

Supreme Court of Canada

SCC explains criminal jeopardy, other fallout from suspended declarations of constitutional invalidity

By **Cristin Schmitz**

(November 19, 2021, 4:26 PM EST) -- The Supreme Court of Canada has upheld convictions for two men who were operating a sexual escort service in a 7-2 decision which affirms that, with limited exceptions, the state can prosecute those who break an unconstitutional criminal law during the period of time the court has temporarily suspended its declaration of unconstitutionality.

Justice Andromache Karakatsanis's majority ruling Nov. 19 provides guidance on Charter remedies, and is far-reaching because it deals with the fallout in situations where courts temporarily suspend their declarations of unconstitutionality in order to avoid a harmful legislative vacuum or gap, and to give legislators time to pass constitutionally-compliant replacement laws: *R. v. Albashir*, 2021 SCC 48.



Justice Andromache Karakatsanis

The top court's decision deals specifically with the fallout from *Canada (Attorney General) v. Bedford*, 2013 SCC 72, in which the court struck down as overbroad three prostitution offences, including s. 212(1)(j) of the *Criminal Code* (prohibiting living on the avails of sex work) because the law criminalized non-exploitative actions, such as driving or providing security, that could enhance the safety of sex workers. The Supreme Court suspended the effect of its *Bedford* declaration of invalidity for one year — but without explicitly stating whether its declaration would apply retroactively, or purely prospectively after the period of suspension ended.

In *Albashir*, the top court was asked how to treat alleged crimes that are committed after the Supreme Court of Canada declares a law unconstitutional but before its suspension of the declaration of invalidity ends.

"This case requires us to determine the legal consequences of suspending declarations of invalidity of a criminal offence," Justice Karakatsanis explained. "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."

Justice Karakatsanis affirmed the conclusion of the B.C. Court of Appeal below in 2020 that the B.C. Crown was not constitutionally barred from prosecuting the appellants Kasra Mohsenipour and Tamim Albashir for living off the avails of prostitution during the one-year period when the Supreme Court had suspended its declaration in *Bedford*. Moreover, the Crown could validly prosecute those offences committed during the one-year suspension period — after the expiry of the suspended declaration, the Supreme Court concluded.

Parliament enacted a narrower replacement law about two weeks before the Bedford one-year suspension period would have expired, but did not specify whether the new provision that prohibits obtaining a material benefit from sexual services, but exempts legitimate, non-exploitive conduct, was to apply retroactively or prospectively.

Lara Vizsolyi of the criminal appeals and special prosecutions section of the B.C. Ministry of the Attorney General in Victoria, who with Janet Dickie argued the appeals for the Crown, told *The Lawyer's Daily* “the crux of the issue that was before the court was: what was the effect of the suspended declaration of invalidity made in *Bedford* on the criminal prosecution of an offence subject to that suspended declaration?”

“The court’s answer,” she summed up, “is the suspension in *Bedford* was, by necessary implication, prospective—meaning that the law remained valid for the period of the suspension and that an accused person can be prosecuted for an offence committed prior to the expiry of the suspension, regardless of when that prosecution is initiated or concluded.”

Going forward, Vizsolyi said, where a declaration of invalidity is made prospective (as in *Bedford*) then an individual remedy under s. 24(1) of the Charter remains available to those to whom the law still applies. “So because the declaration is prospective — it stays in force until the end of the period of suspension — but if a person were to come before the court and say ‘Well actually I fell within what the court found to be unconstitutional when it made the declaration of invalidity,’ and where it’s not contrary to the public interest that animated the choice to suspend the declaration of invalidity, then a s. 24(1) remedy may be available.”

Vizsolyi said the court has also sent a strong message that in future where a court has suspended its declaration of invalidity, “it must be explicit about the temporal application of that declaration.”

Eric Purtzki of Vancouver’s Fowler Blok, who with Alix Tolliday, represented the appellant Albashir, told *The Lawyer's Daily* “the Supreme Court of Canada has said that suspensions of invalidity will be rare, and this is a further example of how careful courts need to be when crafting suspensions of invalidity.”

“In terms of its on-the-ground impact, this is obviously quite a specialized area in terms of constitutional remedies,” Purtzki remarked.

