



SUPREME COURT OF CANADA

CITATION: R. v. Albashir, 2021
SCC 48

APPEALS HEARD: May 14,
2021

JUDGMENT RENDERED:
November 19, 2021

DOCKETS: 39277, 39278

BETWEEN:

Tamim Albashir
Appellant

and

Her Majesty The Queen
Respondent

AND BETWEEN:

Kasra Mohsenipour
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario and Attorney
General of Quebec**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,

Martin and Kasirer JJ.

**REASONS FOR
JUDGMENT:** Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté,
Martin and Kasirer JJ. concurring)
(paras. 1 to 73)

**DISSENTING
REASONS:** Rowe J. (Brown J. concurring)
(paras. 74 to 124)

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Tamim Albashir

Appellant

v.

Her Majesty The Queen

Respondent

- and -

Kasra Mohsenipour

Appellant

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and

**Attorney General of Canada,
Attorney General of Ontario and
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Interveners

Indexed as: R. v. Albashir

2021 SCC 48

File Nos.: 39277, 39278.

2021: May 14; 2021: November 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Declaration of invalidity — Temporal nature of declaration of invalidity — Supreme Court of Canada in Bedford declaring void offence of living on avails of sex work and suspending declaration of invalidity for one year — Accused charged after expiry of suspension period for committing offence of living on avails of sex work while declaration suspended — Trial judge quashing charges on basis that offence was unconstitutional when committed — Court of Appeal holding that remedial legislation enacted by Parliament prior to expiry of suspension period pre-empted retroactive effect of declaration of invalidity — Whether provision prohibiting living on avails of sex work retroactively invalid such that it cannot ground conviction for offence committed prior to declaration taking effect — Canadian Charter of Rights and Freedoms, s. 24(1) — Constitution Act, 1982, s. 52(1) — Criminal Code, R.S.C. 1985, c. C-46, s. 212(1)(j).

In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, the Court found s. 212(1)(j) of the *Criminal Code*, which prohibited living on the avails of sex work, to be unconstitutionally overbroad because it criminalized non-exploitative actions that could enhance the safety and security of sex workers. The

Court declared this offence to be inconsistent with the *Charter* and hence void. The declaration of invalidity did not take immediate effect but rather was suspended for one year. The Court did not explicitly state whether this declaration would apply retroactively or purely prospectively at the conclusion of the period of suspension. Two weeks before the suspension expired, the former s. 212(1)(j) was replaced with a new provision that prohibits obtaining a material benefit from sexual services but exempts legitimate, non-exploitive conduct. Parliament did not state whether the amendments were to apply retroactively or prospectively.

About two years after the declaration took effect, the accused were charged with numerous offences arising out of an escort operation. Some of the offences occurred during the one-year period of suspension, resulting in charges under s. 212(1)(j). The trial judge found the accused to be parasitic, exploitative pimps, but he quashed the charges against both accused for living on the avails of sex work. He reasoned that once the *Bedford* suspension expired, the offence was unconstitutional because suspended declarations under s. 52(1) of the *Constitution Act, 1982*, have a delayed retroactive effect — meaning that once the suspension expires, the law will have always been unconstitutional —, unless it is clearly stated otherwise. The Court of Appeal allowed the Crown’s appeals and entered convictions on the counts of living on the avails of sex work. It held that the *Bedford* declaration never came into effect because the legislature enacted remedial legislation during the suspension, which pre-empted the retroactive effect of the suspended declaration of invalidity.

Held (Brown and Rowe JJ. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Côté, Martin and Kasirer JJ.: In light of the purpose animating the suspension of the declaration of invalidity in *Bedford*, the presumption of retroactivity of a declaration of invalidity is rebutted by necessary implication. The purpose of a suspension must be considered in determining whether the declaration must logically operate retroactively or purely prospectively. In *Bedford*, the Court's remedy was purely prospective, because the purpose of the suspension — avoiding deregulation that would leave sex workers vulnerable — would be frustrated by a retroactive remedy. Accordingly, the accused could be charged and convicted, after the suspension expired and the declaration took effect, for committing the offence of living on the avails of sex work under s. 212(1)(j) during the suspension period. Because they engaged in exploitative and parasitic conduct, the exact conduct that was always legitimately criminalized, a remedy under s. 24(1) of the *Charter* is not available to them.

When legislation violates a *Charter* right, three foundational constitutional principles guide the interpretation of constitutional remedies: constitutionalism, the rule of law, and the separation of powers. To determine an appropriate remedy, a court must consider not only the principle of constitutional supremacy in s. 52(1) of the *Constitution Act, 1982*, but also the entitlement of the public to the benefit of legislation, as well as the different institutional roles that courts and legislatures are

called to play. These foundational principles also establish strong — but rebuttable — presumptions that legislation is prospective and judicial declarations are retroactive.

There is a strong presumption against retroactive application of legislation because the rule of law requires that people be able to order their affairs in light of an established legal order. In the instant case, in the absence of retroactive legislative intent either explicitly or by necessary implication, the strong presumption that legislation is prospective is not challenged. Whereas the rule of law dictates a presumption that legislation is prospective, the inverse is true for judicial remedies. The basic role of courts to decide disputes after they have arisen requires that judicial decisions operate (at least ordinarily) with retroactive effect.

When a court makes a s. 52(1) declaration of invalidity, the same presumption of retroactivity arises. A retroactive declaration changes the law for all time, both reaching into the past and affecting the future: the law is deemed to have been invalid from the moment of its enactment. However, many fundamental principles that are essential to Canada's constitutional system curtail the retroactive reach of judicial remedies. For example, the doctrine of *res judicata* and the *de facto* and qualified immunity doctrines balance the generally retroactive nature of judicial remedies with the need for finality and stability. When the declaration is purely prospective, the law was valid from its enactment but is invalid once the declaration takes effect.

The presumption of retroactivity can be rebutted explicitly or by necessary implication. The rare circumstances and constitutional considerations that warrant a suspension of a declaration of invalidity can justify an exception to the retroactive application of declarations where necessary to give effect to the purpose of the suspension. When retroactivity would defeat the compelling public interests that required the suspension, the presumption is rebutted and the declaration must apply purely prospectively. Courts in the future should explicitly state the temporal application of their s. 52(1) declarations to avoid any confusion.

The purpose animating the suspension in *Bedford* was to avoid the deregulation of sex work (thus maintaining the protection of vulnerable sex workers) while Parliament crafted replacement legislation. In light of that purpose, the declaration of invalidity was purely prospective, effective at the end of the period of suspension. A retroactive declaration would have rendered the regulatory system of criminal offences that was maintained by the suspension entirely unenforceable once the suspension expired, undermining the protection of the vulnerable victims that was at the root of the finding of unconstitutionality. Conversely, prospective application is far more consonant with the purpose of the *Bedford* suspension and more protective of sex workers' rights.

When a s. 52(1) declaration is prospective, a person whose *Charter* rights are breached by the law declared to be unconstitutional is not left without a remedy. A prospective declaration does not deprive people of individual remedies and would not

contravene the principle that nobody may be convicted of an offence under an unconstitutional law. Where the compelling public interests that required suspending the declaration would not be undermined and when additional relief is necessary to provide an effective remedy in a specific case, s. 24(1) is a flexible vehicle that can be combined with s. 52(1). The findings of unconstitutionality by the court can operate retroactively in individual cases, giving remedial effect to both ss. 24(1) and 52(1). Following the findings of *Bedford*, if an accused is charged with conduct that bears no relation to the purpose of the living on the avails offence — for example because they were a legitimate driver or bodyguard — an application judge may find a breach of that accused's s. 7 rights and grant a s. 24(1) remedy.

Per Brown and Rowe JJ. (dissenting): The declaration of invalidity in *Bedford* had retroactive effect as of the date the suspension expired, rendering s. 212(1)(j) of the *Criminal Code* void *ab initio*. Remedial legislation did nothing to cure the constitutional defect in s. 212(1)(j) as it existed in the past, and could do nothing to alter the Court's declaration that s. 212(1)(j) is unconstitutional. As such, s. 212(1)(j) was unconstitutional at the time the accused were found guilty, and the s. 212(1)(j) counts must accordingly be quashed.

Ordinarily, constitutional declarations of invalidity are retroactive, and have immediate effect. This is the logical implication of s. 52(1) of the *Constitution Act, 1982*. The retroactive nature of constitutional declarations of invalidity also flows from the nature of judicial remedies generally. An immediate retroactive declaration of

invalidity renders the law invalid from the date of the declaration, back to the date the law was enacted.

Although the Court recognized the predominance of the retroactive approach, it also recognized two important exceptions: prospective declarations and suspended declarations. Prospective declarations of invalidity apply only forward in time from the moment of the declaration, but do not render a law invalid back in time from the moment of its enactment, as though the law never existed. Suspended declarations of invalidity delay the moment when the effects of a declaration of invalidity, whether retroactive or prospective, become operative. When a retroactive declaration of invalidity is suspended, the law is treated as valid for the period of the suspension, but when the suspension period expires, it is as though the law had always been invalid. An immediate prospective declaration of invalidity renders a law invalid from the date of the declaration forward into the future, but not back into the past. The law was and remains valid from the date it was enacted until the date of the prospective declaration. A prospective declaration of invalidity with a suspension, often called a transition period, works in a similar way to an immediate prospective declaration, except that the declaration becomes effective only when the transition period ends.

Prospective declarations raise concerns, because they fail to address any past unconstitutional effects of a law. Similarly, suspended declarations of invalidity are deeply controversial, because they allow an unconstitutional state of affairs to persist, thereby posing a threat to the very idea of constitutional supremacy.

When a court issues a declaration of constitutional invalidity and intends that declaration to deviate from the traditional norm of retroactivity and immediacy, it must say so deliberately and explicitly, in order to avoid confusion. Only a clear statement that a declaration is prospective, suspended, or prospective with a transition period, will suffice, because of the strong presumption that constitutional declarations are retroactive and immediate. While prospective and suspended remedies are available, it must be borne in mind that they are not explicitly authorized by the text of s. 52(1). They are deviations from the traditional and widespread understanding of the role of the judiciary in which courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed.

