

## The 2018 Wilson Moot Problem

### *Crawford v. Nova Scotia (Attorney General)*

In 2014, Jerome Crawford applied to be a police officer with the Halifax Regional Police (the “HRP”). His application was rejected. Jerome was informed that he had failed to meet the provincially established requirements to become an officer, specifically, that he did not possess the requisite “good character” to become a police officer. In making this determination, the HRP relied on information obtained from Jerome during various “street checks” to which he had been subject over the years.

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Policing in Nova Scotia is administered by 10 municipal police services. All of these police services must follow the provisions of the *Police Act* and corresponding *Police Regulations* (the “Regulations”). Section 97(1)(b) of the *Police Act* provides that the Governor-in-Council may make regulations “governing the qualifications and requirements for the appointment of members to police departments.”

Section 4 of the Regulations provides:<sup>1</sup>

4. (1) To be a candidate for appointment as a member, a person must be at least 19 years old and must demonstrate all of the following qualifications to the satisfaction of the chief officer or, for an appointment as chief officer, to the satisfaction of the council:

- (a) a good character, which assessment shall be made having regard to the information obtained through the criminal and background checks referred to in subsection 4(2) and any other information about the candidate that is in the possession of the chief officer;
- (b) Canadian citizenship with residence in Canada, or permanent residence as defined by the *Immigration and Refugee Protection Act* (Canada);
- (c) the ability to carry out the services required of them as a member;
- (d) successful completion of a recognized training program; and

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<sup>1</sup> The wording of paragraph 4(1)(a) of the Regulations has been modified for the purposes of the Wilson Moot.

(e) any qualifications prescribed by the Minister in addition to those specified in clauses (a) to (d).

(2) To be a candidate for appointment as a member, a person must consent to criminal and background checks, including testing and interviews.

(3) A person must not be appointed as a member if criminal and background checks show that the person has been convicted of any criminal offence or has been or is the subject of a disciplinary proceeding in any jurisdiction that, in the opinion of the chief officer or, for an appointment of a chief officer, the council, would reasonably be expected to have a negative impact on their acting as a member or on the policing profession generally.

Jerome brought an application before the Nova Scotia Supreme Court, seeking declarations that:

- a) paragraph 4(1)(a) of the Regulations (the “good character requirement”) infringes section 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) because it discriminates against black people, who are more likely to be the subject of police scrutiny or interaction, even if they have never been charged with a criminal offence;
- b) the infringement of section 15 is not saved by section 1 of the *Charter*; and
- c) paragraph 4(1)(a) of the Regulations is of no force or effect.

Jerome’s application was heard in March 2016 before Justice Daniel Lazier, who made the following findings of fact:

1. Jerome was born in 1992 in North Preston, Nova Scotia, a community located in the eastern Halifax Regional Municipality. He has lived in North Preston his entire life. Jerome and both of his parents are black.

2. Jerome’s mother, Natalie, is a homemaker. His father, Alvin, owns and runs a 24-hour convenience store in North Preston called “Alvins”. Alvins has two long-term employees, Clyde George and Gavin Benjamin, who have both been with the store since Jerome was a young boy. Clyde or Gavin often manage the store while Alvin is offsite and supervise other employees.

3. By 2006, both Clyde and Gavin had become involved in the recreational drug trade in Halifax, and began selling marijuana, mushrooms, cocaine, and MDMA to customers at Alvins and elsewhere. By 2007, Alvin was aware of rumours that Clyde and Gavin were selling drugs out of Alvins, but chose not to confront them. Alvin had become close to Clyde and Gavin over the years and saw them as otherwise trustworthy employees. Satisfied that they were selling only small quantities of recreational drugs and only to adults, Alvin largely turned a blind eye to their activities.

4. Throughout his adolescence, Jerome worked at Alvins, handling inventory, restocking shelves, and sometimes tending the cash register. Jerome often worked with Clyde and Gavin and sometimes witnessed drug deals in or just outside of the store. Jerome himself was never involved in buying or selling drugs, at Alvins or otherwise. Alvin always encouraged Jerome to succeed in school and use his education to secure a well-paying job.

