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 APPELLANT

Team Number: 9

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PART I—OVERVIEW

1. Systemic racism in policing is an insidious problem that must not be tolerated. The historical disadvantage of black Nova Scotians persists today and is perpetuated by seemingly neutral policies that nevertheless work to reinforce systemic biases. The specific issue on this appeal is whether the broad discretion to examine good character authorized by Paragraph 4(1)(a) of the *Police Regulations* violates the Appellant's right to be free from racial discrimination. The Appellant submits that it does.

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

2. The effect of Paragraph 4(1) is to institutionalize a subjective and discretionary view of good character that reinforces black stereotypes. The breadth of the inquiry into good character authorized by the impugned provision further normalizes and perpetuates the prejudice inflicted on the black community by racially biased practices such as carding.

3. The perpetuation of systemic racism through ostensibly neutral policies cannot be justified. Accordingly, Paragraph 4(1)(a) must be struck down and the Appellant granted a constitutional exemption from its continued application during any period of suspended invalidity.

PART II—STATEMENT OF FACTS

Factual Background

4. Jerome Crawford is a young, black man who grew up in North Preston, which is a predominantly black neighbourhood. The area has a high rate of crime and a low socio-economic status. Despite having grown up around crime, Jerome has always been conscious to avoid it. He has never been charged with or taken part in criminal activity. Spurred on by the encouragement of his father, he succeeded in attaining a Bachelor of Commerce degree as well as a diploma in Police Foundations. As an aspiring, career-minded, young professional, Jerome meets all of the objective qualifications to be a police officer in many Canadian jurisdictions.

Official Problem, Wilson Moot 2018 at paras 1, 4, 9, 19, 29 [Official Problem].

5. In 2007, the new chief of the HRP announced a strategy for canvassing residents of high-crime areas. To increase police presence in places like North Preston, the HRP instituted "carding", a practice in which citizens are stopped without reasonable suspicion and required to show identification and to provide personal information.

Official Problem, *supra* para 4 at para 23.

6. In practice, carding disproportionately targets black individuals. The number of individuals carded in Halifax in the eight years since implementation is 36,700 of the city's total population of 400,000. The black community constitutes 3.5% of the Halifax population. In a fair environment, black people should have been carded in proportion to their percentage of the total population. Instead, at 11%, carding of black people is three times what is fair and equal. Demonstrably, there is an overrepresentation of black people being carded. The unfortunate result is that carding fosters resentment by the black community towards law enforcement and instills mistrust.

Official Problem, *supra* para 4 at paras 19, 20, 24, 30.

7. Jerome has been the target of 13 incidents of police carding. He has always been respectful to police but felt nervous and scared of what would happen if he did not answer the officers' questions. During each carding incident, Jerome felt like he was under suspicion even though he was never doing anything wrong. At no time did he feel like his participation in the conversations was voluntary or that he had any choice to simply walk away. Rather than feeling resentment towards police, Jerome wants to join the force to engage with his community in a more thoughtful and sensitive way and effect change from within. Jerome, therefore, applied to be an HRP officer in 2014.

Official Problem, *supra* para 4 at paras 8, 15, 17, 21.

8. In assessing Jerome's application, the chief officer relied on information amassed through the practice of carding. Paragraph 4(1)(a) of the *Regulations* authorizes the use of carding information in the assessment of good character as it prescribes the consideration of "any other information in the possession of the police."

9. In Jerome's case, the carding information revealed that, in his adolescence, he knew a few people who were either persons of interest to the police or who had engaged in criminal activity. This is not unusual for an individual who has grown up in a high-crime neighbourhood. However, this information would not have existed in the hands of the HRP at all were it not for Jerome being a target for carding 13 times and feeling intimidated and threatened into answering questions about his acquaintances. Nevertheless, this information, obtained from an intimidated adolescent in the course of questionable police interactions, was the reason Jerome's application was rejected.