Similarly, when a legislature enacts new legislation in order to correct the unconstitutional effects of a law during a period of suspension of invalidity, the temporal effect of the new law should be stated explicitly so as to avoid confusion. There is a strong presumption that laws are of prospective, and not of retroactive, effect. However, the presumption that legislation applies prospectively can be rebutted by either express words or necessary implication. Therefore, where a legislature wishes legislation to be retroactive, so as to avoid a legal gap that would arise when the period of suspension of invalidity of a retroactive declaration of invalidity expires, it should make this explicit in the legislation.

Suspending a retroactive declaration of invalidity can be an uneasy fit in the criminal law context, because criminal prosecutions take time. When an offence is

declared void *ab initio* by a court, no one can thereafter be convicted of that offence, even for conduct that occurred prior to the declaration. This is because the offence will be deemed to have never existed and no one can be found guilty of an unconstitutional (and non-existing) law. Accused persons can only be convicted of the offence during the brief window of the suspension. The suspension therefore accomplishes little, precisely because criminal prosecutions take time to move through the system.

The Court could have issued a prospective declaration in *Bedford*, but did not. *Bedford* did not say that the declaration was prospective, and retroactivity is the default position. The absence of any explicit justification for a prospective ruling weighs against interpreting a declaration as having a prospective effect only, especially in the criminal context, because of the general rule that no one should be convicted of an offence under an unconstitutional law. The potential for continued, active enforcement of an unconstitutional criminal law gives rise to rule of law concerns and weighs against imposing a declaration that is prospective only. It also weighs against interpreting an ambiguous declaration as prospective, after the fact. Accordingly, the declaration from *Bedford* had retroactive effect, as of the date the suspension expired.

Cases Cited

By Karakatsanis J.

Explained: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013]

3 S.C.R. 1101; **considered:** *Ontario (Attorney General) v. G*, 2020 SCC 38; *Canada*

(Attorney General) v. Hislop, 2007 SCC 10, [2007] 1 S.C.R. 429; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Bain*, [1992] 1 S.C.R. 91; *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13; **referred to:** *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Li*, 2020 SCC 12; *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *R. v. Wigman*, [1987] 1 S.C.R. 246; *R. v. Thomas*, [1990] 1 S.C.R. 713; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *In re Spectrum Plus Ltd.*, [2005] UKHL 41, [2005] 2 A.C. 680; *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat*, [2017] 3 M.L.J. 561; *India Cement Ltd. v. State of Tamil Nadu*, A.I.R. 1990 S.C. 85; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R.

By Rowe J. (dissenting)

Schachter v. Canada, [1992] 2 S.C.R. 679; *Ontario (Attorney General) v. G*, 2020 SCC 38; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Hess*, [1990] 2 S.C.R. 906; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Campbell v. Campbell* (1995), 130 D.L.R. (4th) 622; *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *R. v. Finta*, [1994] 1 S.C.R. 701; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *R. v. Poulin*, 2019 SCC 47; *R. v. Thomas*, [1990] 1 S.C.R. 713; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Bartle*, [1994] 3 S.C.R.

173; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599.

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APPEALS from a judgment of the British Columbia Court of Appeal (Saunders, Groberman and Bennett JJ.A.), 2020 BCCA 160, 464 C.R.R. (2d) 272, 389 C.C.C. (3d) 163, [2020] B.C.J. No. 909 (QL), 2020 CarswellBC 1410 (WL Can.), setting aside Masuhara J.’s order quashing counts, 2018 BCSC 736, and entering convictions. Appeals dismissed, Brown and Rowe JJ. dissenting.

Eric Purtzki and Alix Tolliday, for the appellant Tamim Albashir.

Joven Narwal and Angela M. Boldt, for the appellant Kasra Mohsenipour.

Lara Vizsolyi and Janet Dickie, for the respondent.

Anne M. Turley, for the intervener the Attorney General of Canada.

Michael S. Dunn, for the intervener the Attorney General of Ontario.

Fiona Émond, for the intervener the Attorney General of Quebec.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

[1] In *Ontario (Attorney General) v. G*, 2020 SCC 38, this Court provided a framework for identifying those exceptionally rare cases where a declaration of constitutional invalidity should be temporarily suspended to permit the legislature to respond. A suspended declaration is only justified where a compelling public interest, grounded in the Constitution, outweighs the harms of temporarily maintaining the unconstitutional law. This case requires us to determine the legal consequences of suspending declarations of invalidity of a criminal offence. In particular, can persons who commit that offence prior to the expiry of the suspension be convicted once the suspension expires and the declaration takes effect? The answer depends on whether the declaration (or any remedial legislation) has retroactive or purely prospective application.

[2] Retroactive declarations change the law for all time, both reaching into the past and affecting the future. Once the declaration takes effect, the law is deemed to have been invalid from the moment of its enactment. Conversely, when the declaration is purely prospective, the law was valid from its enactment but is invalid once the declaration takes effect.

[3] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, this Court found s. 212(1)(j) of the *Criminal Code*, R.S.C. 1985, c. C-46, which prohibited living on the avails of sex work, to be unconstitutionally overbroad because it criminalized non-exploitative actions that could enhance the safety and security of sex workers. By criminalizing, for example, legitimate bodyguards, the offence violated the rights of sex workers under s. 7 of the *Canadian Charter of Rights and Freedoms*. This declaration did not take immediate effect but rather was suspended for one year. The Court did not explicitly state whether this declaration would apply retroactively or purely prospectively at the conclusion of the period of suspension.

[4] Parliament enacted remedial legislation before the suspension expired. The former s. 212(1)(j) was replaced with a new provision that prohibits obtaining a material benefit from sexual services but exempts legitimate, non-exploitative conduct. The new legislation did not include any transitional or retroactive provisions.

[5] The appellants were found by the trial judge to be parasitic, exploitative pimps during the one-year period of suspension, contrary to s. 212(1)(j). The prosecution proceeded after the suspension expired. The appellants successfully

applied to quash the resulting charges at trial. The British Columbia Court of Appeal allowed the Crown's appeals, set aside the trial judge's order and entered convictions on each count. The appellants now ask this Court to set aside the Court of Appeal's order and restore the trial judge's order quashing the counts.

[6] I would dismiss the appeals and affirm the appellants' convictions. The purpose animating the suspension in *Bedford* was to avoid the deregulation of sex work (thus maintaining the protection of vulnerable sex workers) while Parliament crafted replacement legislation. In light of that purpose, I conclude that the declaration of invalidity was purely prospective, effective at the end of the period of suspension. Thus, the appellants were liable under s. 212(1)(j) for their conduct during the suspension period, and could be charged and convicted under this provision even after the suspension expired.

[7] The temporal application of a declaration is grounded in foundational constitutional principles and the presumptions to which they give rise.

[8] As I shall explain, judicial declarations are presumptively retroactive but that presumption is rebutted when retroactivity would defeat the compelling public interests that required the suspension. However, this does not leave those who may be personally prejudiced by a *Charter* breach during the suspension without a remedy. Where the remedial declaration operates prospectively, the findings of unconstitutionality by this Court can operate retroactively in individual cases, giving remedial effect to both s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act*,

1982. Such a result respects the constitutional roles of both the legislature and the judiciary, ensures that the public and vulnerable persons maintain the protections of the criminal law, ensures that Parliament has the option to design a specific regime, and gives remedial protection to those whose *Charter* rights have been violated.

[9] As the *Bedford* declaration applied purely prospectively, the appellants could be charged and convicted after the suspension expired and the declaration took effect for committing the offence of living on the avails during the suspension period. Because the trial judge found them to be abusive and exploitative, it cannot be said that they were prejudiced by the constitutional infirmity identified in *Bedford*. I would dismiss the appeals.

I. Background

A. *Bedford* and Responding Legislation

[10] On December 20, 2013, this Court released its decision in *Bedford*. The *Bedford* applicants had challenged three provisions of the *Criminal Code* that criminalized various activities related to sex work. One of those provisions, the former s. 212(1)(j), criminalized living on the avails of sex work. While this offence was intended to prevent the exploitation of sex workers by “the person who lives parasitically off a [sex worker’s] earnings” (*R. v. Downey*, [1992] 2 S.C.R. 10, at p. 32; see also *Bedford*, at para. 142), it also prevented sex workers from accessing security-enhancing safeguards, such as drivers and bodyguards. The offence was therefore

overbroad and a violation of the s. 7 rights of the sex workers that was not saved under s. 1 of the *Charter*: *Bedford*, at paras. 66-67, 142, 145 and 162-63.

[11] This Court declared the living on the avails offence, as well as the two other challenged offences, to be inconsistent with the *Charter* and hence void: *Bedford*, at para. 164. However, because “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”, the declaration of invalidity was suspended for a period of one year: *Bedford*, at paras. 167 and 169. The Court did not state whether this declaration was to operate retroactively or purely prospectively.

[12] Two weeks before the suspension expired, Parliament enacted remedial legislation, replacing the living on the avails offence with the offence of obtaining a material benefit from sexual services provided for consideration: *Criminal Code*, s. 286.2. The new offence includes a number of exceptions but they do not apply in abusive or exploitative situations: *Criminal Code*, s. 286.2(5). Parliament did not state whether the amendments were to apply retroactively or prospectively.

B. *Supreme Court of British Columbia, 2018 BCSC 736 (Masuhara J.)*

[13] About two years after the declaration took effect, the appellants, Tamim Albashir and Kasra Mohsenipour, were charged with numerous offences arising out of an “escort” operation. They managed practically all aspects of the operation — clients, service locations, advertising, supplies, and transportation.

[14] The trial judge found that the appellants were abusive towards the sex workers in their employ. One of the complainants, K.C., testified that Albashir was repeatedly violent towards her. The trial judge found that Albashir’s “use of violence for the purpose of controlling [K.C.’s] conduct was normalized”: para. 228. Another complainant, S.C., testified that Mohsenipour had pointed a gun at her and threatened to kill her, and that Albashir had threatened to kill her son.

[15] Thus, far from providing safety and security-enhancing services, on the trial judge’s findings the appellants were precisely the type of “controlling and abusive pimps” that were the legitimate targets of the living on the avails offence: *Bedford*, at para. 142.

[16] Despite that, the trial judge quashed the charges against both appellants for living on the avails of the sex work of K.C. and S.C. The trial judge found that both offences had been established by the Crown but he quashed the charges because, once the *Bedford* suspension expired, the offence was unconstitutional.

