SCC File Numbers: 39277 and 39278

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

TAMIM ALBASHIR

Appellant
(Respondent)
(39277)

– and –

HER MAJESTY THE QUEEN

Respondent
(Appellant)

AND BETWEEN:

KASRA MOHSENIPOUR

Appellant
(Respondent)
(39278)

– and –

HER MAJESTY THE QUEEN

Respondent
(Appellant)

– and –

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC

Interveners

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ONTARIO

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

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PART I: OVERVIEW

1. In *Ontario (Attorney General) v G*[1], this Court explained *when* a declaration of constitutional invalidity should be suspended. This case offers an opportunity to clarify the consequences of breaking the law while the declaration is suspended.

2. The Attorney General of Ontario ("Ontario") submits that this second question, like the first, should be answered in accordance with the remedial principles described in *G*. Applying that approach produces two sensible rules.

3. First, where Parliament[2] repeals the offending law prior to the expiry of the suspension, individuals who broke the law during the suspension can be held accountable for those crimes. This is true regardless of when those individuals are charged or when their trials take place. Permitting "post-suspension prosecutions" where Parliament has repealed the offending legislation is consistent with the "logic of the suspension"[3], with constitutional principles and with this Court's jurisprudence.

4. Second, where Parliament takes no action in response to a suspended declaration of invalidity, the declaration will have full retroactive effect, in accordance with this Court's decision in *Hislop*.[4] These rules respect the different institutional roles of Parliament and the courts while fairly balancing the interests of accused persons and the public, who are entitled to the protection of the law during the period of the suspension.

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[1] 2020 SCC 38.
[2] Ontario will refer only to Parliament throughout these submissions. The same principles should be applied when a provincial law is struck down and the declaration of invalidity suspended.
[3] Kent Roach, *Constitutional Remedies in Canada*, Second Edition (2020), at § 14.1571.
[4] *Canada (Attorney General) v Hislop*, 2007 SCC 10.

PART II: ISSUES

5. Ontario makes two submissions on the constitutional validity of post-suspension prosecutions:

a) *G* provides the proper framework for deciding whether post-suspension prosecutions are constitutionally permissible.

b) A blanket prohibition on post-suspension prosecutions is inconsistent with the remedial principles in *G*.

PART III: STATEMENT OF ARGUMENT

a) *G* provides the proper framework for deciding whether post-suspension prosecutions are constitutionally permissible

6. This Court recognized in *G* that "a measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution."[5] In exercising this discretion, a court must balance four "fundamental remedial principles":

(1) *Charter* rights should be safeguarded through effective remedies;

(2) the public has an interest in the constitutional compliance of legislation;

(3) the public is entitled to the benefit of legislation; and

(4) courts and legislatures play different institutional roles.[6]

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[5] *G,* at para 86.
[6] *G*, at paras 94, 131, 158.

7. Drawing on these remedial principles, this Court endorsed a three-step approach for crafting a s. 52(1) remedy. First, the court must determine the extent of the inconsistency between the offending legislation and the Constitution. This ensures that the law is invalidated to the "full extent of its inconsistency" while also giving the public the benefit of the law, to the extent that it is not inconsistent with the Constitution.[7]

8. Second, the court must choose the appropriate form for the declaration. The court may read down, read in or sever the offending provision, as appropriate.[8] The court must have regard to the division of competences between legislatures and the judiciary. If used in the wrong circumstances, "tailored remedies can intrude on the legislative sphere."[9]

9. Finally, the court must decide whether to suspend the declaration. The power to suspend a declaration "arise[s] from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid."[10] Before suspending a declaration, the court must be satisfied that a compelling public interest, grounded in the Constitution, outweighs the harmful effects of delaying the declaration.[11] This analysis must be transparent and conducted in accordance with the four overarching remedial principles described above.[12]

10. Like the decision to suspend a declaration, determining the "practical and legal effects" of a suspension implicates both the protection of constitutional rights as well as "other — at times, competing — constitutional principles".[13] As in *G*, this tension should be resolved by applying the

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[7] *G*, at paras 108-111 (emphasis deleted).
[8] *G*, at para 113.
[9] *G*, at paras 114-116.
[10] *G*, at para 121.
[11] *G*, at paras 83, 126.
[12] *G*, at paras 94, 126-134.
[13] *G*, at paras 89, 121.

same four remedial principles that are used "at every stage" when determining an appropriate remedy.[14] Relying on those remedial principles ensures symmetry between the criteria used to *suspend* a declaration of invalidity, and the criteria used to determine the *legal consequences* of that suspension.[15]

b) A blanket prohibition on post-suspension prosecutions is inconsistent with the remedial principles in *G*

11. Prohibiting post-suspension prosecutions is inconsistent with the remedial principles laid out in *G*, and in particular that (1) the public is entitled to the benefit of legislation; and (2) courts and legislatures play different institutional roles.