Regulations, *supra* para 1 at para 4(1)(a).
Official Problem, *supra* para 4 at paras 8, 14, 15, 17.

Procedural History

10. Following the HRP's rejection of his application, Jerome brought an application before the Nova Scotia Supreme Court in March 2016 seeking a declaration that Paragraph 4(1)(a) of the *Regulations* infringed his section 15(1) *Charter* rights. Justice Lazier allowed the application, holding that Paragraph 4(1)(a) infringed the Jerome's section 15(1) *Charter* rights. 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*.

> *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*].
> Official Problem, *supra* para 4 at 10.

11. 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) did not deprive Jerome of his section 15(1) *Charter* rights since the violation at most flows from the "unconstitutional application of an otherwise neutral provision, not from the legislation itself."

> Official Problem, supra para 4 at 10.

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

> Official Problem, *supra* para 4 at 10, 11.

PART III—STATEMENT OF POINTS IN ISSUE

13. There are 3 issues on appeal:

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

Yes.

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*?

No.

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 to the HRP while the existing good character requirement remains in effect?

Yes.

PART IV—ARGUMENT

ISSUE 1: Paragraph 4(1)(a) of the *Police Regulations* infringes section 15 of the *Charter*

14. Discrimination is established where (i) a law creates a distinction based on an enumerated or analogous ground and (ii) the distinction creates a disadvantage by perpetuating prejudice or stereotyping based on the enumerated grounds of race. Paragraph 4(1)(a) imposes differential treatment that has the effect of perpetuating disadvantage, prejudice and stereotyping of black individuals.

> *Andrews v Law Society British Columbia*, [1989] 1 SCR 143 at 178-80, 56 DLR (4th) 1 [*Andrews*].
> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at 17 [*Kapp*].
> *Québec (Attorney General) v A*, 2013 SCC 5 at 162, [2013] 1 SCR 61 [*Québec*].

15. Section 15 of the *Charter* is concerned with substantive and not merely formal equality. Formal equality is often framed as treating those who are similarly situated the same way. Substantive equality is grounded in "recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law." As such, the equality analysis is a contextual inquiry into whether the impugned provision substantively deprives claimants of equal treatment under the law. The differential treatment need not be intentional for it to be discriminatory and a law need not draw an obvious distinction to violate section 15(1) of the *Charter*.

> *Andrews, supra* para 14 at para 171.
> *Kapp, supra* para 14 at para 14.
> *Québec, supra* para 14 at para 162.
> *Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at paras 25, 51, 170 DLR (4th) 1 [Law]*.

Paragraph 4(1)(a) creates a distinction, in effect, based on race

16. Section 15(1)'s guarantee of substantive equality encompasses the right to be free from adverse effects discrimination. As Abella J recognized in *Québec*, laws that appear to be neutral

because they do not draw obvious distinctions may nevertheless "treat individuals like second-class citizens whose aspirations are not equally deserving of consideration." Overlooking the adverse effects of a neutral policy on certain groups supports formal equality and perpetuates systemic discrimination. This is precisely the effect of Paragraph 4(1)(a) of the *Regulations*.

> *Andrews, supra* para 14 at 172-75.
> *Québec, supra* para 14 at para 198.
> *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union*, [1999] 3 SCR 3 at para 41, 1999 SCC 48.

17. In assessing a claim of adverse effects discrimination, the question is whether the law is unequal in its actual effect not whether the state has directly caused the inequality. The good character requirement in Paragraph 4(1)(a) and its discretionary assessment have an unequal effect on black applicants to the HRP.

> *Janzen v. Platy Enterprises Ltd*., [1989] 1 SCR 1252 at para 62.
> *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504 at para 76, 2003 SCC 54.
> *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 at para 40.

