
**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 OF THE RESPONDENT

Counsel for the Respondent

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PART I – OVERVIEW

[1] Public safety is the principal imperative of law enforcement. It is the decisive consideration across every facet of a police force’s duties, but takes on critical importance with respect to hiring decisions. Police bodies are tasked with anticipating, preventing and minimizing harm in the communities they serve. If they are to succeed, there can be no room for corruption within their ranks. Character assessments ensure that only the most qualified, committed and trustworthy officers serve on the frontlines of law enforcement. This standard is essential to maintaining the public’s confidence, which in turn is essential to the functioning of law enforcement itself.

[2] Section 4(1)(a) of the *Police Regulations* (“the HRP Regulations” or “the good character requirement”) empowers the Halifax Regional Police (“the HRP”) to consider any information available to it when it assesses an applicant’s ability to perform an officer’s duties in good faith. This is a highly discretionary assessment that is informed by the HRP’s expertise on a case-by-case basis. The good character requirement ensures that the HRP’s decision is an informed one.

Police Regulations, NS Reg 90/2012, s 4(1) (as amended for the purposes of the Wilson Moot 2018) [HRP Regulations].

[3] It is respectfully submitted that the Court of Appeal’s ruling should be upheld. The good character requirement is not the source of any disparate impact against black applicants which can be said to discriminate. It applies equally to all applicants and therefore does not violate s. 15(1) of the *Charter*.

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, s 15 [*Charter*].

[4] Should this Court find that the Appellant’s s. 15 rights have been infringed, the infringement is demonstrably justified and should stand under s. 1 of the *Charter*. The good

character requirement is a public safety initiative which protects against law enforcement being undermined by officers who are vulnerable to coercion or corruption.

Charter, supra para 3 at s 1.

[5] Should this court find that the good character requirement is not justified, the Appellant should not be granted a constitutional exemption during a period of suspended invalidity. A s. 24(1) individual remedy would only duplicate the relief that a s. 52 ruling would provide.

Charter, supra para 3 at s 24(1).

Constitution Act, 1982, being Schedule B to *the Canada Act 1982 (UK)*, 1982, c 11, s 52 [*Constitutional Act, 1982*].

PART II – STATEMENT OF FACTS

1. Factual background

[6] In 2007 the HRP announced that it would focus on “community policing,” a strategy to strengthen ties between police officers and the communities they serve. As part of this initiative, the HRP formalized the practice of street checks or “carding,” which is a common practice in police forces across Canada. During street checks, police officers stop individuals to ask them questions which may elicit details of their activities and associations, which is then recorded and stored in a centralized database.

Official Problem, Wilson Moot 2018 at paras 5–6, 22 [Official Problem].

[7] Individuals are not obligated to take part in these conversations and are free to leave at any time. Information collected by the HRP through street checks has been useful for investigations and planning proactive crime prevention strategies, particularly with respect to gang-related crime.

Official Problem, *supra* para 6 at para 21.

[8] The appointment of members to the HRP is governed by the *Police Regulations*, created pursuant to section 97(1)(b) of the *Police Act*. Prospective officers must demonstrate, among other requirements “a good character, which assessment shall be made having regard to...criminal and background checks... and any other information about the candidate that is in the possession of the chief officer” to the satisfaction of the chief officer.

Police Act, SNS 2004, c 31 s 97(1)(b) [*Police Act*].
HRP Regulations, *supra* para 2 at 4(1)(a).

[9] A number of other police forces across Canada require that prospective officers have avoided association with criminal behaviour, both detected and undetected.

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

[10] The Appellant applied to the HRP in November of 2014. His application was rejected at the initial vetting stage because the HRP determined that he did not satisfy the good character requirement. The HRP came to this conclusion after reviewing information about the Appellant in its database, including information obtained from 13 street checks conducted between 2007 and 2014. This information suggested that the Appellant affiliated with individuals who are known to the police for their involvement in criminal activity.

Official Problem, *supra* para 6 at paras 11, 14–16.

[11] The Appellant’s father, Alvin, owns and runs a convenience store in North Preston called “Alvins,” where the Appellant worked throughout his adolescence.

Official Problem, *supra* para 6 at para 4.

[12] Two of Alvins’ long-term employees, Clyde George and Gavin Benjamin, who often worked with the Appellant, were involved in the recreational drug trade in Halifax. In 2007, Clyde pleaded guilty to possession of marijuana for the purposes of trafficking. The Appellant witnessed drug deals in and just outside of Alvins.

Official Problem, *supra* para 6 at paras 2–4, 10.

[13] The information elicited from the Appellant’s “cards” formed part of the record on his application to the HRP, and included the following:

- a. In March of 2010 and again in September of 2012, Jerome acknowledged that he worked at Alvins and that he was friends with Clyde and Gavin, who were noted in the HRP database to be “persons of interest” with respect to drug trafficking.
- b. In June 2012, Jerome acknowledged that he associated with individuals who use illegal drugs.

- c. In November 2013, Jerome was carded at a public park with a friend, Dennis Butcher, who had previously been convicted of aggravated assault, and for which he received a suspended sentence.

Official Problem, *supra* para 6 at para 16.

[14] The HRP is the only police force in a major Canadian city that is as racially diverse as the community it serves.

Official Problem, *supra* para 6 at para 24, 27.

[15] Deputy Chief Jill Taylor of the HRP in her affidavit states that because police officers are directly influencing how the law is interpreted and enforced on a daily basis, all available resources must be used “to ensure that only individuals of the highest moral character join the HRP”. When members of the public are aware that officers may not be law-abiding themselves, or are susceptible to coercion or blackmail, the credibility of law enforcement is threatened. The HRP has “a serious responsibility to ensure that officers... have no ties to individuals affiliated with criminality” and are “incorruptible” in order to maintain the legitimacy of the HRP.

