IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N

JEROME CRAWFORD

Appellant

-AND-

NOVA SCOTIA (ATTORNEY GENERAL)

Respondent

FACTUM FOR THE APPELLANT

COUNSEL FOR THE APPELLANT

TEAM 6

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PART I – OVERVIEW

[1] The ability to pursue one's career aspirations and goals is significant to all members of society, and as the Supreme Court of Canada has noted, a key component of an individual's identity. Its value is magnified for minority populations because they are generally in a position of socio-economic disadvantage. It is thus of the utmost importance that employment requirements do not have a discriminatory impact that operates to disproportionately exclude, or places undue burdens on, minority groups.

> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 91, 38 D.L.R. (4th) 161.

[2] Jerome Crawford aspires to become a police officer in his hometown of North Preston, Nova Scotia. He dreams of being able to serve his community and engage with its members in a thoughtful and sensitive way. After completing a diploma in Police Foundations, he applied to the Halifax Regional Police ("HRP"). The *Police Regulations* mandate that the HRP consider all available information on a candidate in their vetting process, which requires that candidates be of good character (the "*Police Regulations*" or the "good character requirement"). Accordingly, the HRP rejected Jerome's application, concluding that he was not of the requisite good character on the sole basis of information obtained from "street checks".

> Official Problem, Wilson Moot 2018 at paras 17, 9, 14–15.
> *Police Regulations*, NS Reg 90/2012, s 4(1)(a) (as amended for the purposes of the Wilson Moot 2018) [*Police Regulations*].

[3] The information obtained through "street checks" is negative information that is disproportionately available in relation to black Nova Scotians. As a result, Jerome, as a black individual, was denied equal treatment under the law because of his race.

[4] The good character requirement infringes section 15 of the *Charter* because it denies black Nova Scotians an equal opportunity to benefit from an employment opportunity with the HRP, and perpetuates an arbitrary disadvantage.

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

[5] The good character requirement is not saved by section 1 of the *Charter* because it does not constitute a minimal impairment of Jerome's section 15 rights and therefore lacks proportionality.

[6] In addition to a suspended declaration of invalidity, Jerome should be granted a constitutional exemption pursuant to section 24(1) of the *Charter* to re-apply to the HRP, while the existing good character requirement remains in effect, as it is the only appropriate and just remedy in the circumstances of this case.

PART II – STATEMENT OF FACTS

1. Factual background

[7] Jerome Crawford is a black male who has spent his entire life in North Preston, a community located in Halifax. Jerome aspired to become a police officer and serve his community. In 2015, despite never having been charged or investigated for a crime, Jerome's application to become an officer was rejected by the HRP on the basis that he did not possess the requisite good character due to his affiliations with individuals known for their criminal activities. Jerome's assessment was based on 13 street checks that occurred between 2007 and 2014.

> Official Problem, *supra* para 2 at paras 1,13–15,17.

[8] The good character requirement mandates that the police consider criminal background checks and "*any other information* about the candidate that is in the possession of the chief officer" in order to assess the character of the applicant during the vetting process.

[9] "Street checks", also referred to as "carding", reflect a practice whereby police officers randomly stop and question people on the street to collect information. It is part of a community policing initiative that is meant to allow the police to more effectively investigate and solve crimes. Community policing efforts are meant to allow the police to more effectively investigate crimes and thus target communities with high rates of street crime.

Official Problem, *supra* para 2 at paras 5–6, 30.

[10] Black people are carded disproportionately more than their white counterparts. While black people comprise 3.5% of the population in Halifax and surrounding areas, they are subject to 11% of the street checks. Additionally, street checks generally end up targeting racialized and/or low-income communities such as North Preston, where 70% of its residents identify as black. Black Nova Scotians are also subject to biased policing because even the most well-intentioned officers tend to have implicit biases and affiliate black men with criminal activities.

Official Problem, *supra* para 2 at paras 24, 30.

[11] Between 2007 and 2014, Jerome was carded 13 times. Officers often patrol the area around his workplace, where he was carded twice. Other carding incidences occurred innocuous places like a public park and at large social gatherings such as the Canada Day block party. Under the good character requirement, these "cards" formed part of Jerome's application to the HRP.

Official Problem, *supra* para 2 at paras 15–17.

2. Procedural History

[12] After his application to become a police officer was rejected, Jerome brought an application challenging the constitutionality of the good character requirement under section 15(1) of the *Charter*. Justice Lazier of the Nova Scotia Supreme Court allowed Jerome's application, declaring that the good character requirement was of no force or effect, and granted Jerome a personal exemption allowing him to re-apply to the HRP without regard to the information obtained through street checks. Justice Lazier held that "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". He also found that because black Nova Scotians are more likely to be the subject of street checks, it is more likely that the police will possess negative information about them, "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".

Official Problem, *supra* para 2 at 9–10.

