S.C.C. File No. 39826

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- AND -

WALKER MCCOLMAN

RESPONDENT
(Respondent)

- AND -

CANADIAN CIVIL LIBERTIES ASSOCIATION; DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS OF QUEBEC

INTERVENERS

FACTUM OF THE INTERVENER
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(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

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PART I — OVERVIEW

1. In his dissent in *Ladouceur,* Justice Sopinka wrote that "the last straw" for drivers' civil liberties had been reached when the majority recognized an unfettered discretion for police to "stop any vehicle at any time, in any place, without having any reason to do so."[1] This case is an attempt to go one step further and extend the reach of that discretionary power onto private property under subsection 48(1) of the *Highway Traffic Act.*[2]

2. As this Court recognized in *Hufsky* and *Ladouceur,* a "random" stop of a motorist under s. 189(a) (now s. 216) HTA is arbitrary *per se* as there are "no criteria, express or implied, which govern its exercise."[3] The closely related discretionary power conferred by subsection 48(1) of the HTA is similarly unfettered. As these provisions are interpreted since *Ladouceur*, every single stop carried out under their authority results in an arbitrary detention in violation of s. 9 of the *Charter.*

3. When considering whether an *expansion* of this police power was reasonably necessary in this case, Justice Tulloch referred to this Court's reminder issued in *Grant* that racialized communities and marginalized individuals "are at particular risk from unjustified "low visibility" police interventions"[4] such as the purely discretionary vehicle stop.[5]

4. The unfettered police discretion to stop any motorist without reasonable cause has been the subject of intense and repeated criticism since this Court decided *Ladouceur* precisely because it is a significant source of discrimination, racial profiling and abuse of police powers. This criticism has come from some of Canada's most prominent professors of criminal law. Professor David Tanovich described *Ladouceur* as having provided the police with "a racial profiling writ of assistance"[6] and "an open invitation to conduct race-based stops."[7] Professor

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1 *R v Ladouceur*, [1990] 1 SCR 1257, p. 1264.
2 *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("HTA").
3 *R v Hufsky,* [1988] 1 SCR 621, par. 13; *R v Ladouceur*, [1990] 1 SCR 1257, p. 1277.
4 *R v Grant*, 2009 SCC 32, par. 154.
5 *R v Grant*, 2009 SCC 32, par. 154, referring to D. M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002**),** 40 *Osgoode Hall L.J.* 145.
6 D.M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 *S.C.L.R.* (2d) 656, p. 673.
7 D.M. Tanovich, "E-Racing Racial Profiling" (2004) 41 *Atla. L. Rev.* 905, p. 929.

Steven Penney wrote that it raises "the spectre of discriminatory profiling."[8] The authors of *Criminal Procedure in Canada* accused the majority in *Ladouceur* of having "unduly downplayed the risk of abusive roadside detentions" and specifically asked this Court to reconsider its decision in light of the realities of racial discrimination.[9] In this context, any expansion of this power must be categorically rejected.

5. On the second question, while it may be appropriate to exclude evidence under subsection 24(2) following a *Charter* breach carried out by a police officer who acted diligently and in good faith in a truly novel or legally "untested" situation, such circumstances will be extremely rare.

PART II — POSITION ON THE QUESTIONS IN ISSUE

6. This Court granted leave to appeal on two specific questions:

    1) Whether the police stop was authorized by s. 48(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8; and

    2) If there was a breach of s. 9 of the *Charter*, whether the evidence obtained should have been excluded under s. 24(2) of the *Charter*.

7. With regard to the first question, the police stop was not authorized under the HTA. The statute does not create any authority to conduct suspicionless vehicle stops on private property.

8. With regard to the second question, while the CCLA does not take a position on the outcome of Mr. McColman's case, evidence obtained without any statutory authority and in clear violation of the *Charter* should only rarely be admitted. The novel police power claimed here does not present a case of genuinely unsettled law or arise in "unknown legal territory"[10] for the purposes of subsection 24(2).

