

(i) Whether s. 212(1)(j) of the *Criminal Code* is constitutionally applicable in the prosecution of the appellants for committing the offence of living on the avails of prostitution, where the offence was committed between March 15 and December 5, 2014, in light of this Court's decision in *Bedford*, and in particular the suspension of the declaration of invalidity at paragraphs 166-169 of that decision.

26. The respondent agrees with the appellants that this Court has jurisdiction to hear these appeals as of right.

27. The respondent further submits that the issues stated by the appellants are subsumed in the constitutional question stated by the respondent. The respondent's position is that s. 212(1)(j) is constitutionally applicable where the offence was committed during the period of the suspension of the declaration of invalidity. As to the sub-issues raised by the appellants, the respondent's position is as follows:

(b) Suspended declarations of invalidity may have a retroactive effect upon their expiry, but are not presumed to have such an effect;

(c) The Court of Appeal did not err in finding the reasoning in *Hislop* squarely addressed the issue arising in these appeals;

(d) The appellants' conduct was relevant to the analysis in the manner relied upon by the Court of Appeal;

(e) The Court of Appeal's findings in respect of the effect of remedial legislation does not amount to legislative encroachment on the core jurisdiction of s. 96 courts;

(f) Suspended declarations of invalidity should not be presumed to have a delayed retroactive effect and the enactment of remedial legislation prior to the expiry of the suspension period does impact the onset or effect of the declaration (this issue is somewhat duplicative of issue (b));

(g) A presumption of delayed retroactive affect does not achieve an appropriate balance between the competing legal objectives;

(h) If a remedy was applicable to the appellants, it was a remedy pursuant to s. 24(1) of the *Charter* nullifying the impugned counts, however, no such remedy was applicable to the appellants.

PART III – STATEMENT OF ARGUMENT

A. This Court has Jurisdiction to Hear this Appeal as of Right

28. Section 691(2)(b) of the *Criminal Code* permits an appeal to this Court as of right, on a question of law, where the appellant was acquitted of an indictable offence and the Court of Appeal has entered a verdict of guilty. The issue in these appeals is whether the quashing of counts is tantamount to an acquittal.

29. In *R. v. Li*[25], the appellant had pled guilty but successfully argued at trial that the charges should be stayed on the basis of entrapment. On appeal, the Court of Appeal lifted the stay and remitted the matter for sentencing. This Court held that "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".

30. In the case at bar, the trial judge made clear in his reasons that, absent granting the motion to quash the counts, the offences were made out and the appellants would have been convicted. While he did not specifically use the language that he was "making a finding of guilt", his reasons leave no doubt as to his clear intention.[26]

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[25] 2020 SCC 12.

[26] *Oral Reasons for Judgment*, paras. 196-199 and 267-268, *AR*, pp. 51 and 66.

31. The respondent submits that the quashing of counts in these circumstances is indistinguishable, for the purposes of s. 691(2)(b), from a judicial stay of proceedings, particularly in light of the broad interpretation of "enters a verdict of guilty" in *Li*. The reinstatement of the quashed counts and the resulting verdict is, in the circumstances of these appeals, the setting aside of an order made by the trial judge that leaves a finding of guilt standing and is, therefore, properly before this Court as an appeal as of right.

B. Section 212(1)(j) is Constitutionally Applicable

32. The respondent stated a constitutional question in these appeals: whether s. 212(1)(j) is constitutionally applicable in the prosecution of the appellants for committing the offence of living on the avails of prostitution, where the offence was committed between March 15 and December 5, 2014, in light of this Court's decision in *Bedford* and, particularly, the suspension of the declaration of invalidity.

33. Essentially, this appeal asks if the appellants could properly be convicted of an offence committed during the period of the suspension that was not charged prior to the expiry of the suspension.

34. The effect of the expiry of a suspended declaration of invalidity on offences committed during the suspension is a question raising the constitutional applicability of legislation.

35. The respondent submits that, for the reasons stated below, the law was constitutionally applicable to the prosecutions of the appellants under s. 212(1)(j).

36. While the propriety of the suspended declaration of invalidity in *Bedford* is not relevant to these appeals, the basis on which the provision was found unconstitutional and the purpose of selecting the remedy of a suspended declaration are material to the analysis, as are the history and principles related to suspended declarations generally. The respondent's argument will examine the underlying principles, the decision in *Bedford*, the enactment of Bill C-36[27], the jurisprudence and legal commentary considering the effect of remedial legislation, the *Interpretation Act*, and the availability of s. 24(1) remedies, before applying those principles to these appeals.