Official Problem, *supra* para 6 at para 18.

2. Procedural History

[16] The Appellant applied for a declaration that the good character requirement violates s.15 of the *Charter* because it discriminates against black people, and that it is not saved by s. 1 of the *Charter*. The application was heard by Justice Lazier of the Nova Scotia Supreme Court, who allowed the application. Justice Lazier concluded that the good character requirement infringed the Appellant’s rights and could not be saved by s. 1 of the *Charter*.

Official Problem, *supra* para 6 at 9–10.

[17] The Attorney General appealed to the Nova Scotia Court of Appeal where Justice Balantine for the majority allowed the appeal, stating in part that Justice Lazier erred in his conclusion that the good character requirement violates s. 15(1) of the *Charter* because the Appellant failed “to draw a clear nexus between the pre-requisites to become a police officer in Nova Scotia and his race.” She held, further, that if the good character requirement did infringe s. 15(1) of the *Charter*, it would nonetheless be demonstrably justified under s.1 of the *Charter* because it supports the province’s objective of “ensuring that police forces can recruit officers who act with integrity and uphold the law” and who are “not affiliated with crime or susceptible to coercion.” She then suggested that if she erred in her assessment of the evidence, any violation of the Appellant’s rights “stems from an unconstitutional application of an otherwise neutral provision” and not the good character requirement itself.

Official Problem, *supra* para 6 at 10–11.

PART III – STATEMENT OF POINTS IN ISSUE

- 1) Does section 4(1)(a) of the *Police Regulations* violate section 15(1) of the *Charter*?
- 2) If there is a section 15(1) violation, is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?
- 3) If the infringement cannot be saved under section 1, should the Appellant 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?

PART IV – ARGUMENT

Issue 1: The good character requirement does not violate s.15(1) of the *Charter*

i) Overview of the Respondent’s position on s. 15(1)

[18] To establish a violation of s. 15(1) of the *Charter* the Appellant must demonstrate, first, that the good character requirement creates a distinction based on an enumerated or analogous ground, and second, that this distinction has a discriminatory impact (*Withler*).

Withler v Canada, 2011 SCC 12 at paras 30, 34 [2011] 1 SCR 396 [*Withler*].

[19] The good character requirement withstands scrutiny at both steps of the s. 15(1) analysis. The first stage of the analysis asks “whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground” (*Taypotat*). The good character requirement is facially neutral and impacts all applicants equally. The Appellant has failed to demonstrate that the law nonetheless disproportionately impacts him because of his race. There is no evidence to suggest that black Nova Scotians are disproportionately denied the opportunity to become police officers. Even if this were a proven fact, the s. 15 claim should fail because the Appellant has not demonstrated that the good character requirement itself is the source of the alleged disproportionate impact.

Kahkewistahah First Nation v Taypotat, 2015 SCC 30 at para 19, [2015] 2 SCR 548 [*Taypotat*].

[20] If this Court finds that the good character requirement itself creates a distinction based on race, it is respectfully submitted that this distinction is not discriminatory within the meaning of s. 15(1). The good character requirement is *bona fide* occupational requirement and as such does not create an arbitrary disadvantage. The effects of the good character requirement reflect the actual circumstances of the Appellant and thus do not perpetuate stereotyping. Finally, the

Appellant has not demonstrated that the effects of the good character requirement perpetuate prejudice or disadvantage against black Nova Scotians.

[21] If a s. 15 violation is found in this case, it is the result of an unconstitutional application of the good character requirement, and not the good character requirement itself.

ii) The good character requirement does not draw a distinction based on race.

[22] In some adverse effects cases, the “disparate impact on an enumerated or analogous group will be apparent and immediate” (*Taypotat*). Where this impact is not apparent and immediate, however, a s. 15 claim will fail absent any evidence linking the requirement to a disparate impact on members of an enumerated or analogous group (*Taypotat*). It is respectfully submitted that the Appellant has failed to discharge his burden of establishing that the good character requirement is the source of any discriminatory impact on black Nova Scotians.

Taypotat, supra para 19 at paras 33, 15.

The Appellant has failed to demonstrate that black Nova Scotians are disproportionately prevented from becoming police officers

[23] The Appellant has not adduced evidence which demonstrates that black Nova Scotians are disproportionately denied the opportunity to become police officers, due to the good character requirement or otherwise. “If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved” (*Symes*). This warning highlights the importance of examining what the evidence before this Court establishes, and what it does not.

Symes v Canada, [1993] 4 SCR 695 at 764, 110 DLR (4th) 470 [*Symes*].

[24] No evidence has been adduced to show that individuals from other racial groups who demonstrate an equally concerning lack of good character do not face the same burden as black

applicants to the HRP. While Canadian courts have moved away from requiring the identification of mirror comparator groups in s. 15 claims, equality remains a comparative concept (*Withler*). Comparison is engaged at this stage of the analysis because “inherent in the word “distinction” is the idea that the claimant is treated differently than others” (*Withler*).

Withler, supra para 18 at paras 41, 62.

[25] What the evidence before Justice Lazier and before this Court does demonstrate is that the HRP is the only police force in a major Canadian city as racially diverse as the community it serves. This suggests that insofar as the HRP receives applications from a pool of applicants that are representative of the demographics of Halifax, a representative number of those applications are successful.

Official Problem, *supra* para 6 at para 27.