(i) The public is entitled to the benefit of legislation

12. Prohibiting post-suspension prosecutions would deprive the public of the benefit of legislation during the suspension period. There is generally a public interest in legislation that "weighs heavily in the balance" of remedial discretion.[16] This is equally true of criminal legislation, which "represents Parliament's response to a threat of harm to a public interest ... such as peace, order, security, health and morality, or to another similar interest."[17]

13. Invalidating a criminal law has three potential effects, each of which risks depriving the public of the benefit of legislation:

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[14] *G*, at paras 82, 90, 94.

[15] The majority in *G* relied on those remedial principles to explain every step of its s. 52(1) framework, from tailoring a declaration (paras 109-111), determining the form the declaration will take (paras 112-114), deciding whether to suspend the declaration (paras 126, 131), and deciding whether to grant individual claimants an exemption from the suspension (paras 147, 150).

[16] *G*, at para 96.

[17] *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, at para 68.

- first, individuals who violated the law in the past but have not yet been convicted will not be held to account;

- second, individuals who have been convicted under the law may have those convictions reversed; and

- third, the law can no longer regulate future conduct.

14. To preserve the benefits of criminal legislation, courts already temper the retroactive effect of suspended declarations of invalidity. For example, when a suspension expires, offenders who are no longer "in the judicial system" do not benefit from the declaration of invalidity, even though they were convicted of unconstitutional offences.[18] The reason is that upending settled convictions threatens "[f]inality in criminal proceedings"[19], an "overarching societal interest"[20] of the "utmost importance".[21] By limiting the retroactive reach of suspended declarations of invalidity, the "in-the-system" rule ensures that the public is not deprived of the benefit of criminal legislation through the wholesale invalidation of prior convictions.

15. Like the in-the-system rule, post-suspension prosecutions are necessary to provide the public with the legitimate benefits of criminal legislation. While the in-the-system rule prevents settled convictions from being overturned at the end of a suspension, post-suspension prosecutions address violations of the law which could not be discovered, investigated, prosecuted and resolved

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[18] *R v Wigman*, [1987] 1 SCR 246, at p 257; *R v Thomas*, [1990] 1 SCR 713, at pp 715-16; *R v Boudreault*, 2018 SCC 58, at para 103. See also *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, at p 757.
[19] *Wigman*, at p. 257.
[20] *R v Brown*, [1993] 2 SCR 918, at p 923, *per* L'Heureux-Dubé (dissenting); *R v Rollocks* (1994), 19 OR (3d) 448 (CA); *R v Barrett*, 2019 SKCA 6, at para 44.
[21] *Wigman*, at p 257; *R v Sarson*, [1996] 2 SCR 223, at para 26.

before the suspension expired. By ensuring that criminal liability for these offences does not unravel when a suspension ends, post-suspension prosecutions allow the law to effectively regulate conduct when the suspension is still in force. This is an equally important benefit to the public – one which is integral to achieving the purposes for which the suspension was imposed.

16. When a court grants a criminal law temporary validity through a suspension, it does so because the continued operation of the law is necessary to protect the rule of law, public safety, or another compelling, constitutionally-grounded public interest. A criminal law cannot achieve these goals unless it is enforced through prosecution, which is an "indispensable device for the effective enforcement of the criminal law."[22] Indeed, the valid exercise of the federal criminal law power demands a prohibition, backed by a penalty, imposed for a criminal law purpose.[23] The absence of a penalty enforceable through prosecution would be inconsistent with the character of the enactment – and would undermine its ability to serve as a meaningful constraint on prohibited conduct.

17. Yet this is the potential result if post-suspension prosecutions are prohibited. Offenders who successfully conceal their crimes until after the suspension expires will avoid prosecution. Offenders whose crimes are discovered close to the expiry are unlikely to be prosecuted. Offenders who have been convicted but remain in the judicial system may be able to evade conviction by filing notices of appeal after the suspension expires. Knowledge of an impending "amnesty" for breaking the law erodes the legitimacy of the law during the suspension period, weakens enforcement and creates perverse incentives for offenders to evade detection, including through further unlawful activity.