Good character disproportionately negatively affects black individuals

18. The phrase "good character" is an inherently undefined and subjective concept that necessarily reflects the attitudes, experiences, and prejudices of the dominant class. It embodies institutionalized, systemic, and unconscious biases. In the Appellant's circumstances, the good character requirement creates an effects-based distinction on the basis of race.

> Alice Woolley, "Tending the Bar: The 'Good Character' Requirement for Law Society Admission" (2007) 30:27 Dalhousie LJ 28 at 69.
> *Konigsberg v State Bar,* 353 S Ct 722 at 728 (1957) [*Konigsberg*].

19. By requiring applicants to meet an undefined standard of good character, Paragraph 4(1)(a) necessarily works to distinguish those candidates who fit the institutionalized perception of good character from those that do not. The undefined standard has the effect of creating a distinction

based on race because it reinforces the historical and sociological disadvantages already imposed on black individuals that are not imposed on others.

> *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396 at para 43, 2011 SCC 12 [*Withler*].

The undefined and extensive discretion authorized by Paragraph (4)(1)(a) disproportionately affects black applicants

20. Even if "good character" is not found to be problematic in itself, the undefined and extensive discretion to assess good character is. By giving the chief officer an extensive discretion to inquire into the background and character of applicants, Paragraph 4(1)(a) works to disproportionately exclude black people from the HRP. The *Regulations* in fact authorize the chief officer to consider, without limitation, *any* available information, including racially biased carding information. While the constitutionality of carding practices is not before this Court, it is relevant that such practices are subject to ongoing review. The context relevant to the equality analysis necessarily includes the apparently biased enforcement of carding practices because that information is the basis for Jerome's rejection.

> Official Problem, *supra* para 4 at para 23.

21. Carding programs typically target higher-crime neighborhoods. (Official Problem) Demographically, such neighborhoods have populations that are disproportionately lower-income and racialized. Further, implicit bias in even the most well-intentioned officers results in a disproportionate number of black people being targeted for carding. As a result, black individuals in Halifax are three times more likely to be subjected to carding than their white counterparts. Despite making up only 3.5% of the population, black persons make up 11% of all individuals subject to carding. Plainly, race is a distinguishing factor in the instances of carding in Halifax.

R v Nur, 2011 ONCA 677 at para 182, 117 OR (3d) 401 [*Nur*].
Official Problem, *supra* para 4 at paras 17, 25, 30.

22. By authorizing the use of such information, Paragraph 4(1)(a) disproportionately affects black individuals seeking to become police officers. The expansive discretion granted to the chief officer in assessing an applicant's good character under Paragraph 4(1)(a) imposes a disproportionate burden on black applicants because it allows racially biased practices to inform the assessment. This kind of adverse impact based on enumerated grounds is precisely the kind of discrimination against which section 15(1) of the *Charter* is intended to grant protection.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 106, [2009] 2 SCR 567 [*Hutterian Brethren*].
Andrews, supra para 14 at 172-75.

The distinction created by Paragraph 4(1)(a) perpetuates both prejudice against and the stereotyping of black applicants

23. Two concepts guide the assessment of discrimination at the second stage of the test: (i) the perpetuation of prejudice and disadvantage; and (ii) stereotyping. Prejudice and stereotyping are not discreet elements of the test, but rather useful indicia by which discrimination may be measured. Where state conduct "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."

Québec, supra para 14 at para 318, 327, 332.

24. The perpetuation of historical disadvantage is a central and "compelling factor" in the discrimination analysis. There can be no question that black individuals in Canada generally, and Nova Scotia specifically, have suffered serious historical and ongoing disadvantage. Unemployment of black individuals in Nova Scotia is double that of the non-visible minority population and those black individuals that are employed earn an average of $6,200 less than their non-visible minority counterparts. In Jerome's case, Paragraph 4(1)(a) perpetuates both disadvantage and stereotyping of his already disadvantaged position as a black individual.

Law, *supra* para 15 at paras 25, 51.
Official Problem, *supra* para 4 at para 31.
Withler, *supra* para 19 at para 35.