[26] It is unknown how many applications the HRP receives from residents of North Preston specifically, or from black individuals in Nova Scotia generally. The impact of the good character requirement on diversity is also unknown with respect to police forces in Nova Scotia outside of Halifax. Indeed, no evidence directly establishes a link between the good character requirement and the alleged disparate impact on black applicants. In these circumstances, the evidence tendered by the Appellant to demonstrate a distinction based on race amounts to nothing more than a mere “web of instinct” and as such cannot support a s. 15 claim (*Taypotat*).

Official Problem, *supra* para 6 at para 28.

Taypotat, supra para 19 at para 34.

The good character requirement is not the source of the Appellant’s complaints

[27] If black applicants to the HRP are disproportionately denied the opportunity to become police officers, of which there is no evidence before this Court, the good character requirement is not the source of that disproportionate impact. The Appellant alleges that he was denied the

opportunity to become a police officer effectively because his race and the high-crime neighborhood in which he resides meant he was carded more frequently than others, resulting in more “negative” information about him being at the disposal of the HRP, which was obligated to consider that information when vetting the Appellant’s application to the HRP.

Official Problem, *supra* para 6 at paras 17, 30.

Clarifications to Official Problem, Wilson Moot 2018 at para 5.

[28] The effect of the good character requirement is that the HRP is not permitted to ignore information in its possession about any applicant. The Appellant’s complaint lies not with the good character requirement, but with the frequency with which he has been subject to carding, which is not the subject of this appeal.

[29] If this Court finds that the alleged disproportionate impact is not properly attributed to carding practices, it is respectfully submitted that the good character requirement is nonetheless not the source of the Appellant’s complaints. In adverse effects claims “[w]e must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision” (*Symes*). If black Nova Scotians are disproportionately denied the opportunity to become police officers, of which there is no evidence before this Court, this is attributable to social circumstances which exist independently of the good character requirement.

Symes, *supra* para 23 at 764–65.

[30] A recent application of the principle stated in *Symes* is seen in the case of *Nur*, where mandatory minimum sentencing requirements were alleged to violate s. 15 of the *Charter* because they disproportionately impacted black individuals. The claim failed at the first stage of the analysis because the claimant could not establish that the discriminatory effects complained of were caused “by the law itself” (*Nur*).

R v Nur, 2011 ONSC 4874 at para 79, 275 CCC (2d) 306 [*Nur*] [emphasis in original].

[31] In rejecting the s. 15 claim at the first stage of the analysis, the Court in *Nur* emphasized that criminal activity falling under the scope of the mandatory minimum sentencing provisions was not a phenomenon unique to the black population. The decision acknowledged the many complex causes that led to a disproportionate number of black individuals being impacted by the mandatory minimum sentencing provisions, relative to their population. These causes, which included anti-black discrimination and heavy police attention because of factors like unemployment and gun crime, did not, however, establish that the sentencing provisions themselves violated s. 15 of the *Charter* (*Nur*). Associations with persons known to the police to engage in criminal activity and dubious moral character in general are certainly not unique to the black population in Nova Scotia.

Nur, *supra* para 30 at paras 81, 79.

[32] The Appellant may have been carded a disproportionate amount of times because his neighbourhood is a focus of the HRP's community policing strategy, but this alone cannot implicate the good character requirement. The Appellant's choice to associate with individuals involved with the drug trade, his choice to spend time in high-crime areas that attract the attention of community policing strategies, and his choice to engage in conversations with the police during street checks illustrate just some of the factors that might lead the HRP to reject a black individual's application for lack of good character. Simply put, the good character requirement is not the cause of any disproportionate impact based on race.

iii) If the good character requirement creates a distinction based on race, it is not a discriminatory distinction

[33] Should this Court find that the good character requirement draws a distinction on the basis of race, it is respectfully submitted that the distinction is nonetheless not discriminatory within the meaning of s. 15(1) of the *Charter*. Not all distinctions based on an enumerated or analogous ground are discriminatory. Rather, “[t]he second part of the analysis focuses on arbitrary — or discriminatory — disadvantage” (*Taypotat*).

Taypotat, supra para 19 at para 20.

[34] Prejudice and stereotyping may be indicia of discrimination, but they must be considered in the full context of any s. 15 claim:

The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group (*Withler*).

Having regard to the above factors, the good character requirement is not discriminatory for three reasons: (i) no arbitrary distinction exists in this case, (ii) any distinction drawn by the good character requirement reflects the actual circumstances and characteristics of the Appellant, and (iii) the Appellant has not shown that the good character requirement perpetuates any disadvantage or prejudice against him or other black individuals.

Withler, supra para 18 at para 71.

The good character requirement does not create an arbitrary disadvantage

[35] No arbitrary distinction is at play in this case. The Court in *Taypotat* observes that while facially neutral employment qualifications sometimes “operate as “built-in headwinds”” for minority groups, these requirements will be found discriminatory only when they are *unrelated* to measuring job capability. This is in line with the approach to s. 15 established in *Andrews*,

where Justice McIntyre stated that distinctions based on an individual's merits and capacities will rarely be classed as discriminatory. Good character is indisputably related to a potential police officer's ability to perform his or her duties. This is why the Royal Canadian Mounted Police ("RCMP") and other police forces, for example, in Calgary and Saskatoon, also require prospective officers to have avoided association with criminal behaviour, both detected and undetected.

Taypotat, supra para 19 at para 23.
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 174–75, 56 DLR (4th) 1, McIntyre J, dissenting in part [*Andrews*].
Official Problem, *supra* para 6 at para 29.