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[8] Steven Penney, "Driving While Innocent: Curbing the Excesses the 'Traffic Stop' Power" (2019) 24 *Can. Crim. L. Rev.* 339, p. 26.

[9] Steven Penney, Enzo Rondinelli and James Stribopoulos, *Criminal Procedure in Canada*, 2nd ed (Markham, ON: LexisNexis, 2018), §2.97, 2.98.

[10] *R v Paterson*, 2017 SCC 15, par. 46.

PART III — ARGUMENT

The Facts

9. The facts are straightforward and largely uncontested. Of particular relevance are the following: i) the police officers involved had no reason to suspect that the Respondent had been drinking prior to following him onto his parents' private property, where Mr. McColman lived;[11] ii) the police officers observed no signs of impairment in the Respondent's driving;[12] iii) there is no evidence or allegation of any other highway safety infraction or concern;[13] iv) the police officers did not require or signal the Respondent to stop prior to him turning into his parents' driveway;[14] and, importantly, vi) there is no evidence that Mr. McColman had been attempting to flee or evade the police.[15]

The Proposed Power Does Not Exist Under the HTA

10. The proposed expansion of police power was described by the majority as "the power to pursue a vehicle off the highway and detain the driver to conduct a random sobriety check on a private driveway, where there are no grounds to suspect an offence has been or is about to be committed."[16] The majority concluded that the plain language of subsection 48(1) of the HTA does not authorize interceptions of motorists carried out on private property.[17]

11. Referring to Justice Doherty's definition of "highway" in *Hajivasilis*,[18] the majority concluded that because a private driveway is not "intended for or used by the general public for the passage of vehicles" it is not a "highway."[19] Because it is not a "highway," a person in their private driveway cannot be a "driver" within the meaning of subsection 48(1) of the HTA.[20]

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[11] *R v McColman*, 2021 ONCA 382, pars. 11, 76.
[12] *R v McColman*, 2021 ONCA 382, par. 11.
[13] *R v McColman*, 2021 ONCA 382, par. 8.
[14] *R v McColman*, 2021 ONCA 382, par. 10.
[15] *R v McColman*, 2021 ONCA 382, par. 42.
[16] *R v McColman*, 2021 ONCA 382, par. 58.
[17] *R v McColman*, 2021 ONCA 382, par. 38.
[18] *R. v Hajivasilis*, 2013 ONCA 27, par. 10
[19] *R v McColman*, 2021 ONCA 382, pars. 33-34.
[20] *R v McColman*, 2021 ONCA 382, par. 35.

12. The Crown argues that unless subsection 48(1) is interpreted purposively to allow the stop to occur on private property, impaired drivers will seek "sanctuary" there. Both components of this argument, statutory interpretation and the so-called sanctuary, will be addressed in turn.

Statutory Interpretation of Police Powers that Interfere with Civil Liberties

13. This Court has recently insisted that the interpretation of police powers must be particularly restrictive where such powers interfere with the liberty interests of individuals who are not presumptively engaged in any dangerous or unlawful activity, as is the case here.[21] How many innocent motorists will be arbitrarily detained on private property, or on their own property, if the proposed power is recognized is a question which should be central to the analysis.

14. Adhering to statutory limits is thus particularly important when dealing with legal provisions that set the scope of (and therefore the limits applicable to) police powers. The rules of statutory interpretation do not give courts license to disregard clear legislative texts, especially when what is proposed is to read in a police power which violates *Charter* rights.

15. The legislature's intention in enacting the HTA was to regulate vehicular traffic and to address important public safety concerns *on public roadways* by giving the police specific powers. The statute's text, context, and purpose does not support the view that the legislature also intended to extend police powers in order to regulate private residential property under subsection 48(1).