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[27] *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25, s. 49.

(i) Suspended declarations of invalidity

37. The history and animating principles of suspended declarations of invalidity were recently examined in depth by this Court in *Ontario (Attorney General) v. G.*[28] The following is a briefer survey.

38. Section 52(1) of the *Constitution Act, 1982* reads:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

39. Courts give effect to s. 52(1) by way of a general declaration pursuant to the court's statutory or inherent jurisdiction. A court faced with a constitutional challenge to a law must determine to what extent the law is unconstitutional and declare it to be so: *G.*, para. 85.

40. The Blackstonian, or declaratory, approach to constitutional remedies, involves the nullification of the law from the outset because, according to this approach, the legislature never had the authority to enact an unconstitutional law. This Court has often taken that approach in granting a remedy under s. 52(1): *Hislop*, paras. 82-84.

41. However, this Court has also recognized that the Blackstonian approach is not always appropriate and has crafted other remedies. These include reading in, reading down, severance and suspensions of declarations of invalidity. While these remedies were used prior to the decision in *Schachter v. Canada*[29], it was in that decision that this Court set out guidelines for their application. For example, in *R. v. Bain*[30], Cory J., writing for himself, Lamer C.J., and La Forest J., suspended a declaration of invalidity to avoid a "hiatus" and to allow Parliament to remedy the situation if it chose to do so: p. 104. As Mr. Albashir notes[31], in that case, the majority of this Court restored the acquittal, thus giving the claimant the benefit of the declaration even though it

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[28] 2020 SCC 38.

[29] [1992] 2 S.C.R. 679.

[30] [1992] 1 S.C.R. 91.

[31] *Appellant's Factum (Albashir),* para. 49.

had been suspended. Neither Cory J., nor Stevenson J., who concurred in the result, gave reasons for why the acquittal was restored.

42. In *Schachter*, Lamer C.J., writing for the majority of this Court, explained the remedy of a suspension of a declaration of invalidity. He recognized that the suspension would keep in force a statute that had been found to be unconstitutional and that it constituted a serious interference with the legislative process by forcing the matter back on the agenda. A temporary suspension would only be appropriate where the immediate striking down of the legislation would: (1) pose a danger to the public; (2) threaten the rule of law; or (3) would result in the deprivation of benefits from deserving persons: pp. 717-719.

43. Adherence to the principle of the rule of law means that the impact of legislation, even when it is unconstitutional, extends beyond those whose rights are violated. The public interest rests in both not having unconstitutional laws "remain on the books" but the public is also entitled to the benefit of legislation: *G.*, para. 96.

44. The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach: *G.*, para. 108. While in some cases, where a criminal offence's effects on particular groups of people or in certain circumstances has rendered it unconstitutional, all those people have been exempted from criminal liability, for example *Carter v. Canada*[32]: *G.*, para. 110.

45. However, to the extent that laws are not inconsistent with the Constitution, the public is entitled to the benefit of laws passed by the legislature. In such cases, tailored remedies are appropriate because they permit the court to both safeguard the constitutional rights of all those affected and, at the same time, preserve the constitutional aspects of the law: *G.*, para. 111. Where an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweighs the cost of preserving an unconstitutional law, a suspended declaration of invalidity will be appropriate: *G.*, paras. 117-118.

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[32] [2015] 1 S.C.R. 331.

46. In *R. v. Demers*[33], a suspension of the declaration of invalidity was granted to prevent a "lacuna in the regime before Parliament would have a chance to act": para. 57. Similarly, in *Hislop*, the majority recognized that a suspended declaration of invalidity allows the constitutional infirmity to continue temporarily to allow lawmakers to fix the problem:

> [90] In another type of situation, which arises more frequently, the Court has held that providing immediate and retroactive judicial remedies may be "inappropriate" when "doing so would create a lacuna in the regime before Parliament would have a chance to act": *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46, at para. 57. In such cases, the Court has temporarily suspended the declaration of invalidity of the unconstitutional legislation to avoid creating a "legal vacuum" or "legal chaos" before Parliament or the legislature has the opportunity to enact something in place of the unconstitutional legislation: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("*Manitoba Language Rights Reference*"), at p. 747; *Schachter*. In *Schachter*, this Court held that the suspended declaration of invalidity was appropriate when giving immediate retroactive effect to the Court's declaration of invalidity would (a) "pose a danger to the public"; (b) "threaten the rule of law"; or (c) "result in the deprivation of benefits from deserving persons", such as when the legislation was "deemed unconstitutional because of underinclusiveness rather than overbreadth": *Schachter*, at p. 719.
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> [91] Like transition periods and other purely prospective remedies, the suspended declaration of invalidity is not fully consistent with the declaratory approach. By suspending the declaration of invalidity, the Court allows the constitutional infirmity to continue temporarily so that the legislature can fix the problem. In other words, the Court extends the life of a law which, on the Blackstonian view, never existed.
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> [92] Although if the legislature fails to comply with the Court's order within the period of suspension, the Court's declaration would apply retroactively, the purpose of a suspended declaration of invalidity can be to facilitate the legislature's function in crafting a prospective remedy. The temporal delay in striking down the law also has the effect of extending the life of an unconstitutional law. In such cases, to allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court's decision to grant a suspended declaration of invalidity: *Schachter*, at p. 720.
>
> [93] The determination of whether to limit the retroactive effect of a s. 52(1) remedy and grant a purely prospective remedy will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm. When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.

[33] [2004] 2 S.C.R. 489.

47. Even where a declaration of invalidity is made, other legal doctrines, including the *de facto* doctrine, *res judicata*, and the law of limitations may restrict its retrospective reach: *Hislop*, para. 101.

48. The underlying rationale for granting a suspension of a declaration of invalidity is to avoid the harmful and undesirable consequences of an immediate declaration: *G.*, para. 129.

49. In *G.*, the majority of this Court articulated a framework based on principled discretion for determining when a suspended declaration of invalidity is appropriate:

> [139] In sum, the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The court must consider the impact of such a suspension on rights holders and the public, as well as whether an immediate declaration of invalidity would significantly impair the legislature's democratic authority to set policy through legislation. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it has demonstrated it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

50. Underlying this approach is the recognition that courts and legislatures have different roles and competencies. Suspension allow the legislature to determine the remedy for its own breach of the Constitution. However, that respect for the role of legislatures cannot come at the expense of the role of the judiciary to give effect to constitutional rights and make determinations of law: para. 128.

51. The principled discretion approach recognizes that, in some circumstances, the legal rights created by the declaration of invalidity could undermine the legislature's policy choices. In those circumstances, "the benefit achieved (or harm avoided) must be transparently weighed against the countervailing fundamental remedial principles" namely that *Charter* rights and the public's interest in constitutionally compliant legislation should be safeguarded: paras. 130-131.

52. The balancing approach allows courts to engage with the underlying principles and ensure that a delayed declaration is not ordered in the absence of compelling reasons to do so – suspensions will only be appropriate in rare circumstances. This is because leaving unconstitutional laws on the books, particularly criminal prohibitions, can lead to legal uncertainty

and instability. When unconstitutional laws continue to have legal effect without a compelling basis, public confidence in the Constitution, the laws and the justice system is undermined. The principled approach requires that countervailing factors be weighed and does not allow for a suspension to be granted simply because the case engages public safety: para. 132.

(ii) The Decision in *Bedford*

53. *Bedford* dealt with three provisions of the *Criminal Code* related to prostitution: keeping a common bawdy house (s. 210); communicating for the purpose of obtaining the sexual services of a prostitute in a public place (s. 213(1)(c)); and living wholly or in part on the avails of prostitution of another person (s. 212(1)(j)). The latter provision is the one at issue in these appeals.

54. With respect to s. 212(1)(j), as previously noted, this Court held that the purpose of the provision, as set out in *Downey*, is to target pimps and the parasitic, exploitative conduct in which they engage (para. 137):

> [40] It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1)(j) is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. See *R. v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont. C.A.); *R. v. Celebrity Enterprises Ltd.* (1977), 41 C.C.C. (2d) 540 (B.C.C.A.); and *Shaw v. Director of Public Prosecutions* (1961), 45 Cr. App. R. 113 (H.L.).

55. This Court concluded that the law was overbroad in that it 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 potentially increase the safety of and security of prostitutes. The law also captured within its ambit anyone involved in business with a prostitute including accountants and receptionists: para. 142.

56. In considering the appropriate remedy, the Court recognized that regulation of prostitution is a complex and delicate matter and that it should be left to Parliament to devise a new approach if it should choose to do so: para. 165.