[36] Indeed, this case should be analogized with workplace discrimination claims under human rights legislation, which can hinge on the identification of a *bona fide* occupational requirement. In *BC v BCGEU*, an aerobic standard which was prima facie discriminatory against female forest firefighters was analyzed to determine whether it was nevertheless justified as a *bona fide* occupational requirement. It was not classified as such because the employer failed to discharge its burden of showing (i) that the standard was reasonably necessary to accomplish its purpose because (ii) accommodating individual employees rather than imposing an absolute standard would impose undue hardship on the employer.

British Columbia (Public Service Employee Relations Commission) v BCGEU, [1999] 3 SCR 3 at paras 1, 83, 73, 176 DLR (4th) 1 [*BC v BCGEU*].

[37] The good character requirement, however, meets this test. Unlike the aerobic standard analysed in *BC v BCGEU*, the good character requirement already accommodates individuals by assessing them on a case-by-case basis. It should be viewed as a *bona fide* occupational requirement, as it is in place to ensure that (i) underqualified individuals do not move past the vetting stage of the application process and (ii) that the HRP's final decisions with respect to

who qualifies are not uninformed. Eroding the HRP's power to make a full assessment of good character defeats the purpose of the good character requirement itself. Seen as such, whether the effect of the good character requirement is to create a headwind against black applicants or not, such an effect cannot be deemed discriminatory.

The good character requirement does not create a disadvantage that perpetuates a stereotype

[38] Second, the good character requirement does not discriminate because it responds to the actual circumstances of the Appellant and other Nova Scotians who apply to the HRP. It does not perpetuate stereotyping, which “attributes characteristics to members of a group regardless of their actual capacities” (*Quebec v A*).

Quebec (Attorney General) v A, 2013 SCC 5 at para 326, [2013] 1 SCR 61
[*Quebec v A*].

[39] If black individuals such as the Appellant are rejected based on a failure to demonstrate good character, this distinction is not discriminatory because it “arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice” (*Hutterian Brethren*). In *Hutterian Brethren* the neutral and rationally defensible policy choice was requiring photographs on driver's licences, which, in its effects, limited the ability of religious a group opposed to being photographed to obtain licences. In this case, the policy choice is requiring good character assessments to be made in a thorough and informed manner. Furthermore, good character is only one of the factors considered by the HRP in its preliminary screening process. Demonstrating good character alone does not guarantee individuals from any race the opportunity to be appointed a police officer. Far from attributing characteristics that ignore any individual or group's actual capacities, the good character requirement ensures that before any assessment of good character is made by the HRP that they look at their records to make the most accurate assessment possible.

Hutterian Brethren of Wilson Colony v Alberta, 2009 SCC 37 at para 108, [2009] 2 SCR 567 [*Hutterian Brethren*].

The good character requirement does not perpetuate prejudice or disadvantage

[40] Finally, the Appellant has not shown that the good character requirement, in its effects, perpetuates prejudice or disadvantage. “Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group” (*Withler*). In *Taypotat*, the Court rejected the idea that census data encompassing broad demographics across Canada could ground a finding of discriminatory impact in the very specific context of that case, which involved one First Nation community. The factual background of this case presents similar “evidentiary vacuums” (*Taypotat*). As noted at the first stage of the analysis in this case, there is no evidence to demonstrate that the good character requirement actually prevents black individuals from joining the HRP.

Withler, *supra* para 18 at para 35.

Taypotat, *supra* 19 para at para 30–31.

iv) Any infringement of the Appellant’s s. 15 rights is the result of an unconstitutional application of the good character requirement

[41] In the further alternative, the Respondent respectfully submits that if there is a discriminatory distinction drawn in this case it is the result of an unconstitutional application of the good character requirement at the administrative level, and not the good character requirement itself.

[42] Unconstitutional application of a constitutionally valid law is seen in *Little Sisters*. In this case Customs officials at the Canadian border were empowered by the *Customs Act* to withhold materials they considered “obscene”. A bookstore which catered to gay and lesbian clientele saw many of its shipments of erotic books wrongfully withheld or delayed as a result of being flagged

as “obscene” by officials. The Court found that nothing in the impugned law’s language or necessary effects was the cause of this targeting. Instead, Customs officials were applying the law in an unconstitutional manner by discriminating against erotic materials meant for a gay or lesbian audience.

Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69, [2000] 2 SCR 1120 [*Little Sisters*].
Customs Act, RSC 1985, c 1 (2nd Supp) [*Customs Act*].

[43] The legislative scheme in *Little Sisters* is analogous to the scheme within which the good character requirement operates. Ultimately, in *Little Sisters* the s. 15 claim failed because the adverse treatment complained of was attributable to the operation of the legislative scheme as opposed to the legislation itself. The *Customs Act* was perfectly capable of constitutional application. Similarly, the Appellant’s claim, if found to have merit, could only be attributable to the HRP which includes carding as a part of the community policing strategy.

Little Sisters, *supra* para 42 at para 77.

[44] This principle from *Little Sisters* was applied in the law enforcement context by the Ontario Court of Appeal in *Khawaja*, which is relied on by the Court in *Nur*. In *Khawaja*, the Court notes that while

improper police conduct such as profiling...is not only unacceptable, it is unconstitutional... improper conduct by the state actors charged with enforcing legislation [cannot] render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional.

This case is analogous to *Little Sisters*, *Nur* and *Khawaja*. The good character requirement does not define “good character.” It does not recommend that information from street checks be given any particular weight over other sources of information, nor does it mandate that street check

information be collected or used at all. It goes no further than to ensure that the HRP makes informed hiring decisions that do not overlook an applicant's moral character.

Little Sisters, supra para 42.

R v Khawaja, 2010 ONCA 862 at para 143, 103 OR (rd) 321.

Nur, supra para 30.

