

**IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)**

BETWEEN:

JEROME CRAWFORD

APPELLANT

-AND-

NOVA SCOTIA (ATTORNEY GENERAL)

RESPONDENT

FACTUM OF THE RESPONDENT

Team Number: 9

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PART I—OVERVIEW

1. The policing profession is highly regarded and must be populated by only the most moral and incorruptible individuals. Police have considerable power and discretion over matters that can affect the fundamental rights of community members. In order to ensure the incorruptibility of police forces, it is essential that only the most upstanding and moral individuals are accepted onto the force. The question to be determined on this appeal is the extent to which the Halifax Regional Police (HRP) may require applicants to meet a “good character” requirement in furtherance of this objective.

Official Problem, Wilson Moot 2018 at para 18 [Official Problem].

2. It is respectfully submitted that the good character requirement in Paragraph 4(1)(a) of the Nova Scotia *Police Regulations* does not infringe section 15(1) of the *Charter* because it does not discriminate against black individuals. It is a neutral requirement that must be met by every applicant regardless of race, background or any other immutable characteristic. The requirement is a protective measure that ensures the safety of Nova Scotia communities and fosters public confidence in the police.

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*].

Police Regulations NS Reg 230/2005 at para 4(1)(a) made under subsection 97(1) of the *Police Act*, 2004, c 31 at s 5(2) [*Regulations*].

Official Problem, *supra* para 1 at para 18.

3. If an infringement of section 15(1) is found, the impugned provision nonetheless reflects a proportional balancing of section 15(1) values and the Government’s objectives.

PART II—STATEMENT OF FACTS

Factual Background

4. The HRP is the only major city police force in Canada that is as racially diverse as its community. In 2007, in an effort to further improve police connection with the Halifax community, the HRP implemented a system of police foot patrols. These involve going into neighbourhoods and speaking with residents in an effort to build relationships with the people the HRP serves and protects. The system aims to more effectively deter crime. It is a practice employed in many other cities across Canada.

Official Problem, *supra* para 1 at paras 5, 22, 27.

5. Foot patrols result in street checks which gather information from voluntary conversations with community members. The conversations collect details from individuals such as name, age, race and personal associates and their activities. This information is kept in a central police database.

Official Problem, *supra* para 1 at paras 6, 21, 22.

6. The Appellant in this matter applied to be an officer with the HRP in 2014. Applicants are assessed in accordance with the relevant provisions of the *Regulations* which must be applied throughout the province. In light of the importance of good character to one's suitability for police work, Paragraph 4(1)(a) of the *Regulations* permits a holistic inquiry into the character of all applicants. This includes having regard to criminal and background checks as well as any information in the possession of the chief officer. The requirement to demonstrate good character is in accordance with other provincial Police Acts and the *Royal Canadian Mounted Police Act*.

Official Problem, *supra* para 1 at para 29.

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

Royal Canadian Mounted Police Act, RSC 1985, c R-10 at para 9.1(1).

7. In conducting the good character assessment provided for in Paragraph 4(1)(a) of the *Regulations*, the chief officer had access to and considered the Appellant's street check information. The dominant purpose of the HRP's screening is to ensure officers are not affiliated with criminality in order to project the image of incorruptibility of police officers and to maintain the force's legitimacy.

Official Problem, *supra* para 1 at para 18.

8. The Appellant's street check information revealed a long history of associations with criminals. Throughout his adolescence, the Appellant worked in his father's business, Alvins, a 24-hour convenience store. He worked alongside two individuals known to be involved in selling marijuana, mushrooms, cocaine and MDMA. Both the Appellant and his father knew that these employees were selling drugs in or just outside the store. Neither took any steps to discourage it or to report the illegal activity to police. The Appellant's father 'turned a blind eye' to the activity because he considered the individuals induced to be trustworthy employees. The Appellant followed suit. The street check information also revealed that the Appellant was friends with an individual who had been convicted of aggravated assault and that he associated with individuals who use illegal drugs. Considered collectively, this information formed the basis of the Appellant's application being rejected as he was deemed not to be of good character due to his repeated associations with persons of interest.

Official Problem, *supra* para 1 at paras 3, 4, 8, 10, 13, 14, 16(a),(b),(d).

Procedural History

9. In March 2016, the Appellant brought an application before the Nova Scotia Supreme Court seeking a declaration that Paragraph 4(1)(a) of the *Regulations* infringed his section 15(1) *Charter* rights. In allowing the application, Justice Lazier took no issue with the objectives of the law but found that the infringement could not be justified under section 1 of the *Charter*.