[13] The Attorney General appealed the decision to the Nova Scotia Court of Appeal. Writing for the majority, Justice Balantine allowed the appeal and held that "the evidence goes against Mr. Crawford" because "the demographics of the HRP are equivalent to the community it serves" and that evidence presented did not establish a clear connection between race and the pre-requisite to becoming a police officer. In dissent, Justice Mirakirimi largely adopted Justice Lazier's reasoning.

Official Problem, *supra* para 2 at 10–11.

PART III – STATEMENT OF POINTS IN ISSUE

[14] The present appeal raises the following constitutional questions:

1. **Does section 4(1) of the *Police Regulations* violate Jerome Crawford's section 15 *Charter* rights?**

   The good character requirement imposes a differential treatment on the enumerated ground of race. The good character requirement discriminates against Jerome and infringes section 15(1) of the *Charter*.

2. **If Jerome Crawford's section 15 rights are violated, is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?**

   The good character requirement cannot be justified in a free and democratic society under section 1. The good character requirement does not minimally impair Jerome's equality rights, and the deleterious effects of the good character requirement outweigh its salutary effects.

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 reapply to the HRP while the existing good character remains in effect?**

   A constitutional exemption to reapply for the HRP under section 24(1) is a just and appropriate remedy under the circumstances. The court should revisit and critically examine the general rule against combining remedies.

PART IV – ARGUMENT

Issue 1: The good character requirement infringes Jerome's Section 15 *Charter* rights

[15] Jerome submits that the good character requirement is discriminatory on the basis of its disparate impact on black Nova Scotians. The good character requirement imposes a differential treatment, that in effect, disproportionately excludes black Nova Scotians from being able to become police officers. It denies them an equal opportunity under the law. This differential treatment also perpetuates stereotypes and arbitrary disadvantage not imposed on others.

[16] The two-stage test for establishing a breach of section 15(1) was articulated in *Kapp* as follows:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

R v Kapp, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].

[17] The jurisprudence has repeatedly stressed that the central concern of section 15(1) is substantive equality (*Withler, Kapp*). To determine whether a law violates this norm, the Court must undertake a contextual analysis, with a focus on the law's real impact on the claimant and members of the group to which they belong (*Withler*).

Withler v Canada (Attorney General), 2011 SCC 12 at para 2, [2011] 1 SCR 396 [*Withler*].
Kapp, *supra* para 16 at 14.

[18] The Supreme Court of Canada has consistently stated that substantive equality also embraces the right to be free from adverse effect discrimination (*Quebec*). Ignoring the adverse effects of a seemingly neutral law on certain groups can perpetuate systemic discrimination. Substantive equality also "recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society" (*Kahkewistahaw*).

Quebec (Attorney General) v A, 2013 SCC 5 at para 182, [2013] 1 SCR 61 [*Quebec*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 17, [2015] 2 SCR 548 [*Kahkewistahaw*].

[19] The analysis under the first step of the *Kapp* test will begin by outlining the accepted approach to adverse effect discrimination and discuss the nexus between race, the ground on which differential treatment is being imposed, and the good character requirement. The second step will demonstrate how the distinction is discriminatory.

1. The good character requirement creates an adverse distinction based on race

a) The law on adverse effect discrimination

[20] Although the good character requirement appears neutral on its face, it has an adverse effect on black Nova Scotians. Quebec reaffirms that an adverse effect occurs when "rules that are seemingly neutral (because they do not draw obvious distinctions) … treat individuals like second-class citizens whose aspirations are not equally deserving of consideration" (*Quebec*).

Quebec, *supra* para 18 at para 198.

[21] The jurisprudence indicates that there may be a heavier evidentiary burden on claimants in cases where "establishing the distinction will be more difficult, because what is alleged is indirect discrimination" (*Withler*). In *Kahkewistahaw*, Justice Abella further commented on this evidentiary burden, finding that it need not be onerous, but that "the evidence must amount to more than a web of instinct". A claimant must therefore support the connection alleged between the law and the differential treatment or distinction imposed based on an enumerated ground.

Withler, *supra* para 17 at para 64.
Kahkewistahaw, *supra* para 18 at 34.

b) The good character requirement creates an adverse distinction based on race

[22] Under the impugned regulations, "good character" shall be assessed by having regard to "*any other information about the candidate that is in the possession of the chief officer*". The effect of this requirement is to create a distinction based on race. The HRP fails to consider the racialized and disadvantaged nature of the neighborhoods targeted by community policing activities. As a result, they are likely to possess more negative information about black Nova Scotians, than on non-visible minorities. When this information is then used to determine good character, it effectively imposes a differential treatment on black Nova Scotians under the same law.

Police Regulations, *supra* para 2 at s 4(1)(a).