[45] In *Little Sisters* the Court observed that Parliament is constitutionally able to confer broad powers on state agents without legislating specific frameworks for *Charter*-sensitive activities. It followed that the legislation governing Customs officers could not be declared unconstitutional simply because it failed to prescribe special procedures to ensure compliance with the *Charter*. Thus, the good character requirement should not be declared unconstitutional simply because in conferring discretion to the HRP in its internal hiring practices, the Legislature has not prescribed a specific framework for information obtained through carding. To the extent that information obtained through carding is collected in a discriminatory manner, that is a matter for a constitutional challenge to carding, an issue that is not before this Court.

Little Sisters, supra para 42 at para 134.

Issue 2: Any section 15(1) violation is demonstrably justified in a free and democratic society under s.1 of the *Charter*

[46] The Respondent submits that, should this Court find that the good character requirement infringes s. 15(1) of the *Charter*, the infringement is justified under s. 1 of the *Charter*. First established in *R v Oakes*, the jurisprudence has affirmed the now well-known two step approach to determining whether a limit is reasonable and demonstrably justified: i) the objective(s) of the impugned measure must be “pressing and substantial”; and ii) the means chosen to accomplish the objective must be proportional. The Respondent submits that any infringements of s. 15(1) caused by the good character requirement are justified, as the good character requirement

represents a reasonable measure aimed at furthering the legitimate concern that the members of a police force are not vulnerable to corruption caused by a lack of high moral character.

Charter, supra para 3 at ss 1, 15.

R v Oakes, [1986] 1 SCR 103 at paras 69–70, 26 DLR (4th) 200 [*Oakes*].

i) The objective of the impugned measure is pressing and substantial

[47] The pressing and substantial objective that the good character requirement was enacted to address is maintaining the public’s confidence in the legitimacy of the police force, by ensuring that only those individuals with the highest moral character are accepted, in order to reduce corruptibility so that the law can be properly executed.

Official Problem, *supra* para 6 at para 18.

[48] In *Big M*, the Supreme Court of Canada established the test for determining whether the impugned provision is aimed at a pressing and substantial objective: the objective must be of “sufficient importance to warrant overriding a constitutionally protected right or freedom.” The protection of public safety and integrity of any system of government or policy is an objective that the Court has previously found to be pressing and substantial (*Hutterian Brethren*). The Respondent submits that ensuring that law enforcement are made up of members of the highest moral character and invulnerable to corruption, so as to preserve the public interest, is a pressing and substantial objective within the meaning of s. 1.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at para 139, 18 DLR (4th) 321 [*Big M*].

Hutterian Brethren, supra para 39 at paras 42, 45.

Official Problem, *supra* para 6 at para 18.

ii) The means chosen to accomplish the objective are proportional to the objective

[49] The Respondent submits that the means chosen to implement the goal of ensuring the high moral character of those applicants accepted to become police officers meets the

proportionality branch of the *Oakes* test. In ensuring the means of implementation are proportional to the objective, the following must be established: a rational connection between the means adopted and the objectives in place; that the measures minimally impair the right or freedom in question; and that the deleterious effects of the limit are proportional to the salutary effects of the measures (*Oakes*). The Respondent respectfully submits that all three stages of the proportionality analysis in this case are met.

Oakes, supra para 46 at para 70.

Contextual Factors Relevant to the Court's Proportionality Analysis

[50] There are several contextual factors present in this case that are relevant to the Court's proportionality analysis, namely: deference and the importance of high moral character.

The good character requirement demands a higher degree of deference from this Court

[51] The Respondent respectfully submits that the means chosen to implement the good character requirement warrants considerable deference to the decision of the government.

Deference to the law-maker reflects the court's respect for the legislative and executive branches by refraining from making social policy:

This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary. (*RJR-MacDonald*)

The Supreme Court of Canada has recognized that a "measure of leeway" is afforded to the government to determine whether infringements are justified (*Hutterian Brethren*). Further, the jurisprudence has also recognized the need to give deference to those with the particular expertise and knowledge in a field which the judiciary lacks (*Doucet-Boudreau; Michaud*).

RJR-MacDonald Inc v Canada, [1995] 3 SCR 199 at para 68, 127 DLR (4th) 1 [*RJR-MacDonald*].

Hutterian Brethren, *supra* para 39 at para 35.

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 at paras 34, 57, [2003] 3 SCR 3 [*Doucet-Boudreau*].

R v Michaud, 2015 ONCA 585 at para 109, 127 OR (3d) 81[*Michaud*].

[52] Here, deference means an acknowledgment that the government has delegated to the chief officer the authority to determine, based on his or her expertise in policing, how best to assess applicants in order to ensure high moral character.

The importance of having police officers with high moral character

[53] The good character requirement is meant to uphold the integrity of the policing system by providing a means to the HRP to screen out applicants lacking a high moral character. Similar provisions have been included in the regulations of other police forces across Canada, including the RCMP, and the Calgary and Saskatoon police forces.

Official Problem, *supra* para 6 at paras 18, 29.

[54] There is no consensus in the facts of this case or in jurisprudence as to what amounts to “high moral character” in the context of policing. However, in *Quebec c. Montréal* the majority court found that “there is no doubt that being of good moral character is a qualification required to become or remain a police officer.”

Québec (Commission des droits de la personne & des droits de la jeunesse) c Montréal (Communauté urbaine) Service de police, 2008 SCC 48 at para 25, [2008] 2 SCR 698 [*Quebec c Montréal*].

[55] The government has determined that applicants require a “high moral character” to join the Nova Scotian police force, which requires something more than the absence of criminal activity. Criminal and background checks only provides information regarding a person’s detected criminal activity, such as convictions, and information on an individual’s education, employment and credit history.