The good character requirement perpetuates prejudice against and disadvantage of black applicants

25. By requiring applicants to meet an undefined good character requirement, Paragraph 4(1)(a) necessarily works to disadvantage applicants who do not fit within the institutionalized perception of good character. Originally defined with reference to wealth and social standing, good character requirements for professionals are inherently imbued with the attitudes, experiences and prejudices of the dominant class. As the United States Supreme Court has recognized:

> [t]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of [rights].

Deborah L. Rhode, "Moral Character as a Professional Credential" (1985) 94:3 Yale LJ 491 at 494.
Konigsberg, *supra* para 18 at 728.

26. The effect of requiring police applicants to meet such a good character requirement is to perpetuate the systemic disadvantages already faced by members of the black community. Bias and prejudice in the administration of criminal justice serves to perpetuate the socioeconomic disadvantage of the black community. Black people in Canada are more likely to be unemployed, achieve lower rates of education, have lower incomes and to reside in public housing. These socio-economic disadvantages contribute to the proliferation of criminal activity in black neighborhoods.

Nur, *supra* para 21 at paras 78-79.

27. The good character requirement in Paragraph 4(1)(a) is to be applied by the same front-line administrators of the criminal justice system that are responsible for the prejudice and bias in the system's administration. Good character, therefore, cannot be divorced from the inherent biases and prejudices with which Canada's euro-centric history has imbued it, including the notion that one's associations define one's character.

The overbroad discretion to inquire into the background of applicants perpetuates prejudice against and disadvantage of black applicants.

28. Even if requiring applicants to demonstrate good character is not found to be problematic in itself, the undefined and expansive discretion by which good character is assessed disproportionately negatively affects black applicants. In effect, Paragraph 4(1)(a) perpetuates the pre-existing disadvantage of black applicants and "widens the gap" between them and the rest of society because it systematizes and institutionalizes the racism inherent in carding practices.

Québec, *supra* para 14 at para 31.

29. Fulfillment of the eligibility criteria prescribed in Paragraph 4 of the *Regulations* is determined solely in the discretion of the chief. Further, Paragraph 4(1)(a) authorizes the chief to consider, without limitation, *any* information in his or her possession about an applicant when assessing whether the good character requirement is met. As such, the impugned paragraph authorizes consideration of controversial and questionable carding information.

Official Problem, *supra* para 4 at 1.

30. The alleged bias in carding practices is an integral part of the contextual inquiry into discrimination in this case. Even if carding is not considered unconstitutional, there can be no question that it is applied, in Halifax, in a way that reflects bias against black individuals given their three-fold overrepresentation in carding incidents.

Official Problem, *supra* para 14 at para 24.

31. By authorizing the use of carding information, Paragraph 4(1)(a) has the effect of further systematizing and institutionalizing the inherent racial bias bound up in carding practices. This necessarily widens the gap between black individuals and the rest of society.

32. Permitting the use of carding information in the assessment of character also perpetuates racially biased stereotypes. As LeBel J summarized in *Québec*, stereotypes:

> … are inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group … Negative characteristics, such as lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominantly to members of a particular group.

Québec, supra para 14 at para 202.

33. The moral worth identified by LeBel J as problematic is the same moral worth that is being assessed through the good character requirement in Paragraph 4(1)(a). By authorizing assessment of good character by reference to an absence of certain associations, Paragraph 4(1)(a) enables the perpetuation of false stereotypes associating black individuals with criminality.

34. Necessarily, for an association to be disqualifying in the context of Paragraph 4(1)(a), one must presume that knowing someone who has engaged in criminal activity predisposes the assessed individual to criminality. Predisposition to criminality is a pervasive and false black stereotype. The pervasiveness of this stereotype is evidenced by the carding statistics themselves: black people are three times more likely to be carded than their white counterparts. The overrepresentation of black individuals in carding reinforces the stereotype associating race with predisposition to criminality. By authorizing the use of carding information in the assessment of

character, Paragraph 4(1)(a) perpetuates this stereotype and denies the reality of the socioeconomic disadvantage and prejudice faced by black people.