Official Problem, *supra* para 1 at para 1, at 10.

10. The Nova Scotia Court of Appeal allowed the Attorney General's appeal. Justices Balantine and Nguyen found that the Appellant's reliance on statistical evidence failed "to draw a clear nexus between the pre-requisites to become a police officer in Nova Scotia and his race." Accordingly, the Court held that Paragraph 4(1)(a) of the *Regulations* did not deprive the Appellant of his section 15(1) *Charter* rights since the violation, at most, flowed from the "unconstitutional application of an otherwise neutral provision, not from the legislation itself."

Official Problem, *supra* para 1 at 10.

11. In the alternative, the requirement would have been justified under section 1 of the *Charter* since it aligns with the Government's venerable objective of recruiting upstanding police officers who are free from the influences of coercion. The Court of Appeal disagreed with the trial judge's decision regarding the remedy, holding that it is not the place of the courts to determine what information police may take into account during the assessment of a job application. The Appellant has been granted leave to appeal the Court of Appeal's decision to this Court.

Official Problem, *supra* para 1 at 10-11.

PART III—STATEMENT OF POINTS IN ISSUE

12. There are three issues on appeal:

Issue 1. Does Paragraph 4(1)(a) of the *Police Regulations* violate s 15(1) of the *Charter*?

No.

Issue 2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society under s 1 of the *Charter*?

Yes.

Issue 3. If the answer to question 2 is no, should Jerome be granted a constitutional exemption pursuant to section 24(1) of the *Charter* to re-apply for the HRP while the existing good character requirement remains in effect?

No

PART IV—ARGUMENT

ISSUE 1: Paragraph 4(1)(a) of the *Regulations* does not violate s 15(1) of the *Charter*

13. The qualification criteria established by Paragraph 4(1)(a) of the *Regulations* does not infringe the Appellant's equality rights under section 15(1) of the *Charter*. Section 15(1) of the *Charter* aims to protect substantive equality and prohibits discriminatory distinctions on the basis of specific enumerated and analogous grounds. To establish a breach of equality, the Appellant must prove that (i) the law creates a distinction based on an enumerated or analogous ground; and (ii) the distinction creates a disadvantage by perpetuating prejudice and stereotyping. The Appellant has not established either of these elements.

Andrews v Law Society British Columbia, [1989] 1 SCR 143 at para 178, 56 DLR (4th) 1 [Andrews].

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

Paragraph 4(1)(a) does not draw any prohibited distinction

14. Paragraph 4(1)(a) does not impose, on its face or in its effects, differential treatment on the basis of any prohibited ground. To the extent that the impugned provision draws any distinction, it does so on the basis of good character, which is neither an enumerated nor analogous ground.

15. Further, the good character requirement in Paragraph 4(1)(a) establishes a standard criteria for the entire applicant pool. It does not create a distinction in its effects on the basis of race. Nothing in Paragraph 4(1)(a) contemplates or authorizes differential treatment of black individuals. Rather, the provision sets out good character requirements for all applicants that, together with the other requirements of Paragraph 4, comprises a merit-based approach to assessing an applicant's suitability for membership of the police force.

16. Equality rights protect immutable characteristics. Individual associations and behaviors cannot be described as immutable characteristics. The exclusion of individuals not of good

character, on the basis of their criminal associations, is one flowing not from their immutable personal characteristics but from their past actions and associations. As McIntyre J observed in *Andrews*, “distinctions...based on an individual’s merits and capacities will rarely be...classed as discriminatory.”

Andrews, supra para 13 at paras 37, 195.

Eaton v Brant County Board of Education, [1997] 1 SCR 241, 142 DLR (4th) 385 [*Eaton*].

Paragraph 4(1)(a) does not create a distinction in effect

17. Paragraph 4(1)(a) does not have the effect of disproportionately excluding black applicants. To establish such a discrepancy, the Appellant must establish that a disproportionate number of black individuals have had their applications rejected based on their street check information. There is no evidence of this. In fact, Dr. Morrison’s evidence establishes that the percentage of black police officers roughly mirrors the percentage of the black population of Halifax: “Of all major cities in Canada, Halifax is the only police force that is as racially diverse as its community.”

Official Problem, *supra* 1 at para 27.