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[22] *Sriskandarajah v United States of America,* 2012 SCC 70, at para 27.
[23] *Reference re Genetic Non-Discrimination Act*, at para 67.

18. For these reasons, prohibiting post-suspension prosecutions would deprive the public of the benefit of legislation *during* the suspension period. Preventing the prosecution of crimes committed during the suspension is "at cross-purposes"[24] with the decision to suspend the declaration, because it creates the very constitutional concerns – principally, threats to public safety and the rule of law – that justified the suspension in the first place.[25]

19. Significant public safety concerns may arise, for example, if conduct targeted by the criminal law cannot be effectively regulated, and if the individuals who commit those crimes cannot be convicted, sentenced and separated from the public. It is "beyond dispute that one of the most fundamental purposes of criminal law – indeed its most fundamental purpose – is the protection of personal security."[26] The continued enforcement of the criminal law during the suspension period serves vital protective purposes: from "protect[ing] the vulnerable from ending their life in times of weakness"[27], to "target[ing] pimps and the parasitic, exploitative conduct in which they engage"[28], to responding to "emergencies" such as "hostage takings, bomb threats and armed standoffs"[29], and "remov[ing] weapons from persons in the interests of public safety"[30], among others. Compromising these objectives by undercutting enforcement threatens the rule of law, which provides the public with an "entitlement to a positive order of laws that organizes society and protects it from harm."[31]

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[24] *Hislop*, at para 92.
[25] *G*, at paras 129, 150.
[26] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, at para 58.
[27] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 84.
[28] *Bedford v Canada (Attorney General)*, 2012 SCC 72, at para 137.
[29] *R v Tse*, 2012 SCC 16, at para 28, citing *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, No 44, 3rd Sess, 34th Parl, June 2, 1993, at p 44:10.
[30] *R v Hurrell* (2002), 60 OR (3d) 161 (CA), at para 69; see also para 31.
[31] *G*, at para 156.

20. Prohibiting post-suspension prosecutions also weakens the rule of law in a second way: it rewards offenders with the resources and sophistication to evade detection, delay prosecution, or preserve their appeal rights until a suspension expires. By leveraging these "factual differences among [offenders] into arbitrary and unjust legal effects"[32], a prohibition on post-suspension prosecutions conflicts with the equal application of the law – a core tenet of the rule of law.[33]

21. To avoid these problems, and to provide the public with the benefits that suspensions are supposed to confer, courts already permit post-suspension prosecutions in cases where charges were laid prior to the expiry of the suspension. As the Manitoba Court of Appeal recognized in *Ackman*, commenting on the *Bedford* suspension:

> The purpose of the suspension was to avoid the creation of a situation wherein prostitution, including living on the avails of prostitution, would be unregulated. The systematic staying of proceedings against persons who were validly charged, either before or during the suspension, on the basis that it ended while they were still in the system, would undermine this purpose.[34]

22. The Constitution does not mandate preferential treatment for offenders who succeeded in concealing their crimes until after a suspension expired. Immunizing such offenders from prosecution would undermine enforcement of the law during the suspension, depriving the public of the benefit of the legislation.

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[32] Robert Leckey, "The harms of remedial discretion" (2016), 14 *I CON* 584, at p 592.
[33] Tom Bingham, *The Rule of Law* (2010), at p 55.
[34] *R v Ackman*, 2017 MBCA 78, at para 75; see also Roach, at § 14.1571 (noting that allowing for a prosecution to be completed "even though the suspension lapsed", "can be supported by the logic of the suspension"); *R v McCrady*, 2011 ONCA 820, at paras 22, 25; *R v Stupak*, 2018 ONSC 1867 at paras 27-28; *R v Al-Qaysi,* 2016 BCSC 937, at paras 24-30. This Court has previously invoked the underlying purposes of a suspension to uphold a conviction under a law subject to a suspended declaration of invalidity: see *Bilodeau v Attorney General (Manitoba*), [1986] 1 SCR 449.

(ii) Courts and legislatures play different institutional roles

23. Permitting post-suspension prosecutions respects the different institutional roles played by Parliament and the courts. There are two related ways in which this principle is at play. First, permitting post-suspension prosecutions is consistent with the structure of the Constitution and, in particular, the restriction on retroactive criminal offences in s. 11(g) of the *Charter*. Second, in light of s. 11(g), permitting post-suspension prosecutions respects the differing roles of Parliament and the courts in prohibiting criminal conduct and in addressing unconstitutional legislation.

