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] Police officers influence the day-to-day enforcement of the law more than any other individuals in society. The Halifax Regional Police ("the HRP") has extensive powers and is entrusted with safeguarding the communities it serves. The HRP has a serious responsibility to ensure that only individuals of the highest moral character become police officers. Paragraph 4(1)(a) of the *Police Regulations* requires the HRP to assess an applicant's good character having regard to all available information, including street checks. The consideration of this information is crucial to maintaining the legitimacy of the police force and ensuring that HRP officers are not susceptible to coercion.

[2] Any violation of section 15 of the *Charter* is caused by the HRP's unconstitutional application of Paragraph 4(1)(a). This provision itself does not violate section 15 of the *Charter* because it does not create a distinction on the basis of an enumerated or analogous ground. Alternatively, any distinction that is created by the provision is not arbitrary and thus not discriminatory. The Appellant was rejected from the HRP because of his known criminal affiliations and not because of his race.

[3] If Paragraph 4(1)(a) violates section 15 of the *Charter*, the infringement is justified under section 1. The creation of police hiring standards is a complex social task that warrants a high degree of deference to the Legislature. Any impact on section 15 is minimally impairing because the HRP is granted an appropriate amount of discretion to balance important objectives.

[4] The Appellant should not be granted a constitutional exemption under section 24(1) of the *Charter*. A declaration of invalidity, even when suspended, is a meaningful vindication of the Appellant's rights. In the interim, the Appellant will not suffer the severe harm required to warrant a constitutional exemption.

PART II – STATEMENT OF FACTS

1. Factual Background

a) The HRP is committed to public safety and the creation of a moral police force

[5] Police officers are on the front line of law enforcement and safeguard the communities they serve. The HRP believes it has a serious responsibility to ensure that only individuals of the highest moral character become police officers due to the immense responsibilities and powers they possess. Applicants who are affiliated with criminals may be subject to coercion or blackmail and are not accepted as a result. The HRP strives to be perceived as incorruptible to maintain its legitimacy in the community.

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

[6] Halifax is the only major city in Canada with a police force as racially diverse as its community. Police forces that have a racial composition reflective of the communities they serve are better able to gain the trust of individuals who live there. Racially diverse police forces also have a better understanding of the communities in which they work. Approximately 3.5 percent of the population in Halifax and its surrounding area is Black. Seventy percent of the population in North Preston, including the Appellant, identify as Black. Black people in Nova Scotia have historically experienced, and continue to experience, disadvantage seeking and maintaining stable employment.

Official Problem, *supra* para 5 at paras 27, 25, 24, 19, 1, 31.

[7] In 2007, the HRP implemented a community policing initiative to strengthen ties between police officers and the neighbourhoods they serve. The Appellant is from North Preston, a community generally considered to have a higher per capita crime rate than other regions in Halifax. Community policing generally involves increased foot patrols, particularly in high-

crime neighbourhoods. Through this initiative, the HRP engages residents in conversations, also known as street checks. The constitutionality of street checks is not at issue. The data collected from street checks has been very useful for investigating crimes and implementing crime prevention strategies. Of the individuals approached by the HRP during street checks, eighty-nine percent were not Black.

Official Problem, *supra* para 5 at paras 5, 6, 31, 21, 24.
Clarifications to the Official Problem, Wilson 2018 at para 5 [Clarifications].

[8] Police hiring in Nova Scotia is administered under the *Nova Scotia Police Act* and the *Police Regulations* enacted pursuant to it. Paragraph 4(1)(a) of the *Police Regulations* ("the Provision") requires that applicants to the HRP possess good character. The Chief Officer determines whether a candidate satisfies the good character requirement. This assessment is made with regard to criminal and background checks and any other information in the possession of the Chief Officer, including street check information.

NS Reg 230/2005, s 4(1)(a).

[9] Nova Scotia is not unique in requiring that prospective officers have no association with criminal activity and possess good character. The Saskatoon Police Services and the Royal Canadian Mounted Police both require that applicants have no history of criminal activity, either detected or undetected by police. The Calgary Police Force has similar hiring criteria.

Official Problem, *supra* para 5 at para 29.

b) The Appellant was rejected by the HRP for affiliating with individuals involved with crime

[10] The Appellant, Jerome Crawford, chose to work at his father's convenience store in North Preston ("Alvins") where drug trafficking took place. Two of the Appellant's coworkers and friends, Clyde George and Gavin Benjamin, sold marijuana, mushrooms, cocaine, and

MDMA while at work. The Appellant knew about these crimes, witnessed these crimes, and yet continued his employment without reporting them. During this time, he was completing a Bachelor of Commerce and a Diploma in Police Foundations.

Official Problem *supra* para 5 at paras 2, 4, 3, 16.

[11] The Appellant applied to the HRP and was rejected because he failed to meet the good character requirement. He was employed at Alvins in the same year he applied to the HRP. The Appellant's street check records showed that he was affiliated with individuals known for their involvement in criminal activity. The HRP reviewed information obtained from the thirteen street checks the Appellant had amassed by the time of his application.

Official Problem *supra* para 5 at paras 16, 14.

[12] On at least three occasions, the police asked the Appellant for his information when he was in close proximity to where a crime occurred. On two of those occasions, he was approached while close to Alvins. On the third, he was approached after leaving a party where someone had just been stabbed.