[17] The trial judge relied on this Court’s decision in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, as saying that suspended s. 52(1) declarations have a “delayed retroactive effect”, unless the court clearly states otherwise: para. 345. Thus, “[o]nce the suspension expires, the law will always have been unconstitutional” and the effect of the *Bedford* suspension expiring was that “s. 212(1)(j) has always been invalid”: paras. 345 and 350.

C. *Court of Appeal for British Columbia*, 2020 BCCA 160, 389 C.C.C. (3d) 163 (Bennett J.A., Saunders and Groberman J.J.A. concurring)

[18] The British Columbia Court of Appeal allowed the Crown’s appeals. In the Court of Appeal’s view, *Hislop* stood for the proposition that a suspended declaration operates retroactively if the legislature fails to enact remedial legislation during the suspension. However, if the legislature *does* enact such remedial legislation then “the retroactive effect of a suspended declaration of invalidity is pre-empted”: para. 90. Therefore, the *Bedford* declaration never came into effect and the trial judge should not have quashed the counts.

D. *Positions of the Parties*

[19] Albashir submits that the trial judge was right to quash the charges because the *Bedford* declaration operated retroactively once the suspension expired. In his view, the “Blackstonian” theory posits that because the legislature never had authority to enact an unconstitutional law, a declaration of constitutional invalidity nullifies the law from the outset. A suspension is only a temporary limit on the retroactive effect of the declaration to give Parliament time to cure the constitutional defect. If the impugned provision is a criminal offence, nobody may be prosecuted for that offence once the declaration comes into effect because no one can be convicted of an offence under an unconstitutional law. Otherwise, the Crown could use the former s. 212(1)(j) to indefinitely prosecute anybody who was paid to provide legitimate security services to sex workers prior to the expiry of the suspension.

[20] Mohsenipour similarly argues that, unless expressly stated otherwise, declarations of invalidity have retroactive effect, including when they are suspended. It is then up to the legislature to determine how best to respond, whether through purely prospective or retroactive remedial legislation. As the *Bedford* declaration was not explicitly prospective, it must have applied retroactively, rendering s. 212(1)(j) void *ab initio* once the suspension ended.

[21] The Crown submits that because Parliament enacted remedial legislation, the *Bedford* declaration never came into force and those who committed the offence of living on the avails under s. 212(1)(j) prior to the remedial legislation may still be prosecuted for that conduct. To the extent that legitimate bodyguards, drivers, or accountants could also be prosecuted, s. 24(1) is sufficiently flexible to provide them a remedy. This remedy is not available to the appellants, however, because their exploitative conduct did not fall within the unconstitutional overbreadth of s. 212(1)(j).

[22] The intervener the Attorney General of Canada argues in favour of a different approach: that the *Bedford* declaration was prospective. This Court should take a purposive approach to the temporal application of suspended s. 52(1) declarations, looking to the purpose of the suspension to determine whether the declaration must logically operate retroactively or purely prospectively. The *Bedford* declaration must be purely prospective because the purpose of its suspension would be undermined by a retroactive declaration. This is because criminal offences during the suspension would be unenforceable unless a prosecution could be entirely disposed of

before the suspension expired. In other words, a retroactive declaration would result in sex work being effectively unregulated during the suspension period — despite the very purpose of the suspension being to maintain the regulation of sex work.

II. Analysis

[23] For the reasons that follow, I agree with the Attorney General of Canada that the *Bedford* declaration operated prospectively. Accordingly, the appellants could be tried and convicted under s. 212(1)(j) after the declaration took effect.

[24] As a preliminary matter, the parties were invited to make submissions on whether this Court has jurisdiction to hear these appeals as of right. The parties all agreed that the reinstatement of quashed counts by the Court of Appeal was tantamount to the reversal of an acquittal. Because the factual guilt of the appellants was established at trial, I agree that a reversal on appeal would result in findings of guilt on the quashed counts. There needs to be at least one level of court that can review the questions of law arising from the convictions: *R. v. Li*, 2020 SCC 12, at para. 1, citing *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 38. For this reason, this Court has jurisdiction to hear these appeals as of right.

[25] The key issue on appeal is whether s. 212(1)(j) was retroactively invalid such that it could not subsequently ground a conviction. The answer to this turns on the temporal nature of judicial remedies. I will then consider the relationship between a declaration of invalidity under s. 52(1) and individual remedies under s. 24(1).

A. *Temporal Nature of Remedies*

[26] When a court makes a declaration of invalidity under s. 52(1), the temporal effect of that constitutional remedy is rooted in the nature of the remedy itself. Constitutional remedies must be purposively interpreted in their “proper linguistic, philosophic and historical contexts”: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. They must also be interpreted in a “generous and expansive” manner that is sensitive to evolving circumstances: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 24; see also *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52.

[27] When legislation violates a *Charter* right, three foundational constitutional principles guide the interpretation of constitutional remedies: constitutionalism, the rule of law, and the separation of powers (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*P.E.I. Judges Reference (1997)*)), at paras. 90-95; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 54; *G*, at paras. 153-59).

[28] Constitutionalism requires that all laws comply with the Constitution as the supreme law of Canada. Section 52(1) of the *Constitution Act, 1982*, reads:

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 or effect.

[29] This supremacy clause has existed in other forms since Canada’s original constitution, the *Constitution Act, 1867: Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 482. The Canadian judiciary’s role in reviewing the constitutionality of legislation thus has a considerable history: P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 5:20. In *Manitoba Language Reference*, the Court explained that “[s]ection 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years”: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 746.

[30] When a court finds legislation to be inconsistent with the Constitution, it must consider not only the principle of constitutional supremacy in s. 52(1), but other — at times competing — constitutional imperatives to determine an appropriate remedy: K. Roach, “Principled Remedial Discretion Under the Charter” (2004), 25 *S.C.L.R.* (2d) 101, at pp. 105 and 111-13. In this way, courts are also guided in their remedial discretion by the principles of the rule of law and the separation of powers. They can take into account, for example, the entitlement of the public to the benefit of legislation, as well as the different institutional roles that courts and legislatures are called to play: *G*, at para 94. As LeBel and Rothstein JJ. stated for the majority in *Hislop*, “[t]he text of the Constitution establishes the broad confines of the supreme law, but it is up to the courts to interpret and apply the Constitution in any given context”: para. 114.

[31] Thus, despite the absolute language of s. 52(1), when a court exercises its remedial jurisdiction to grant a declaration of unconstitutionality, it has discretion to give the principle of constitutional supremacy immediate effect or to suspend the declaration for a given period of time: *G*, at paras. 120-21. In rare circumstances, a compelling public interest will warrant a suspension, although this suspension must not last longer than is necessary for the government to address the constitutional infirmity: *G*, at paras. 132 and 135.

[32] In the face of unconstitutional legislation, s. 52(1) is not the only remedial provision in the *Constitution Act, 1982*. Section 24(1) may also provide a remedy:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[33] Unlike a formal declaration under s. 52(1) that renders the legislation invalid, s. 24(1) is an entirely personal remedy that can only be invoked by a claimant alleging a violation of their own constitutional rights: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61.

[34] Thus, the principles of constitutionalism, the rule of law, and the separation of powers shape the remedial relief for legislation that is inconsistent with the Constitution. These foundational principles also establish strong — but rebuttable — presumptions that legislation is prospective and judicial declarations are retroactive.

[35] There is a strong presumption against retroactive application of legislation because the rule of law requires that people be able to order their affairs in light of an established legal order: R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 354. As Professor Sullivan aptly puts it, when legislation is retroactive, “the content of the law becomes known only when it is too late to do anything about it”: p. 354. Even so, the rule of law does not *prohibit* retroactive legislation. When they can do so within the confines of the *Charter* (for example, when it does not offend the protections of s. 11(g) or (i)), legislatures can decide how and when their laws will apply. It may thus be open to them to correct a constitutional infirmity retroactively.

[36] Choudhry and Roach posit that legislatures have internalized the principles underlying the presumption against retroactivity and are reluctant to enact retroactive legislation as a result: S. Choudhry and K. Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003), 21 *S.C.L.R.* (2d) 205, at pp. 241-42. Especially when working with remedial legislation that is a direct response to a court’s declaration of constitutional invalidity, I agree with those authors that it would be helpful for the legislatures to turn their mind to the temporal application of their laws and explicitly explain what provision will govern during the transitional period in order to provide certainty and clarity.

[37] No one in this case has argued that the remedial legislation was intended to be retroactive. Thus, in the absence of retroactive legislative intent either explicitly

or by necessary implication, the strong presumption that legislation is prospective is not challenged.

[38] Whereas the rule of law dictates a presumption that legislation is prospective, the inverse is true for judicial remedies. Generally, legal determinations of this Court are effective immediately, and all courts are bound to apply this Court's decisions about the constitutional infirmities of legislation in outstanding matters before them. In this sense, this Court's decisions are retroactive, applying even to cases arising before the decision. As one author notes, "it is the basic role of courts to decide disputes after they have arisen. That function requires that judicial decisions operate (at least ordinarily) with retroactive effect": R. J. Traynor, "Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility" (1977), 28 *Hastings L.J.* 533, at p. 536, quoting P. Mishkin, "The High Court, The Great Writ, and the Due Process of Time and Law" (1965), 79 *Harv. L. Rev.* 56, at p. 60.

[39] When a court makes a s. 52(1) declaration of invalidity, the same presumption of retroactivity arises. The appellants say that this arises from the Blackstonian theory that judges do not create but merely discover the law so that a constitutionally invalid law is "invalid from the moment it is enacted": Hogg and Wright, at §58:1, quoting *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28; see also W. Blackstone, *Commentaries on the Laws of England* (1765), Book 1, at pp. 69-70; *Hislop*, at para. 79.