18. Paragraph 4(1)(a) is not the cause of any discriminatory or disproportionate impact on black applicants. The good character requirement is applied equally to all applicants, regardless of race (or any other immutable personal characteristic). As asserted in *Egan*, adverse effects discrimination occurs when “a law, rule or practice is facially neutral but has a disproportionate impact on a group *because* of a particular characteristic of that group.” (emphasis added) To establish adverse effect discrimination, the Appellant must demonstrate that the adverse effect complained of is actually caused by the law in question. As expressed by Iacobucci J in *Symes v Canada*, the court must be careful not to assume a statutory effect that is not proved:

We 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.

Egan v Canada, [1995] 2 SCR 513 at paras 586-587, 124 DLR (4th) 609 [*Egan*].

Eaton, supra para 16 at para 67.

R v Nur, 2013 ONCA 677 at para 79, 117 OR (3d) 401 [*Nur*].

Symes v Canada, [1993] 4 SCR 695 at para 134, 110 DLR (4th) 470.

19. There is no connection between any alleged racial bias in the administration of street checks and the operation of Paragraph 4(1)(a). There is no effect of over-representation of black individuals in the incidence of street checks that is caused by the *Regulation* itself. Similar to the finding of the Ontario Court of Appeal in *Nur*, this flaw is fatal to the Appellant's case.

Nur, supra para 18 at para 18.

20. A disproportionate representation of specific incidences does not indicate a distinction in effect. In *Nur*, the applicant argued that bias and prejudice in the administration of criminal justice served to perpetuate the socio-economic disadvantage of the black community, leading to an almost 800% over-representation of black people (compared to the rest of the population) in the incidence of firearms possession charges. The Court of Appeal accepted this over-representation and acknowledged that systemic disadvantages and anti-black discrimination had contributed to the proliferation of gun crime. This leads to disproportionately high numbers of black individuals being charged with gun possession offences. Nevertheless, the Court confirmed that such circumstances were the product of existing social circumstances, not of the impugned *Criminal Code* provision.

R v Nur, 2011 ONSC 4874, 275 CCC (3d) 330 at paras 77-78.

Nur, supra para 18 at para 182.

21. Similarly, in the case at bar, the Appellant's street check information revealed criminal associations as a result of existing social circumstances, not Paragraph 4(1)(a). North Preston is a high-crime neighbourhood. It is natural that police should allocate more policing resources to

such neighbourhoods. More allocation of resources will lead to a higher number of street checks being conducted in accordance with the community policing strategy. However, none of these facts establish that Paragraph 4(1)(a) violates s 15(1) of the *Charter*.

Official Problem, *supra* 1 at para 5.

Clarifications to the Official Problem (2018) at para 5 [Clarifications].

Any distinction arises only through unequal application

22. Improper conduct by state actors charged with implementing legislation cannot render what is an otherwise constitutional provision unconstitutional. Where unconstitutional implementation of a valid law is the problem, the solution is to remedy that improper implementation, not to declare the provision unconstitutional. If anything, it is a flaw in the decision-making process employed by the chief officer, not a flaw in Paragraph 4(1)(a), that information obtained through street checks formed part of the assessment of the Appellant's eligibility. Paragraph 4(1)(a) does not authorize the consideration of street check information.

Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue), 2007 SCC 2 at paras 133-135, [2007] 1 SCR 38 [*Little Sisters*].

23. To the extent that information about the Appellant's associations was obtained through unconstitutional police conduct, the Respondent accepts that consideration of this information would be improper. In that circumstance, the chief officer's decision to rely on street check information in assessing the Appellant's character would be improper and subject to review. However, the Appellant has not challenged the chief officer's decision; he has challenged the validity of the provision itself. Improper exercise of discretion does not render the provision enabling the exercise of discretion invalid. Rather, it renders the specific decision improper and subject to an order of *certiorari*.

24. Paragraph 4(1)(a), when applied properly, does not create any impermissible distinctions. It filters out applicants on the basis of merit regardless of their race. Any discriminatory distinctions associated with the application of Paragraph 4(1)(a) result solely from improper exercise of the discretion conveyed not a discriminatory effect.

Little Sisters, supra para 22 at para 117.

In the alternative: If a distinction in effect arises from Paragraph 4(1)(a), it is not discriminatory

25. Distinctions are discriminatory when they are based not on the actual capacities and circumstances of the affected group but on stereotypes and prejudice. To establish discrimination, the Appellant must demonstrate that the impugned provision “has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being.” Even if the distinction in Paragraph 4(1)(a) is drawn on the basis of a prohibited ground, such a distinction does not perpetuate prejudice or stereotyping.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 51, 170 DLR (4th) 1 [Law].