Official Problem, *supra* para 5 at para 16.

[13] The Appellant admitted to being friends with known criminals multiple times during street checks. In March 2010 and September 2012, the Appellant acknowledged that he worked at Alvins and that he was friends with Clyde and Gavin. Clyde and Gavin were noted in the HRP database as "persons of interest" with respect to drug trafficking. Clyde had previously pleaded guilty to possession of marijuana for the purposes of trafficking. In November 2013, the Appellant was approached by police while with a friend who had previously been convicted of aggravated assault.

Official Problem *supra* para 5 at paras 16, 10.
Clarifications to the Official Problem, *supra* para 7 at para 5.

2. Procedural History

[14] The Appellant brought an application in the Nova Scotia Supreme Court seeking a declaration that Paragraph 4(1)(a) of the *Police Regulations* is of no force or effect. The Appellant did not challenge the HRP's reasoning for the decision to reject his application or the discretion exercised by the HRP in conducting street checks.

Official Problem, *supra* para 5, at p 2.
Clarifications, *supra* para 7 at para 3.

[15] In September 2016, Justice Lazier of the Nova Scotia Supreme Court allowed the application and held that Paragraph 4(1)(a) of the *Police Regulations* violated section 15 of the *Charter* and was not demonstrably justified under section 1. Justice Lazier held that reading in limitations to the good character requirement would be inappropriate because any amendment to Paragraph 4(1)(a) must be made by the Legislature. Justice Lazier granted the Appellant a constitutional exemption to re-apply to the HRP and have his application assessed without information obtained from street checks.

Official Problem, *supra* para 5 at para 31.

[16] The Nova Scotia Court of Appeal overturned Justice Lazier's decision and held that the Provision did not violate section 15 of the *Charter*. Justice Balantine's majority judgment stated that the Appellant failed to draw a clear nexus between race and the qualifications required for admission to the police force. The good character requirement aligned with the province's objective of ensuring that police forces remain incorruptible. Further, it was not appropriate for the Court to dictate what information the police could or could not rely on when assessing candidates. Justice Balantine clarified that, if she was wrong, any violation of the Appellant's section 15 rights stemmed from an unconstitutional application of an otherwise neutral provision.

Official Problem, *supra* para 5 at para 31.

PART III – STATEMENT OF POINTS IN ISSUE

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

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

Any violation of section 15 of the *Charter* is caused by the HRP's unconstitutional application of Paragraph 4(1)(a). The Provision itself does not violate section 15 of the *Charter* because it does not create a distinction on the basis of an enumerated or analogous ground. Any distinction that is created by the Provision is not arbitrary and therefore not discriminatory.

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

If the Court finds that Paragraph 4(1)(a) of the *Police Regulations* violates section 15 of the *Charter*, the infringement is demonstrably justified in a free and democratic society under section 1.

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

The Appellant should not be granted a constitutional exemption pursuant to section 24(1) of the *Charter* to re-apply to the HRP. A suspended declaration of invalidity pursuant to section 52(1) of the *Constitution Act* is a meaningful and appropriate remedy.

PART IV – ARGUMENT

Issue 1: Paragraph 4(1)(a) of the *Police Regulations* does not violate section 15 of the *Charter*

1. Any violation of section 15 of the *Charter* stems from an unconstitutional application of Paragraph 4(1)(a) and not the Provision itself

[18] Paragraph 4(1)(a) of the *Police Regulations* does not violate section 15 of the Charter. Any violation of section 15 is a result of an unconstitutional application of the Provision. The appropriate mechanism for such a violation is administrative review of either the HRP's use of street check data or the Chief Officer's decision to reject the Appellant's application to the HRP. Since the Appellant did not bring an application for judicial review, it is not appropriate for this Court to consider the constitutionality of any application of the *Police Regulations*.

> *Divito v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 SCC 47 at para 49, [2013] 3 SCR 157.

[19] Since Paragraph 4(1)(a) applies equally to all candidates, improper implementation by the HRP does not render the Provision itself unconstitutional. In *Khawaja*, the Supreme Court of Canada held that "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." The government is entitled to enact laws with the expectation that administrative discretion will be exercised in accordance with the *Charter* (*Little Sisters*). The solution to any violation of section 15 in the Appellant's case would be to remedy the HRP's improper enforcement of Paragraph 4(1)(a).

> *R v Khawaja*, 2012 SCC 69 at para 83, [2012] 3 SCR 555 [*Khawaja*].
> *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 136, [2000] 2 SCR 1120 [*Little Sisters*].

[20] The HRP's decision to conduct street checks, which incidentally generates data available for consideration in the hiring process, is a discretionary decision. Paragraph 4(1)(a) confers power on the Chief Officer to consider any information about a candidate that is in their possession when determining whether the candidate meets the good character requirement. While the Provision states that all information in the possession of the Chief Officer shall be considered, the weight accorded to street check data, and the manner in which the information is interpreted, is at the discretion of the Chief Officer.

NS Reg 230/2005, s 4(1)(a).

2. Paragraph 4(1)(a) does not violate section 15 of the *Charter*

[21] In the alternative, the Provision itself does not violate section 15 of the *Charter*. The Supreme Court in *Taypotat* set out a two-step test for finding an infringement of section 15: first, the law must create a distinction based on an enumerated or analogous ground, and second, the law must create arbitrary disadvantage. Paragraph 4(1)(a) does not create a distinction on an enumerated or analogous ground. If a distinction is created, the distinction is not arbitrary and therefore not discriminatory.