[40] A strict Blackstonian theory, however, cannot easily be reconciled with modern constitutional law. Many fundamental principles that are essential to our constitutional system curtail the retroactive reach of judicial remedies. *Res judicata*, for example, prevents the reopening of settled matters due to later judicial pronouncements, even maintaining convictions for offences later declared unconstitutional if the accused has exhausted their appeals such that they are no longer “in the judicial system”: *R. v. Wigman*, [1987] 1 S.C.R. 246, at p. 257; see also *R. v. Thomas*, [1990] 1 S.C.R. 713. Similarly, the *de facto* and qualified immunity doctrines validate and preclude financial liability for government actions taken under laws that are later found to be unconstitutional: K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at ¶ 14.1980; *Hislop*, at para. 102, citing *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, and *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405. These doctrines balance the generally retroactive nature of judicial remedies with the need for finality and stability. Finally, it is also difficult to square the Blackstonian view with the judicial discretion to suspend a declaration of invalidity: *G*, at paras. 87-89. Thus, the theory is subject to numerous exceptions and qualifications. It cannot preclude purely prospective constitutional remedies. Indeed, this has been recognized in many other jurisdictions that have grappled with the Blackstonian theory: *In re Spectrum Plus Ltd*, [2005] UKHL 41, [2005] 2 A.C. 680, at paras. 17, 35, 41-42, 74 and 161-62; *Johnson v. New Jersey*, 384 U.S. 719 (1966); Constitution of South Africa, s. 172(b); *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat*, [2017] 3 M.L.J. 561 (Federal Court of Malaysia); *India Cement Ltd. v. State of Tamil Nadu*, A.I.R. 1990 S.C. 85.

[41] That said, the general presumption that declarations of constitutional invalidity have retroactive effect is firmly rooted in principles of constitutional interpretation and s. 52(1).

[42] Section 52(1), the cornerstone of constitutionalism, enshrining the supremacy of the Constitution, must be read in light of all constitutional principles. A s. 52(1) declaration will generally be both immediate and retroactive. Retroactive remedies that immediately apply to everybody who is still “in the system” maximize the protection and vindication of *Charter* rights, as a general system of delayed prospective remedies would risk leaving those harmed in the past by an unconstitutional law without a remedy: Choudhry and Roach, at pp. 247-48. Furthermore, legislatures would have lesser incentives to ensure that new legislation complies with the *Charter* if they could rely on the second chances provided by consequence-free prospective declarations: see R. Leckey, “The harms of remedial discretion” (2016), 14 *Int’l J. Const. L.* 584, at pp. 595-96.

[43] However, that judicial declarations are *generally* immediate and retroactive does not mean they are *necessarily* so: *Hislop*, at para. 86. As I will explain, the rare circumstances and constitutional considerations that warrant a suspended declaration can justify an exception to the retroactive application of declarations where necessary to give effect to the purpose of the suspension.

B. *Temporal Nature of Suspended Declarations*

[44] When compelling public interests outweigh the continued violation of *Charter* rights, courts may suspend a declaration of invalidity: *G*, at paras. 117 and 126. The tool of a suspended declaration allows courts to temper the retroactive effects of a declaration. However, a court's decision to suspend a declaration does not alter the presumptively retroactive application of the declaration but merely changes when it comes into effect. The presumption of retroactivity persists, although it may be rebutted explicitly or by necessary implication. For example, this Court's first experience issuing a suspended declaration of invalidity was in *Manitoba Language Reference*. Nearly all of Manitoba's legislation was found to be unconstitutional because it was enacted in English only. Because an immediate retroactive remedy would have created a legal vacuum in Manitoba, with catastrophic consequences for the rule of law, the Court suspended its declaration of invalidity to give the legislature time to pass new, constitutionally sound laws: p. 758. Nonetheless, the declaration was retroactive.

[45] In *Hislop*, this Court explained some circumstances where "judges may rule prospectively": para. 96. In these circumstances, the presumption of retroactivity is rebutted and a s. 52(1) declaration will operate prospectively. A prospective remedy could be appropriate if there is a "substantial change in the law": para. 99. *Hislop* set out some further factors that courts should consider in determining whether to issue a prospective remedy, including good faith government reliance, fairness to the litigants, and whether a retroactive remedy would unduly interfere with the allocation of public resources: para. 100. *Hislop* was clear that this was not an exhaustive list: para. 100.

The question then becomes what other “conditions will justify the crafting of judicial prospective remedies”: para. 86.

[46] In my view, a suspended declaration of invalidity may provide another exception to the presumption of retroactivity where the purpose of the suspension, by necessary implication, requires a purely prospective declaration. Suspended declarations will only issue where the government demonstrates that compelling public interests, grounded in the Constitution, outweigh the continued breach of constitutional rights and require that the legislature have an opportunity to remedy the constitutional infirmity: *G*, at paras. 133 and 139. Furthermore, declarations of invalidity will be issued only if more tailored remedies, such as reading in, reading down, or severance, are inappropriate: *G*, at paras. 112 and 114. When these rare and exceptional circumstances arise, a retroactive application of the declaration at the conclusion of the suspension could frustrate the purpose — the compelling public interests — that required a period of transition, creating uncertainty and removing the protection that justified the suspension in the first place. The necessary implication of the suspension may be that the declaration, when it comes into effect, must operate purely prospectively so that it does not defeat the very purpose of the suspension.

[47] The appellants suggest that concerns with self-defeating retroactive declarations can be alleviated by Parliament enacting retroactive remedial legislation. Ultimately, however, the choice of whether to make remedial legislation retroactive belongs to the legislature. The suggestion that the courts should rely on this legislative

choice fails to give full effect to the separation of powers and the responsibility of the courts as “guardians of the Constitution”: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169. The judiciary must give effect to the supremacy clause in s. 52(1) through judicial declarations that stand on their own.

[48] Similarly, I cannot accept the proposition of the Court of Appeal and the Crown that remedial legislation can somehow amend a court’s declaration or “pre-empt” its retroactive effect. Remedial legislation may impact the ultimate state of the law but it cannot change the court’s order. Nothing in *Hislop* (at para. 92) says otherwise. Furthermore, the legislature may legitimately choose to not enact remedial legislation. Thus, the courts must exercise their duty to craft coherent, principled s. 52(1) remedies that give effect to the interests and the various foundational principles of the Constitution at stake — including when establishing the temporal application of a declaration.

[49] The appellants further submit that a declaration cannot be prospective unless the court explicitly directs. While such precision is strongly advised, this Court has rarely stated explicitly when a declaration will apply purely prospectively. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (*P.E.I. Judges Reference (1998)*), appears to stand alone in this regard, where this Court clarified the temporal nature of the declaration in *P.E.I. Judges Reference (1997)*, which was silent on the issue: para. 18. However, *P.E.I. Judges Reference (1998)* is not the only purely prospective judgment in this Court’s history.

More frequently, the necessary implications of transition periods or suspended declarations of invalidity demonstrate that, even in the absence of explicit language, the Court’s declaration operates purely prospectively.¹

[50] For example, in *R. v. Brydges*, [1990] 1 S.C.R. 190, this Court found that the right to counsel under s. 10(b) of the *Charter* includes the right to be informed of the existence and availability of legal aid and duty counsel: p. 211. Recognizing that police officers generally fulfilled their informational duties by reading from printed caution cards, the declaration was suspended for 30 days to allow police departments across Canada to prepare new caution cards that included information about legal aid and duty counsel: p. 217. The prospective application of this declaration is necessarily implied from the reason for the suspension. It would have defeated the purpose of the suspension to suspend the declaration because police officers could not realistically comply with the judgment for the next 30 days, only to then have the declaration apply retroactively to everybody detained in the previous 30 days.

[51] Suspended declarations invalidating legislation have also operated in this way. For example, in *R. v. Bain*, [1992] 1 S.C.R. 91, this Court held that the Crown’s disproportionate number of juror stand-asides was unconstitutional, but suspended that declaration for six months to “avoid a hiatus”: p. 104. Again, the necessary implication

¹ In this regard, while some have read the words “transition period” to indicate prospective remedies and “suspension period” to indicate retroactive ones (Choudhry and Roach, at pp. 216-17), the language used by this Court has varied over cases and years and the two expressions have similar effects. In evaluating the temporal application of judicial remedies, the focus ought not to be placed on the terminology used but rather on the purpose and effects of the remedy.

of the suspension was that the declaration applied purely prospectively. A retroactive application, invalidating any juries selected during the suspension period, would have defeated the very purpose of the suspension.

[52] In sum, I agree with the Attorney General of Canada that the court should look to the purpose of a suspension in determining whether the declaration must logically operate retroactively or purely prospectively. The purpose of a suspension is to protect a compelling public interest that would be endangered by an immediate declaration to such an extent that it outweighs the harms of continuing the violation of *Charter* rights for a limited period: *G*, at para. 83. If retroactivity would undermine that purpose, the declaration must apply purely prospectively.

[53] This Court has not always explained why a declaration is suspended, nor explained the temporal application of that declaration. *G* emphasized the importance of transparently explaining the reasons for suspending a s. 52(1) declaration: paras. 125-26 and 159. While those explanations will assist in deducing the necessary temporal implications of suspended declarations, I would expect courts in the future to explicitly state the temporal application of their s. 52(1) declarations to avoid any confusion. Where the court has been explicit, it is unnecessary to consider the necessary implications of a suspension.

C. *Temporal Nature of the Bedford Suspended Declaration*

[54] This brings us to the temporal application of the *Bedford* declaration. *Bedford* represented a substantial change in the law, with this Court revisiting its conclusion in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123: see *Hislop*, at para. 99. The key issue in this case is whether, in the absence of explicit language, the presumption of retroactivity is rebutted by necessary implication. In my view, the purpose of the *Bedford* suspension required the declaration to operate purely prospectively.

[55] The *Bedford* suspension emanated from a concern about immediately leaving sex work entirely unregulated: para. 167. A retroactive declaration would have rendered the regulatory system of criminal offences that was maintained by the suspension entirely unenforceable once the suspension expired, undermining the protection of the vulnerable victims that was at the root of the finding of unconstitutionality and defeating the purpose of the suspension.

[56] Nor would a retroactive declaration have given effect to and vindicated *Charter* rights. The *Bedford* provisions were found unconstitutional because their overbreadth imperiled the security of sex workers. For example, the offence of living on the avails *protected* sex workers from parasitic, exploitative pimps but was unconstitutionally overbroad because it *prevented* them from accessing security-enhancing services such as legitimate drivers and bodyguards: paras. 137-45. However, the Court issued a declaration of invalidity rather than reading the provisions down, recognizing that a judicially crafted exclusion for non-exploitative protective services

could have unforeseen impacts on other aspects of the regulatory scheme: para. 165. The suspension temporarily maintained in effect both the constitutional “protection” and unconstitutional “prevention” aspects of the offence. If the declaration was retroactive, then not only would sex workers have their rights continually violated by the “prevention” measures during the suspension, but they would also lose the protective aspect of the living on the avails offence as parasitic and exploitative pimps would enjoy practical criminal immunity for their actions during the suspension. Far from vindicating the *Charter* rights of sex workers, as *Bedford* sought to do, a retroactive declaration would have gravely imperiled those rights.