57. The Court ultimately decided to suspend the declaration of invalidity for the following reasons:

> [167] On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.
>
> [168] On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension - risks which violate their constitutional right to security of the person.
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> [169] The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.

58. The rationale for granting the suspension of the declaration of invalidity in *Bedford* represents an application of the principled discretion framework set out in *G*. The public was entitled to the benefit of a law that was unconstitutional only in some of its effects, while allowing Parliament the opportunity to remedy the defects in the law. This was a careful balancing of the s. 7 security rights of the claimants and the need to regulate the conduct engaged in by the appellants.

(iii) Bill C-36

58. Bill C-36 came into force on December 6, 2014 - two weeks prior to the expiry of the suspension. The Bill repealed s. 212 in its entirety and enacted ss. 286.1 and 286.2: ss. 13, 20. Section 286.2 replaced s. 212(1)(j). While the conduct contemplated by s. 286.2 mirrors that in s. 212(1)(j), the language is quite different. Additionally, s. 286.2(4) enumerates exceptions clearly intended to address the unconstitutional aspects of s. 212(1)(j). Section 286.2(5) restricts the application of s. 286.2(4).

(iv) The Effect of Remedial Legislation

59. As explained by Peter W. Hogg:

> A suspended declaration of invalidity is not to be confused with a prospective ruling. A

> suspended declaration of invalidity is delayed into coming into force, but if and when it comes into force it has the normal retroactive effect of a court order. It operates to invalidate the unconstitutional statute from the time of its enactment. Of course, a suspended declaration of invalidity will not come into force at all if during the period of suspension the competent legislative body enacts corrective legislation that replaces the unconstitutional statute with one that is constitutional. It would seem to follow from the retroactive effect of a declaration of invalidity (including one that is suspended), that the corrective legislation would also have to be retroactive in its effect.[34]
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> [Emphasis added]

60. Professor Hogg's explanation is entirely consistent with *Hislop,* where Lebel and Rothstein JJ. held that "if the legislature fails to comply with the Court's order within the period of suspension, the Court's declaration would apply retroactively": para. 92 (emphasis added).

61. The use of "if" and "would" in *Hislop* can only be interpreted to mean that if the legislation is repealed, repealed and replaced, or corrected, then the declaration will never come into force. That interpretation is consistent with the purpose of suspending the declaration - to avoid a legal vacuum and to allow Parliament to remedy the provision.

62. Moreover, the Manitoba Court of Appeal specifically found that the enactment of s. 286.2(1) was corrective legislation and, as such, the declaration of invalidity never took effect: *Ackman*. Mr. Mohsenipour seeks to distinguish *Ackman* on the basis that the appellant in that case had committed the offence prior to the decision in *Bedford*, had been charged during the period of the suspension, but his trial had not commenced until after the expiry of the suspension. However, this is a distinction without a difference. On the appellants' arguments, the law became null and void the moment the period of the suspension expired. As the appellant in *Ackman* was still in the system, the law would have ceased to apply before his matter was finally disposed of. Cameron J.A.'s finding that the declaration never came into effect would, likewise, apply equally to these appellants as to the appellant in that case.

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[34] P.W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2016) (loose-leaf updated 2019, release 1) at c. 40.1(d).

63. McArthur J. also came to the same conclusion as the Court of Appeal and the court in *Ackman* as to the effect of new legislation but in the context of the medical marijuana regulations.[35]

(v) The Interpretation Act

64. Section 43(d) of the *Interpretation Act* provides that when an enactment is repealed in whole or in part, the repeal "does not affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed".

65. Section 44(c) of the *Act* states that where an enactment has been repealed and another act is substituted, "every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment".

66. These provisions of the *Act* establish the temporal operation of repeal and re-enactment absent a transition clause expressly stating otherwise.