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*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 19, 20, [2015] 2 SCR 548 [*Taypotat*].

a. Paragraph 4(1)(a) does not create a distinction on an enumerated or analogous ground

[22] Section 15 of the *Charter* protects against laws that are discriminatory on their face or in their impact (*Taypotat*). Paragraph 4(1)(a) is facially neutral because it applies equally to all applicants. The Provision also does not create a distinction based on adverse effects.

Taypotat, *supra* para 21, at para 19.

[23] The higher rate of encounters between police officers and the Black community in Halifax, compared to the non-Black community, does not indicate that the use of the information obtained from street checks creates a distinction on the basis of race. The HRP evaluates the good character of both Black and non-Black applicants with reference to street check information, as well as criminal and background checks. The HRP must consider all available street check information about an applicant regardless of their race. The Appellant has not established that street check information for Black applicants is treated differently than street check information for non-Black applicants. Further, no evidence has been adduced to show a causal connection between race and the rates of success for applications to the HRP.

Official Problem, *supra* para 5 at paras 24.
NS Reg 230/2005, s 4(1)(a).

[24] While Black individuals in Halifax are approached by police for street checks at a higher rate than non-Black individuals, this difference does not amount to a distinction caused by the Provision. The Supreme Court has held that courts "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*). In this case, the availability of carding information for Black applicants to the HRP in North Preston is a reflection of the community policing efforts in high-crime areas. The availability of street check information does not indicate that using this information to determine good character creates a distinction based on race.

Symes v R, [1993] 4 SCR 695 at paras 142, 110 DLR (4th) 470 [*Symes*].
Official Problem, *supra* para 5 at paras 24, 5, 6.
Clarifications, *supra* para 7 at para 5.

[25] A law's differential treatment of one group is not sufficient to establish a distinction unless the differential treatment is based on the personal characteristic expressed by an

enumerated or analogous ground. In *Health Services*, over ninety percent of employees affected by legislation that interfered with collective bargaining rights were women. The unions argued that the legislation discriminated on the basis of sex. The Supreme Court, however, held that the legislation did not infringe section 15 since "[t]he differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are." Likewise, in *Fraser*, the Federal Court held that there was no distinction on the enumerated ground of sex due to a provision limiting pension contributions for part-time or job-sharing workers, despite the fact that most of the workers were women.

Official Problem, *supra* para 5 at para 24.
Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 at para 165, [2007] 2 SCR 391 [*Health Services*].
Fraser v Canada (*Attorney General*), 2017 FC 557 at para 11, 281 ACWS (3d) 748 [*Fraser*].

[26] Similarly, in the present case, any adverse effect on Black applicants to the HRP is caused by the behaviour or socio-economic circumstances of the applicants and not by the Provision itself. Neither behaviour nor socio-economic circumstance is an enumerated or analogous ground. In *Nur*, the Ontario Superior Court rejected an argument that the mandatory minimum sentence for possession of a loaded prohibited firearm in the *Criminal Code* created an adverse effect based on race. Statistical data showed that 62.1 percent of all firearm possession charges in Toronto were laid against Black people even though only 8.4 percent of the population was Black. Despite the defendant's extensive evidence demonstrating the socio-economic disadvantages of Black individuals and the bias in policing decisions, the Court held that the Applicant failed to establish "that the discriminatory effect of over-representation and over-incarceration" of Black individuals was "caused *by the law* itself."

R v Nur, 2011 ONSC 4874 at paras 77, 79, [2011] OJ No 3878 [*Nur*].

[27] Similar to *Health Services*, *Fraser*, and *Nur*, there is no effect in this case on an enumerated ground. The availability of street check information corresponds to an applicant's proximity to criminality and not to race. Several of the Appellant's street checks occurred in North Preston, an area that is generally regarded as having higher rates of crime than the rest of Halifax. At least two of those street checks occurred while the Appellant was walking alongside persons of interest to the police with respect to drug trafficking. Paragraph 4(1)(a), in requiring information from street checks to assess an applicant's good character, does not create a distinction on the basis of race.

Health Services, *supra* para 25.
Fraser, *supra* para 25.
Nur, *supra* para 26.
Official Problem, *supra* para 5 at paras 16, 5.
Clarifications, *supra* para 7 at para 5.

b. Paragraph 4(1)(a) does not infringe section 15 of the *Charter* because it does not arbitrarily disadvantage Black applicants

[28] In the alternative, if Paragraph 4(1)(a) creates a distinction on the basis of race, the distinction is not discriminatory because it does not perpetuate arbitrary disadvantage. In *Taypotat*, the Supreme Court used arbitrary disadvantage synonymously with discrimination. Arbitrary disadvantage occurs when the law both "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (*Taypotat*).

Taypotat, *supra* para 21 at para 20.