[57] Conversely, prospective application is far more consonant with the purpose of the *Bedford* suspension and more protective of sex workers’ rights. As *Bedford* intended, the status quo regulation continued for one year. In that time, sex workers retained the full protection of the criminal law against parasitic and exploitative conduct, thus providing them the benefit of the law.

[58] Given the purely prospective nature of the declaration in *Bedford*, the specific challenge in this case is to determine what happens to those who committed the *Bedford* offences prior to the expiry of the suspension. Any answer involves some degree of legal uncertainty. This uncertainty reinforces why suspensions must be rare. Where suspensions are necessary, the court should also consider whether any measures during the suspension may minimize the impact of the ongoing *Charter* breaches. For example, in *R. v. Swain*, [1991] 1 S.C.R. 933, this Court suspended its declaration

striking down the automatic indefinite detention provisions, but dictated that any detentions during the interim be capped at 30 to 60 days: p. 1021. In *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13, this Court provided guidelines for constitutional exemptions for physician-assisted death during the extended suspension period: para. 6. Of course, the legislature can always legislate a different approach, including retroactively, within the confines of the Constitution.

D. *Protection of Rights Under Prospective Remedies*

[59] The appellants' submissions that the *Bedford* declaration must be retroactive emphasize the potential unfairness to accused persons charged for engaging in non-exploitative conduct under s. 212(1)(j) prior to the declaration taking effect. However, a prospective declaration does not deprive these people of individual remedies and would not contravene the principle from *Big M Drug Mart* that nobody may be convicted of an offence under an unconstitutional law.

[60] The principle that nobody may be convicted of an offence under an unconstitutional law was described by this Court in *Big M Drug Mart* as a corollary to the supremacy of the Constitution: p. 313. However, this Court noted that neither s. 52(1) nor s. 24(1) are the *only* recourse in the face of an unconstitutional law: p. 313. Rather, they coexist to offer relief from an unconstitutional offence.

[61] It does not follow from *Big M Drug Mart* that s. 52(1) remedies must always be retroactive in the criminal law. First, the *Big M Drug Mart* principle has

never been absolute: the doctrine of *res judicata* has always tempered its application. Indeed, by preventing collateral attacks on final judgments once a law has been declared unconstitutional, the doctrine allows people to remain convicted — and potentially deprived of liberty — for an offence under an unconstitutional law. Second, as I will explain, when a s. 52(1) declaration is prospective, a person whose *Charter* rights are breached by the law declared to be unconstitutional may still apply for a personal remedy under s. 24(1). I must therefore reject the appellants’ arguments.

Remedies Available Following a Prospective Declaration

[62] While s. 52(1) is the usual remedy against unconstitutional laws and s. 24(1) is “generally used” against unconstitutional acts, both can be combined to provide relief in cases where it is appropriate to do so: *Ferguson*, at paras. 59-60 and 63. A declaration under s. 52(1) provides general relief against the law, whereas an individual remedy under s. 24(1) — such as an exemption or a stay of proceedings — can mitigate the effects of that law or of actions taken under the law in specific cases. In *Ferguson*, this Court held that, while constitutional exemptions under s. 24(1) are not appropriate substitutes for s. 52(1) challenges to the unconstitutionality of legislation, s. 24(1) can be combined with s. 52(1) when additional relief is necessary to provide an effective remedy in a specific case: para. 63.

[63] Similarly, in *G*, this Court held that there was no rule against granting both a suspended s. 52(1) declaration and a retroactive s. 24(1) remedy. There are numerous examples in our jurisprudence of a personal constitutional remedy being granted during

the period of suspension of a declaration under s. 52(1): see *Carter*, at paras. 5-6; *G*, at para. 182; *Martin*, at paras. 120-21; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32-34; *Mackin*, at paras. 75-76; *Bain*, at pp. 105 and 165. In that sense, the practice of this Court has often been to apply the findings of unconstitutionality retroactively to the claimant before them, even when the temporal application of the declaration itself was suspended.

[64] The same reasoning holds when the suspended declaration is prospective. This is because there is a conceptual distinction between the legal findings as to the constitutional validity of a law and the particular relief ordered — between the substantive conclusions and the appropriate remedy: M.-S. Kuo, “Between Choice and Tradition: Rethinking Remedial Grace Periods and Unconstitutionality Management in a Comparative Light” (2019), 36 *UCLA Pac. Basin L.J.* 157, at p. 160. While the legal finding that the legislation breaches a *Charter* right is a necessary condition for the granting of a general s. 52(1) declaration, that finding can also be the basis for a personal remedy under s. 24(1).

[65] A s. 52(1) declaration is simply the means by which a court with the jurisdiction to do so makes its findings on the constitutionality of a law opposable to the world, including government: *Martin*, at para. 28. However, even in the absence of a declaration, judges must assess *Charter* compliance in specific cases when an issue is appropriately raised before them, though their findings may remain applicable only to that case: *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paras. 15 and 19; *Martin*,

at para. 3; Roach (2nd ed.), at ¶ 6.200. When a judge is asked to consider whether a particular accused's *Charter* rights have been breached under s. 24(1), the constitutional findings of this Court are binding, even when the declaration itself is not operative. While this Court's decision to suspend the declaration or to make it purely prospective keeps the law temporarily alive so as not to create a legal vacuum that would compromise compelling public interests, this does not preclude personal remedies for violations of *Charter* rights before the coming into force of the declaration. Whether a remedy is appropriate in the circumstances is a separate question.

[66] Generally, recourse to s. 24(1) will be limited so as not to undermine the compelling public interests that required suspending the declaration. A personal remedy that undermined compelling public interests would indeed not be “appropriate and just” in the circumstances. However, where compelling public interests would not be undermined, s. 24(1) is a flexible vehicle for someone whose *Charter* rights are breached. *Carter* is an example where compelling interests to permit physician-assisted death justified a broad interim remedy that granted personal relief to people whose rights were jeopardized by the extended suspension. In that case, the Court fashioned a detailed transitional remedy that mitigated irreparable harm, based on the criteria arising from its findings of unconstitutionality. Similarly, in *G*, although widespread individual exemptions would have undermined the purpose of the suspension by significantly impairing the legislature's ability to enact remedial legislation, this Court

was able to grant the applicant a s. 24(1) exemption because in his circumstances it did not undermine the purpose of the suspension.

[67] Thus, s. 24(1) remedies may be available even during the period of suspension if the accused can demonstrate that conviction under the legislation found to be constitutionally infirm would be a breach of their own *Charter* rights, and if granting an individual remedy would not undermine the purpose of suspending the s. 52(1) declaration.

[68] Applying this reasoning to this case, a person charged under s. 212(1)(j) for conduct prior to or during the suspension may seek an individual remedy under s. 24(1). Unlike *Ferguson*, in this context the living on the avails offence has already been found to be unconstitutional pursuant to s. 52(1). But because the Court's declaration of invalidity was suspended, both the law and decisions by officials to lay charges or prosecute continued to affect the rights of an accused: see *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 106. The Court in *Bedford* found that by punishing both those who exploit sex workers and those who enhance their safety, the living on the avails offence infringed the security of sex workers in a manner that bore no relation to its purpose and was therefore overbroad: paras. 142 and 144. While the constitutional flaw related to the s. 7 rights of sex workers, this finding has direct implications for providers of security-enhancing services who are charged under s. 212(1)(j). The liberty of these accused is put in jeopardy, despite the finding in

Bedford that this aspect of the living on the avails offence bears no relation to its purpose.

[69] This risk may be mitigated through a personal remedy under s. 24(1). Following the findings of *Bedford*, if an accused is charged with conduct that bears no relation to the purpose of the living on the avails offence — for example because they were a legitimate driver or bodyguard — an application judge may find a breach of that accused’s s. 7 rights and grant a s. 24(1) remedy. However, if the trial judge finds that the accused’s conduct did not fall within the unconstitutional overbreadth, for example because they were an exploitative pimp, then the accused’s s. 7 rights are not violated and no remedy lies in s. 24(1). Furthermore, granting individual remedies for non-exploitative conduct within the bounds of the constitutional defects as identified by this Court in *Bedford* is unlikely to undermine the purpose of the *Bedford* suspension. The suspension maintains the protection of the law for vulnerable victims and the public by allowing sex workers recourse against parasitic or exploitative behaviour. The suspension allows the law to continue temporarily to target those whose conduct may legitimately be criminalized. However, when an application judge finds as a fact that the accused before them acted within the safety-enhancing unconstitutional overbreadth, s. 24(1) may be available to stay the charges. Doing so upholds the Constitution fully and maximizes rights protection.

[70] Finally, while this Court has often stated that prosecutorial discretion is not a solution to a constitutionally defective situation, it is highly unlikely that the Crown

would prosecute someone in the face of the Court’s determination that to do so would likely be a violation of their *Charter* rights: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 86. In the unlikely event that they do, a person in non-exploitative position can seek a s. 24(1) remedy.

[71] In sum, the fact that the *Bedford* declaration was purely prospective does not mean someone will be convicted of s. 212(1)(j) in violation of their *Charter* rights. While the law remains valid and can ground legal convictions, no one should be convicted of the offence if its overbreadth violates their rights. However, where the conduct does not fall within the area of overbreadth identified by this Court, individuals may be charged, prosecuted, and convicted under s. 212(1)(j) for conduct that occurred while the law still governed.

III. Conclusion

[72] A suspended declaration of invalidity may be purely prospective where the purpose of the suspension requires such a temporal application. In *Bedford*, this Court’s remedy was purely prospective, because the purpose of the suspension — avoiding deregulation that would leave sex workers vulnerable — would be frustrated by a retroactive remedy. As the remedy was purely prospective, the appellants could be charged for their conduct prior to the declaration taking effect. Thus, an accused could be convicted for conduct caught by s. 212(1)(j) before the effective date of the declaration. However, an accused who could demonstrate that their personal rights

were prejudiced by the constitutional infirmity could seek relief under s. 24(1), provided their conduct did not undermine the public interests the suspension was designed to protect.