(vi) Remedies under s. 24(1) of the *Charter*

67. In *Schachter*, Lamer C.J. observed that a s. 24(1) remedy would rarely be available in conjunction with a remedy under s. 52 of the *Constitution Act, 1982* where the declaration of invalidity is suspended. This is because to grant a s. 24(1) remedy during the period of the suspension would be tantamount to giving the declaration retroactive effect: p. 720. In *Demers*, Iacobucci and Bastarache JJ., relying on *Schachter*, held that courts were precluded from granting a s. 24(1) remedy during the period of the suspension. However, courts were not similarly precluded from granting prospective s. 24(1) remedies in conjunction with a suspended declaration of invalidity: paras. 61-63. In *Demers*, a prospective remedy was granted: if Parliament did not amend the invalid legislation within the period of the suspension, those accused who did not pose a significant threat to public safety could ask for a stay of proceedings as an individual remedy

[35] *R. v. Stupak*, 2018 ONSC 1867.

pursuant to s. 24(1). In other words, in the absence of remedial legislation, those who fell within the scope of the overbreadth could obtain a prospective remedy under s. 24(1).[36]

68. However, in *G.*, Karakatsanis J., writing for the majority of this Court, held that "to the extent that *Demers* reads *Schachter* as setting out a hard-and-fast rule against combining s. 24(1) and s. 52(1) remedies, it misreads that case" as "s. 24(1) is too flexible to be restricted in this way". Individual exemptions from suspension will often be "appropriate and just" where a claimant has pursued constitutional litigation and obtained a declaration which benefits society at large: para. 142. Moreover, Karakatsanis J. held that this Court's jurisprudence makes clear that granting individual remedies while the effects of invalidity are suspended can be appropriate and just, specifically citing cases where this Court acquitted individuals of criminal or quasi-criminal charges stemming from unconstitutional laws despite suspending the declarations of invalidity: para. 145.[37] Those individuals, however, were claimants who advanced the constitutional issue and stand in a different position than other claimants: *G.*, paras. 145-149.

69. Karakatsanis J. was primarily addressing whether the claimants in a particular case could be exempted, pursuant to s. 24(1) from the suspension. Section 24(1) remedies, in order to be "appropriate and just" should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court and be fair to the party against whom the remedy is ordered. An effective remedy under s. 24(1) will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant's experience and address the circumstances of the rights violation. As such, the approach to remedies under s. 24(1) must be flexible and responsive to the needs of a given case: paras. 140, 144.

70. Remedial discretion is a fundamental feature of the *Charter*. A bar on exempting individual claimants would often be unfair to the claimant, given that it is often the decision to grant a suspension that makes an individual remedy necessary: para. 146. However, the purpose behind the granting of a suspension is an important consideration in determining whether a s. 24(1)

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[36] *Ackman*, para. 42.

[37] Citing *R. v. Guignard*, [2002] 1 S.C.R. 472; and *Bain*. Also citing *Corbiere c. Canada*, [1999] 2 S.C.R. 203 where no exemption was granted to the claimant though that would ordinarily be appropriate (para. 23).

remedy is appropriate: para. 146. The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy. Vindicating individual rights with effective remedies is a cornerstone of constitutional law: para. 147.

71. In deciding whether to grant an individual remedy to a claimant, a court must consider whether granting an exemption would undermine the very purpose of suspending the declaration of invalidity. Specifically, where a suspension is granted to protect public safety, an individual exemption would not be appropriate and just if it would endanger public safety.

72. In *Bedford*, the claimants were sex trade workers who argued that the impugned provisions endangered them, thus violating their rights to security of the person under s. 7 of the *Charter*. This Court agreed that the impugned provisions did have that effect and that they were therefore overbroad. However, this Court recognized that the impugned laws were directed at precisely the type of conduct engaged in by the appellants and never concluded (nor was it argued) that s. s. 212(1)(j) was unconstitutional in its application to that type of conduct. The appellants were not claimants, nor was their conduct captured by the overbreadth of the provision; to the contrary, their conduct was the polar opposite of that which gave rise to the overbreadth. Further, the exploitative conduct they engaged in was the very foundation of the rationale for suspending the declaration of invalidity.

73. The appellants argue that if remedial legislation pre-empts the declaration of invalidity, then, in the case of s. 212(1)(j), those who fell within the scope of overbreadth such as legitimate bodyguards, drivers, or accountants could be charged and convicted without recourse to a remedy.[38] However, the respondent submits that the jurisprudence ensures flexibility and would permit such an accused to seek a remedy under s. 24(1) either on the basis that the law is unconstitutional in its application to them or under the rubric of abuse of process.[39] The rule in *Schachter* is not absolute. This Court's finding that the law was unconstitutional in some of its effects remains a basis on which to seek an individual remedy. This is particularly so following this Court's decision in *G*. While the concern articulated by the majority in that decision is directed at the claimant who brings the constitutional challenge, the rationale and flexible interpretation of

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[38] *Appellant's Factum (Mohsenipour)*, para. 44; *Appellant's Factum (Albashir)*, paras. 77-78.