[29] The specific evidence required to determine whether a distinction is discriminatory varies "depending on the context of the claim" (*Taypotat*) and requires a "flexible and contextual inquiry" (*Taypotat*, *Quebec v A*). The Court may consider the four contextual factors from *Law*, including correspondence with actual characteristics (*Withler*). Correspondence "has proved to

be the most important factor" and is generally decisive (*B(TM*). The Court may also consider "[t]he objects of the scheme and circumstances of the groups impacted" (*B(TM)*). In this case, the information used during the good character assessment corresponds to the actual characteristics of Black applicants and does not reinforce, perpetuate or exacerbate their disadvantage.

> *Taypotat, supra* para 21 at para 21.
> *Droit de la famille – 091768*, 2013 SCC 5 at para 331, [2013] 1 SCR 61 [*Quebec v A*].
> *Law v Canada (Minister of Employment & Immigration*), [1999] 1 SCR 497 at para 88, 170 DLR (4th) 1 [*Law*].
> *Withler v Canada*, 2011 SCC 12 at para 66, [2011] 1 SCR 396 [*Withler*].
> *R v B(TM)*, 2013 ONSC 4019 at para 50, [2013] OJ No 3413 [*B(TM)*].

i) Any information used in the assessment of good character corresponds to the actual characteristics of applicants

[30] The Appellant was not rejected from the HRP because he was Black; he was rejected because he has a history of associating with criminals and persons of interest to the police. In *Eaton*, the Supreme Court held that "distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination." In the Appellant's case, any distinction that exists between Black and non-Black applicants is reflective of their actual characteristics and not presumed characteristics. The HRP's decision that the Appellant did not have the requisite good character for the police force corresponded to his actual characteristic as a person affiliated with criminals.

> *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at para 66, [1996] SCJ No 98. [*Eaton*].

[31] The content of an applicant's street check information, and not the quantity of street check data, is used to consider the applicant's character. Even though there may be more street check information for some Black applicants, the availability of this information does not have a discriminatory effect. For example, where an applicant has had numerous interactions with the

police but has not provided information demonstrating that they are not of good character, the street check information will not prevent them from proceeding in the application process. This is true even if more information is available for that applicant. On the other hand, where street check information indicates that the applicant lacks good character, this information will be considered in conjunction with their criminal and background checks and any other relevant information pursuant to Paragraph 4(1)(a).

Official Problem, *supra* para 5 at para 24.

[32] The Appellant was rejected from the HRP because of accurate information he provided to the police during street checks. The information showed that the Appellant was affiliated with individuals known to the police for their involvement in criminal activity. The HRP does not accept applicants affiliated with crime because they are susceptible to coercion or blackmail.

Official Problem, *supra* para 5 at paras 14, 16, 18.

[33] The Appellant's circumstance is similar to both *McKenzie-Sinclair* and *Freeman* where the section 15 claim failed due to correspondence with actual characteristics. In *McKenzie-Sinclair*, the Court rejected an argument that sentencing provisions in the *Criminal Code* violated indigenous peoples' equality rights. The Court held that indigenous persons are more likely to re-offend than non-indigenous persons: "[w]hile Aboriginal people may be impacted more by the operation of the provision, this is a reflection of their social circumstances rather than the operation of [the impugned provisions]." In *Freeman*, requiring information about sexual orientation to donate blood would not have violated section 15 of the *Charter* because the likelihood of transmission of HIV/AIDS was higher among gay men. The distinction based on sexual orientation thus corresponded to an actual characteristic of the enumerated group.

R v McKenzie-Sinclair, 2015 MBPC 5 at para 140, [2015] 9 WWR 599 [*McKenzie Sinclair*].

Canadian Blood Services / Société candienne du sang v Freeman, 2010 ONSC 4885 at para 3, [2010] OJ No 3811 [*Freeman*].

[34] The information considered in the good character requirement corresponds to the actual characteristics of applicants and thus does not create arbitrary disadvantage. It is relevant to determining whether an applicant should be accepted to the police force.

ii) Paragraph 4(1)(a) does not reinforce, perpetuate, or exacerbate the disadvantage of Black individuals

[35] The effect of the facially neutral good character requirement has not adversely impacted the representation of Black individuals in the HRP. As such, the requirement has not exacerbated their disadvantage. While Black individuals in Nova Scotia have historically experienced difficulty seeking and maintaining stable, high-paying employment, this disadvantage is not reflected in the HRP since the diversity of the police force corresponds to the diversity of Halifax.

Official Problem, *supra* para 5 at paras 27, 31.

[36] The requirement that applicants to the HRP have no ties with individuals affiliated with crime does not create an arbitrary disadvantage because it directly relates to an applicant's fitness to be a police officer. In *Taypotat*, the Supreme Court of Canada held that "employment requirements that are unrelated to measuring job capability can operate as "built-in headwinds" for minority groups, and will therefore be discriminatory." The Supreme Court imported the definition of "headwind" from *Griggs*, a United States Supreme Court decision. In *Griggs*, the Court held that the Civil Rights Act of 1964 was violated when an employer required its employees to have a high school diploma to work as coal handlers. The Court emphasized that "[t]he effect of this facially neutral requirement was to disproportionately exclude African Americans from positions in the plant." The requirement of a high school diploma was not

related to the qualifications to work as a coal handler and thus discriminated against African Americans.

Taypotat, *supra* para 21 at para 23.
Griggs v Duke Power Company, 401 US 424 (1971), 91 SCt 849 [*Griggs*].