Québec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61 [Québec].

26. Distinctions based on stereotype and prejudice are often discordant with the legislative purpose as a whole. The *Regulations* are authorized pursuant to section 97(1)(b) of the *Police Act* which refers to “the qualifications and requirements for the appointment of members to police departments.” The objective of the *Police Act* as a whole is not expressly detailed. However, using the principles of statutory interpretation the object can be inferred from the text and context of the Act as a whole. Section 5(1) of the *Police Act* imposes duties on the Minister of Justice who is responsible for “ensur[ing] that an adequate and effective level of policing is maintained throughout the Province.” Further, section 5(2) requires the Minister of Justice to

“promote the preservation of peace, the prevention of crime, the efficiency of police services and the improvement of police relationships with communities within the province.”

Vriend v Alberta [1998] 1 SCR 493 at paras 71,72, 156 DLR (4th) 385.
Police Act, SNS 2004, c-31, ss 5(1)-(2), 97(1)(b) [*Police Act*].
 Official Problem, *supra* 1 at 1.

27. Paragraph 4(1)(a) of the *Regulations* is designed to engender public trust in the police force by ensuring the integrity and incorruptibility of police applicants. Requiring a broad-ranging assessment of good character is essential to this purpose. Therefore, Paragraph 4(1)(a) functions not by way of stereotype but by way of merit-based considerations necessary to achieving its purpose.

Official Problem, *supra* 1 at para 18.

28. Further, Paragraph 4(1)(a) does not exacerbate the disadvantage of a historically disadvantaged group. The Respondent acknowledges that racial minorities historically have suffered prejudice and disadvantage. However, the good character requirement is not the cause of, nor does it perpetuate, that disadvantage. The fact that North Preston suffers a high crime rate, and therefore attracts increased police attention, is a circumstance that is unrelated to the operation of the good character requirement imposed by Paragraph 4(1)(a).

Clarifications, *supra* 21 at para 5.

Good character is not discriminatory

29. Good character is a neutral requirement that does not impose any disadvantage recognized by s 15(1) of the *Charter*. Nothing about the good character requirement “has the effect of perpetuating or promoting the view that the individual is less capable or less worthy of recognition or value as a human being.” The Appellant’s application was rejected not because he is an unworthy human being but because his actual association with criminals disqualifies him

from the position. Paragraph 4(1)(a) does not perpetuate prejudice or stereotyping; it is a neutral, merits-based requirement.

Québec, supra para 25 at para 329.

30. Furthermore, the good character requirement does not operate by way of stereotype.

Criminal associations can lead to a perception of corruptibility and form an unacceptable risk for the police. Applicants with criminal associations are rejected not because of stereotypical thinking connecting race to criminality but because actual criminal associations can lead to corruptibility. The good character requirement, therefore, operates to exclude candidates based on their “actual need, capacity, or circumstances” and is not based on stereotyping. The good character requirement is in line with the objects of the *Police Act*.

Miron v Trudel [1995] 2 SCR 418 at para 131, 124 DLR (4th) 693.

Official Problem, *supra* para 1 at para 18.

Law, supra para 25 at para 9.

31. Further, the nature of the interest affected is relevant to assessing whether the differential treatment at issue is in fact discriminatory. To the extent that the good character requirement imposes a disadvantage, it is an economic or career disadvantage, not one that goes to the Appellant’s worth as a human being. Courts have repeatedly rejected economic disadvantage as a basis for a s15(1) violation, even when a claimant group is severely disadvantaged.

Law, supra para 25 at para 51.

Ontario (Attorney General) v Fraser, 2011 SCC 20 at para 303, 315-19, [2011] 2 SCR 3.

The broad discretion to assess character is not discriminatory

32. The Appellant alleges that the broad discretion to assess good character contained in Paragraph 4(1)(a) discriminates *because* it is broad. To the contrary, the breadth of information that the good character requirement permits to inform the analysis is precisely what makes it non-discriminatory. Cory J’s assessment of the definition of “spouse” in *Egan* is instructive. In

that case, because “spouse” was defined with reference to the limiting words “of the opposite sex”, it was not capable of being read in a way that could include same-sex relationships. That narrowness created a discriminatory distinction based on sexual orientation. Just as the term “spouse”, absent words of limitation, is capable of encompassing all relevant relationships, so too is the term “good character” capable of encompassing all relevant definitions.