5. In 2007, the new chief of the HRP announced that going forward, the force would focus on “community policing.” Community policing is a policing strategy that focuses on building ties between police officers and individuals in the communities they serve. Two objectives of this approach are to implement community-focused crime-prevention strategies and to facilitate relationships that allow the police to more effectively investigate and solve crimes. Among other things, community policing generally involves increased foot patrols using officers based in the community, particularly in high-crime neighbourhoods.

6. As part of the community policing initiative, the HRP formalized a process for conducting “street checks”, sometimes referred to as “carding”. Street checks are a practice whereby police officers stop and question individuals to collect information. The information obtained about each person – including their name, age, perceived skin colour, estimated height and weight, and potentially, details of their activities and associations – are recorded and stored in a police database.

7. Although police officers have always engaged with individuals in the community, the parties agreed that “carding” represents a more routinized way of collecting and maintaining information obtained from community members outside the context of a specific investigation.

8. Jerome was carded on 13 occasions between 2007 and 2014.

9. Jerome completed his Bachelor in Commerce from the Sobey School of Business at St. Mary's University in 2013 and a diploma in Police Foundations from Eastern College in Halifax in 2014. Throughout his post-secondary studies, Jerome continued to work part-time at Alvins.

10. Neither Jerome nor Alvin nor Gavin has ever been charged with or convicted of a criminal offence. In 2007, Clyde pleaded guilty to possession of marijuana for the purposes of trafficking; the offence for which he was convicted did not take place at Alvins.

11. In November 2014, Jerome applied to become an officer with the HRP. As with other police services across Canada, during its initial vetting process the HRP requires applicants to provide information and consents to facilitate a background check, and medical information to allow the HRP to assess their physical fitness.

12. Applicants must also fill out a questionnaire regarding their present and past associations with criminal activity, which police can verify through internal records. The questionnaire states that "Applicants must generally be clear of any detected or undetected criminal activity to be considered for security clearance by [the HRP]." Individuals who move through the initial vetting stages receive an interview and are required to complete further testing of their physical fitness.

13. Questions on the HRP's questionnaire include:

- a. Have you ever been arrested, charged for and/or convicted of any offence in Canada?
- b. Have you ever lied to a police officer during an investigation?
- c. Have you ever hidden anyone from the police or helped anyone avoid being arrested?
- d. Have you used any illegal drugs in the past three years?

Jerome truthfully answered "no" to all of the above questions in his questionnaire.

14. In February 2015, Jerome received a letter advising him that his application had been rejected following the initial screening process. That letter stated, in part: "By law, we are required to ensure that all prospective officers possess good character to be hired. We have

reviewed our records and concluded that you do not meet this requirement due to your affiliation with individuals known to the police for their involvement in criminal activity."

15. In the course of conducting Jerome's background check, the HRP reviewed the information in its database obtained from the 13 street checks that Jerome had amassed by the time of his application. The HRP admitted that this information formed the basis of the its assessment that Jerome lacked the required good character to become an officer.

16. Jerome's "cards" formed part of the record on the application. Among other things, they reflected the following information:

- a. In March 2010 and again in September 2012, Jerome acknowledged that he worked at Alvins and that he was friends with Clyde and Gavin, during two street checks that each took place near the store. Clyde and Gavin were noted in the HRP database to be "persons of interest" with respect to drug trafficking.
- b. In June 2012, Jerome acknowledged during a street check that he associated with individuals who use illegal drugs.
- c. In July 2013, Jerome was carded with a small group of friends just after leaving a Canada Day block party in Africville attended by nearly 300 people. Police later investigated a stabbing at the block party that they believed to have been gang-related (although none of Jerome or his friends were involved in that investigation).
- d. In November 2013, Jerome was carded at a public park together with a friend. The friend, Dennis Butcher, had previously been convicted of aggravated assault, for which he received a suspended sentence.