[37] In contrast to *Griggs*, the requirement in this case that applicants to the HRP have no ties to individuals affiliated with crime is necessary for employment with the police force. Data from police encounters reveals whether an individual has associated with criminals or participated in criminal activities. The HRP is not the only police force in Canada that requires prospective officers to have no association with criminal behaviour. This commonality demonstrates that any ties officers have to criminal behaviour can endanger the legitimacy of the police. Thus, the good character requirement is not discriminatory because it is not arbitrary.

Griggs, *supra* para 36.
Official Problem, *supra* para 5 at paras 18, 29.

Issue 2: If Paragraph 4(1)(a) violates section 15 of the *Charter*, this infringement is justified under section 1

[38] Paragraph 4(1)(a) is prescribed by law and addresses the pressing and substantial objective of ensuring that only individuals of the highest moral character are able to join the HRP. A deferential approach to the section 1 analysis is appropriate. Paragraph 4(1)(a) is the Legislature's attempt to address the complex social task of hiring police officers who will remain incorruptible and inspire confidence in the communities they serve. The distinction under Paragraph 4(1)(a) is proportionate because it is rationally connected to the objective, impairs the equality right minimally, and is balanced in its salutary and deleterious effects.

Official Problem, *supra* para 5 at para 18.
R v Oakes, [1986] 1 SCR 103 at paras 70, 26 DLR (4th) 200 [*Oakes*].

1. Paragraph 4(1)(a) is prescribed by law

[39] Paragraph 4(1)(a) of the *Police Regulations* was enacted pursuant to the *Police Act of Nova Scotia* and is therefore prescribed by law. For the purposes of a section 1 analysis, "law" is not restricted to primary legislation but includes delegated legislation such as regulations and municipal by-laws.

> *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 53, [2009] 2 SCR 295.

2. Paragraph 4(1)(a) serves the pressing and substantial objective of ensuring the integrity of the police force

[40] To justify a limit on a *Charter* right, an objective must be both pressing and substantial and aimed at the realization of collective goals that are of fundamental importance to society (*Oakes*). The HRP Deputy Chief has stated three objectives of the good character requirement under Paragraph 4(1)(a): (1) to ensure that only individuals of the highest moral character join the HRP, (2) to maintain the legitimacy of the police force by ensuring that all candidates are perceived as incorruptible by the community, and (3) to maintain the credibility of the police force by ensuring that all candidates are not affiliated with criminality.

> *Oakes*, *supra* para 38 at para 136.
> Official Problem, *supra* para 5 at para 18.

[41] Police officers are on the front line of law enforcement and are entrusted with directly influencing how the law is applied and enforced on an everyday basis. It is necessary for police officers to be trustworthy individuals who will remain incorruptible and not susceptible to coercion, and to be perceived in that manner. These are pressing and substantial objectives which ensure that police officers will be devoted to their duty of protecting public safety.

> Official Problem, *supra* para 5 at paras 18, 31.
> Police Act, SNS 2004, c 31, s 35(3).

3. A deferential application of the section 1 test is appropriate

[42] The Legislature should be accorded a high degree of deference during the section 1 analysis. Generally, courts accord deference during the section 1 analysis when the government is addressing a complex social issue. The hiring of police officers requires consideration of complex social circumstances such as the relationship between law enforcement and the communities they serve. The Legislature must consider both the interest of applicants in an equal and fair hiring practice as well as society's interest in allowing only those applicants with the highest moral character to become police officers.

> *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 at para 216, 58 DLR (4th) 577.
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

[43] Police officers have immense authority: they must uphold the rule of law and maintain society's trust in the integrity of the police force. In light of these significant responsibilities, the Legislature requires police forces to consider all information available about a candidate and make a holistic, fact-sensitive decision. As stated in *Edmonton Police Services*, "society demands police officers have and exhibit the highest integrity and be of the highest moral character. As a consequence, recruiting is taken much more seriously and done much more comprehensively than in most organizations." The high stakes involved in the hiring of police officers warrants a high degree of deference to the Legislature.

> *Edmonton Police Services and EPA*, [2016] Alta LRBR 12 at para 9, 271 CLRBR (2d) 1 [*Edmonton Police Services*].

4. Paragraph 4(1)(a) is rationally connected to its objective of ensuring the integrity of the police force

[44] Rational connection requires a relationship between the objective of the law and the measures enacted by the law. Even if evidence is inconclusive, a connection based on common

sense, reason, or logic suffices (*RJR MacDonald*). Under this deferential standard, there is room for debate about what will work and what will not (*JTI*). In *Quebec (Commission des droits)*, the Supreme Court held that "being of good moral character is a qualification required to become and remain a police officer." Police officers must have, and appear to have, good character so that they are capable of keeping the community safe.

> *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at paras 87, 156-158, 111 DLR (4th) 385 [*RJR MacDonald*].
> *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 41, [2007] 2 SCR 610 [*JTI*].
> *Québec (Commission des droits de la personne & des droits de la jeunesse) c Montréal Service de police*, 2008 SCC 48 at para 25, 295 DLR (4th) 577 [*Québec (Commission des droits)]*.