[39] See for example, *R. v. D'Souza*, 2016 ONSC 2749.

s. 24(1) articulated, would permit an accused person whose conduct fell within the overbreadth contemplated by this Court in determining the impugned provision was unconstitutional to bring an application for an individual remedy from the effects of the suspension. In this way, the broad remedial authority of s. 24(1) allows for precisely tailored and responsive relief to individuals whose conduct may be captured by the constitutional defect, while at the same time respecting the overall balancing inherent in the decision to suspend a declaration of invalidity. This has the salutary effect of reconciling the tension inherent in suspensions of declarations of invalidity: it allows for maintenance of the public interest identified as warranting the suspension, while at the same time protecting the *Charter* rights of individuals whose conduct is encompassed by the constitutional deficiency that gave rise to the decision of invalidity.

74. The appellants, however, would never have been eligible for a s. 24(1) exemption. They were not the original claimants. Even if they were the original claimants, no s. 24(1) remedy would lie because protecting the public from the exploitative conduct the appellants were held to have engaged in was the very rationale underlying the suspension of invalidity in the first place. Finally, as individuals charged with offences committed during the period of the suspension, the appellants could have sought a s. 24(1) remedy[40] exempting them from the effects of the suspension. However, such an exemption would not have been appropriate for the same reasons it would not have been had they been individual claimants.

(vii) Application

75. The Court of Appeal did not err in finding that, because remedial legislation was enacted before the expiry of the period of the suspension, the declaration of invalidity never came into effect.

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[40] The appellants never made a claim under s. 24(1) of the *Charter*, but Bennett J.A. considered that their application was properly one made under s. 24(1) and that nothing turned on the failure to treat it as such in the lower court: *Reasons for Judgment (CA)*, paras. 53-55, *AR*, pp. 102-103.

76. The appellants rely on the rule in *R.* v. *Big M Drug Mart Ltd.*[41] that no one can be convicted of an unconstitutional law[42]. However, that rule is not absolute. The remedy of a suspended declaration of invalidity is itself an exception to that rule. Moreover, in *Bilodeau v. A.G. (Man.)*[43], this Court maintained a conviction for speeding despite having found the law to be unconstitutional. In other cases, as noted by this Court in *G.*, and Mr. Albashir[44], individual remedies were granted. However, in each of those, the rationale for granting those remedies was not explained. In the respondent's submission, either those courts erred in granting those remedies or, they simply granted an individual remedy under s. 24(1). The respondent takes the position that those courts necessarily concluded that an individual remedy under s. 24(1) was warranted. Moreover, as this Court explicitly recognized in *G.* that the granting of such a remedy for the individual claimant is not irreconcilable with a suspended declaration of invalidity.

77. If this Court were to adopt the appellants' submissions, there would be no purpose to suspending a declaration of invalidity. If the purpose of a suspension is to avoid a vacuum in the law while giving Parliament an opportunity to remedy the law if it chooses to do so, then rendering that law entirely unenforceable negates that purpose. If remedial legislation does not pre-empt the declaration taking effect and the law is rendered void on the date the suspension expires, then on the appellant's interpretation, no offence can be prosecuted if it is not complete, including any appeal, prior to the expiry date. Justice Bennett did not err in finding that to be an absurd result.

78. Moreover, that interpretation of the effect of the expiration of the suspension period encourages obstruction of justice, threats, and extortion to prevent discovery of the offence in time for it to be prosecuted during the period of the suspension.

79. Finally, the Court of Appeal did not err in finding that the appellants could not have been charged under the s. 286.2 for offences committed prior to the coming into force date of that provision. The offence in s. 286.2 addresses the same conduct but it is constructed very differently.

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[41] [1985] 1 S.C.R. 295.

[42] *Appellant's Factum (Albashir)*, para.31; *Appellant's Factum (Mohsenipour)*, paras. 35,42.

[43] [1986] 1 S.C.R. 449.

[44] *Appellant's Factum (Albashir)*, paras. 48-50.