17. Jerome described the June 2012 street check in his affidavit sworn in support of the application:

I remember that night in particular. I was walking from work to a party at a friend's house. It felt like there were always officers patrolling around Alvins at that time, and me and my friends had been carded in that area before. My father always told me that I should always be respectful and tell the truth to police officers, even though I felt it was unfair that I would be stopped and questioned just for going about my business.

On that night, the officer stopped me in the middle of the sidewalk and asked to see my ID. While I was taking it out of my wallet, he asked me where I was going. I told him I was going to see some friends. The officer told me that he knew that I worked at Alvins and that he had seen me around there before. He asked me if I “had anything on me that I shouldn’t”. I said “no” very quickly. Then he asked me if I did drugs. Again, I said “no,” which was the truth. Then he asked me if any of my friends did drugs. His tone was very harsh and I felt like he was accusing me of something. I was nervous and I did not really want to say anything about my friends, but I was scared of what would happen if I wouldn’t answer his question, or if he thought I was lying. So I said “probably some of them do, but I stay away from that stuff.” The officer was writing in his notepad the whole time. Then he gave me back my driver’s licence and walked away.

As I’ve described in this affidavit, I have had numerous encounters with police like this since 2007. Even though I was never doing anything wrong, I felt like I was under suspicion. I certainly never felt like I could just walk away at any time. If anything, I felt that would make me seem more suspicious to officers. Part of why I want to become a police officer is because I know that I can engage with the community in a more thoughtful and sensitive way than some of the officers who carded me over the years. Now, I feel that I am being denied the chance to become a police officer effectively because I worked at Alvins and grew up in North Preston, where young black men like me couldn’t avoid being carded.

18. An affidavit sworn by HRP Deputy Chief Jill Taylor stated, in part:

Police officers are on the front line of law enforcement. No individuals in society have a more direct influence on how the law is interpreted and enforced on a day-to-day basis. We must, therefore, use all resources available to us to ensure that only individuals of the highest moral character join the HRP, as required by the Regulations.

Our vetting process involves a number of steps to assess if a person is fit for this role. But a big part of that screening is to ensure prospective officers are law-abiding and are not affiliated with criminality. The credibility of the HRP is diminished if people are aware that the same officers executing the law are not, or have not been, law abiding themselves. Moreover, the police must be seen as “incorruptible” to maintain our legitimacy.

We have a serious responsibility to ensure that officers who join the police force have no ties to individuals affiliated with criminality or to criminal organizations. This is vital to ensure that these individuals are not subject to coercion or to blackmail. By law, and in good conscience, we cannot ignore information regarding an applicant’s interactions with police and the information obtained through those interactions.

19. The population of Nova Scotia is approximately 950,000. Approximately 400,000 of those people live in Halifax, the provincial capital. The population of North Preston is approximately 4,000 people, 70% of whom identify as black.

20. Between 2007 and 2015, an estimated 68,400 street checks have taken place in Halifax, with 36,700 different individuals checked.

21. The evidence of Deputy Chief Taylor was that street checks are regarded by the HRP as voluntary conversations in which people are free to leave at any time they wish. Deputy Chief Taylor also stated that the intelligence gathered from street checks has been very useful for investigating crimes and planning pro-active crime preventions strategies, particularly with respect to gang-related crime.

22. Many police forces across Canada, particularly in urban areas, perform street checks and maintain the information collected from those checks in a centralized database, similar to the HRP.

23. Carding has been a controversial practice across the country. Several civil society organizations have expressed concerns that street checks adversely affect police relations with many visible minority communities and that street checks are stigmatizing. The manner in which street checks are conducted is under review in many Canadian jurisdictions, including Halifax, Edmonton and the province of Ontario.

24. An affidavit from Christie Desimini, an expert in police practices, was admitted on behalf of Jerome. It stated that while approximately 3.5% of the population in Halifax and its surrounding area are black, since street checks began in Halifax, 11% of all individuals who were subject to street checks were black. It also added that black residents are more than three times as likely to be subjected to a street check as Caucasian residents.