[45] It is reasonable for Paragraph 4(1)(a) to direct hiring officers to consider all available information about a candidate, including street check information. Even if there is disproportionately more data available for Black applicants, information from street checks can provide valuable insight about candidates. The use of street check information for assessing applicants' good character is not dispositive. It supplements the information already available about all candidates and is considered as part of a holistic case-by-case assessment of an applicant's character. There is a rational connection between considering street check information and ensuring that a candidate is not susceptible to coercion due to their criminal affiliations. Consideration of this information also enhances the legitimacy of the police force since individuals who are known to be associated with criminals do not progress past the initial vetting stage.

> Official Problem, *supra* para 5 at para 24, 5.

5. Paragraph 4(1)(a) is minimally impairing

[46] For complex social issues the minimal impairment requirement is satisfied if the Legislature has chosen one of several reasonable alternatives that achieves the legislative objective in a real and substantial manner (*Edwards Books*, *Hutterian Brethren*). It is reasonable for the HRP to consider available street check information when assessing an applicant's good character. Alternative methods fail to achieve the legislative objective in a real and substantial way.

> *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 126, 35 DLR (4th) 1 [*Edwards Books*].
> *Hutterian Brethren*, *supra* para 42 at paras 160, 59.

[47] The use of street check information in the good character assessment falls within the range of reasonable alternatives available to the government. This range depends on the tools available to the government to pursue its objectives (*Hutterian Brethren*). The HRP has legally-obtained, relevant information at its disposal. This information allows the police force to uncover important information about an individual that can reveal an applicant's criminal affiliations. This use of street check information reduces the risk that a police force may be susceptible to coercion and ensures that individuals of the highest moral character are admitted into the HRP.

> *Hutterian Brethren*, *supra* para 42 at para 101.
> Official Problem, *supra* para 5 at para 6.

[48] Discretion plays a key role in ensuring that the Provision is minimally impairing and not overbroad in light of the legislative objectives (*B(A)*). Assessing good character is a difficult and complex task. In specifying the information to be used, but allowing for discretion in the assessment of that information, the Legislature has crafted an appropriate solution.

> *B(A) v College of Physicians & Surgeons (Prince Edward Island)*, 2001 PESCTD 75 at para 57, 204 DLR (4th) 750 [*B(A)*].
> NS Reg 230/2005, s 4(1)(a).

[49] Any alternative measure would fall short of achieving the legislative objectives in a real and substantial manner. The Appellant's proposed contextualized ethics tests and behavioural interviews do not substantially achieve the objective of ensuring that the candidate is not affiliated with criminals or that the candidate is perceived as incorruptible. The questionnaire already required in the hiring process solicits self-reported information from candidates in a highly artificial context. Past behaviour is a good predictor of future behaviour (*Allan*). Street check records provide basic statements of facts about an applicant's past and current criminal affiliations. This information can reveal an applicant's ability to effectively police criminals.

Appellant's Factum, Wilson 2018 Team 2, at paras 58-61.
Official Problem, *supra* para 5 at para 6.
R v Allan, 2015 BCCA 229 at para 269, 372 BCAC 236 [*Allan*].

6. The salutary effects of Paragraph 4(1)(a) outweigh any deleterious effects on the Appellant's section 15 right

[50] As stated in *Hutterian Brethren*, "the limit on the right must be proportionate in effect to the public benefit conferred by its limitation." This requires determining whether any harm done to the Appellant's, and other Black applicant's, equality rights are out of proportion with the public good achieved by the infringing measure.

Hutterian Brethren, *supra* para 42 at paras 73, 78.

[51] Here, the harm to the equality interest is minimal because Black applicants are not automatically or permanently excluded from becoming police officers with the HRP. Rather, the effect of the Provision is simply that Black applicants may have more street check information available about them included in the good character assessment. Street check information is only one of multiple sources of information. The benefit derived by ensuring that all successful applicants are of the highest moral character outweighs the effect of creating a hurdle for some

Black applicants. There is no good reason to categorically exclude all street check information. It is a reliable source of information about an individual's criminal affiliations, which is relevant to the assessment of an individual's application to the police force. Further, the use of this information has not prevented the HRP from hiring and maintaining a racially diverse police force reflective of the demographics of Halifax.

NS Reg 230/2005, s 4(1)(a).
Official Problem, *supra* para 5 at paras 24, 6, 26.

[52] The good character requirement achieves a meaningful and significant public good by ensuring that society perceives the police force as trustworthy and legitimate. The Provision allows the HRP to conduct a holistic, discretionary assessment of the candidate's character based on all available information. It ensures that only individuals who possess the highest moral character, and who are not susceptible to coercion, are entrusted with the significant responsibility of protecting society.

Official Problem, *supra* para 5 at para18.
NS Reg 230/2005, s 4(1)(a).

Issue 3: The Appellant should not be granted a constitutional exemption pursuant to section 24(1) of the *Charter*

[53] The parties have agreed that a suspended declaration of invalidity pursuant to section 52(1) of the *Constitution Act* is a meaningful and appropriate remedy. The Appellant should not be granted a constitutional exemption to re-apply to the HRP during the period of suspension. Constitutional exemptions are not normally granted simultaneously with suspended declarations of invalidity. The Appellant's situation is not a rare circumstance that warrants an exception.

Constitution Act, 1867 (UK), 30&31 Vict, c.3, reprinted in RSC 1985, Appendix II, No 5, s 52(1).
Clarifications, *supra* para 7 at para 4.
R c Demers, 2004 SCC 46 at paras 56-64, 240 DLR (4th) 629 [*Demers*].