Nur, supra para 20 at paras 78-79.

35. Consequently, Jerome is assessed not on the basis of his actual merits and capacities, but on the basis of stereotypical assumptions about the intersection of race, associations, and criminality. This is the very essence of discrimination.

ISSUE 2: The infringement of Jerome's section 15(1) equality is not justified under section 1 of the *Charter*

36. The limitation of Jerome's s 15(1) equality rights cannot be justified under s 1 of the Charter. This Court should afford the Respondent little deference in determining whether it has discharged its onus of proving that the limitation is "demonstrably justified in a free and democratic society." The violation of Jerome's equality rights is rooted in and perpetuates hundreds of years of systemic racism. A limitation that has the effect of entrenching and perpetuating systemic racism should not be capable of being justified.

37. To establish that a limitation of *Charter* rights is "demonstrably justified", the Respondent must prove that (i) the rights violation is rationally connected to the aim of the legislation; (ii) the impugned provision minimally impairs the *Charter* right in question; and (iii) there is proportionality between the effect of the measure and its objective. The Appellant acknowledges that the purpose underlying Paragraph 4(1)(a) is a pressing and substantial objective. However, the limitations imposed by Paragraph 4(1)(a) are not rationally connected to these purposes, are not minimally impairing, and have deleterious effects that outweigh any salutary benefits.

Egan v Canada, [1995] 2 SCR 513 at para 182, [1995] SCJ No 43.
R v Oakes, [1986] 1 SCR 103 at paras 69-71, 26 DLR (4th) 200 [*Oakes*].

There is no rational connection between the purpose of Paragraph 4(1)(a) and its effects

38. The underlying objective of the impugned provision is to ensure that police forces can recruit officers who act with integrity and uphold the law. By enabling police forces to do so, the aim is to ensure an adequate and effective level of policing which preserves the peace, prevents crime and improves police relations with communities within the Province. This serves to protect the reputation of the policing profession and instill confidence in the community at large. The means chosen by the legislature, an open-ended, discretionary good character requirement, are not rationally connected to the above objectives.

> Official Problem, *supra* para 4 at 11.
> *An Act Respecting Policing in Nova Scotia*, CNS 2004 c 31 as amended by 2007, c. 10, s. 5; 2010, c. 12, s. 2; 2010, c. 68; 2011, c. 69; 2014, cc. 25, 55, 56, s 5(1), 5(2) [*Regulations*].

39. There is no "causal connection between the infringement and the benefit sought 'on the basis of reason or logic." To be rational, the measure adopted must be carefully tailored and designed to achieve the objective in question. It must not be arbitrary, unfair or based on irrational considerations"; however, this is its effect.

> *RJR-MacDonald Inc. v Canada* (*Attorney General*), [1995] 3 SCR 199 at 153, [1995] SCJ No 68.
> *Oakes*, *supra* para 37 at 70, Dickson CJ.

Good character is inherently arbitrary

40. Requiring applicants to be of "good character" is inherently imposing an arbitrary standard. There are no objective criteria against which good character is to be measured. Accordingly, any assessment of good character will be entirely dependent upon the subjective morality of the assessor, not the actual circumstances and characteristics of the applicant. Laws premised on an inaccurate characterisation of an individual or group on grounds that are unacceptable under section 15(1) of the *Charter* will be arbitrary in themselves. A law that is arbitrary in its effects is not rationally connected to its purpose.

Québec, *supra* para 14 at para 201.
Hutterian Brethren, *supra* para 22 at para 48.