[23] The statistical evidence presented in this case amounts to more than just "a web of instinct" (*Kahkewistahaw*). It strongly supports the link between the amount of negative information about an applicant possessed by the police, and an applicant's race. For example, the evidence demonstrates that black residents are three times as likely to be subjected to street checks. 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" (Official Problem). Thus, community policing initiatives will contribute to increased incidences of street checks experienced by black Nova Scotians. This will generate more negative information about black Nova Scotians that will later be available to the HRP in the vetting process.

Kahkewistahaw, *supra* para 18 at para 34.
Official Problem, *supra* para 2 at paras 24, 30.

[24] The evidence also establishes that despite only representing 3.5 % of the population in Halifax, black individuals comprised 11% of all individuals subject to street checks. This evidence, accepted by Justice Lazier, demonstrates not only that a black individual is more likely

to be carded than a similarly-situated white person, but also that he or she will likely get *repeatedly* carded. Further, community policing efforts tend to target racialized and/or low-income communities like North Preston, where 70 % residents identify as black. The facts are clear: it is more likely, as Justice Lazier correctly noted, "that the police will possess more negative information about a black Nova Scotian, even if that person (like Mr. Crawford) has never been investigated for or charged with a crime" (Official Problem).

Official Problem, *supra* para 2 at paras 24, 19, 30, at 10.

c) The differential treatment is a result of the good character requirement and not an unconstitutional application of an otherwise valid law

[25] Jerome submits that it is the words of the good character requirement that impose the deferential treatment on Jerome, and not merely the unconstitutional application of the provision, as the Court of Appeal suggested. The legislation, in its use of the word "shall", created a requirement that the HRP consider all "information about the candidate" possessed by the police. It is this legislative requirement that forms the basis of the differential treatment because it necessitates that the police consider negative information disproportionately available vis-à-vis black Nova Scotians.

Police Regulations, *supra* para 2 s 4(1)(a).

2. The distinction is discriminatory

[26] The differential treatment imposed by the good character requirement perpetuates an arbitrary disadvantage on Jerome, and similarly situated black Nova Scotians, by not considering the social circumstances that lead to disproportionate amounts of information being collected on them. This information is in turn used to exclude them from an equal opportunity to meet the HRP requirements. Additionally, the differential treatment results in stereotyping that does not correspond to actual characteristics, but is instead based on prejudicial inferences.

[27] The Supreme Court of Canada held that under the second step of the *Kapp* test, a distinction that perpetuates arbitrary disadvantage will be discriminatory (*Kahkewistahaw*). A distinction will perpetuate arbitrary disadvantage when it "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens" *(Kahkewistahaw*).

> *Kahkewistahaw, supra* para 18 at para 20.

[28] In the context of employment practices, the Supreme Court of Canada has taken the view that often "[t]he essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly" (*McGill University*). Justice Abella points out in *McGill University*, a case regarding workplace standards, that "the goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones."

> *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para 48, [2007] 1 SCR 161 [*McGill University*].

a) Perpetuation of arbitrary disadvantage not imposed on others

[29] The good character requirement fails to take into account the social circumstances that render Jerome, and those like him, more likely to be the subject of police scrutiny, as a result, it disproportionately excludes them from being able to meet the requisite character. This exclusion perpetuates arbitrary disadvantage because 1) it is a disproportionate barrier not experienced by others and 2) the exclusion itself is arbitrary since it is based on biased information that does not accurately reflect an applicant's character.

[30] Community policing efforts that target predominantly black neighbourhoods, coupled with biased policing, lead to a higher level of scrutiny in the HRP's vetting process for black

Nova Scotians than for their counterparts of other races. The purpose of community policing is to facilitate crime fighting. Consequently, police efforts are targeted at low-income, high crime, racialized areas, where black individuals tend to be over-represented. Individuals in communities such as North Preston, where 70% of residents identify as black, are therefore very likely to be subjected to street checks. This information is later used to impugn the character of applicants. By failing to take into account this over-representation of black individuals and their disadvantaged nature, the information collected has the effect of imposing a higher good character threshold on already disadvantaged black Nova Scotians and disproportionately excluding them from consideration as applicants to the HRP. If community policing efforts equally targeted black and non-black individuals, and racialized and non-racialized neighbourhoods, then the consideration of information obtained through those initiatives would not be discriminatory because applicants would have an equal opportunity under the law. However, as noted, that is not the case under current circumstances.

Official Problem, *supra* para 2 at paras 21, 30, 19.

[31] Further this higher good character threshold imposed on black Nova Scotians is arbitrary because in the context of a community with a high crime rate, information on an individual's "criminal affiliations" will not be informative of character. It may simply be impossible to avoid those affiliations in such an environment. For example, Jerome's "cards", that formed part of the record on his application to the HRP, included being carded after leaving a Canada Day block party attended by 300 people. The police later investigated a stabbing there. Despite not being involved in the stabbing or the investigation, Jerome's character was nonetheless implicated by this carding incidence.