[56] By contrast, the use of “other information” provides information regarding an individual’s choices concerning affiliations and associations that are not identified in a criminal record check or personal background check. Concerns of corruption occurring from an individual’s affiliations are not easily detected by the chief officer except through the use of “other information.” The “other information,” therefore, provides valuable evidence of the individual’s integrity and moral decisions that are not necessarily available from criminal and background checks alone. This need for something more than the lack of criminal activity is a relevant contextual factor in relation to the proportionality analysis.

The good character requirement is rationally connected to the pressing and substantial objective

[57] The Respondent submits that the good character requirement is rationally connected to the stated goal of ensuring that all prospective officers are of the highest moral character in order to maintain the legitimacy of law enforcement.

Official Problem, *supra* para 6 at para 18.

[58] In *RJR-MacDonald*, the Supreme Court of Canada held that there is a rational connection where a “connection between the infringement and the benefit sought on the basis of reason or logic” is found. The rational connection test is aimed at preventing limits on *Charter* rights from being arbitrarily imposed. In other words, the government must show that there is reasonable belief that “the limit may further the goal, not that it will do so” (*Hutterian Brethren*). Proof that the impugned measure will meet its stated goal, or the effectiveness of the measure, are not required in order for the rational connection stage to be made out.

RJR-MacDonald, *supra* para 51 at para 153.

Hutterian Brethren, *supra* para 39 at para 48.

[59] The logic behind the good character requirement is to provide a tool to assess whether candidates are susceptible to corruption. This is rationally connected to the goal of upholding the integrity of the police force in the eyes of the public. In her dissenting reasons in *Quebec c Montréal*, Charron J stated that “[p]olice work requires individuals not only to exercise a significant degree of judgment and integrity, it is also a position that requires the utmost public trust.” Therefore, she held, “[c]learly the standard of “good moral character” set out in s. 3 of the *Police Act*...is rationally connected to the job and is imposed in good faith.”

Quebec c Montréal, supra para 53 at paras 84–85.
Official Problem, *supra* para 6 at para 18.

[60] The effect of the good character requirement, in using more than just criminal and background checks is rationally connected to the stated goal because the HRP is trying to prevent a risk of harm to the legitimacy of their police body. Criminal and background checks only provide information that are more obviously detrimental to an applicant’s character, such as convictions. Instead, the use of other means can provide information about the individual’s chosen affiliations and undetected criminal associations. Those affiliations and associations are what the HRP is concerned will put its mandate in jeopardy, because it is those affiliations that may make police officers more vulnerable to coercion and blackmail and in turn make the HRP more vulnerable to corruption.

Official Problem, *supra* para 6 at para 18.

The good character requirement minimally impairs the Appellant’s s. 15 rights

[61] The question at minimal impairment is “whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question” (*Big M*) and “whether there is an alternative, less drastic means of achieving the objective” (*Hutterian Brethren*). The Respondent submits that the good character requirement minimally impairs the

right because without the requirement the HRP would not be able to adequately pursue its objective.

Big M, supra para 48 at para 139.

Hutterian Brethren, supra para 39 at para 55.

[62] The good character assessment cannot be determined solely on background and criminal checks. The information provided from those checks does not provide the evidence needed to determine whether someone holds a high moral character. Rather it only provides information concerning the person's detected criminal behaviour and personal and financial data. Instead, using "other information" that is obtained and stored by the HRP can help it, and police forces like it in Nova Scotia, to assess the applicant's choices in who they affiliate with and their undetected behaviour that does not come to light in criminal and background checks. The affidavit of Deputy Chief Jill Taylor states the HRP's vetting process is to ascertain that their officers are not affiliated with criminality in order to maintain the confidence of the public in the credibility of the HRP. To do that, police forces have a responsibility to assess their potential officers with the information that they have available to them.

Official Problem, *supra* para 6 at paras 6, 18.

[63] Other jurisdictions rely solely on proven criminal activity or behaviour as a means of assessing the character of applicants to their forces. However, the courts have recognized the need to "allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of each province to legislate for its population" (*Quebec v A*). Additionally, in *Advance Cutting* the Court recognized that part of Canadian federalism means that the application of the *Charter* does not require legislative uniformity and provincial differences must be factored into any analysis of minimal impairment.

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

Quebec v A, *supra* para 38 at para 449.
R c Advance Cutting & Coring Ltd, 2001 SCC 70 at para 275, [2001] 3 SCR 209
[*Advance Cutting*].

[64] The population in Halifax is relatively small with an estimated 400,000 people. Coercion and blackmail of police officers is an expressed concern of the HRP. The information that is gained through “other information” checks like carding provides the HRP with the means to prevent the coercion of members because it can identify those affiliations and associations that put the officers at risk.

Official Problem, *supra* para 6 at paras 18–19.

[65] As noted, the government has determined that high moral character requires *more* than just the absence of a criminal conviction. In other words, the government has determined that “absence of criminal activity” is not equated with “high moral character”. In *ET* the court states that “[t]he Board does not have to wait for harm to occur before it is permitted to act on its experience and judgment and govern itself accordingly in order to avoid what it perceives, on eminently reasonable grounds, to be a very real risk of harm.” The HRP should not have to wait for instances of corruption within its ranks before it is allowed to act.

ET v Hamilton-Wentworth District School Board, 2017 ONCA 893 at para 37,
285 ACWS (3d) 544 [*ET*].