1. A six-month suspended declaration of invalidity is a meaningful remedy

[54] A suspended declaration of invalidity is a meaningful and appropriate remedy for the Appellant. The Legislature must balance important interests to create a legal framework in which the integrity of the police force can be ensured without discriminating against Black applicants. A six-month suspension would allow the Legislature to craft a new good character requirement to maintain an effective and holistic hiring process. This short period of time militates against granting the Appellant a constitutional exemption in the interim.

> Clarifications, *supra* para 7 at para 4.
> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 134, [2015] 1 SCR 331[*Carter 2015*].

2. Constitutional exemptions are not granted during a suspended declaration of invalidity

[55] Section 24(1) remedies are only ordered after the period of suspension has expired (*Demers*). This aligns with the rule in *Schachter* that courts cannot grant a section 24(1) remedy during the period of suspended invalidity.

> *Demers, supra* para 53 at para 63.
> *Schachter v Canada*, [1992] 2 SCR 679 at para 92, 93 DLR (4th) 1 [*Schachter*].

[56] Recently, the Supreme Court considered and unanimously declined to create a mechanism for constitutional exemptions during the period of suspended declarations of invalidity(*Carter 2015*). The Court held that the creation of such a mechanism is best left to the expertise of Parliament and that Parliament should be given an opportunity to craft an appropriate remedy. A constitutional exemption was only granted in *Carter 2016* after the government requested, and was granted, an extension to the suspended declaration of invalidity.

> *Carter 2015, supra* para 54 at para 125.
> *Carter v Canada (Attorney General)*, 2016 SCC 4 at paras 6-7, [2016] 1 SCR 13 [*Carter 2016*].

3. The Appellant will not suffer any severe harm that is time-sensitive in the interim

[57] Courts only grant a constitutional exemption for litigants during a suspended declaration of invalidity in exceptional circumstances. An exemption is granted when the litigations (1) would otherwise suffer severe harm that is life-threatening or (2) would not receive meaningful relief if they awaited the government's response. Neither of these conditions apply to the Appellant.

> *Carter 2016*, *supra* para 56 at para 6.
> *R v Parker*, [2000] OJ No 2787 at para 208, 188 DLR (4th) 385 [*Parker*].
> *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 11, [2011] 3 SCR 134 [*PHS Community Services*].
> Catholic Children's Aid Society of Hamilton v H(G), 2016 ONSC 6287 at para 111, [2016] OJ No 5233 [*Catholic Children's Aid Society of Hamilton*].

[58] The Appellant should not be granted a constitutional exemption because he will not suffer severe harm that is life-threatening or time-sensitive during the suspension period. In *Carter 2016*, the Supreme Court stated that if a constitutional exemption was not granted, terminally-ill patients would be deprived of their right to die with dignity. Those patients would have suffered severe harm due to medical conditions that were grievous, intolerable, and irremediable. In previous cases, constitutional exemptions were not granted except where the litigant would suffer life-threatening harm. These cases demonstrate that the Courts only grant constitutional exemptions in exceptional circumstances. For example, in *Parker*, the litigant was allowed to retain possession of his medical marijuana since there was sufficient evidence that the marijuana controlled his life-threatening seizures. Similarly, in *PHS Community Services*, the Court permitted a safe injection site to remain in operation since the site was found to prevent the spreading of infectious diseases and harm caused through overdose.

> *Carter 2016*, *supra* para 56 at paras 1-6.
> *Parker*, *supra* para 57 at para 208.
> *PHS Community Services Society*, *supra* para 57 at para 11.

[59] Second, the Appellant will be able to receive additional meaningful relief after the suspension has expired. Constitutional exemptions are only granted where the litigant would not otherwise receive such meaningful relief. In *Catholic Children's Aid Society of Hamilton*, the Court granted a constitutional exemption for a young Métis girl. If a constitutional exemption was not granted, the girl would have been removed from her family home and faced with undue trauma. Her only opportunity to receive meaningful relief was through a constitutional exemption that would allow her to receive the same benefits that were only available to Indian and Native children.

Catholic Children's Aid Society of Hamilton, *supra* para 57 at para 111.

[60] The Appellant will suffer no such harm if his remedy is delayed by six months since his circumstances are not time-sensitive. Additionally, he will receive further meaningful relief after the suspension expires. Although the Appellant has a right to choose his profession and this choice is important for an individual's self-fulfillment, a delay in six months in his re-application to the HRP does not significantly hinder his career goals. Such a delay would not cause the severe level of harm that has justified constitutional exemptions in the past. The Appellant is a healthy, young adult in his early twenties who is well-educated. He has strong employment prospects in his community.

Official Problem, *supra* para 5 at para 9.

4. A constitutional exemption would create administrative complexities

[61] The hiring process was not designed to assess applicants without Paragraph 4(1)(a) in place. The good character requirement is a reflection of the general values of a police force. It is a primary requirement for many of the positions with a municipal police force, including special

constables, auxiliary officers, and board members. As the Supreme Court held in *Quebec (Commission des droits),* having good moral character is necessary to become a police officer.

> NS Reg 230/2005, s 4(1)(a), s 7(1)(a), s 11(1)(a), s 77(1)(c), s 83(1)(c).
> *Quebec (Commission des droits), supra* para 44 at para 25.