Official problem, *supra* para 2 at para 16.

[32] Biased policing is also a factor resulting in the police possessing a disproportionate amount of negative information on black individuals. An implicit bias that tends to affiliate black individuals with criminal activities means that black Nova Scotians are carded disproportionately more than non-black individuals. For Jerome and the residents of North Preston, it is therefore not a matter of whether he will be carded, but when and how many times.

[33] These factors combined show that, because of the breadth of information that the HRP is required to consider, Black Nova Scotians are disproportionately prevented from meeting the good character requirement. It is likely that an applicant of a different race, yet with similar 'criminal affiliations' to those of Jerome will meet the good character requirement because he or she is less likely to be carded, if carded at all, by virtue of being from a different neighbourhood and/or of a different race.

Official Problem, *supra* para 2 at paras 24, 30.

[34] In *BCGSEU*, the BC Government's Aerobic fitness requirement was held to have unfairly excluded women from firefighting jobs. A unanimous court cautioned that "[e]mployers seeking to maintain safety may err on the side of caution and set standards higher than are necessary". The effect may be to exclude qualified applicants who do not have an equal ability to meet this excessive standard.

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3 at para 2, 176 DLR (4th) 1 [*BCGSEU*].

[35] A similar analysis can be applied in Jerome's case. Black Nova Scotians do not have the same opportunity as non-blacks to meet the good character requirement. The level of unavoidable scrutiny experienced by Jerome, as a black individual, generated more negative information on him. If that information can later be used to conclude that he is not of good character, the effect, as Justice Lazier correctly notes, is to create a "headwind" that makes it

more difficult for black Nova Scotians to become police officers. Additionally, the effect of this law is most severe on disadvantaged, low-income communities with a high prevalence of crime. This means that those most likely to be disproportionately excluded are those most vulnerable and already marginalized.

Official Problem, *supra* para 2 at 10.

b) The arbitrary exclusion perpetuates negative stereotypes

[36] Justice Abella defines stereotyping as "a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities" (*Quebec*). It is not the discriminatory intent that matters, but the effect. In Jerome's case, the good character requirement has the effect of reinforcing the stereotype that black individuals tend to be affiliated with criminality and are of poor moral character.

Quebec, supra para 18 at para 326.

[37] Stereotypes and prejudices can be perpetuated by the conditions of the exclusions itself. "[T]he very exclusion of the disadvantaged group . . . fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces' for example, that women 'just can't do the job'".

> *Quebec*, *supra* para 18 at para 326, Abella J, dissenting, citing *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139, 40 DLR (4th) 193.

[38] Because black Nova Scotians are subject to biased policing that tends to affiliate them with criminal activities, the required consideration of carding further perpetuates this belief by grounding the determination of character in prejudicial inferences. This excludes black applicants, not based on their actual character, but based on the prejudicial assumption that they are more likely to be affiliated with criminality. This exclusion, in turn, perpetuates and fosters the very bias that originally contributed to the arbitrary exclusion.

Official Problem, *supra* para 2 at para 30.

3. Heterogeneity within a group does not bar a finding of discrimination

[39] In allowing the Attorney General's appeal, the majority of the Court of Appeal held that a section 15 violation could not be made out because the statistical evidence shows that the demographics of the HRP matches that of the community. Respectfully, it is no defence to the claim of discrimination. In fact, the Supreme Court of Canada has rejected that very line of reasoning, finding that "[i]t is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value" (*Janzen*). The jurisprudence is thus clear that discriminatory treatment need not be "perfectly inclusive" of an entire group to establish a nexus between the enumerated group and the discrimination (*Quebec*).

> *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1288-89, 59 DLR (4th) 352 [*Janzen*].
> *Quebec, supra* para 18 at para 354.

[40] For example, in *Janzen* the Court rejected the notion "that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women". The majority in *Quebec*, in finding that the exclusion of de-facto spouses from statutory protection violated equality rights, held that "[e]ven if there is a range of need or vulnerability among *de facto* spouses, as there must inevitably be" heterogeneity within a claimant group does not defeat a claim of discrimination.

> *Janzen, supra* para 39 at 1289.
> *Quebec, supra* para 18 at para 354.

[41] In cases involving race or gender, the unequal effects of an apparently neutral law often create "disproportionate, but not absolute, exclusion of members of a particular group" (*Sheppard*). In *BCGSEU* for example, the court found that a hiring requirement resulted in gender-based discrimination despite the fact that some women passed and some men failed.

> Colleen Sheppard, *Inclusive inequality: The Relational Dimensions of Systemic Discrimination in Canada*, (Montreal: McGill Queen's University Press, 2010) at 20 [*Sheppard*].
> *BCGSEU, supra* para 34.