[66] Therefore, allowing a police force to consider any information available in its databases regarding an applicant’s character provides them a broad array of options for assessment. The good character requirement minimally impairs that right because although it is not the least impairing means, it is the least harmful means which adequately achieves the goal of the HRP: a fulsome determination of the character of applicants.

iii) The effects of the good character requirement are proportionate

[67] The third stage of the *Oakes* analysis requires “proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance” (*Oakes*). The proportionality analysis must balance the harm done to the Appellant’s s. 15 rights against the benefit to the public of a good character requirement, used to screen vulnerable police officers. The Respondent submits that the effects of the good character requirement are proportionate because empowering the HRP to make more fully-informed hiring decisions and character assessments far outweighs the alleged adverse effects flowing from the use of information obtained by carding, the evidence of which are speculative and inconclusive.

Oakes, supra para 46 at para 70 [emphasis in original].

The deleterious effects of the good character requirement

[68] The deleterious effect that arises from the HRP’s use of “other information” in their assessment of good character stems from the use of information obtained by carding in this assessment. The Appellant relies on the assertion that as a result of carding, the HRP is likely to have more negative information about black Nova Scotians than it will about other applicants.

Official Problem, *supra* para 6 at 10.

The salutary effects of the good character requirement

[69] By contrast, the salutary effect of the good character requirement is the HRP can consider a broader array of information outside criminal record and background checks, in assessing applicants for the highest moral character to come to a more fully informed conclusion.

[70] The effect of being able to use a broader array of “other information” means that the HRP can assess an applicant’s character more fulsomely than using only criminal records and financial information obtained from criminal and background checks. It also means that the HRP

does not ignore the information available to them that can be potentially relevant and revealing of an applicant's character.

[71] Using "other information" allows the HRP to maintain a legitimate police force that is not subject to coercion and blackmail due to vulnerable police officers. Assessing the officers using all available information screens out vulnerable applicants and allows the HRP to be better equipped to protect the public of Halifax

The salutary effects of the good character requirement outweigh the deleterious effects

[72] The salutary effect of the HRP's mandate to protect the people of Halifax's safety from corruption outweighs the alleged deleterious effects that have arisen from using some of the mechanisms that provide "other information."

[73] As noted, the government maintains that a broader good character assessment gives the police the ability to better assess their candidates' character, for more than just criminal convictions and financial matters. It allows the HRP to assess their applicants for a deeper level of integrity and morality to ensure only those with the highest moral character are allowed to protect the public.

[74] The evidence has not shown that the good character assessment has disproportionately impacted the racial diversity of the police force. Rather, the good character assessment will assist in the development of a police force better equipped to protect the people of Halifax, and more legitimate in the eyes of the people of Halifax.

[75] Any deleterious effect in this case is concerning the information the HRP is allowed to consider resulting from "street checks". However, as noted, the constitutionality of that practice is not before the Court. Therefore, the HRP should not be prevented from using information

obtained through carding to make a more fulsome assessment of its candidates, when the practice of carding has not been determined to be unconstitutional.

[76] Police officers with poor moral character threaten the legitimacy of law enforcement. A police force that is illegitimate in the eyes of the public cannot effectively protect the public. Therefore, the good character requirement and the use of all information available to the police is essential to the function of maintaining a legitimate police force that the public can have confidence in. The HRP's approach to assessing the good moral character of their prospective officers is proportionate, and therefore reasonable and justified under s. 1 of the *Charter*.

Issue 3: An individual remedy under s. 24(1) is not appropriate in the circumstances of this case

[77] The Respondent submits that, should this Court find that the good character requirement infringes s. 15(1) of the *Charter* and cannot be saved under s. 1, the Respondent submits that the only remedy that is appropriate in the circumstances of this case is a suspended declaration of invalidity. The Appellant should not be granted a constitutional exemption pursuant to s. 24(1) to re-apply for the HRP.

Charter, supra para 3 at ss 1, 15(1), 24(1).

[78] In *Schachter*, the seminal case on constitutional remedies, the Supreme Court of Canada held that generally speaking and absent extraordinary circumstances, an individual remedy under s. 24 should, rarely, if ever, be granted alongside the striking down of the legislation under s. 52 of the *Constitution Act, 1982*. This is because a s. 24 remedy is not meant to be retroactive, and by giving such a remedy during a suspension of invalidity it would only duplicate the relief already flowing from the relief granted under s. 52 (*Schachter*). This important principle was reiterated in the Supreme Court of Canada's 2008 decision *Ferguson*, where the court recognized that s. 52 and s. 24 serve different remedial purposes. On the one hand, "section 52(1) provides a

remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights” (*Ferguson*). Most importantly, in making the determination as to the appropriate remedy in any *Charter* case, the courts must be guided by respect for the role of the legislature (*Ferguson*).

Schachter v Canada, [1992] 2 SCR 679 at 720, 93 DLR (4th) 1 [*Schachter*].
Constitution Act, 1982, *supra* para 5.
R v Ferguson, 2008 SCC 6 at para 61, [2008] 1 SCR 96 [*Ferguson*] [emphasis in original].

[79] In *Carter* the majority of the court faced the issue of whether to grant exemptions to individuals seeking medically-assisted dying during the suspended declaration of invalidity of the legislation that made assisted dying a criminal offence. In that case, the court was faced with the state’s unconstitutional control over an individual’s life under s. 7 of the *Charter*. It was, quite literally, a matter of life or death. The court found that while it was appropriate to grant Parliament additional time to fix the impugned provision, it would be unfair to prolong the suffering of those individuals during that time. Therefore, granting an exemption would reduce the harm those individuals were facing. Ultimately the Court found that “the prejudice of the rights flowing from the four-month extension outweighs countervailing considerations” (*Carter*). Similarly, in *Demers* the court granted an individual remedy to a permanently unfit accused who was not a danger to the public, because it was not a case in which the s. 24 remedy would cause the same relief flowing from the s. 52 remedy.

