Court File No.: 36059

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

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant (Appellant)

- and -

OWEN EDWARD SMITH

Respondent (Respondent)

- and –

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

FACTUM OF THE INTERVENER
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

1. The Criminal Lawyers' Association (Ontario) (the "CLA") accepts the facts as set out in the parties' facta. The CLA takes no position on disputed facts.

PART II: THE CLA'S POSITION ON THE QUESTION IN ISSUE

2. The CLA's submissions in this case focus on two interrelated concepts: standing and remedy. On the facts of this case, both standing and remedy should be determined by applying one of the most fundamental principles of constitutional law: the principle in *Big M Drug Mart* that no one shall be convicted under an unconstitutional law.[1]

3. The majority in the Court of Appeal held that the Respondent had standing pursuant to the principle in *Big M Drug Mart.* This principle flows from s. 52(1) of the *Constitution Act, 1982,* which affirms that the Constitution is supreme. Because the Constitution is supreme, no person can be convicted of an offence under an unconstitutional law. This principle holds true for all individuals subjected to the law regardless of their individual circumstances. It follows that accused persons are entitled to challenge the constitutionality of the law under which they are charged solely by virtue of their status as an accused. In doing so, they are seeking a remedy aimed at the law (*i.e.,* to prevent its application), and not a personal remedy; thus, their basis for standing does not limit them to raising only those arguments that engage their personal rights.

4. The dissenting judge in the Court of Appeal, however, would have denied the Respondent standing to challenge the constitutionality of the *Marihuana Medical Access Regulations* ("*MMARs*") because they have "nothing to do with him" (*i.e.,* he did not operate within this regulatory scheme).[2] In doing so, the judge misunderstood the scope of the *Big M Drug Mart* principle. The impugned law does not have to engage the personal rights of the accused; it is enough that he is charged under the law. In this case, the Respondent was charged under the *Controlled Drugs and Substances Act* ("*CDSA*"), under which the *MMARs* are made and to which the *MMARs* provide an exemption. Thus, the Respondent has standing to raise the constitutional defects of this legislative scheme. Nothing more is required.

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[1] [1985] 1 S.C.R. 295 at 313.
[2] *R. v. Smith,* [2014] B.C.J. No. 2097 at para. 151 per Chiasson J.A. in dissent (C.A.).

5. The principle in *Big M Drug Mart* also affects this Court's analysis on the question of remedy. In this case, the trial judge granted a remedy of immediate application (*i.e.*, reading out the word "dried"), which the Court of Appeal overturned in favour of a suspended declaration of invalidity. The latter remedy undermines the *Big M Drug Mart* principle. Where a declaration of invalidity is aimed at a statutory provision that affects criminal liability (*e.g.*, the *MMARs*, which provide an exemption to what would otherwise be a criminal offence), the suspension of that declaration allows the offence to remain on the books in its unconstitutional form. As a result, the State can arrest, prosecute and incarcerate individuals based on an unconstitutional law — even if only for a temporary period. This substantially undermines the doctrine of constitutional supremacy. If this outcome is to be tolerated, it must be strictly limited to circumstances in which the government can justify it as a practical necessity (*e.g.*, public safety is a stake).

PART III: STATEMENT OF ARGUMENT

I. THE *BIG M DRUG MART* PRINCIPLE FOR STANDING SHOULD BE REAFFIRMED

6. The Respondent's standing in this case flows from s. 52(1) of the *Constitution Act, 1982*. This must be distinguished from standing under s. 24 of the *Charter*. Section 24 sets out an *in personam* remedy for individuals whose rights under the *Charter* have been infringed.[3] The focus is on the individual's need for redress. Therefore, the individual only has standing where the constitutional defect affects his or her *Charter* rights.