[42] Similarly, in Jerome's case, black individuals are disproportionately, not absolutely, excluded from an equal opportunity to benefit under the law. It is a combination of social characteristics and circumstances that cause the good character requirement to have a discriminatory impact. Those circumstances are not necessarily shared by *all* black individuals, impacted by the good character requirement. This diversity is inevitable, and should not defeat the claim of discrimination. It is in fact those differences that substantive equality requires the law to be sensitive to (*Martin*). The Court of Appeal thus erred in concluding that the fact that the HRP is as racially diverse as the community it serves, means that the good character requirement is not discriminatory.

> *Nova Scotia (Workers Compensation Board) v Martin*, 2003 SCC 54 at para. 81, [2003] 2 SCR 504 [*Martin*].

Issue 2: The section 15 infringement cannot be justified under section 1 of the *Charter*

[43] Jerome submits that any infringement of section 15(1) caused by the good character requirement cannot be saved under section 1 of the *Charter*. The burden is on the Respondent to prove that the limits imposed on Jerome's section 15(1) rights are reasonable, and "demonstrably justified in a free and democratic society".

> *R v Oakes*, [1986] 1 SCR 103 at para 71, 26 DLR (4th) 200 [*Oakes*].

[44] The test for justifying infringement under section 1 of the *Charter* requires a pressing and substantial objective that is rationally connected to the *Charter* limit imposed. The limit must impair the *Charter* right "as little as possible" (*Oakes*). Where no alternative means are reasonably capable of satisfying the government's objective, "the final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation" (*Hutterian*). Jerome submits that although the good character requirement addresses a pressing and substantial objective to which it is rationally connected, it does not minimally impair the right and its deleterious effects are disproportionate to its benefits.

> *Oakes*, *supra* para 43 at para 70.
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 77, [2009] 2 SCR 567 [*Hutterian*].

[45] The argument under section 1 will begin by addressing the appropriate degree of deference to be accorded in this case and then demonstrate that although the good character requirement addresses a pressing and substantial objective to which it is rationally connected, it does not minimally impair the right, and its deleterious effects are disproportionate to its benefits.

1. This is not a case where deference to the Legislature is appropriate

[46] Canadian courts have traditionally shown deference to the legislature under the section 1 analysis. However, the degree of deference accorded will depend on the nature of the case (*Hutterian*). Unlike cases where the impugned law arises as a result of complex policy decisions or the balancing of competing interests, the limit imposed on Jerome arises from an employment practice that is discriminatory because it *fails* to take into account the individual circumstances.

> *Hutterian*, *supra* para 44 at paras 53–55.

[47] In *Chaoulli*, the Supreme Court of Canada emphasized that deference cannot be taken so far as to result in an abdication by the courts of their constitutional responsibility to review legislation for *Charter* compliance: "if a court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position." This is a case where the court has all the evidence it requires to perform its role. The court is not tasked with deciding whether the chosen approach is the best and therefore, this Court should not allow the principle of deference to interfere with a robust analysis of whether the good character requirement can be saved by section 1.

> *Chaoulli v Québec (Attorney General)*, 2005 SCC 35 at para 87, [2005] 1 SCR 791 [*Chaoulli*].

2. Pressing and Substantial Objective

[48] Jerome concedes that the good character requirement serves a pressing and substantial objective. Police officers enforce are on the front line of law enforcement. Ensuring only applicants of good character join the HRP is a pressing and substantial objective.

3. Rational Connection

[49] The good character requirement is rationally connected to its objective. At this stage, the Respondent does not face a heavy burden. They must simply "show that it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Hutterian*). Jerome agrees that "it is reasonable to suppose" that the good character requirement furthers the objective of ensuring police officers in Nova Scotia possess good character by allowing the HRP to consider all available information about an applicant.

> *Hutterian*, *supra* para 44 at para 48.

4. The good character requirement does not minimally impair Jerome's section 15 rights

[50] To be minimally impairing, the Respondent must show that the good character requirement "impairs the right as little as reasonably possible in order to achieve the legislative objective" (*Huterrian*). There must be "a sound evidentiary basis for the government's conclusions" (*Irwin Toy*). While the government is not required to pursue the least drastic means of achieving its objective, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail" (*Hutterian*). Jerome submits that the good character requirement goes further than necessary in impairing his section 15(1) right, and there is no evidence before this court to suggest that the Respondent has considered and rejected other less-impairing alternatives.

> *Hutterian, supra* para 44 at para 50, citing *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199 at para 160, 127 DLR(4th) 1.
> *Irwin Toy Ltd v Quebec (Attorney General),* [1989] 1 SCR 927 at 999, 58 DLR (4th) 577 [*Irwin Toy*].

a) The Respondent failed to consider and reject less impairing alternatives

[51] Under the minimal impairment stage, the jurisprudence indicates that it is appropriate to look to measures taken by the rest of Canada in considering whether there are alternative, less infringing options available (*Martin, Mounted Police*). In this case, it has not been established before this court that the HRP is "materially different" from other police forces to justify the Respondent's more intrusive chosen measure.