[73] Because the appellants engaged in exploitative and parasitic conduct, the exact conduct that was always legitimately criminalized, a s. 24(1) remedy is not available to them. I would dismiss the appeals.

The reasons of Brown and Rowe JJ. were delivered by

ROWE J. —

I. Introduction

[74] The law relating to the suspension of declarations of invalidity has been bedeviled by a lack of doctrinal clarity. This, in turn, has given rise to sustained ad hockery. The first key question, in what circumstances should a declaration of invalidity be suspended, was addressed in a structured way three decades ago in *Schachter v. Canada*, [1992] 2 S.C.R. 679. Unhappily, the test for granting a suspension set out there was honoured so consistently in the breach that the whole issue had to be revisited in 2020 in *Ontario (Attorney General) v. G*, 2020 SCC 38.

[75] In this case, we deal with a second key question: if a suspension of a declaration of invalidity is to be made, then how should it be structured and operate? Again, what is needed is doctrinal clarity, in the absence of which will arise yet more ad hocery. I seek to provide an overall framework for the structuring and the operation of such suspensions. In my view, what is needed is to tailor the terms of the suspension to the purpose for which the suspension is given. In other words, the terms of the suspension should be set, deliberately and explicitly, based on the state of the law that the declaration is intended to achieve, both during and following the expiry of the suspension. That did not happen in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. As a result, we are asked in these appeals to do a *post facto* patch up. Tempting as it is in order to avoid an unhappy result, we should not be drawn into doing so.

[76] Applying this framework to the specific facts of this case, I agree with Justice Karakatsanis that the approach of the Court of Appeal for British Columbia is flawed. However, I part ways with Justice Karakatsanis in her interpretation of the effect of the declaration of invalidity in *Bedford*.

[77] While this Court in *Bedford* could have issued a prospective declaration of invalidity, on my reading, it did not do so. Therefore, the declaration of invalidity in *Bedford* rendered s. 212(1)(j) of the *Criminal Code*, R.S.C. 1985, c. C-46, void *ab initio*. It follows that the appeals must be allowed, the convictions of the appellants set aside and the trial judge's decision quashing the counts restored.

II. Legal Framework

A. *Temporal Operation of Constitutional Declarations of Invalidity*

[78] Ordinarily, constitutional declarations of invalidity are retroactive, and have immediate effect. Section 52(1) of the *Constitution Act, 1982*, provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. If a law is “of no force or effect” to the extent that it is inconsistent with the Constitution, then it has always been of no force and effect, from the moment it was enacted, or from the moment the provision of the Constitution with which it is inconsistent came into effect, whichever came second. This is the logical implication of s. 52(1). This Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, referred to this as the “declaratory approach”, and explained that “[i]f the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past” (para. 83).

[79] The retroactive nature of constitutional declarations of invalidity also flows from the nature of judicial remedies generally. As this Court explained in *Hislop*, because courts generally decide the legal consequences of events that occurred in the past, “they generally grant remedies that are retroactive” such that the successful litigant will benefit from the ruling (para. 86, citing S. Choudhry and K. Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003), 21 *S.C.L.R.* (2d) 205, at pp. 211 and 218).

[80] In the criminal context, this is demonstrated by the fact that accused persons may defend themselves against convictions by arguing that the law under which they are convicted is unconstitutional. This is foundational. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. (as he then was) explained that the “undoubted corollary to be drawn” from s. 52(1) and the principle that the Constitution is supreme is that “no one can be convicted of an offence under an unconstitutional law” and that “[a]ny accused . . . may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid” (pp. 313-14). It follows from this that constitutional declarations are typically retroactive, so as to provide a remedy to the litigant before the court, who is seeking relief from the effects of an unconstitutional law that occurred in the past, prior to the hearing and ruling.

[81] This is borne out by this Court’s case law. In *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, this Court explained that “[t]he invalidity of a legislative provision inconsistent with the [Canadian Charter of Rights and Freedoms] does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted” (para. 28). In *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held much of Manitoba’s legislation to be unconstitutional for being enacted in English only. The result was that all unilingually enacted Acts of Manitoba “are, and always have been, invalid and of no force or effect” (p. 767 (emphasis added)). This Court made clear that this declaration affected laws enacted *since 1890, some 95 years in the past* (p. 747).

As Bastarache J. pointed out in his concurring reasons in *Hislop*, “[t]he general norm of retroactivity has been reaffirmed many times by this Court”, citing *Reference Re Manitoba Language Rights*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *R. v. Hess*, [1990] 2 S.C.R. 906, as a few examples among many (para. 140).

[82] Many academics agree that retroactive and immediate declarations of unconstitutionality are the norm. According to Sujit Choudhry and Kent Roach, “[u]nder the Charter, retroactivity is the default position” (p. 211). They explain that a s. 52(1) declaration means that the legislature never had the authority to enact the law, such that “the law no longer exists *and never did exist*” (pp. 211-12 (emphasis in original), quoting K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 14.920). Similarly, Peter W. Hogg and Wade K. Wright explain that “[a] judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset” (*Constitutional Law of Canada* (5th ed. Supp.), at p. 58-2). According to Robert Leckey, “[o]n the understanding of nullity prevailing in the Commonwealth tradition, a law declared invalid should cease to have effect *immediately*” and this theory “implies that legislative invalidity reaches back to the law’s purported enactment or to the entry into force of the superior norm rendering it invalid, such as a bill of rights” (“The harms of remedial discretion” (2016), 14 *Int’l J. Const. L.* 584, at p. 586 (emphasis in original); see also L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 151).

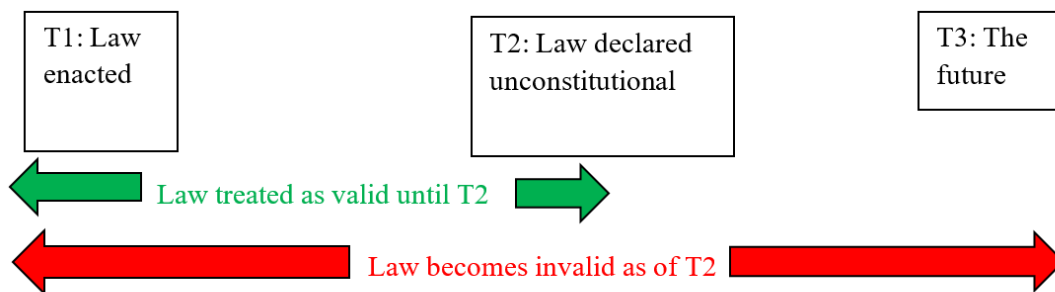
[83] The retroactive effect of declarations of invalidity can be limited by legal doctrines such as the *de facto* doctrine, *res judicata*, and the law of limitations (see *G*, at para. 121, citing *Hislop*, at para. 101). These doctrines limit the retroactive effect of a declaration of invalidity, but they do not change the fact that a retroactive declaration is retroactive, in the sense that it deems a law invalid *ab initio* and applies to events in the past.

[84] Although this Court recognized the predominance of the retroactive approach in *Hislop*, it also recognized two important exceptions: prospective declarations and suspended declarations. Prospective declarations of invalidity apply only forward in time from the moment of the declaration, but do not render a law invalid back in time from the moment of its enactment, as though the law never existed. For example, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, this Court stated that the s. 52(1) remedy would “apply prospectively” only (para. 18; see also *Hislop*, at para. 88). Suspending a declaration of invalidity means that the moment when the effects of a declaration of invalidity — whether retroactive or prospective — become operative is delayed. It does not change the effect of a declaration of invalidity — it just delays its coming into effect.

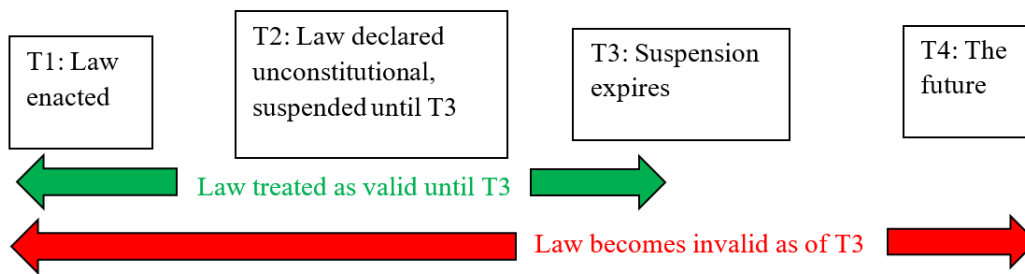
[85] When a declaration comes into effect (immediate or suspended) and what the temporal effect of the declaration is once it does come into effect (retroactive or

prospective) are two separate questions. Thus, there are four possible temporal effects of a declaration of constitutional invalidity:

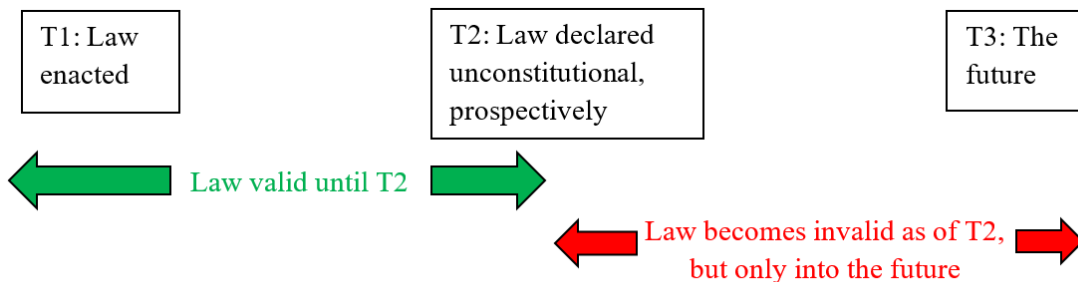
- a) An **immediate retroactive declaration of invalidity** renders the law invalid from the date of the declaration, back to the date the law was enacted (or to the date the constitutional provision under which it is invalid came into force, whichever came after).