24. When determining how a declaration of invalidity should operate during a period of suspension, it is imperative to consider s. 52(1) as part of the "entire constitutional structure".[35] This includes both the division of competences between the legislatures and the courts, and other constitutional provisions.

25. In a case where a court suspends a declaration that an offence is unconstitutional, s. 11(g) of the *Charter* provides important context. Section 11(g) prohibits the retroactive imposition of penal liability. This is a feature unique to criminal or quasi-criminal cases. Outside this sphere, this Court has recognized the legitimacy of retroactive legislation.[36] Parliament may, for example, respond to a declaration that a tax is invalid through retroactive legislation.[37] But s. 11(g) "excludes the creation" of a retroactive criminal offence.[38]

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[35] Roach, *Constitutional Remedies*, at § 14.1450.

[36] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, at paras 69-72; *Air Canada v British Columbia*, [1989] 1 SCR 1161, at p 1192. See also Peter W. Hogg, *Constitutional Law of Canada*, Fifth Edition (2019), at s 51.8.

[37] See, e.g., *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2007 SCC 1, at para 25.

[38] Hogg, *Constitutional Law of Canada*, at s 51.8.

26. This leads to a second point: permitting post-suspension prosecutions is consistent with the different institutional roles of Parliament and the courts. The Constitution gives Parliament exclusive authority to pass criminal laws. Prohibiting post-suspension prosecutions, however, would "significantly impair" Parliament's authority to prohibit and penalize conduct deserving of criminal sanction during the period of the suspension.[39] Because of s. 11(g), prosecutions under the old law may be the only way to address criminal conduct committed when a suspension was in effect. If such prosecutions were prohibited, upon the expiry of a suspension, a potentially significant range of criminal conduct committed during the suspension would be placed beyond the reach of legitimate legislative sanction – interfering with Parliament's distinct institutional role in our constitutional order.

27. The way to avoid this intrusion into Parliamentary authority is to permit post-suspension prosecutions where Parliament has repealed or replaced the offending law before the expiry of the suspension. This treats Parliament's action as the ordinary repeal or replacement of legislation – a matter falling squarely within Parliament's institutional competence.[40] Permitting post-suspension prosecutions in these circumstances is consistent with the general principle that individuals may be prosecuted under a repealed law, provided that the conduct in question took place while the offence was in force.[41]

28. This Court noted in *Hislop* that a declaration of invalidity would apply retroactively "if the legislature fails to comply with the Court's order within the period of the suspension".[42] This

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[39] *G*, at para 129.
[40] *G,* at para 97; See also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, at paras 54-67.
[41] *Interpretation Act*, RSC 1985, c I-21, ss 43(d) and (e).
[42] *Hislop*, at para 92.

understanding of the retroactive effect of a declaration is consistent with the different institutional roles of courts and legislatures. The court has demonstrated respect for Parliament's responsibility for crafting legislation by giving Parliament the opportunity to do so, thus recognizing the "clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination".[43] The fact that Parliament has determined that no new legislation is required is itself a legislative choice that is given effect by permitting the declaration to come into force retroactively. And legislative inaction also provides an important signal as to Parliament's view about the importance of the public receiving the "benefit of" the prior law.

(iii) Conclusion

29. Following *G*, before a court suspends a declaration of invalidity, it must properly tailor the declaration, determine whether a more targeted remedy would be appropriate, *and* identify a compelling constitutionally-grounded public interest in delaying the declaration that outweighs the importance of protecting *Charter* rights and ensuring immediate constitutional compliance. In these "rare" circumstances[44], to give effect to the overriding public interest justifying the suspension, the law must be effectively enforced during the period of the suspension. Enforcement of the law would be frustrated by a blanket prohibition on post-suspension prosecutions. Because such a rule "would undermine the interest motivating the suspension in the first place", it should be rejected.[45]

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[43] *G*, at para 121, citing *Air Canada*, at p 1195.
[44] *G*, at paras 133, 137.
[45] *G*, at para 150; see also *Hislop*, at para 92.

PART IV: COSTS

30. Ontario does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

31. Ontario requests that the constitutional question be answered as follows: Section 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.

32. Ontario requests leave to present oral argument at the hearing of these appeals.

ALL OF WHICH is respectfully submitted by

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DATED at Toronto this 22nd day of April, 2021

PART VI: SUBMISSIONS ON CASE SENSITIVITY

33. Ontario makes no submissions on case sensitivity.

PART VII: TABLE OF AUTHORITIES

Case	Paragraph #
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Peter W. Hogg, *Constitutional Law of Canada*, Fifth Edition (2019)	25
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