Section 11(g) of the *Charter* limits the power of legislatures or Parliament to enact retroactive criminal laws. Specifically:

> … the law will be effective retroactively only if the newly-illegal act or omission constituted at the time of its occurrence an offence under international law or was criminal according to the general principles of law recognized by the community of nations. Needless to say, s. 11(g) does not change the fundamental principle that a person cannot be found guilty of an offence in Canada merely because his act or omission was a breach of a principle of international law or a principle of law recognized by the community of nations. Only if such a principle were translated into Canadian statute law would a person be exposed to penalty (or any other legal consequence) within Canada. However, s. 11(g) does permit such a principle to be translated into Canadian law retroactively, if the competent legislative body does so by apt language.[45]

80. Furthermore, this Court has recognized that it is, as Bennett J.A. held, a bedrock principle of the criminal law that an individual cannot be guilty of an offence not known to law at the time of the offence:

> [33] Since long before the *Charter*, Canadian criminal law has adhered to the principle of certainty: prohibited conduct must be fixed and knowable in advance: M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 76. As Glanville Williams explained in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 575-76 (cited in D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at pp. 20-21):
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> > ... *Nullum crimen sine lege, Nulla poena sine lege* that there must be no crime or punishment except in accordance with fixed, predetermined law this has been regarded by most thinkers as a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty... .
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> > ... "Law" for this purpose means a body of fixed rules; and it excludes wide discretion even though that discretion be exercised by independent judges. The [page216] principle of legality involves rejecting "criminal equity" as a mode of extending the law.[46]

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[45] Hogg, at c. 51:8.

[46] *R v Levkovic*, [2013] 2 S.C.R. 204.

81. In *R. v. Barbeau*[47], this Court held that an allegation that a particular crime (sexual assault) was committed at a time when in law no such offence existed must be quashed: paras. 137-138.

82. This principle was applied in *R. v. K.M.*[48], where the accused was charged with offences under a predecessor provision (indecent assault) and a successor provision (sexual assault). The issue was whether time was an essential element of the offences. Hill J. held that neither the transitional provisions in the legislation enacting sexual assault nor ss. 43 or 44 of the *Interpretation Act*[49] "provide[d] the court jurisdiction to convict of an offence the trier of fact cannot be satisfied was committed by defaulting to the option that that offence *or* a similar offence was committed": para. 137.

83. The change in approach and language in Bill C-36 means that s. 212(1)(j) and s. 286.2 do not overlap entirely. In these appeals, the appellants would have been guilty of whichever offence was in force at the time of commission.

(viii) Remaining Issues

The Appellants' Conduct is a Proper Focus of the Analysis

84. Mr. Albashir alleges that the Court of Appeal erred in considering the appellants' conduct in the analysis. However, while Bennett J.A. ultimately concluded that a constitutional exemption was not available to the appellants, it was relevant that the appellant's conduct was, at all times, illegal. While her analysis correctly focused on the legal effect of remedial legislation, it was proper for her to consider that to allow the appellants' conduct to be immune from prosecution would be contrary to the very purpose of having suspended the declaration of invalidity.

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[47] [1992] 2 S.C.R. 845.

[48] 2008 O.J. No. 198 (O.N.S.C.).

[49] The legislation enacting sexual assault as an offence specifically provided that: "An offence committed prior to the coming into force of this Act against any provision of law affected by this Act shall be dealt with in all respects as if this Act had not come into force" . Hill J. understood this to restrict the application of s. 44 of the *Interpretation Act*: para. 134.

The Finding that the Enactment of Remedial Legislation does not Encroach on the Core Jurisdiction of s. 96 courts

85. The Court of Appeal's ruling does not impede the core jurisdiction of a s. 96 court. Section 96 courts are courts of inherent jurisdiction and have broad authority to act. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[50], McLachlin C.J., writing for the majority of this Court, held that s. 96 "restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction": para. 30. A law will interfere with the jurisdiction of s. 96 courts where:

> [33] …. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

86. Mr. Albashir argues that, if remedial legislation pre-empts a declaration of invalidity, the jurisdiction of criminal courts to examine the constitutionality of a law has been improperly encroached upon.[51]

87. The respondent submits that no such encroachment occurs. The enactment of remedial legislation is responsive to constitutional infirmities identified by a court. The legislation is not intended to usurp the role of s. 96 courts but rather to respond to concerns identified by those courts.