The lack of objective criteria for assessing good character creates an arbitrary discretion

41. In the alternative, if good character is not itself an arbitrary requirement, the lack of any criteria by which character is to be measured makes it an arbitrary and unfair requirement. Paragraph 4(1)(a) prescribes an open-ended and expansive inquiry into an applicant's character, without limitation as to the nature of the information to be considered nor the time period relevant to the inquiry. In the context of a policing environment still infused with implicit bias affiliating black individuals with criminality, this is inherently unfair and leads to arbitrary rather than meritorious assessments of character.

Official Problem, *supra* para 4 at para 30.
Campbell v Jones, [2001] NSJ 598 at para 25 [*Campbell*].

42. Paragraph 4(1)(a)'s arbitrary effect is obvious when Jerome's circumstances are contrasted with that of a white applicant. Objectively, Jerome has shown himself to be "incorruptible": he has never engaged in criminal activity, despite knowing people who have; he has always been polite and honest with police even in circumstances where the police arguably have not shown him the same respect in their interactions with him; and he wants to be a positive influence within his community. Nevertheless, because he was subjected to carding and because he answered the questions asked of him honestly, his application has been rejected.

Official Problem, *supra* para 4 at para 17.

43. Conversely, a white individual who has never been subjected to carding, and whose association with serious criminals has, therefore, never come to light, would have his application accepted. A similar result would ensue even if that individual had participated in criminal activity but simply had not been identified. That same individual may have associations with

organized crime. However, because there is no carding information to reveal these associations, his application will be accepted.

44. This example illustrates the arbitrariness and irrationality of the good character requirement in Paragraph 4(1)(a). In effect, Paragraph 4(1)(a) fails to exclude corruptible applicants who should be excluded, while excluding upstanding individuals like Jerome who should not be excluded. The limitations imposed by the effects of Paragraph 4(1)(a), therefore, are not rationally connected to its objective of ensuring the recruitment of individuals who will act with integrity and uphold the law.

Paragraph 4(1)(a) does not minimally impair Jerome's section 15(1) equality rights

45. The test for minimum impairment is that there must not be "an alternative, less drastic means of achieving the objective in a real and substantial manner." If there is a reasonable substitute that achieves the legislative goal, then the Government is obliged to use that substitute. There are alternative means available to protect the safety of the public and uphold the reputation of the policing profession. For example, the language in the provision to provide objective criteria of assessment could be tailored. The impugned provision is overbroad in its effects and arbitrarily assesses applicants on an undefined basis.

Hutterian Brethren, *supra* para 22 at para 55.

A broad, discretionary assessment of good character is not minimally impairing

46. There are more tailored, less harmful means of ensuring that applicants possess the character necessary to act with integrity and to uphold the law than an expansive discretionary assessment. Specifically, objective assessment of an applicant's suitability or competency should be preferred to a subjective assessment of good character. Suitability or competency

requirements defined by reference to qualitative and tailored criteria provide an objective basis for assessing an applicant's capacity and tendency to act with integrity and to uphold the law.

47. This is the approach used in Alberta. The *Police Service Regulation* assesses candidates on the basis of competencies. Competency is assessed based on "basic standards of skill and knowledge". Other provinces apply a good character requirement, but do so with reference to other measurable criteria, such as not having any criminal convictions and not having criminal charges pending before the courts. There is no evidence to suggest that police in these jurisdictions are more susceptible to corruption.

Alberta Police Service Regulation 356/1990 at s 3(1).

48. Therefore, Paragraph 4(1)(a) cannot be said to be minimally impairing of Jerome's equality. A competency-based, objective assessment is clearly superior to the open-ended, subjective assessment authorized by the impugned provision.

The deleterious effects are disproportionate to the benefits

49. In order to justify the infringement of Jerome's equality, the Respondent must demonstrate that the salutary benefits of Paragraph 4(1)(a) outweigh the deleterious effects of the limitation. The more severe the deleterious effects of the provision, the stronger the objective must be if the law is to be "reasonable and demonstrably justified in a free and democratic society."