Carter v Canada (Attorney General), 2016 SCC 4 at para 6, [2016] 1 SCR 13 [*Carter*].
R c Demers, 2004 SCC 46 at para 103, [2004] 2 SCR 489 [*Demers*].

[80] *Carter* and *Demers*, in the Respondent’s submission, reflect the kind of extraordinary circumstances, not present in this case, where a personal constitutional exemption awarded alongside a suspended declaration of invalidity may be appropriate.

[81] Granting the exemption in this case would also cause the court to overstep its role, and to step into the shoes of the Legislature. Conflict between the branches of government is acknowledged in the partial dissent of McLachlin C.J. (as she then was), Cromwell, Moldaver and Brown JJ in *Carter #2*, where they note that creating a mechanism for an exemption during the suspension “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”. It is not the role of the Court to determining the appropriate hiring practices in relation to police forces, and granting the Appellant a constitutional exemption would unduly infringe on the government’s role.

Carter, supra para 79 at para 12, citing *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 125, [2015] 1 SCR 331.

[82] Granting the Appellant an exemption to re-apply to the HRP engages far less extreme considerations and consequences than were present in *Carter* and *Demers*. It is not a life or death decision or a decision affecting individual liberty; instead the issue is whether the Appellant should be given a chance to re-apply for a specific job. There is nothing in the evidentiary record before Justice Lazier to suggest that the Appellant will not be permitted to re-apply to the HRP once any changes to the good character requirement are made by government. Nor is there any evidence to suggest that his application would not be fully considered, based on whatever new criteria for determining “good character” the government adopts in light of this Court’s decision in this case.

[83] The Respondent submits that this case does not engage the extraordinary circumstances that warrant an immediate individual remedy, in addition to the suspended declaration of invalidity under s. 52. Therefore, the Respondent submits that the Appellant should not receive a constitutional exemption pursuant to s. 24(1) to re-apply to the HRP.

PART V – ORDER SOUGHT

Nature of Order Sought

[84] The Respondent respectfully submits that for all these reasons, the appeal should be dismissed, and the decision of the Court of Appeal upheld.

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

Team #6

PART VI – AUTHORITIES

JURISPRUDENCE	PARAGRAPHS
<i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143, 56 DLR (4 th) 1.	35
<i>British Columbia (Public Service Employee Relations Committee) v BCGEU</i> , [1999] 3 SCR 3, 176 DLR (4 th) 1.	36
<i>Carter v Canada (Attorney General)</i> , 2016 SCC 4, [2016] 1 SCR 13.	79, 81
<i>Doucet-Boudreau v Nova Scotia (Department of Education)</i> , 2003 SCC 62, [2003] 3 SCR 3.	51
<i>ET v Hamilton-Wentworth District School Board</i> , 2017 ONCA 893, 284 ACWS (3d) 544.	65
<i>Hutterian Brethren of Wilson Colony v Alberta</i> , 2009 SCC 37, [2009] 2 SCR 567.	39, 48, 51, 58, 61
<i>Kahkewistahah First Nation v Taypotat</i> , 2015 SCC 30, [2015] 2 SCR 548.	19, 22, 26, 33, 35, 40
<i>Little Sisters Art & Book Emporium v Canada</i> , 2000 SCC 69, [2000] 2 SCR 1120.	42, 43, 44, 45, 46
<i>Quebec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine) Service de police</i> , 2008 SCC 48, [2008] 2 SCR 698.	54, 59
<i>Quebec (Attorney General) v A</i> , 2013 SCC 5, [2013] 1 SCR 61.	38, 63
<i>R c. Advance Cutting & Coring Ltd</i> , 2001 SCC 70, [2001] 3 SCR 209.	63
<i>R v Big M Drug Mart Ltd</i> , [1985] 1 SCR 295, 18 DLR (4 th) 321.	48, 61
<i>R c Demers</i> , 2004 SCC 46, [2004] 2 SCR 489.	79
<i>R v Ferguson</i> , 2008 SCC 6, [2008] 1 SCR 96.	78
<i>R v Khawaja</i> , 2010 ONCA 862, 103 OR (3d) 321.	44
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<i>R v Nur</i> , 2011 ONSC 4874, 275 CCC (2d) 306.	30, 31, 44
<i>R v Oakes</i> , [1986] 1 SCR 103, 26 DLR (4 th) 200.	46, 49, 67
<i>RJR-MacDonald Inc v Canada</i> , [1995] 3 SCR 199, 127 DLR (4 th) 1.	51, 58
<i>Schachter v Canada</i> , [1992] SCR 679, 93 DLR (4 th) 1.	78
<i>Symes v Canada</i> , [1993] 4 SCR 695, 110 DLR (4 th) 470.	23, 29
<i>Withler v Canada</i> , 2011 SCC 12, [2011] 1 SCR 396.	18, 24, 34, 40

LEGISLATION	PARAGRAPHS
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11	3, 4, 5, 46, 77
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11.	5, 78
<i>Customs Act</i> , RSC 1985, c 1, (2 nd Supp).	42

<i>Police Act</i> , SNS 2004, c 31 s 97(1)(b).	8.
<i>Police Regulations</i> , NS Reg 90/2012.	2, 8

OFFICIAL WILSON MOOT SOURCES	PARAGRAPHS
Clarifications to Official Problem, Wilson Moot 2018 at para 5.	27
Official Problem, Wilson Moot 2018.	6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 25, 26, 27, 35, 47, 48, 53, 57, 59, 60, 62, 63, 64, 68