Egan, supra para 18 at para 168.

33. The breadth of the assessment permitted by Paragraph 4(1)(a) is necessary to ensure that all relevant considerations are taken into account when assessing an applicant’s character. Were the assessment of good character to be circumscribed by limiting conditions, it may be susceptible to under inclusiveness. In other words, it would fail to capture all relevant information and in that way create discrimination by failing to provide for a holistic assessment.

ISSUE 2: Any infringement of the Appellant’s section 15(1) equality is justified under section 1 of the Charter

34. Should the court find that Paragraph 4(1)(a) of the *Regulations* infringes the Appellant’s section 15(1) equality rights, any infringement is nonetheless demonstrably justified in a free and democratic society. The objective of Paragraph 4(1)(a) is pressing and substantial and the means employed to achieve that objective are rational and proportional. The good character requirement is (i) rationally connected to its objective, (ii) it minimally impairs the Appellant’s equality rights and (iii) its salutary benefits outweigh its deleterious effects.

R v Oakes, [1986] 1 SCR 103 at paras 69-71, 26 DLR (4th) 200.

Paragraph 4(1)(a) has a pressing and substantial objective

35. The underlying objective of the good character requirement is to protect the reputation and integrity of the HRP by ensuring that only individuals of the highest moral character join the police force. This is a pressing and substantial objective: it is essential to a free and democratic

society that the individuals charged with upholding and enforcing the law be, and be perceived to be, incorruptible.

Montréal (City) v Québec (Commission des droits de la personne et des droits de la jeunesse), 2008 SCC 48 at para 86, [2008] 2 SCR 698 [*Montréal*].
Official Problem, *supra* 1 at para 18.

36. The eligibility criteria for police applicants must also be read in conjunction with the overarching mandate that municipalities maintain adequate, efficient and effective police departments in accordance with their needs. A broad good character requirement enables local police forces like the HRP to recruit effective, efficient and incorruptible police officers in accordance with community needs.

Police Act, *supra* para 26 at s 35.

The good character requirement is rationally connected to its objective

37. To establish a rational connection, the Respondent must demonstrate that “it is reasonable to suppose that the limit may further the goal, not that it *will do* so.” At a fundamental level, the assessment of an individual’s character is done with the primary goal of protecting public interest and securing public protection. A broad good character requirement that enables assessment of all aspects of an applicant’s character and that excludes individuals with criminal associations is rationally related to the objective of maintaining the integrity of, and public confidence in, the police force. Past associations may be predictors of future behaviour. Therefore, it is reasonable to suppose that the good character assessment mandated by Paragraph 4(1)(a) will go at least some way to achieving its objective.

Alberta v Hutterian Brethren of Wilson Colony at para 48, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

DeMaria v Law Society of Saskatchewan, 2013 SKQB 178 at para 61, [2013] SJ No 292 [*DeMaria*].

Deborah Rhode, “Moral Character as a Professional Credential” (1985) 94 Yale LJ 491 at 555.

Leslie C Levin, “The Character and Fitness Inquiry: Can We Predict “Problem” Lawyers?”

(Paper, presented at the 40th National Conference on Professional Responsibility, 29 May 2014), [unpublished] at 2.

38. Requiring police officers to be of good character is not an arbitrary requirement, as asserted by the Appellant. The Appellant suggests that it is arbitrary because not all individuals with criminal associations will be caught by the assessment, some good applicants may be improperly excluded, and a notional “good character” based on assessment at the time of application does not guarantee that an individual will always act with integrity and uphold the law. However, the fact that the provision is not perfect, and may not achieve its goal in all instances, is irrelevant. No application criteria will be perfect. Imperfect realisation of its objective does not render the good character requirement in Paragraph 4(1)(a) arbitrary.

Hutterian Brethren, supra para 37 at para 48.

39. Criminal associations are relevant in assessing the character and suitability of applicants to the police force. People who have criminal associations may be more susceptible to being corrupted. This process is not infallible and may allow, for example, white people with no street check history but with actual criminal associations through. This fact does not make the inquiry irrational. It is still rational to assume that a person who has criminal associations may be of poor character and, therefore, it is rational to inquire into those associations. As Justice Balantine of the Nova Scotia Court of Appeal correctly identified, it is not the Court’s place to circumscribe the information that may be considered in that assessment.