He said he sees the decision as giving defence counsel greater scope to seek a personalized remedy for clients, under s. 24(1) of the Charter, in prosecutions pursuant to the operation of an unconstitutional law. “That was a movement that started late last year and has now, I think, continued with this decision as a more [of a] emphasis on individualized remedies under s. 24(1).”

The Supreme Court’s majority dismissed the companion appeals from the decision below in *R. v. Mohsenipour*, 2020 BCCA 160, which overturned a trial decision, *R. v. Albashir*, 2018 BCSC 736, that found the appellants “factually guilty” but quashed their convictions. The trial judge reasoned, relying on *Canada (Attorney General) v. Hislop*, 2007 SCC 10, that because the Supreme Court did not expressly specify in *Bedford* whether the suspension of its declaration of invalidity had retroactive, or only prospective effect, it had, by default, retroactive effect. Thus once the suspension of the constitutional declaration of invalidity expired, s.212(1)(j) was invalid *ab initio* — and the convictions under the non-existent offences had to be quashed. The appellants urged that the offences no longer had any effect by the time they were charged with them because when Parliament replaced s. 212(1)(j) with s. 286.2 of the Code in 2014, which was within the period of suspension, the suspension came to an end, and s. 212(1)(j) was no longer a valid law.

In convicting the appellants, however, the B.C. Court of Appeal reasoned that Parliament’s enactment

of the replacement legislation resulted in the Supreme Court's suspended declaration of constitutional invalidity never taking effect.

In her ruling, Justice Karakatsanis noted that judicial decisions ordinarily operate with retroactive effect and admonished all courts in future "to explicitly state the temporal application of their constitutional declarations "to avoid any confusion."

She held that in light of the purpose animating the suspension of the declaration in *Bedford* — which was to avoid the deregulation of sex work (thus maintaining the protection of vulnerable sex workers) while Parliament crafted a replacement law — that declaration of invalidity "was purely prospective, effective at the end of the period of suspension."

She reasoned that a retroactive declaration would have rendered the regulatory system of criminal offences that was maintained by the suspension entirely unenforceable once the suspension expired, thus undermining the protection of the vulnerable victims that was at the root of the Supreme Court's finding of unconstitutionality.

"Conversely, prospective application is far more consonant with the purpose of the *Bedford* suspension and more protective of sex workers' rights," Justice Karakatsanis said in dismissing the appeals. "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," she concluded. "Because the trial judge found them to be abusive and exploitative, it cannot be said that [the appellants] were prejudiced by the constitutional infirmity identified in *Bedford*."

Justice Karakatsanis added, however, that individuals charged under s. 212(1)(j) for conduct prior to, or during, the suspension may seek an individual remedy under s.24(1) of the Charter "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 declaration."

Therefore, "while the law remains valid and can ground legal convictions, no one should be convicted of the offence if its overbreadth violates their rights," Justice Karakatsanis stipulated. "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."

In dissent, Justices Malcolm Rowe and Russell Brown set aside the convictions, and agreed with the trial judge that the convictions should be quashed.

The minority held that the declaration in *Bedford* had retroactive effect, as of the date the suspension expired.

Justice Rowe said the coming into force of the replacement *Criminal Code* provisions did not "pre-empt" the retroactive effect of the high court's 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," Justice Rowe explained. However the new provision (s.286.2) did nothing to cure the constitutional defect in ss. 212(1)(j), as it existed in the past, "and of course could do nothing to alter" the Supreme Court's declaration of unconstitutionality," Justice Rowe said.

"As such, s. 212(1)(j) was unconstitutional at the time the appellants were found guilty," and the convictions had to be quashed.

"This result is not entirely satisfying," Justice Rowe acknowledged, "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)."

Justice Rowe's detailed reasons for judgment not only provide extensive written guidance to courts, legislatures and lawyers, but also red- and green-coloured flow charts, on questions related to the "Temporal Operation of Constitutional Declarations of Invalidity."

He advises that 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.

Justice Rowe addresses the two separate questions of when a declaration comes into effect (immediate or suspended) and what the temporal effect of the declaration is once it does come into effect. He outlines and examines four possible temporal effects of a declaration of constitutional invalidity: 1) an immediate retroactive declaration of invalidity; 2) a suspended retroactive declaration of invalidity; 3) an immediate prospective declaration of invalidity; and (4) a prospective declaration of invalidity with a suspension (i.e. "transition period") (para. 85).

Photo of Justice Andromache Karakatsanis by David Balfour Photography

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