7. The focus under s. 52(1), however, is on the impugned law. Section 52(1) affirms the fundamental principle of constitutional law that the Constitution is supreme. "The undoubted corollary to be drawn from this principle", this Court said in *R. v. Big M Drug Mart,* "is that no one can be convicted of an offence under an unconstitutional law."[4] This is an *in rem* remedy directed at the law that may extend to the accused and all similarly affected persons.[5] If an accused is compelled to attend Court on the basis of such a law, then he has standing to seek a declaration of invalidity under s. 52(1). Because it is not an *in personam* remedy, it matters not whether the constitutional defects raised by the accused affect his *Charter* rights or those of others.[6]

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[3] *R. v. Big M Drug Mart, supra* at 313 (S.C.C.); *Ravndahl v. Saskatchewan,* [2009] 1 S.C.R. 181 at para. 27.
[4] *R. v. Big M Drug Mart, supra* at 313 (S.C.C.).
[5] *Ravndahl v. Saskatchewan, supra* at para. 27 (S.C.C.).
[6] See *R. v. Church of Scientology of Toronto,* [1997] O.J. No. 1548 at para. 119 (C.A.).

8. This Court has repeatedly reaffirmed the principle in *Big M Drug Mart*. In each of these cases, the constitutional defect had "nothing to do" with the actual *Charter* rights of the accused. In *R. v. Morgentaler,* male doctors were allowed to challenge the constitutionality of an abortion law on the basis that it violated the s. 7 rights of female patients.[7] In *R. v. Nguyen,* McLachlin J. (as she then was) stated: "Any constitutional defect may be raised in the defence of a criminal charge", even if the accused argued that the law violated the equality rights of another person.[8] She further wrote: "This is only just. A person should not be convicted under an invalid law."[9] In *R. v. Wholesale Travel Group Inc.*, a corporation was allowed to argue that absolute and strict liability offences violated s. 7 of the *Charter,* even though corporations do not enjoy s. 7 rights.[10]

9. The Court has even extended these principles to civil proceedings where they are "instigated by the state...pursuant to a regulatory regime."[11] As this Court held in *Canadian Egg Marketing Agency v. Richardson,* just as no one should be convicted of an offence under an unconstitutional law, "no one should be the subject of coercive proceedings and sanctions authorized by an unconstitutional law."[12]

10. The Respondent's case is indistinguishable from each of the above cases — and is especially indistinguishable from *Morgentaler*. In this case, the Respondent directed his constitutional arguments at the exemption scheme in the *MMARs* instead of the offence-creating provision. Similarly, in *Morgentaler,* the doctors directed their constitutional arguments at the exemption scheme in s. 251 of the *Criminal Code.* The only difference is that the exemption in *Morgentaler* was contained in the same statute as the offence-creating provision (*Criminal Code*), whereas the exemption in this case is contained in a regulation (*MMARs*) made under the statute containing the offence-creating provision (*CDSA*). This, however, is not a distinction on which the question of standing should turn.

11. In this case, the Respondent did not use marijuana for medical purposes, and so it was not his security of the person right that was engaged. Similarly, in *Morgentaler,* the male doctors did

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[7] [1988] 1 S.C.R. 30.
[8] [1990] 2 S.C.R. 906 at 944-945 (dissenting on the merits).
[9] *Ibid.*, at 944-945.
[10] [1991] 3 S.C.R. 154.
[11] *Canadian Egg Marketing Agency v. Richardson,* [1998] 3 S.C.R. 157 at para. 34.
[12] *Ibid.*, at para. 44.

not seek to have an abortion, and so it was not their security of the person rights that were at stake. This also was not a reason to deny standing.

12. Further, in this case, the Respondent and his employer were supplying marijuana outside of the regulatory scheme in the *MMARs.* Similarly, in *Morgentaler,* the doctors offered to perform abortions outside of the exemptions provided by the *Criminal Code,* which required the procedure to be performed at an "accredited or approved hospital" with the prior approval of a "therapeutic abortion committee". Again, this was not a reason to deny standing.

13. The dissenting judge in the court below appeared to rely on the fact that the Respondent did not operate inside the regulatory scheme even when selling dried (as opposed to non-dried) marijuana.[13] This, however, is irrelevant to the analysis. While the Respondent's constitutional argument (that the *MMARs* should include non-dried marijuana) would have been more closely connected to his individual circumstances had he operated within the *MMARs* to the extent possible (when supplying dried marijuana), standing under *Big M Drug Mart* is not dependent on this connection. All that matters is that the Respondent was charged under the legislative scheme.