Oakes, *supra* para 37 at 70, 71.

50. There is benefit to ensuring that applicants to the police force demonstrate integrity and a capacity to uphold the law. However, there is no "cogent and persuasive" evidence that a broad good character requirement guarantees that only the most upstanding applicants will be accepted. Further, the deleterious effects of further institutionalizing and normalizing systemic racism far outweigh this benefit.

51. The effects of systemic racism perpetuated by the good character requirement and the extensive discretion afforded in its assessment, place a burden on an entire section of the population that keeps them from fully participating in society. Paragraph 4(1)(a) furthers racial stereotypes and stigmas which deepen and entrench systemic racism. Systemic racism against black people within police forces includes the rules, norms and values of the institution which have evolved over time. In *Campbell*, Justice Moir asserted:

> Stereotypical thinking about the nature and character of Black people has become part of … police culture. Blacks are not viewed as individuals in their own right but as members of a specific group who are … defined by certain characteristics such as … their propensity to criminal behaviour."

Québec, *supra* para 14 at para 325, Abella J.
Campbell, *supra* para 41 at para 25.

52. Courts in Canada have accepted that this kind of racism exists within police forces. Anti-black racism, in particular, exists at a societal level but the criminal justice system further perpetuates negative, if only subconscious, racial stereotypes.

R. v. Parks, (1993), 15 OR (3d) 324 at p. 342, 84 C.C.C. (3d) 353 at p. 369 (C.A.), Doherty J.A. [*Parks*].

53. The harm extends beyond exacerbating and systematizing racism. Ultimately, such discrimination will result in a police force that is less representative of the population it serves, leading to unequal enforcement of the laws, or at least a perception that the law is being applied unequally. This breeding of mistrust is antithetical to the fundamental principle of the rule of law.

Roncarelli v Duplessis, [1959] SCR 121 at p 142, 16 DLR (2d) 689.
Reference re: Secession of Québec [1998] 2 SCR 217 at para 32.

54. The rule of law is meant to protect equality and ensure a consistent law enforcement approach regardless of a person's background. Systemic racism "undermines the inherent equality enjoyed by all citizens and is incompatible with Canadian policing traditions".

Institutionalized racism, especially within an organisation that is meant to keep the community safe and provide a sense of security, is in direct juxtaposition with the rule of law. When the population no longer views the state as bound by the rule of law, rights cease to have meaning. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status. Therefore, the harm of institutionalizing racism within the institutions that serve and protect society and uphold the rule of law is completely disproportionate to any benefit sought to be achieved by the broad good character requirement in Paragraph 4(1)(a).

> *Brown v. Durham Regional Police Force*, [1998] OJ No 5274 at 15, 167 DLR (4th) 672.
> *R. v. Peck*, [2001] OJ No. 4581 (Ont. SCJ).
> *Saskatchewan (Human Rights Commission) v Whattcott* 2013 SCC 11 at para 74, [2013] 1 SCR 467.

ISSUE 3: A constitutional exemption is an appropriate and just remedy

55. The Appellant agrees that a suspended declaration of invalidity pursuant to s 52(2) of the *Constitution Act 1982* is an appropriate, though insufficient, remedy. To create a right without a remedy is antithetical to the *Charter*; however, such is Jerome's fate absent an exemption to relieve from the continued burden of Paragraph 4(1)(a) during the period of suspended invalidity.

> *Charter, supra* para 10 at s 52(2).
> *Nelles v Ontario,* 1989 2 SCR 170 at para 50, 60 DLR (4th) 609.
> *R v Mills,* [1986] 1 SCR 863 at para 295, 29 DLR (4th) 161.

56. Although the doctrine of constitutional exemption largely has been rejected by the Supreme Court, it retains an important function in the specific context of suspended declarations of invalidity. In such cases, pursuant to s 24(1) of the *Charter*, an exemption may be granted to relieve a successful claimant of the continued burden of an unconstitutional law during the period of suspended invalidity.