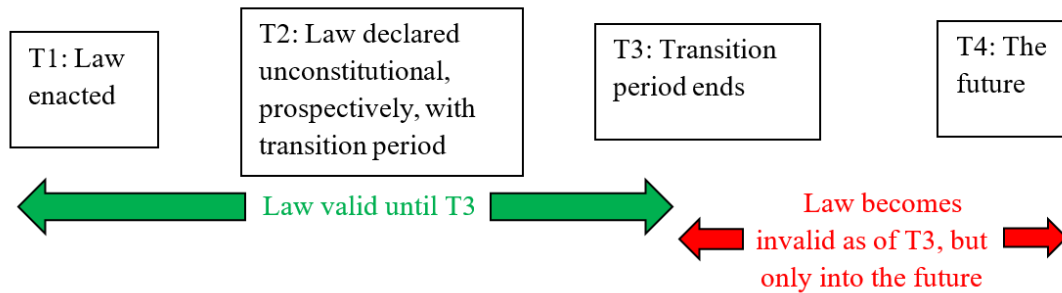
- b) A **suspended retroactive declaration of invalidity** does the same thing, but not until the suspension period expires: the law is treated as valid for the period of the suspension, but when the suspension period expires, it is as though the law had always been invalid.



- c) An **immediate prospective declaration of invalidity** renders a law invalid from the date of the declaration forward into the future, but *not* back into the past. When there is a prospective declaration of invalidity, the law was and remains valid from the date it was enacted until the date of the prospective declaration.



- d) A **prospective declaration of invalidity with a suspension**, often called a “**transition period**”, works in a similar way to an immediate prospective declaration, except that the declaration becomes effective only when the transition period ends.



B. *Guidance for Courts*

[86] When a court issues a declaration of constitutional invalidity, it must consider the consequences of each option, craft a remedy that is appropriate in the circumstances, and be explicit about the temporal effect of the remedy imposed if it is to be other than retroactive and immediate.

[87] Suspended declarations of invalidity are “deeply controversial, because they allow an unconstitutional state of affairs to persist, thereby posing a threat to the very idea of constitutional supremacy” (Choudhry and Roach, at p. 230; see also Leckey, at p 602; *Schachter*, at p. 716). Prospective declarations, which fail to address any past unconstitutional effects of a law, raise similar concerns.

[88] In *G*, a majority of this Court endorsed a principled approach to determining when suspending a declaration of invalidity is appropriate. The government bears the onus of demonstrating that a compelling public interest, such as public safety or the rule of law (as set out in *Schachter*) supports a suspension (para. 126). In *Hislop*, this Court set out a list of considerations that may justify a

declaration that is prospective only. A substantial change in the law is required, but is not sufficient. Other factors that may, together with a substantial change in the law, justify a purely prospective remedy, include good faith reliance by governments, unfairness to the litigants, or interference with the constitutional role of legislatures (paras. 99-100).

[89] In considering these factors, courts must have regard to the effect that a suspended or prospective declaration of invalidity will actually have in the particular case. For example, if suspending a declaration of invalidity will not significantly further public safety or the rule of law, the suspension may be inappropriate. Tailored remedies, like reading down, severance, or reading in, may also be available as alternatives to a full declaration of invalidity, and may mitigate the rule of law or public safety concerns of declaring an entire law to be retroactively invalid, as set out in *G*, at paras. 113 and 116.

[90] When a court does make a declaration of invalidity, and when a court intends that declaration of invalidity to be other than immediate and retroactive, it must say so deliberately and explicitly, in order to avoid confusion. I say this for two reasons.

[91] First, only a clear statement that a declaration is prospective, suspended, or prospective with a transition period, will suffice, because of the strong presumption that constitutional declarations are retroactive and immediate. While prospective and suspended remedies are available, it must be borne in mind that they are not explicitly authorized by the text of s. 52(1), as a majority of this Court recognized in *G*. Rather,

the “immediate and retroactive effect to the fundamental rights and freedoms guaranteed by the *Charter* must, at times, yield to other imperatives” (*G*, at para. 121). Suspended and prospective declarations are deviations from the “traditional and widespread understanding of the role of the judiciary” in which “courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed” (*Hislop*, at paras. 84 and 91; see also Choudhry and Roach, at p. 219).

[92] Second, too much guess work is involved in trying to infer what a court meant to do after the fact, given the array of remedial options available to courts, and the multiple kinds of declarations. While it may be possible to infer in some cases that a court probably meant to impose a certain remedy, or that it would have been more sensible to have done so, in my view it would be inappropriate to essentially read into a court order something that is not there *ex post facto*. Litigants are entitled to know where they stand without engaging in a second round of litigation, and where the court making the declaration is an appellate court, lower courts cannot be left to infer — essentially guess — the result by which they are bound. For both of these reasons, when a court imposes a remedy that deviates from the traditional norm of retroactivity and immediacy, it must say so explicitly.

C. *Guidance for Legislatures*

[93] When a legislature enacts new legislation in order to correct the unconstitutional effects of a law during a period of suspension of invalidity, the temporal effect of the new law should be stated explicitly. This is so because whether

a law is prospective or retroactive has different implications. A prospective law will have effect from the moment of its coming into force and for the future (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §25.24 and §25.106). A law has retroactive effect when “a new statute applies in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement” (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 135; see also Sullivan, at §25.24).

[94] There is a strong presumption that laws are of prospective, and not of retroactive, effect (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10; see also *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 43; Côté, at p. 123; Sullivan, at §25.51). This presumption exists for good reason. As Sullivan explains, “[i]t is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of rule of law, [because] the fundamental principle on which rule of law is built is advance knowledge of the law” (§25.50, citing J. Raz, *The Authority of Law* (1979), at pp. 210 et seq.).

[95] In the context of whether certain *Criminal Code* provisions were void for vagueness under s. 7 of the *Charter*, Lamer J. (as he then was) explained in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at

p. 1152, that “there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive”. He explained the rationale as follows:

It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards (see Professor L. Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 1033). This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law. [Emphasis added; p. 1152.]

[96] However, this presumption that legislation applies prospectively can be rebutted by either (1) express words, or (2) necessary implication, as in *Campbell v. Campbell* (1995), 130 D.L.R. (4th) 622 (Man. C.A.) (Sullivan, at §25.52; see also *Gustavson Drilling*, at p. 279; *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47, at pp. 50-51; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 71; *Tran*, at para. 43; *Côté*, at p. 132; *Hogg and Wright*, at §51:26). Where a legislature wishes legislation to be retroactive, so as to avoid a legal gap that would arise when the period of suspension of invalidity of a retroactive declaration of invalidity expires, it should make this explicit in the legislation.

[97] That said, retroactive criminal legislation could be expected to be challenged under s. 11(g) of the *Charter*. Section 11(g) of the *Charter* reads as follows:

Any person charged with an offence has the right . . . not to be found guilty on account of any act or omission unless, at the time of the act or omission,

it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

[98] Section 11(g) is “a limitation of the power of Parliament or a provincial legislature to create new offences with a retroactive application” or, in other words, it is “an authorization to create such an offence if, at the time of the act or omission complained of, it constituted an offence ‘under . . . international law or was criminal according to the general principles of law recognized by the community of nations’” (R. M. McLeod et al., *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (loose-leaf), vol. 4, at p. 18-2; see also Hogg and Wright, at §51:26; *R. v. Finta*, [1994] 1 S.C.R. 701, at pp. 873-74, per Cory J.). Therefore, this section of the *Charter* simply expresses the idea “that an act or omission [must] constitute an offence at the time it was committed” (R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 355). It has been held that “the absence of codification does not mean that a law violates this principle” because “[f]or many centuries, most of our crimes were uncoded and were not viewed as violating this fundamental rule” (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 930).

[99] However, authors Roach and Choudhry advance the position taken by the Crown and the Attorneys General that “[i]n terms of criminal and quasi-criminal laws, legislatures may understandably be unwilling to enact an offence with retroactive application, given that this may be a *prima facie* violation of section 11(g) of the

Charter” (p. 242). I express no view as to the merits of such a challenge nor as to arguments that might be advanced in response under s. 1 of the *Charter*.

[100] Finally, I would also add a word on transitional provisions, which concern “temporal dimension of legal rules” (Côté, at p. 116). In general, “[t]ransitional provisions are enacted to catch those who fall between the cracks created by two pieces of legislation. They ensure that these individuals are not left in legal limbo, uncertain of their rights and with no applicable law” (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para. 17). When a legislature enacts a law in response to a declaration of invalidity, it should consider including transitional provisions on the temporal effect of the law so as to avoid confusion.

D. *Suspending a Retroactive Declaration of Invalidity of a Criminal Law*

[101] Suspending a retroactive declaration of invalidity can be an uneasy fit in the criminal law context, because criminal prosecutions take time. Complainants may take years to come forward, and criminal charges can take years to prosecute. In order to understand the effect of a suspended retroactive declaration in the criminal context, it is important to appreciate the difference between repealing a criminal law and declaring a criminal law void *ab initio*.

[102] When an offence is repealed by the legislature, a charge may be laid after the repeal of a crime for an offence committed prior to the repeal, so the fact that

criminal prosecutions take time is of no moment. A recent example of this can be found in *R. v. Poulin*, 2019 SCC 47, at para. 58:

At common law, the general rule is that an accused must be tried and punished under the substantive law in force at the time the offence was committed, rather than the law in force at any other time — such as at trial or sentencing (*R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203, per McLachlin J.; *Johnson*, at para. 41; *K.R.J.*, at para. 1; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, at para. 42. . . .) This explains why, in this case, the state was able to charge Mr. Poulin in 2014 for an offence that had been repealed from the *Criminal Code* in 1987. While the offence no longer existed when Mr. Poulin was charged, convicted and sentenced, it existed when he committed his offences of gross indecency between 1979 and 1983 (see also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 43). [Emphasis added.]

(See also Côté, at p. 149; Sullivan, at §25.44; E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. (loose-leaf)), vol. 5, at para. 33:4150.)

[103] In contrast, when an offence is declared void *ab initio* by a court, no one can thereafter be convicted of that offence, even for conduct that occurred prior to the declaration. This is because the offence will be deemed to have never existed and no one can be found guilty of an unconstitutional (and non-existing) law. In this case, the fact that criminal prosecutions take time matters very much.