14. For all of these reasons, the overwhelming force of this Court's precedents favour granting the Respondent standing. There is no compelling reason to depart from this unbroken line of case law. Rather, the principle in *Big M Drug Mart* should be reaffirmed. It would be in keeping with the Court's "liberal and generous" approach to standing in the public interest context.[14] It would also promote the "principle of legality" by preserving one of the traditional means of ensuring that state action conforms to the Constitution. Most importantly, the principle in *Big M Drug Mart* is consistent with the purposes of standing law. These purposes are three-fold: (1) to properly allocate scarce judicial resources and screen out the mere busybody; (2) to ensure that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and (3) to preserve the proper role of courts and their constitutional relationship to the other branches of government.[15] Each of these purposes lives in harmony with the principle in *Big M Drug Mart.* An accused cannot be described as a mere busybody and so there is no need to screen him out; an accused "has sufficient motivation to raise the constitutional issue in a full and

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[13] *R. v. Smith, supra* at para. 150 per Chiasson J.A. in dissent (B.C.C.A.): "...he has no authority to possess or sell marijuana in any form and no basis for obtaining such authority."
[14] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 S.C.R. 524 at para. 2.
[15] *Ibid.,* at para. 25.

competent manner";[16] and there is no danger of the courts overstepping their role in adjudicating a constitutional argument raised by an accused so long as they limit such arguments to justiciable questions.

II. DECLARATIONS OF INVALIDITY SHOULD RARELY BE SUSPENDED FOR UNCONSTITUTIONAL CRIMINAL OFFENCES

15. The principle in *Big M Drug Mart* does not only implicate the law of constitutional standing, but it also implicates the law of constitutional remedies. If no one can be convicted of an unconstitutional law, then an unconstitutional law cannot remain on the statute books if it creates a criminal offence. Yet that is precisely what happens when a court suspends a declaration of invalidity aimed at provisions that affect criminal liability (whether it be an offence-creating provision or an exemption scheme), as the Court of Appeal did in this case. The law remains for a period of time, allowing the State to continue arresting, prosecuting and convicting people based on an unconstitutional law.[17] While this may be a practical necessity in some cases, it should be the exception. The government should be required to identify specific and significant deleterious effects that would flow from an immediate declaration and explain why such effects outweigh the substantial harm done to the rule of law by undermining the principle in *Big M Drug Mart*.

16. This Court has yet to directly address the conflict between suspended declarations of invalidity and the principle in *Big M Drug Mart*.[18] This case presents a unique opportunity to do so because the trial judge granted a remedy of immediate application (*i.e.*, reading out the word "dried"),[19] which the Court of Appeal overturned in favour of a suspended declaration.[20] Moreover, unlike *Bedford*[21] and *Carter*[22] — both of which were challenges to *Criminal Code* provisions brought through the civil litigation process — this case was brought through a criminal prosecution

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[16] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Canada Law Book, 2014) at 5.350.
[17] *Ibid.*, at 14.1781. See also *R. v. Moazami*, [2014] B.C.J. No. 297 at paras. 22, 36-37 (S.C.).
[18] In the early *Charter* cases in which criminal offence provisions were invalidated (*e.g.*, *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, *R. v. Martineau*, [1990] 2 S.C.R. 633, *R. v. Heywood*, [1994] 3 S.C.R. 761), the suspended declaration of invalidity had not yet emerged as a remedy of choice in constitutional litigation. When the Court began to use the suspended declaration with increasing frequency in the mid- to late-90s and early 2000s, it stopped invalidating criminal offence provisions (although it did suspend declarations of invalidity in two cases dealing with regulatory offences: *R. v. Powley*, [2003] 2 S.C.R. 207 and *R. v. Guignard*, [2002] 1 S.C.R. 472).
[19] *R. v. Smith*, [2012] B.C.J. No. 730 at paras. 127-128 (S.C.).
[20] *R. v. Smith*, *supra* at paras. 142-143 (B.C.C.A.).
[21] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101.
[22] *Carter v. Canada (Attorney General)*, 2015 SCC 5.

on the basis of *Big M Drug Mart* standing. Thus, the potential conflict between standing and remedy is brought into sharp relief.