> *Carter v Canada (Attorney-General),* 2016 SCC 4, [2016] 1 SCR 13.
> *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para 22,

173 DLR (4th) 1[*Corbiere*].
R v Ferguson, 2008 SCC 6, [2008] 1 SCR 96 at para 46.

For Jerome, an exemption is the only "appropriate and just remedy"

57. Section 24(1) of the *Charter* has been described as a precision instrument that enables the Court to "fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system." An exemption under s 24(1), coupled with the suspended declaration of invalidity under s 52(1), is an "appropriate and just" remedy that appropriately balances individual fairness to Jerome with the greater societal good of ensuring the integrity of applicants to the HRP.

R v O' Connor [1995] 4 SCR 411, 130 DLR (4th) 235.

58. The concerns identified by the Supreme Court in *Ferguson* relating to uncertainty, the rule of law, and the role of the legislature are not apposite in this case; nor is this a circumstance requiring complex legislative policy, as in *Corbiere* or *Carter*. Granting a personal exemption during the period of suspended invalidity will not frustrate the purpose or intent of the Regulation. Jerome has demonstrated his propensity to act with integrity and to uphold the law and he is qualified in all other respects. It is neither appropriate nor just to require him to wait for legislative action in order to be relieved of the burden of systemic racism perpetuated by an unconstitutional law.

Carter v Canada, 2015 SCC 5 at para 22, 129, [2015] 1 SCR 331.
Corbiere, supra para 56 at para 123.
R v Ferguson, 2008 SCC 6 at para 46, [2008] 1 SCR 96.

PART V—ORDERS SOUGHT

59. The Appellant seeks an order (a) allowing the appeal and reversing the order of the Court of Appeal; (b) declaring that Paragraph 4(1)(a) of the *Police Regulations* is invalid and unjustifiably infringes s 15(1) of the *Charter*, with the declaration of invalidity suspended for a period of 12 months; and (c) exempting the Appellant from the application of Paragraph 4(1)(a) during the period of suspended invalidity, pursuant to s 24(1) of the *Charter*.

PART VI – TABLE OF STATUTES AND AUTHORITIES

Legislation	Pinpoints
Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	1, 15, 24, 52
Police Act, SNS 2004	4(1)(a)
Police Regulations NS Reg 230/2005	97(1)

Jurisprudence	Pinpoints
Andrews v Law Society British Columbia, [1989] 1 SCR, 56 DLR (4th) 1	171, 172-75, 178-80
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567	48, 55, 106
Alberta Police Service Regulation 356/1990	s 3(1)
British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union, [1999] 3 SCR, 1999 SCC 48	41
Brooks v. Canada Safeway Ltd., [1989] 1 SCR 1219, [1989] SCJ No 42	40
Brown v. Durham Regional Police Force, [1998] OJ No 5274, 167 DLR (4th) 672	15
Carter v Canada, 2015 SCC 5, [2015] 1 SCR 331	22, 129
Carter v Canada (Attorney-General), 2016 SCC 4, [2016] 1 SCR 13	125
Campbell v Jones, [2001] NSJ NO 373, 197 NSR (2d) 212	25
Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1	22
Egan v Canada, [1995] 2 SCR 513, [1995] SCJ No 43	182
Janzen v. Platy Enterprises Ltd., [1989] 1 SCR 1252, 59 DLR (4th) 352	62
Konigsberg v State Bar, 353 S Ct 722 (1957)	728
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1	25, 51
Nelles v Ontario, 1989 2 SCR 170, 60 DLR (4th) 609	50
Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 SCR 504, 2003 SCC 54	76
RJR-MacDonald Inc. v Canada (*Attorney General*), [1995] 3 SCR 199 at 153, [1995] SCJ No 68	153
R v Ferguson, 2008 SCC 6, [2008] 1 SCR 96	46