> *Martin, supra* para 42 at para 113.
> *Mounted Police Association of Ontario v Canada,* 2015 SCC 1 at para 152, [2015] 1 SCR 3 [*Mounted Police*].

[52] An examination of legislative regimes adopted in other provinces, reveals that a blanket requirement to consider all information possessed by the police cannot be considered to be sufficiently tailored so as to meet the minimal impairment criteria. To the extent that good

character is important to determine suitability for the job, other jurisdictions have applied a more tailored, specific, and less intrusive way to assess character, by measuring only actual criminal behaviour.

[53] For example, the Saskatoon Police Service ("SPS") requires that applicants possess good moral character, yet limits the assessment of good character to "recent drug use and/or other criminal activity" and "criminal convictions for which no pardon has been granted" (Official Problem). The SPS provides a less impairing alternative that is applied to achieve the same legislative goal of ensuring that applicants to the police force have good character.

Official Problem, *supra* para 6 at para 29.

[54] Other jurisdictions such as the Calgary Police Service (the "CPC") and the RCMP also only look at criminal behaviour in their respective vetting processes. For instance, the CPC simply requires that applicants have "no criminal activity within the last three years, both detected and undetected" (Official Problem). The RCMP requires applicants not to have participated in any "serious criminal behaviour or activity regardless of whether they have been charged". The RCMP also requires that they "not have participated in any criminal activity (whether serious or not) within the year prior to their application" (Official Problem).

Official Problem, *supra* para 2 at para 29.

[55] The more tailored approach applied by these other jurisdictions avoids the effect of equating criminal affiliations and associations, with good character, and the discriminatory effect of standard that targets black Nova Scotians. The Respondent has failed to show that it has considered and rejected these alternatives or demonstrate why a measurement based on criminal activity or behaviour is not sufficient to measure good character.

b) The good character requirement goes further than necessary

[56] The good character requirement allows the police to judge "character" through information obtained by carding, which is disproportionately available for black Nova Scotians. The carding of individuals who live in high crime neighbourhoods will inevitably reveal a certain level of criminal association that is not necessarily informative of good character, but rather more indicative of the socio-economic context of the applicant. It also has the effect of penalizing black Nova Scotians and limiting their job prospects based on where they live, and who their friends are. The good character requirement therefore goes further than necessary to advance the legislative objective because it measures much more than character.

[57] This argument is exemplified in *Martin*, where the court found that provisions having the effect of deeming all chronic pain claims as fraudulent did not minimally impair the right at issue. The Court held that the "provisions make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system" (*Martin*). Similarly, in the present appeal, the good character requirement makes no effort to determine who is genuinely of good or bad character. It simply rules out applicants like Jerome, who live in neighbourhoods like North Preston, and have therefore been carded on numerous occasions. In much the same way as in *Martin*, the good character requirement sets an excessive standard that many black applicants will be unable to reach, not because of their own character, but rather because of their race, where they live, and who their friends are.

Martin, *supra* para 43 at para 112.

5. The good character requirement's deleterious effects are disproportionate to its benefits

[58] The "benefits of the impugned law are not worth the cost of the limitation on the right" (*Hutterian*). The salutary effects of the good character requirement are speculative at best and are outweighed by the very real and substantial deleterious effects.

Hutterian, supra para 44 at para 77.

[59] The good character requirement's sole salutary effect is that it provides the police with a larger pool of information to base their hiring decisions on. Although increased access to information about a person may result in more accurate screening decisions, this is a mere theory. The precise value, if any, of a regulation that allows a decision to be made based on all available information has not been measured. There is no evidence before this court that an unlimited source of information about an applicant will provide additional value for judging that applicant or that it is necessary to judge an applicant's good character. (*Thomson Newspapers*). Consequently, potential benefits stemming from the good character requirement should be viewed with a degree of restraint.

Thomson Newspapers Co v Canada, [1998] 1 SCR 887 at paras 126-129, 59 DLR (4th) 385 [*Thomson Newspapers*].

[60] In contrast to these marginal salutary effects, the deleterious effects are very real. First, Jerome was denied an equal opportunity to pursue the career path of his choosing. Jerome's situation would not be unique as the disproportionate amount of negative information possessed by the police has "the effect [of creating] a "headwind" that makes it more difficult for black Nova Scotians to become police officers". Such a "headwind" effect, if left unchecked, will operate to systemically limit the opportunities of those from already disadvantaged, racialized and low-income communities like Jerome.

Official Problem, *supra* para 2 at 10.