Official Problem, *supra* para 1 at 10.

The good character provision is minimally impairing

40. The Government must establish that “the measures employed were the least intrusive, in light of both the legislative objective and the infringed right.” As long as the requirement fits

within a range of reasonable alternatives, it will be minimally impairing. It is not necessary that laws of general application be tailored to individual circumstances.

Hutterian Brethren, *supra* para 37 at para 37.

Québec, *supra* para 25 at para 442.

RJR-MacDonald Inc. v Canada (Attorney General), [1995] 3 SCR 199 at para 102, [1995] SCJ No 68.

41. Canadian courts have regularly upheld good character requirements as essential to the professions for which they are requirements. In the context of policing specifically, the Supreme Court of Canada in *Montréal* has recognized that a good character requirement is essential to becoming and remaining a police officer because:

...most, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties.

Given the pressing and substantial objective of protecting the public and the reputation of the police, nothing less than a good character requirement will achieve this objective in a real and substantial way.

DeMaria, *supra* para 37 at para 60.

Montréal, *supra* para 35 at para 25.

Hutterian Brethren, *supra* para 37 at paras 37, 53, 55, 187.

42. Further, in assessing an applicant's good character, a broad inquiry is necessary. Assessing an individual's background is necessarily context-specific. Individual police forces need to be able to tailor their selection process based on the needs and circumstances of their specific communities and the information available to them. Good character is a holistic assessment and therefore must be measured in that way. A review of the various police statutes and regulations across Canada reveals that there is no single, prescribed standard by which good character and suitability for police work is measured. The broad inquiry authorized by Paragraph 4(1)(a) is just one of many.

Ontario Police Services Act, RSO 1990, c P-15 at s 43(1)(d).

Royal Newfoundland Constabulary Act, SNL 1992, c R-17 at s 13(1)(c).

Prince Edward Island Police Act General Regulations pursuant to s 58 of the *Police Act*, R.S.P.E.I., 1988, c P-11.1 at para 8(1)(h).

Québec Police Act, 2000, c P-13.1 at s 115.

Official Problem, *supra* para 1 at para 29(a),(c).

43. Therefore, the broad inquiry into character authorized by Paragraph 4(1)(a) falls within the range of reasonable alternatives for achieving the objective of ensuring that a police candidate possesses the highest, incorruptible moral character.

Hutterian Brethren, *supra* para 37 at para 55.

44. Further, limiting the discretion afforded to the chief officer in assessing good character, or prescribing specific criteria in that assessment, would not achieve the legislative objective in a real and substantial manner. The *Regulations* apply to the whole of the province. As such, they must be relevant to, and capable of being applied in, a variety of circumstances.

Police Act, *supra* para 26 at s 5(1).

45. The specific skills and qualities essential to the discharge of police duties in a particular community will necessarily depend on the characteristics and needs of that community. A broad discretion in assessing the suitability of police applicants is necessary to ensure that only applicants who can meet the needs of the communities they serve are appointed. Fettering that discretion with fixed criteria impedes the recruitment of police officers who are responsive to the needs of their community, and hinders the maintenance of adequate, efficient and effective police departments generally.

Police Act, *supra* para 26 at s 5(2).

46. Finally, it must be remembered that a broad discretion is not an unlimited one. The discretion to consider any information in the assessment of good character is necessarily

circumscribed by the administrative law requirements that such information be relevant. Further, that discretion may not be exercised in a way that apprehends bias or violates the rule of law.

Roncarelli v Duplessis, [1959] SCR 121 at para 140, 16 DLR (2d) 689 [*Roncarelli*].
Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817, 174 DLR (4th) 193.

The benefits of a broad good character requirement outweigh any detrimental effects

47. The alleged deleterious effects of Paragraph 4(1)(a) are proportional to its salutary benefits. The proportionality analysis “requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms.” The relevant inquiry is whether the benefits of the impugned provision are worth the costs of the rights infringement.

Dagenais v Canadian Broadcasting Corporation, [1994] 3 SCR 835 at para 888, 120 DLR (4th) 12.

48. Context is crucial when conducting a proportionality inquiry. The Government must show through reason and evidence that the good character requirement will be beneficial, not that the law will in fact produce those benefits. Any potential adverse effects resulting from the good character requirement imposed by Paragraph 4(1)(a) are outweighed by the benefits of ensuring that public trust in the incorruptibility of police forces is maintained.