17. In order to resolve this conflict, the suspended declaration of invalidity must be placed in its proper historical context. For most of the long history of judicial review under the Constitution (on both federalism and *Charter* grounds), declarations of invalidity have been given immediate effect. It was not until 1985 that this Court suspended a declaration of invalidity.[23] In *Manitoba Language Reference*, the Court held that all of the laws of Manitoba, which had been published in English but not French, were unconstitutional. The Court declared the laws invalid, but suspended its declaration because "[t]he Constitution will not suffer a province without laws."[24] An immediate declaration would have destroyed "the positive legal order which [had] purportedly regulated the affairs of the citizens of Manitoba since 1890", and "the rights, obligations and other effects arising under these laws [would have become] invalid and unenforceable".[25] The Court had to suspend the declaration of invalidity in order to avert a threat to the rule of law.

18. The Court did not suspend a declaration of invalidity in a *Charter* case until *R. v. Swain* in 1991.[26] Before *Swain,* the Court issued a number of sweeping *Charter* judgments without resorting to the suspended declaration — including the invalidation of restrictions on abortion *(Morgentaler)* and the invalidation of the constructive murder provisions (*Vaillaincourt* and *Martineau*).

19. In *Swain*, the Court held that the statutory scheme that provided for the automatic and indefinite detention of individuals found not guilty by reason of mental disorder violated s. 7 of the *Charter*. The Court suspended the declaration of invalidity for six months in order to avoid the immediate release into the community of all those found not guilty by reason of mental disorder — including those who might pose a danger to the public.[27] Public safety was at stake. As was true in *Manitoba Language Reference,* the circumstances were exceptional.

20. A year later, in *Schachter v. Canada,* this Court engaged in a detailed analysis of the suspended declaration of invalidity the first time. Lamer C.J. stated that "[a] delayed declaration is a serious matter from the point of view of the enforcement of the Charter." It allows a "state of affairs

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[23] *Reference re Language Rights Under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867,* [1985] 1 S.C.R. 721.
[24] *Ibid.,* at 766-767.
[25] *Ibid.,* at 749.
[26] [1991] 1 S.C.R. 933.
[27] *Ibid.,* at 1021.

which has been found to violate standards embodied in the Charter to persist for a time despite the violation."[28] Thus, he held that the suspended declaration should generally be limited to three categories of cases: (i) where an immediate declaration would "pose a danger to the public" (*e.g., Swain*); (ii) where an immediate declaration would "threaten the rule of law" (*e.g., Manitoba Language Reference*); and (iii) where an immediate declaration would result in the deprivation of benefits from deserving persons without benefitting the individual whose rights have been violated, which would occur in the case of a benefits-conferring regime found to be unconstitutional because it is under-inclusive (*e.g., Schachter*).[29]

21. Since *Schachter,* the Court has used the suspended declaration of invalidity with increasing frequency — and has not always remained faithful to the *Schachter* criteria. In some cases, the Court has relied on deleterious effects loosely analogous to one or more of the *Schachter* criteria.[30] In most post-*Schachter* cases, the Court has focused less on concrete deleterious effects and more on the abstract concept of promoting democratic dialogue between the judiciary and Parliament. By suspending the declaration, the argument goes, the Court respects the division of responsibilities between the judicial and legislative branches and enables Parliament to determine how best to respond to its judgments.[31]

22. This rationale has been criticized. As Professor Bruce Ryder points out, "suspended declarations do not in fact offer anything to the legislature that it does not already have." "Whether

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[28] *Schacter v. Canada,* [1992] 2 S.C.R. 679 at 716 per Lamer C.J. See also Sujit Choudhry and Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 S.C.L.R. (2d) 205 at 230: "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."

[29] *Schachter v. Canada, supra* at 717-719.

[30] In *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, the Court suspended the declaration aimed at invalidating prohibitions on tobacco advertising because the complete absence of regulation in this area would leave vulnerable persons (*i.e.,* children) unprotected. See also *Provincial Judges Reference,* [1997] 3 S.C.R. 3. In that case, the Court found that s. 11*(d)* of the *Charter* required the establishment of independent commissions to evaluate any proposed changes to judicial compensation. To avoid disruption to the "orderly administration of justice" in provinces where an independent commission was not in existence, the Court later declared that this requirement should be suspended: *Manitoba Provincial Judges Association v. Manitoba (Minister of Justice),* [1998] 1 S.C.R. 3 (one year suspension); *Manitoba Provincial Judges Association v. Manitoba (Minister of Justice),* [1998] 2 S.C.R. 443 (further two months suspension).