88. The institutional roles of courts and legislature was addressed by this Court in *Doucet-Boudreau v Nova Scotia (Minister of Education)*[52]*:*

> [31] Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential

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[50] [2014] 3 S.C.R. 31.
[51] *Appellant's Factum (Albashir)*, para. 83.
[52] [2003] 3 S.C.R. 3.

role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

[32] Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

[33] This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches . While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, [page28] at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[34] In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

[35] In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton and R. Knopff, *The Charter Revolution and the*

Court Party (2000); A. Petter, "The Politics of [page29] the Charter" (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend, supra*, this Court stated, at para. 136:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

[36] Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

89. The doctrine of inherent jurisdiction does not operate without limits and that even where there are no legislative limits, "the inherent jurisdiction of the court is limited by the institutional roles and capacities that emerge out of our constitutional framework and values": *Ontario v. Criminal Lawyer's Association of Ontario*[53] . A suspended declaration of invalidity is granted to preserve the proper institutional roles of courts and legislature, though that cannot be the sole purpose animating the suspension.[54]

90. Finally, any remedial legislation is itself subject to scrutiny by the courts to ensure that it is constitutionally compliant. Moreover, while remedial legislation does pre-empt the declaration of invalidity, it does not overrule the finding of unconstitutionality. As previously noted, a s. 24(1) remedy is available, even if in most cases it will not be appropriate. As such, s. 96 courts retain the powers they traditionally exercise.

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[53] [2013] 3 S.C.R. 3, para. 24.

[54] *Single Mothers' Alliance Society of B.C. v. British Columbia*, 2019 BCSC 1427, para. 73; *G.*, paras. 126-129.

C. Conclusion

91. The Court of Appeal did not err in its analysis. The enactment of remedial legislation prior to the expiry of the suspension of a declaration of invalidity means that the declaration never takes effect. That conclusion is supported by academic interpretation, jurisprudence and the rule of law. It is also the only conclusion that gives effect to the underlying purpose of suspending a declaration of invalidity.

92. The constitutional question must be answered in the affirmative: s. 212(1)(j) is constitutionally applicable in the prosecution of the appellants for committing the offence of living on the avails of prostitution, where the offence was committed between March 15 and December 5, 2014.

PART IV – COSTS

93. The respondent seeks no costs.

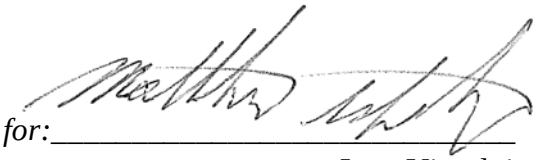
PART V – NATURE OF ORDER SOUGHT

94. The respondent seeks an order dismissing the appeals.

PART VI – SUBMISSIONS ON THE IMPACT OF THE PUBLICATION BAN

95. The respondent submits that the complainants are not identified other than by initials in any of the materials before the Court nor is it anticipated that any judgment of this Court would require that their names be published.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



*for:*_____

Lara Vizsolyi
Janet Dickie
Counsel for the Respondent

Dated at Victoria, British Columbia,
this 2nd day of March, 2021

PART VII – LIST OF AUTHORITIES AND LEGISLATION

Para No.

SECONDARY SOURCES

STATUTORY PROVISIONS

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 and to make consequential amendments to other Acts*	Projet De Loi C-36, *Loi modifiant le Code criminel pour donner suite à la décision de la Cour suprême du Canada dans l'affaire Procureur général du Canada c. Bedford et apportant des modifications à d'autres lois en conséquence*
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ss. 1, 7, 11(g), 24(1)	*Charte canadienne des droits et libertés, partie 1 de la Loi constitutionnelle de 1982*, constituant l'annexe B de la loi canadienne de 1982 (UK), 1982, c 11. ss. 1, 7, 11(g), 24(1)
Constitution Act, 1982, s. 52(1).	*Loi constitutionnelle de 1982*, s. 52(1)
Criminal Code, R.S.C., 1985, c. C-46. ss. 139(2), 210, 212(1)(d), 212(1)(j), 212(1)(h), 213(1)(c), 279.01(1), 279.02(1), 286.1, 286.2 , 286.2(1) 286.3, 286.3(1), 691(2)(b)	*Code Criminel*, L.R.C. (1985), ch. C-46. ss. 139(2), 210, 212(1)(d), 212(1)(j), 212(1)(h), 213(1)(c), 279.01(1), 279.02(1), 286.1, 286.2 , 286.2(1) 286.3, 286.3(1), 691(2)(b)
Interpretation *Act*, R.S.C. 1985, c. I-21 ss. 43(d), 44(c)	*Loi d'interprétation*, L.R.C. (1985), ch. I-21 ss. 43(d), 44(c)