25. An affidavit from Adam Dobson, a sociologist from Dalhousie University, was admitted on behalf of Jerome. It stated in part:

- a. Police forces which have a racial composition that reflect the racial composition of their respective communities are better able to gain the trust of individuals;
- b. Police forces which are racially diverse have a better understanding of the communities in which they work in; and
- c. Individuals who are stopped, questioned or charged by officers of their race are less likely to think these actions are racially motivated.

26. An affidavit from Connie Morrison, a sociologist from Acadia University, was admitted on behalf of the Attorney General. It stated in part:

- a. There is no conclusive evidence to show that racially diverse police forces, alone, improve the public perception of police within a community;
- b. Building trust within a community requires a number of factors, namely the effort officers make both on and off patrol to develop relationships with key community members (such as doing school visits);
- c. The biggest factor for improving police practices is through police training, and ensuring new officers understand their broader role within the community rather than as “crime stoppers.”

27. Dr. Morrison’s affidavit also compared the demographic statistics of the HRP to other police forces in urban centres across the country. It showed that of all major cities in Canada, Halifax is the only police force that is as racially diverse as its community. By comparison:

- a. The Toronto Police Service has 25% of its officers identifying as belonging to a racial minority, while more than 50% of Toronto’s population identifies as belonging to a racial minority;
- b. The Vancouver Police Department has just over 20% of its officers identifying as belonging to a racial minority, while over 50% of its population identifies as belonging to a racial minority.

28. There is no definitive data as to the racial composition of police forces in Nova Scotia outside of Halifax.

29. Nova Scotia is not unique in requiring that prospective officers have avoided association with criminal behaviour. For example:

- a. The Saskatoon Police Service requires that, “[Applicants must possess] good moral character. Recent drug use and/or other criminal activity, either detected or undetected by police, will result in a deferral. No criminal convictions for which a Pardon has not been granted (copy of Pardon required). No criminal charges pending before the Courts.”

- b. The Calgary Police Service requires that applicants must have “no criminal activity within the last three years both detected and undetected.”
- c. The Royal Canadian Mounted Police require that applicants not have a criminal record or any matters pending in a criminal court, and that they have never participated in any “serious criminal behaviour or activity” (including trafficking in illegal narcotics), regardless of whether they have been charged. The RCMP also requires that applicants not have participated in any criminal activity (whether serious or not) within the year prior to their application.

30. The expert affidavit of Sunny Mathai, a criminologist at Dalhousie University, was also admitted on behalf of Jerome, and stated:

“Street check” programs usually target neighbourhoods believed to have higher rates of street crime. As a consequence, police often target communities whose populations are disproportionately lower-income and/or racialized, like North Preston. Additionally, even the most well-intentioned of officers tend to have an implicit bias that makes them affiliate black and brown men as being involved with crime, causing officers to question black and brown males at a disproportionate rate than the rest of the population. Individuals who are repeatedly carded, or whose intimates are repeatedly carded, often feel stigmatized and singled out for suspicion. The net result is that carding can cause communities to develop antipathy towards law enforcement, rather than trust.

31. Jerome provided a further expert affidavit from Dr. Nicos Tolios, an economist, which noted the disadvantage black Nova Scotians have had historically, and continue to have, seeking and maintaining stable high paying employment. In particular, he noted:

- a. While 7.3% of the non-visible minority population in Nova Scotia is unemployed, 14.5% of the black population in Nova Scotia is unemployed;
- b. Among employed individuals, the average after-tax income of non-visible minority Nova Scotians is \$30,000, while the average after-tax income of black Nova Scotians is \$23,800.

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In September 2016, Justice Lazier allowed Jerome’s application, stating in part:

Although the evidence in the record regarding the practice of “carding” has provided valuable context, I note that the constitutionality of these street checks is not before me. The issue on this application is whether paragraph 4(1)(a) of the *Police Regulations* complies with the *Charter*.