[31] Bruce Ryder, "Suspending the Charter" (2003), 21 S.C.L.R. (2d) 267 at 275-280; Choudhry and Roach, *supra* at 232-233; Grant R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011) 49 Alta L Rev 107 at paras. 1, 20. Notably, this was precisely what Lamer C.J. said the Court should not do in *Schachter*: "The question…should not turn on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public." (717)

the operation of a declaration of invalidity is immediate or delayed," Professor Ryder writes, "a legislature faces the exact same range of constitutional possibilities".[32]

23. This is not to suggest that the democratic dialogue rationale can never justify a suspended declaration. It may be that in some cases an immediate declaration will establish a new legal status quo that carries with it a "kind of inertia" that could "prove very difficult to displace".[33] This rationale may be sufficient to justify a suspended declaration where the costs of doing so are insignificant. Where the cost of suspending a declaration of invalidity is to undermine the *Big M Drug Mart* principle, however, something more should be required. Suspending a declaration that a criminal offence is unconstitutional allows for the continued arrest, prosecution and incarceration of individuals based on an unconstitutional law. This poses a severe threat to the rule of law (which, ironically, was the basis for creating the suspended declaration in the first place (*Manitoba Language Reference*)). If this state of affairs is to be tolerated, there must be compelling practical reasons for doing so. At the very least, this should require a return to the rigour of the three *Schachter* criteria.

24. Further, even if one of the three *Schachter* criteria is met, the Court should consider the availability of other remedies of immediate application. In this case, for instance, the trial judge held that it was appropriate to read-out the word "dried" in the *MMARs*, which would take immediate effect.[34] In these circumstances, the suspended declaration of invalidity serves no legitimate purpose. Because "the offending portion of [the] statute can be defined in a limited manner", it is only invalidated to this limited extent. The rest of the statute — and Parliament's objective in enacting it — is preserved. The remedy of reading-out "simultaneously satisf[ies] the constraints of constitutional supremacy and legal continuity."[35]

25. If a suspended declaration is ultimately granted, the Court can mitigate the harm caused by a suspended declaration by exempting the accused from the unconstitutional law during the period of

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[32] Ryder, *supra* at 281, 285. See also Hoole, *supra* at para. 66; Kent Roach, "Principled Remedial Discretion" (2004), 25 S.C.L.R. (2d) 101 at 145.
[33] Ryder, *supra* at 282; Roach, "Principled Remedial Discretion", *supra* at 146-147.
[34] The remedy of reading-out (or reading-in) is only appropriate where one can assume that the legislature "would have passed the constitutionally sound part of the scheme without the unsound part": *Schachter, supra* at 697 (S.C.C.).
[35] Choudhry and Roach, *supra* at 231. As Lamer C.J. put it in *Schachter, supra* at 716, if reading-out is "less intrusive than nullification in a particular case, then there is no reason to think a delayed nullification would be any better." See also Roach, *Constitutional Remedies in Canada, supra* at 14.1890.

suspension.[36] This, however, should not be a basis for choosing the suspended declaration where one of the three *Schachter* criteria is not met. Exempting the accused raises significant "horizontal equity concerns" with respect to the treatment of similarly situated persons who have not brought a *Charter* claim, and those who have brought a *Charter* claim but whose case did not make it up the judicial ladder quickly enough. These accused persons would be treated differently from the accused who reached the Supreme Court despite being charged with the identical offence. As Professors Choudhry and Roach observe, this could create a race to the Supreme Court, in which only the litigants who get to the Court are able to obtain exemptions for periods of delay.[37]

26. The problem of horizontal inequity cannot be easily solved. While one might suggest extending the exemption to all similarly situated persons during the period of suspension, this cure would be worse than the disease. First, this sort of exemption mechanism would be exceedingly difficult to administer. In *Rodriguez,* for instance, Lamer C.J.'s dissenting opinion would have created an exemption process for Sue Rodriguez and similarly situated persons during the period of suspension, but only on application to a superior court judge and only if six conditions were met to ensure that they were truly similarly situated.[38] One can easily imagine the ensuing litigation outlasting the period of suspension, which is typically 12 months. Second, in developing this sort of elaborate exemption scheme, the Court would arguably be legislating and therefore intruding into the legislative sphere. Third, certain *Charter* breaches do not lend themselves to a simple carve-out of "similarly situated persons". This may be possible where the constitutional infirmity is overbreadth; in these circumstances, the impugned legislation will be unconstitutional only in some of its applications. But where the problem is arbitrariness, the impugned provision will be unconstitutional in all of its applications. To exempt similarly situated persons is to exempt all