[104] This is why a suspended retroactive declaration of invalidity can be an uneasy fit in the criminal context: while accused persons can be convicted of the offence during the brief window of the suspension, as soon as the suspension expires, the law will be deemed to have been void *ab initio*, such that, thereafter no one can be convicted of that offence, no matter when the offence occurred. This is true regardless of whether or not the law is repealed before the suspension expires. The suspension

therefore accomplishes little, precisely because criminal prosecutions take time to move through the system.

[105] Further, because criminal prosecutions take time, a suspension can have idiosyncratic effects. This is so for two reasons. First, it creates a somewhat arbitrary distinction between prosecutions that happen to be concluded before the suspension expires such that the accused is no longer “in the system”, and prosecutions that are still ongoing or where the accused still has an avenue of appeal (see *R. v. Thomas*, [1990] 1 S.C.R. 713, at p. 716). This incentivizes an accused to delay until the date when the offence for which they are charged is scheduled to “become” unconstitutional. This creates disparity on a temporal level, between individuals charged under the unconstitutional offence late enough in the suspension period to escape a conviction, and those who are not. It also creates disparity on a financial level, between individuals who can afford legal advice and know to wait out the suspension period instead of pleading guilty or going to trial, and those who cannot (Leckey, at p. 592).

[106] Second, suspended declaration of invalidity may create disparity on how the law is applied during the period of suspension throughout the country by police officers and Crown prosecutors. As Professor Leckey puts it, “[p]olice practices and the exercise of prosecutorial discretion often vary from one administrative zone or province to another” (p. 595). Therefore, “it is rash to suppose that a suspension assures legal stability”, because

[a] declaration of invalidity might well intensify uncertainty in what was probably already a legal grey zone. That is, the criminal prohibition apt to succumb to constitutional attack likely no longer represents a social consensus. Uneven enforcement and punishment might already reflect that fact upstream of the judgment declaring that the measure disproportionately limits rights. In any event, the prospect of incarcerating individuals convicted under an interdiction known to violate rights intensifies concerns for the rule of law and for justice generally. [Emphasis added; p. 595.]

[107] Therefore, courts should consider whether this is the intended effect, and if not, select another remedy.

III. Application

[108] In *Bedford*, the Attorney General of Canada asked the Court to suspend any declaration of constitutional invalidity it might grant “so that Parliament has an opportunity to consider legislative options that respond to the constitutional infirmities identified by the Court” (AGC Factum, at para. 129). A legislative void would, as the Attorney General of Canada saw it, place sex workers and neighbourhoods affected by sex work at risk of harm.

[109] The Attorney General of Canada did not, however, seek a prospective declaration. Nor did he invoke any of the considerations cited in *Hislop* as supporting a prospective declaration. Nor did he offer other considerations that might have supported a prospective declaration. Nor did he suggest that a retroactive declaration would be inappropriate in this case.

[110] In granting a suspended declaration of invalidity, McLachlin C.J. reasoned for the Court that “immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it” (*Bedford*, at para. 167 (emphasis added)). In her view, “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” (para. 167 (emphasis added)). Significantly, she did not state the declaration to be purely prospective. This makes sense, since the Court was not asked to do so. She merely stated that s. 212(1)(j) is “declared to be inconsistent” with the *Charter* and “hence [is] void”, and that “the declaration of invalidity should be suspended for one year” (paras. 164 and 169).

[111] This Court could have issued a prospective declaration in *Bedford*, but on my reading, it did not. First, *Bedford* did not say that the declaration was prospective and as I have explained above, retroactivity is the default position. We could infer that the *Bedford* Court intended to impose a remedy that is prospective only, but we could also infer, for example, that the Court intended only to declare s. 212(1)(j) of no force or effect “to the extent” of the s. 7 violation, as in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 147. But that is not what the *Bedford* Court said. It is not clear to me that it is possible to definitively infer one intended remedy over another. This is why courts must be explicit where the intention is to impose a declaration that is other than the default of retroactive and immediate.

[112] Second, prospective declarations should be justified, and *Bedford* provided no justification. This Court stated in *Hislop* that “[a] substantial change in the law is necessary, not sufficient, to justify purely prospective remedies” and listed a variety of other factors that can, in conjunction with a substantial change in the law, justify a prospective ruling (paras. 99-100, as discussed above). Post-*Hislop*, the absence of any explicit justification for a prospective ruling, which, as per *Hislop*, requires justification, weighs against interpreting a declaration as having a prospective effect only.

[113] I am aware there are instances of this Court having interpreted declarations as purely prospective even where they were not explicitly stated to be so (Choudhry and Roach, at pp. 214-18). But these cases are of no assistance here.

[114] In *R. v. Brydges*, [1990] 1 S.C.R. 190, the Court, having found that the right to counsel includes the right to be informed of the existence of duty counsel and of the ability to apply for legal aid, ordered a “transition period” of 30 days within which the police could prepare proper cautions (pp. 211-12 and 217). No consideration was given to the effect of this transition period. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 20, however, the Court cited *Brydges* as an example of a prospective remedy — which might be taken as suggesting that a declaration can be prospective, even absent specific language to that effect.

[115] In my view, *Brydges* (and similar cases such as *R. v. Bartle*, [1994] 3 S.C.R. 173, and *R. v. Feeney*, [1997] 2 S.C.R. 13) are distinguishable from these appeals. At

the time *Brydges* and *Bartle* were decided, the jurisprudence on s. 52(1) relief was still in its infancy. Indeed, they are the earliest examples of prospective remedies found in this Court’s jurisprudence. In *Hislop*, the Court rationalized this line of jurisprudence and created a specific set of criteria for granting a prospective remedy. Unlike the Court in *Brydges* and *Bartle*, the Court in *Bedford* was operating in a post-*Hislop* world. Given that history, it strains credulity to say that the Court failed to grasp the distinction between suspensions and prospective remedies, or that it would have granted a prospective remedy without engaging in the analytical process mandated by *Hislop*.

[116] Finally, prospective declarations are especially in need of justification in the criminal context, because of the general rule that no one should be convicted of an offence under an unconstitutional law. It is one thing to decline to award retroactive monetary relief for an unconstitutional pension exclusion that occurred in the past, as in *Hislop*. It is quite another to actively authorize the continued enforcement of an offence that is unconstitutional indefinitely into the future. This is because convicting and sentencing an accused person under an unconstitutional law requires active enforcement.

[117] This Court found this point significant in *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599. Having found the mandatory victim surcharge unconstitutional under s. 12 of the *Charter*, in discussing the remedial options for offenders no longer “in the system”, this Court stated that

the rule of law will also not suffer the continued infliction of cruel and unusual punishment that cannot be justified in a free and democratic society. The mandatory victim surcharge violates s. 12 when it is imposed and when it is enforced. Each time a convicted person shows up to court or is arrested and brought to court to provide an update on their financial status, the presiding judge is, in effect, confirming the operation of the victim surcharge [Emphasis added; para. 106.]

[118] While these statements were made in support of a point about the operation of *res judicata* that has no relevance here, the observation that the rule of law will not suffer the continued, active enforcement of a law that has been deemed unconstitutional is apt. In my view, the potential for continued, active enforcement of an unconstitutional criminal law gives rise to rule of law concerns and weighs against imposing a declaration that is prospective only. As such, it also weighs against interpreting an ambiguous declaration as prospective, after the fact.

[119] For these reasons, I understand the declaration from *Bedford* to have retroactive effect, as of the date the suspension expired.

[120] I agree with Justice Karakatsanis that the legislation was not retroactive, and that the coming into force of s. 286.2 of the *Criminal Code* did not “pre-empt” the retroactive effect of the declaration of unconstitutionality. Remedial legislation that brings an infirm law into constitutional compliance can render a declaration of invalidity obsolete, because the target of the declaration has dissipated. However, s. 286.2 did nothing to cure the constitutional defect in s. 212(1)(j) as it existed in the past, and of course could do nothing to alter this Court’s declaration that s. 212(1)(j) is

unconstitutional. As such, s. 212(1)(j) was unconstitutional at the time the appellants were found guilty, and the s. 212(1)(j) counts must accordingly be quashed.

[121] This result is not entirely satisfying, because it means that the appellants, who were found factually guilty of exploitative conduct that does not seem to fall within the overbreadth identified in *Bedford*, cannot be convicted. This result is the product of a (perhaps unnecessarily) blunt remedy in *Bedford*, and replacement legislation that did not (but perhaps could have) applied retroactively to capture a subset of the conduct that was criminal under the old, overbroad s. 212(1)(j).

[122] However, while I acknowledge that the result is an unsatisfying one, especially for the victims of the appellants' crimes, I disagree with the Court of Appeal that it is "absurd" (2020 BCCA 160, 389 C.C.C. (3d) 163, at para. 90). During the period of the suspension, individuals could still be charged and convicted under s. 212(1)(j). Further, Parliament could have enacted remedial legislation that operated both retroactively and prospectively, as long as such legislation was constitutionally compliant. While I make no comment here on whether criminal legislation of this nature could survive scrutiny under s. 11(g) of the *Charter*, it is arguable that where a criminal prohibition is overbroad, the legislature could create retroactive exceptions to an offence, thus leaving the constitutionality compliant aspects of the law in place while eliminating its infringing effects, without violating s. 11(g). Alternatively, it is arguable that such legislation could be justifiable under s. 1.

[123] My interpretation therefore does not undermine or fail to give any effect to the suspension ordered in *Bedford*. On the contrary, my interpretation gives full effect to the *Bedford* Court’s clear decision to strike down the *entirety* of s. 212(1)(j) rather than a more tailored remedy, such as declaring it of no force or effect only to the extent of the s. 7 violation, as this Court did in *Carter*. The whole provision was declared unconstitutional. Thus, interpreting the declaration as operating only prospectively means that the appellants — and anyone else who committed the offence set out in s. 212(1)(j) before it was declared unconstitutional, including offences that fall within the “overbreadth” identified in *Bedford* — can be convicted under a now unconstitutional law. In the absence of any explicit indication of prospectivity in *Bedford*, I cannot agree with this result.

IV. Disposition

[124] I would therefore allow the appeals, set aside the convictions, and restore the order of the trial judge quashing counts 6 and 13 of the indictment.

Appeals dismissed, BROWN and ROWE JJ. dissenting.

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