In my view, Mr. Crawford has demonstrated a clear nexus between his race and the impact that the good character requirement has on limiting opportunities for black Nova Scotians to become police officers. The evidence presented is compelling – black Nova Scotians are more likely to be the subject of street checks, which are readily accessible to police in the vetting stages of the job application process. It is thus more likely that the police will possess negative information about a black Nova Scotian, even if that person (like Mr. Crawford) has never been investigated for or charged with a crime. If that information can then be used to conclude that an applicant is not of good character, the effect is to create a “headwind” that makes it more difficult for black Nova Scotians to become police officers in this province.

I do not accept the Attorney General’s argument that any violation of Mr. Crawford’s rights stems from an unconstitutional application of the regulation, not the regulation itself. The language of paragraph 4(1)(a) is the source of the violation and as a result, must be remedied. I also do not accept the Attorney General’s arguments that the good character requirement is nonetheless demonstrably justified under section 1 of the *Charter*.

Although I have considered whether it would be appropriate to save the good character requirement by reading in limiting language, ultimately I have concluded that this is more properly a job for the Legislature. I therefore declare paragraph 4(1)(a) of the *Police Regulations* to be of no force or effect. In the interim, I grant Mr. Crawford a constitutional exemption to re-apply to the Halifax Regional Police to have his application re-assessed without regard to the information obtained from him through street checks.

The Attorney General appealed Justice Lazier’s order. In August 2017, the Nova Scotia Court of Appeal allowed the Attorney General’s appeal. Justice Kristine Balantine, writing for herself and Justice Brian Ngyuen, held in part:

The application judge erred in concluding that the good character requirement violates section 15(1) of the *Charter*. While statistical evidence is not “invariably required” to establish that a facially neutral law infringes section 15 of the *Charter*, in this case, the evidence goes against Mr. Crawford’s case. The clear and unambiguous statistical evidence is that the demographics of the Halifax Regional Police matches the demographics of the population it serves. The related data on policing practices and social science data presented by Mr. Crawford’s counsel fails to draw a clear nexus between the pre-requisites to become a police officer in Nova Scotia and his race.

Based on my conclusion regarding section 15(1) of the *Charter*, I need not address the application judge’s order with respect to section 1 of the *Charter*. However, in the event I am wrong in my conclusion on section 15(1), I would nonetheless conclude that the good character requirement is demonstrably

justified under section 1 of the *Charter*. The good character requirement aligns with the province's general objective of ensuring that police forces can recruit officers who act with integrity and uphold the law, and aids in ensuring that potential officers are not affiliated with crime or susceptible to coercion. It is not for this court, or any court, to circumscribe what information police can or cannot rely on when assessing candidates.

Even if I am wrong in my assessment of the evidence, I would suggest (without finding) that at most, the alleged violation of Mr. Crawford's section 15 rights stems from an unconstitutional application of an otherwise neutral provision, not from the legislation itself. In these circumstances, a direction that the HRP refrain from considering information from street checks in its assessment of the good character requirement would be sufficient.

In dissent, Justice Tara Mirkarimi largely adopted Justice Lazier's reasoning.

Jerome has been granted leave to appeal the Nova Scotia Court of Appeal's judgment to the High Court of the Dominion of Canada. The High Court has stated the following constitutional questions:<sup>2</sup>

- 1) Does paragraph 4(1)(a) of the *Police Regulations* violate section 15(1) of the *Charter*?
- 2) If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?
- 3) If the answer to question 2 is no, should Jerome be granted a constitutional exemption pursuant to section 24(1) of the *Charter* to re-apply for the HRP while the existing good character requirement remains in effect?

The High Court has not given the parties leave to address any other issues on the appeal, including whether the practice of street checks is itself constitutional.

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<sup>2</sup> Note that the High Court will not consider any legislative or adjudicative facts other than those found by Justice Lazier.