[61] Second, by building its assessment of good character on biased policing, the good character requirement perpetuates the prejudicial stereotypes that black individuals are likely to be affiliated with criminality, in doing so, it further stigmatizes them and adversely affect police relations with many visible minority communities.

[62] The deleterious effects of the good character requirement are very real and have a substantial discriminatory impact on black Nova Scotians. The adverse effects of such a provision, if not remedied, have the potential of perpetuating systemic discrimination in employment opportunities. When compared to its speculative salutary effects, it is clear that deleterious effects are disproportionate to any of its benefits.

Issue 3: Jerome should be granted a constitutional exemption under section 24(1) while the existing good character requirement remains in effect

[63] Both parties to this appeal have agreed that, should this Court find a violation of Jerome's equality rights that cannot be justified, a suspended declaration of invalidity pursuant to section 52 of the *Charter* is an appropriate remedy. However, Jerome also submits that it would be just and appropriate, in the circumstances of this case, for this Court to grant him a personal remedy pursuant to section 24(1) of the *Charter*: a constitutional exemption, allowing him to re-apply to the HRP and to have his application considered without reference to the information obtained during his 13 street checks.

Clarification to the Official Problem, Wilson Moot 2018 at para 4.

[64] The Supreme Court of Canada in *Schacter*, established as a rule that claimants should rarely receive an individual remedy in conjunction with a declaration of invalidity because "to allow for s.24 remedies during the period would be tantamount to giving the declaration of invalidity retroactive effect." The jurisprudence also indicates that an important consideration in

the decision to grant a personal exemption in combination with a suspended declaration of invalidity is respect for parliament's role and the rule of law (*Carter #2, Doucet-Boudreau*).

> *Schacter v Canada*, [1992] 2 SCR 679 at 720, 93 DLR (4th) 1 [*Schacter*].
> *Carter v Canada (Attorney General),* 2016 SCC 4 at para 12, [2016] 1 SCR 13 [*Carter #2*].
> *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 at para 34, [2003] 3 SCR 3 [*Doucet-Boudreau*].

[65] It is appropriate for the court to depart from precedent when circumstances and modern realities have changed causing a "prior decision [to create] uncertainty contrary to the underlying value of *stare decisis*" (*Fraser*) Jerome submits that it is time for this stringent rule excluding the combination of section 52 and section 24(1) remedies to be revisited.

> *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 134, [2011] 2 SCR 3 [*Fraser*], citing *R v Bernard* [1988] 2 SCR 833 at 850–61, CCC (3d) 1.

1. The rule in *Schacter* should be reconsidered

[66] *Schachter* was decided in 1992. Since then, the Supreme Court of Canada's interpretation of the scope of *Charter* rights, and its approach to the availability of section 24(1) remedies has evolved. The stringent *Schachter* rule runs contrary to remedial and constitutional principles and fails to give proper consideration to individual rights during a period of suspended invalidity. It is thus time for the rule in *Schachter* to be modernized. Section 24(1) remedies should be available alongside a suspended declaration of invalidity under section 52 when the failure to grant the section 24(1) remedy would not properly vindicate the claimant's right, and where countervailing factors such as respect for the role of government do not negate the justification for a remedy.

[67] The reliance on a historic, blanket remedial rule, without properly considering the precise circumstances and rights of persons subjected to a suspended invalidity would run contrary to "the most fundamental principles of Canadian constitutional interpretation: that our Constitution

is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life" (*Reference re Same-Sex*).

> *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*Reference re Same-Sex*].

[68] The rule against combining section 24(1) and section 52 remedies also runs contrary to the courts more recent approach to remedial considerations. Motivated by the increased importance of ensuring that *Charter* remedies *properly* vindicate individual rights, the Supreme Court of Canada's approach to section 24 has evolved, making these remedies more widely available, and increasing the range and types of remedies that a claimant may seek. In *Doucet-Boudreau*, the majority notes that section 24 should be allowed to evolve to meet the challenges and circumstances of different cases because "tradition and history cannot be barriers to what reasoned and compelling notions of appropriate justice demands". A recent example of this is the Court's decision in *Ward*, where damages were first recognized as an appropriate *Charter* remedy in certain circumstances.

> *Doucet-Boudreau*, *supra* para 64 at para 59.
> *Vancouver (City) v Ward*, 2010 SCC 27 at para 21, [2010] 2 SCR 28 [*Ward*].

[69] The Majority in *Doucet-Boudreau* further explains that such an evolution may even require "novel and creative features" because "s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*", and so "the judicial approach to remedies must remain flexible and responsive to the needs of a given case".

> *Doucet-Boudreau, supra* para 64 at para 59.