Hutterian Brethren, *supra* para 37 at para 85.

49. An incorruptible police force is essential to the maintenance of civil society and the rule of law. The rule of law is a “fundamental postulate of our constitutional structure” that ensures a “stable, predictable and ordered society” free from “arbitrary state action.” The public must have confidence that those charged with enforcing the law will discharge that duty in good faith and in the public interest. Requiring the utmost good character of police applicants is necessary to fostering this public confidence.

Roncarelli, supra para 46 at para 142.

Reference re: Secession of Québec [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385.

50. The Respondent acknowledges that the harm that comes from discrimination on the basis of race is significant. However, in this case, where we must weigh the greater social good that results from preserving public confidence in the incorruptibility of the police against the individual harm to a few, the balance must favour maintenance of an incorruptible police force.

51. In making this assessment, it is relevant that the HRP is the only major city police force that is “as racially diverse as its community.” What this demonstrates is that, despite some black individuals potentially being improperly excluded, the overall impact on the black community more generally is limited. This harm is less than the harm that would ensue from the disintegration of the rule of law.

Official Problem, *supra* para 1 at para 27.

ISSUE 3: A constitutional exemption is not an appropriate remedy

52. The parties agree that, if Paragraph 4(1)(a) is found to unjustifiably infringe s 15(1) of the *Charter*, the appropriate remedy is a suspended declaration of invalidity. This is the only necessary, appropriate and just remedy. This is not an appropriate case for a constitutional exemption under s 24(1) of the *Charter*.

Clarifications, *supra* 21 at para 4.

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

53. Personal remedies under s 24(1) are generally reserved for violations of rights that result from an unconstitutional application of an otherwise constitutional law. The Supreme Court has limited the availability of a constitutional exemption to exceptional cases in which it is necessary to protect the interests of a party who has succeeded in having legislation declared

unconstitutional and where the declaration of invalidity has been suspended. This is not such an exceptional case.

Carter v Canada, 2015 SCC 5 at paras 22, 129, [2015] 1 SCR 331 [*Carter*].

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 22, 173 DLR (4th) 1 [*Corbiere*].

R v Ferguson, 2008 SCC 6 at para 46 [2008] 1 SCR 96 [*Ferguson*].

Schachter v Canada, [1992] 2 SCR 679 at 715-17, 93 DLR (4th) 1.

54. Indeed, in all but one of the cases in which the Supreme Court has acknowledged the narrow availability of the remedy, an exemption was found to be inappropriate. Significantly, in *Carter*, the circumstances of patients suffering grievous and irremediable medical conditions causing intolerable suffering were insufficient to warrant a constitutional exemption from the suspended declaration of invalidity of the prohibition on assisted suicide.

Carter, supra para 53 at para 129.

Corbiere, supra para 53 at para 123.

Shachter, supra para 53 at 725-729.

55. In denying the Appellants' request in *Carter* for exemption during the period of suspended invalidity, the Supreme Court emphasized that complex regulatory regimes are better created by the legislature than the courts. In other words, the Government is better placed, and must be given the opportunity, to craft a *Charter*-compliant regime that appropriately balances the greater social good with the individual rights of competent adults. Similarly, in *Corbiere*, a constitutional exemption was refused because the Court held that it was preferable to allow the Government to develop a process to balance the rights of off-reserve and on-reserve band members.

Carter, supra para 53 at para 125.

Corbiere, supra para 53 at para 120.

56. Equally, the Nova Scotia Government is better placed to assess the regulatory requirements essential for policing in the province and to balance those requirements with the individual rights

of applicants to the police force. The concerns raised in *Ferguson* and reiterated in *Carter*, that stand-alone constitutional exemptions create uncertainty, undermine the rule of law and usurp Parliament's role, are equally apposite in the present case.

Carter, supra para 53 at para 125.

Ferguson, supra para 53 at para 69.

57. Applying an exemption would not achieve the Government's objective of ensuring that the individuals entrusted with upholding and enforcing the law in the community are of the highest moral character. It also has the effect of substituting the court's definition of good character, and what is relevant to that assessment, for that of the Government. It should be for the Government to determine which criteria applicants to the police force should meet in light of all of the circumstances. It may be that even under new, more tailored criteria the Appellant would be ineligible. A constitutional exemption in such circumstances would be an unjust intrusion by the court into the realm of the legislature.