[62] The Appellant is requesting that his good character be assessed without reference to his street check information. However, the good character requirement contained in the Provision is the only part of the hiring process that is prescribed by law and assesses criminal affiliations. Removing the Provision will leave a gap in the hiring process. The Legislature should be given an opportunity to replace the Provision before individuals are allowed to apply. This will avoid any risk of unsuitable candidate's slipping through the gap.

> NS Reg 230/2005.

[63] Further, any constitutional exemption would only be available in the interim until either the Legislature amends the Provision or the declaration of invalidity expires. In *Corbiere*, the Supreme Court recognized that granting the litigant a constitutional exemption in the interim would create unnecessary administrative problems. Generally, it is more effective to await Parliament's response than create constitutional exemptions. Although this may delay a litigant's relief, not granting an exemption is justified if it best embodies respect for *Charter* rights and democracy, which ultimately guides remedial considerations (*Corbiere*).

> *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para 119, 173 DLR (4th) 1 [*Corbiere*].

5. A constitutional exemption would intrude on the role of the Legislature

[64] Granting the Appellant a constitutional exemption during a suspended declaration of invalidity would constitute an inappropriate intrusion on the role of the Legislature. A Court grants a remedy under section 24(1) when it can assume that the government would have initially

passed the Court's alteration to the impugned provision had the government been aware of the constitutional defect (*Ferguson*). In this case, such an assumption cannot be made because an exemption would create something completely different in nature from what the Legislature intended.

R v Ferguson, 2008 SCC 6 at paras 40, 50, 56, [2008] 1 SCR 96 [*Ferguson*].

[65] The Legislature would likely not have passed the *Police Regulations* without Paragraph 4(1)(a) due to the centrality of the good character requirement. Similarly, the Legislature would likely not have excluded all data collected from street check information without ensuring that other information would equally capture affiliations with criminality. Since it is unclear how the Legislature will amend the Provision, the judiciary should not usurp the role of the Legislature. The Legislature has greater institutional capacity to create and amend hiring schemes. The Appellant agrees that the objectives of the Provision are pressing and substantial and that the Legislature requires time to amend the Provision.

Ferguson, *supra* para 64 at para 50.
Carter 2016, *supra* para 56 at para 12.
Clarifications, *supra* para 7 at para 4.

6. A constitutional exemption would undermine the remedial scheme of the *Charter*

[66] The Appellant is not asking for a constitutional exemption from Paragraph 4(1)(a) in its entirety. Instead, he is asking the Court to read down "all information" to exclude street check information. In other words, the Appellant is applying for another remedy under section 52(1) in the guise of a remedy under section 24(1). The Appellant cannot agree to a suspended declaration of invalidity, implying that the Legislature requires time to amend the Provision, but then suggest that the Court simply not consider street check information for his own assessment. The constitutionality of street check information is not at issue and it is not clear that the

Legislature will amend the Provision simply by reading down "all information" to exclude street check information.

Schachter, *supra* para 55 at para 56.
Official Problem, *supra* para 5 at para 32.

[67] Section 52 and section 24(1) serve different remedial purposes. A remedy under section 24(1) is available where there is some government action beyond the enactment of an unconstitutional provision that infringes a person's *Charter* rights (*Schachter*). So long as government actors act in good faith and do not abuse their power under the prevailing law, there is no need for a section 24(1) remedy (*Mackin*). A constitutional exemption is not warranted for the Appellant since the entire Provision has been found to be unconstitutional and there is no evidence of government actors abusing their powers. The Appellant will be able to meaningfully vindicate his right and receive relief when the suspension has expired and the Legislature has amended the Provision or declared it invalid.

Schachter, *supra* para 55 at para 25.
M*ackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 79, [2002] 1 SCR 405 [*Mackin*].
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 at para 25, [2003] 3 SCR 3.

7. A constitutional exemption would undermine the rule of law

[68] The Appellant should not be granted a constitutional exemption since it would undermine the rule of law and the purpose of a declaration of suspended invalidity. Constitutional exemptions can undermine the primary values that underpin the rule of law: predictability and accessibility. A divergence between the law "on the books" and the application of the law is unjust since future litigants will not know what the law is in advance (*Ferguson*). This causes unnecessary barriers to the exercise of one's constitutional rights because every claimant will have to make an individual case in order to seek relief. Although these concerns are mitigated

once the Legislature has returned with a permanent solution, the exemption nonetheless undermines the rule of law for the duration of the suspension.

Ferguson, supra para 64 at paras 68-69, 72.

PART V – ORDER SOUGHT

[69] The Respondent requests that this appeal be dismissed. In the alternative, if the Court finds a violation of section 15 that cannot be demonstrably justified in a free and democratic society under section 1, the Respondent requests the Court suspend the declaration of invalidity of Paragraph 4(1)(a) for six months. The Respondent requests the Appellant not be granted a constitutional exemption from the operation of the impugned Provision during the suspended declaration of invalidity.

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

Team 2
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

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Constitution Act, 1867 (UK), 30&31 Vict, c.3, reprinted in RSC 1985, Appendix II, No 5, s 52(1).	53
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Official Problem, Wilson Moot 2018.	5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 23, 24, 25, 27, 31, 32, 35, 37, 38, 40, 41, 45, 47, 49, 51, 52, 60, 66,
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