[70] More specifically, the notion that the rule in *Schacter* should be reconsidered has been suggested in the jurisprudence. For example, in *Demers*, Justice Lebel writing for the dissent expresses that "the merits of the general rule in *Schachter* against combining remedies have not been subjected to sustained or critical examination by the Court" and that "slavish adherence to

this rule would result in an injustice". In revisiting the policy rationale underlying this rule, Justice Lebel affirms the observation that this rule was "essentially about limiting the government's pecuniary liability". While valid, these rationales fail to justify a general prohibition against a retroactive remedy under section 24(1) in conjunction with section 52.

*R v Demers***,** 2004 SCC 46 at paras 96-98, [2004] 2 SCR 489 [*Demers*].

[71] Justice Lamer also expressed the same opinion, in his dissent in *Rodriguez*. He stated that "cases to date are unclear on the precise status and rights of persons subject to the law during a period of suspended invalidity, since this Court has never before been faced by a litigant denied a personal remedy because the legislation is challenged under s. 52 of the *Constitution Act, 1982* rather than s. 24(1) of the *Charter"*.

Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at 571, 107 DLR (4th) 342 [*Rodriguez*].

[72] Because the consideration of the "precise status and rights of persons" is at the centre of remedial consideration, a rule that simply "rarely applies" does not account for the nuances that a consideration of rights vis-à-vis a right limiting provision requires (*Rodriguez*). Therefore, the rule in *Schacter* should be reconsidered so that it can be brought back into harmony with the court's approach to constitutional remedies and with the general framework of the *Charter*.

Rodriguez, supra para 71 at 571.

2. A personal exemption would meaningfully vindicate Jerome's section 15 rights

[73] Jerome, as the claimant bringing forward this challenge should be entitled to an immediate remedy, as this is what is necessary in order to properly vindicate his section 15 rights. Again, Justice Lebel writing for the dissent in *Demers* explains that in the context of a constitutional challenge:

> The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests … Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy
>
> *Demers, supra* para 70 at para 101[emphasis in original].

[74] Further, the immediate vindication of Jerome's rights is more important in equality cases such as this because an immediate remedy would counter the negative effect of the prejudicial belief that black individuals are more likely to be affiliated with crime. Additionally, claimants attempting to vindicate their equality rights are often vulnerable individuals who require an immediate relief to remedy the perpetuation of disadvantage.

3. The countervailing factor of respect for the role of government does not negate the justifications for a personal exemption

[75] Despite a more flexible approach to remedial consideration under section 24, the courts have nonetheless cautioned against crafting remedies that would **"**usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited" (*Doucet-Boudreau*). This principle has also guided remedial considerations in cases that specifically considered the combination of a personal exemption with a suspended invalidity (*Carter #2*). In the present appeal, the concern that the remedy sought would undermine the role of government is minimal because the remedy sought is of limited nature.

> *Doucet- Boudreau, supra* para 64 at para 34.
> *Carter #2, supra* para 64 at para 12.

[76] Jerome is not requesting that this court allow his application to the HRP, but simply that his application be reconsidered by the HRP. The level of interference with government operations is therefore minimal because this court would be neither dictating how the legislature must structure their good character requirement, nor substituting its decision for that of the HRP. Additionally,

none of the usual indicia of intrusiveness on the role of government are present. The remedy sought does not impose a pecuniary obligation on the government, and does not raise any "good governance" considerations.

[77] The present case is very similar to *Nguyen*, where the Supreme Court issued a suspended declaration of invalidity combined with an order requesting the reconsideration of the claimant's application to receive instruction in a publicly-funded English language. After finding that the impugned provision violated the *Charter*, the court found it additionally necessary, in considering the appropriate remedy, to consider the situations of the claimants. Justice Lebel concluded that "despite the suspension of the declaration of invalidity, I agree with the Quebec Court of Appeal that their files should be returned to the Ministère de l'Éducation … to be reviewed" in light of this judgement.

> *Nguyen v Quebec (Education, Recreation and Sports*), 2009 SCC 47 at para 47, [2009] 3 SCR 208 [*Nguyen*].

[78] *Nguyen* represents a reasoned and balanced response to an overbroad law in a situation where the remedy sought is minimally intrusive on parliament's role. It provided the legislature with a one-year period to modify the effect of the law, yet also ensured that the limit on the claimant's right was not unduly prolonged (*Nguyen*).

> *Nguyen, supra* para 77 at para 46-47.

[79] When balancing the meaningful vindication of Jerome's equality rights against the minimally intrusive nature of the remedy sought on the role of government, it is reasonable to conclude, akin to *Nguyen*, that a personal exemption should be granted to Jerome while the existing good character requirement remains in effect.

PART V – ORDER SOUGHT

[80] The Appellants request that the appeal be allowed, that the good character requirement be found of no force or effect pursuant to section 52 of the *Charter*, and that Jerome be granted a constitutional exemption, under section 24(1) of the *Charter*, to re-apply to the HRP.

All of which is respectfully submitted this 25th of January, 2018.

Team 6
Counsel for the Appellant

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