R v. Seaboyer; R v. Gayme, [1991] 2 SCR 577 at para 84, 83 DLR (4th) 193.

58. Finally, the Appellant is not unduly prejudiced by the suspended declaration of invalidity. He will be able to re-apply under the new Regulation. That he may have to wait to do so is not an undue hardship: it is a recognition of the deference due to the legislative and executive branches of Government in crafting regulatory policy. Therefore, a constitutional exemption is not an appropriate and just remedy in the circumstances.

Hutterian Brethren, supra para 37 at paras 37, 53, 55, 187.

PART V—ORDERS SOUGHT

59. The Respondent respectfully requests that the Appeal be dismissed.

PART VI – TABLE OF STATUTES AND AUTHORITIES

Legislation	Pinpoints
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the Constitution Act, 1982, being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11	1, 15, 24
<i>Ontario Police Services Act</i> , RSO 1990, c P-15	43(1)(d)
<i>Police Act</i> 2004, SNS 2004, c-31	5(1), 5(2), 35, 97
<i>Police Regulations</i> NS Reg 230/2005	4(1)(a)
<i>Prince Edward Island Police Act General Regulations</i> PEI REG EC141/10	8(1)(h)
<i>Royal Canadian Mounted Police Act</i> , RSC 1985, c R-10	9.1(1)
<i>Royal Newfoundland Constabulary Act</i> , SNL 1992, c R-17	13(1)(c)
<i>Québec Police Act</i> , 2000, c P-13.1	115

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<i>Andrews v Law Society British Columbia</i> , [1989] 1 SCR 143, 56 DLR (4th) 1	37, 143, 195
<i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37, [2009] 2 SCR 567	37, 48, 53, 55, 85, 187
<i>Baker v Canada (Minister of Citizenship and Immigration)</i> [1999] 2 SCR 817, 174 DLR (4th) 193	855
<i>Carter v Canada</i> , 2015 SCC 5, [2015] 1 SCR 331	22, 125, 129
<i>Corbiere v Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 SCR 203, 173 DLR (4th) 1	22, 120, 173
<i>Dagenais v Canadian Broadcasting Corporation</i> , [1994] 3 SCR 835, 120 DLR (4th) 12	888
<i>DeMaria v Law Society of Saskatchewan</i> , 2013 SKQB 178, [2013] SJ No 292	60, 61
<i>Eaton v Brant County Board of Education</i> , [1997] 1 SCR 241, 142 DLR (4th) 385	67
<i>Egan v Canada</i> , [1995] 2 SCR 513, 124 DLR (4th) 609	168, 586-587
<i>Law v Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497, 170 DLR (4th) 1	51
<i>Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)</i> , 2007 SCC 2, [2007] 1 SCR 38	117, 133-135
<i>Miron v Trudel</i> [1995] 2 SCR 418, 124 DLR (4th) 693	131
<i>Montréal (City) v Québec (Commission des droits de la personne et des droits de la jeunesse)</i> , 2008 SCC 48, [2008] 2 SCR 698	25, 86
<i>Ontario (Attorney General) v Fraser</i> , 2011 SCC 20, [2011] 2 SCR 3	303, 315-19
<i>R v Ferguson</i> , 2008 SCC 6, [2008] 1 SCR 96	46, 69

<i>R v Kapp</i> , 2008 SCC 41, [2008] 2 SCR 483	17
<i>R v Nur</i> , 2011 ONSC 4874, 275 CCC (3d) 330	77, 78
<i>R v Nur</i> , 2013 ONCA 677, OR (3d) 401	18, 79, 117, 182
<i>R v Oakes</i> , [1986] 1 SCR 103, 26 DLR (4th) 200	69-71
<i>R v Seaboyer; R v Gayme</i> , [1991] 2 SCR 577, [1991] SCJ No 62	84
<i>Reference re: Secession of Québec</i> [1998] 2 SCR 217, 161 DLR (4th) 385	70
<i>Roncarelli v Duplessis</i> , [1959] SCR 121, 16 DLR (2d) 689	140, 142
<i>RJR-MacDonald Inc. v Canada (Attorney General)</i> , [1995] 3 SCR 199, [1995] SCJ No 68	102
<i>Schachter v Canada</i> , [1992] 2 SCR 679, 93 DLR (4th) 1	715-717
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<i>Vriend v Alberta</i> [1998] 1 SCR 493, 156 DLR (4th) 385	71, 72

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