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[36] While the Court held that this was prohibited in *R. v. Demers,* [2004] 2 S.C.R. 489 at paras. 61-62, it has in fact exempted the *Charter* claimant on numerous occasions — both before and after *Demers*. See Roach, *Constitutional Remedies in Canada, surpa* at 14.910-14.940. This would not appear to run afoul of the Court's holding in *R. v. Ferguson,* [2008] 1 S.C.R. 96 because there the Court was concerned with the use of constitutional exemptions as a standalone remedy for cruel and unusual punishments, rather than as an additional remedy in connection with a s. 52(1) declaration of invalidity. The Court acknowledged that the latter was permitted by the jurisprudence where "necessary to provide the claimant with an effective remedy." (para. 63) Note also the way that the Court qualified its criticism of constitutional exemptions in *Carter v. Canada (Attorney General), supra* at para. 125 (S.C.C.): "The concerns raised in *Ferguson* about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts." (emphasis added) The Court then went on to consider whether an exemption during the period of suspension was appropriate and concluded that it was not. (para. 129)

[37] Choudhry and Roach, *supra* at 246.

[38] *Rodriguez,* [1993] 3 S.C.R. 519 at 579 per Lamer C.J. in dissent.

accused persons charged under the provision, in which case the Court may as well grant an immediate declaration of invalidity.

27. In addition to creating a race to the Supreme Court, the use of the suspended declaration in the *Big M Drug Mart* context could also cause parties to lengthen criminal proceedings. Consider an accused charged with an offence that has already been held to be unconstitutional. If his trial falls within the period of suspension, he will be convicted because the declaration of invalidity will not yet have been triggered. If, however, he manages to delay his trial until after the period of suspension has expired — at which point the declaration will apply retroactively[39] — he will be able to assert the *Big M Drug Mart* defence that no one can be convicted of an unconstitutional law. And even if he cannot delay his trial, he can appeal his conviction and hope that his appeal hearing falls outside of the period of suspension, at which point his appeal will be allowed on the basis of the *Big M Drug Mart* principle.[40] The latter will be possible in nearly all cases.

28. The net result is that the suspended declaration will have achieved nothing other than to allow the State to arrest, charge and potentially incarcerate individuals in pre-trial custody based on an unconstitutional law — despite the practical impossibility of sustaining a conviction. This is anathema to the rule of law and constitutional supremacy. Absent some practical necessity that fits within the *Schachter* criteria, it cannot be justified.

PART IV: SUBMISSIONS ON COSTS

29. The CLA does not seek costs and asks that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

30. The CLA respectfully requests leave to present oral argument for no more than 10 minutes.

All of which is respectfully submitted this 9th day of March, 2015.

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[39] *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 92. See also Choudhry and Roach, *supra* at 244: "Suspension does not alter the presumptively retroactive nature of a declaration of invalidity; it only affects when the fully retroactive declaration of invalidity comes into force."

[40] This was precisely the scenario contemplated by the Ontario Court of Appeal in *R. v. Guo*, [2014] O.J. No. 1330 (C.A.). In that case, the Court was scheduled to hear an appeal from the accused's conviction for keeping a common bawdy house while the declaration of invalidity from *Bedford* was still suspended. Rather than hear the appeal, however, the Court simply adjourned the hearing to a date after the expiry of the period of suspension. See also *R. v. Moazami, supra* at para. 35 (B.C.S.C.). Note that the doctrine of *res judicata* does not apply to prevent the re-litigation of a conviction on the basis of new law until all appeals have been exhausted: Roach, *Constitutional Remedies in Canada, supra* at 14.1980.

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PART VI: TABLE OF AUTHORITIES

Case Law	Paragraph(s)
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PART VII: LEGISLATION CITED

Tab	Legislation
1	*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11, ss. 7, 24

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

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