16. The interpretation proposed by the Appellant would extend police powers to detain a driver to any place, public or private, as long as an officer had formed a subjective intention to intercept the vehicle before the driver left the public road. The scope of such a power not only invites abuse, but it is sweepingly broad and fundamentally indeterminate — how far onto private property? How long can a driver be followed? How much time is permitted between the moment that an officer's intention "crystalizes" and the moment of detention? And what would such a power mean for the entire corpus of jurisprudence that treats private property —

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[21] *Fleming v Ontario*, 2019 SCC 45 pars. 5, 67.

and particularly one's home — as uniquely private sanctuaries, affording them particular protections against state intrusion.

17. As the majority pointed out, the Courts "[do] not have the power to read into the HTA police powers the legislature has not seen fit to provide."[22] If the legislature had intended such a police power to extend to private property, it would have said so.

18. Likewise, allowing the extent of police power to depend on something as difficult to *disprove* as the moment a subjective intent to stop was formed in the police officer's mind, rather than on the locus of interception, would require clear legislative language considering the obvious potential for abuse.

The "Sanctuary" Theory of Intoxicated Driving Must be Rejected

19. The Court must reject any argument to the effect that by refusing to expand police powers to conduct suspicionless roadside stops to private property, it would be endorsing a "sanctuary" approach to intoxicated driving.

20. The officers in this case claimed to have stopped the Respondent's UTV pursuant to subsection 48(1) of the HTA. As mentioned, there is no evidence whatsoever that the Respondent was attempting to evade the police. The power at issue is therefore not one of investigative detention,[23] exigent circumstances[24] or "hot pursuit".[25]

21. As pointed out by the majority, "[a] true case of flight might well contribute to reasonable grounds to detain the accused, depending on the circumstances."[26] Any consideration of this possibility is best left for a case in which the Court could assess the actual circumstances of a true case of flight.

22. In addition to being entirely inapplicable to the facts of the case, the Appellant's argument — also advanced by the dissenting judge at the Court of Appeal — relies on an untested

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[22] *R v McColman*, 2021 ONCA 382, par. 43.
[23] *R v Mann*, 2004 SCC 52, par. 45.
[24] *R v Paterson*, [2017] 1 SCR 202, par. 29.
[25] *R v Macooh*, [1993] 2 SCR 802, p. 816-17.
[26] *R v McColman*, 2021 ONCA 382, par. 48.

hypothesis to the effect that individual drivers are informed regarding the legal scope of police powers, have the foresight to strategically evade police pursuit, and yet are capable of otherwise diligently following the rules of the road without attracting reasonable suspicion — all while driving intoxicated. This theory is implausible and unsupported by any factual findings in the proceedings below.

Any extension of the "random roving stop" power will lead to discrimination, racial profiling, and abuse of police powers

23. There is little doubt that if this Court recognizes the power sought, it will be exercised predominantly in the context of high-risk and "low visibility" encounters.[27] Despite the fact that suspicionless roadside detentions have historically been referred to as "roving random stops" or "random routine traffic checks", it is now well established that these interceptions are not conducted in a genuinely random manner. This fact is recognized by the Appellant at paragraph 60 of its factum.

24. Instead, the practice of suspicionless roadside stops has provided a pretext for profiling and discrimination that disproportionately affects racialized and marginalized individuals.[28] The risk that any expansion of these powers will lead to further discriminatory outcomes and abuse is acute.

25. Furthermore, suspicionless roadside stops are inherently evasive of judicial review.

26. The reality is that these encounters are generally unlikely to lead to a charge, trial, or remedial application under subsection 24(2) — the usual vehicle for *Charter* claims in the criminal law context.[29] The reason is simple: by their very nature, these stops tend to involve the detention of entirely innocent individuals who have done nothing to merit the attention or scrutiny of law enforcement.

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[27] *R v Grant*, 2009 SCC 32 par. 154; *R v Le,* 2019 SCC 34, par. 87.
[28] D. M. Tanovich, "Applying the Racial Profiling Correspondence Test" (2017), 64 *C.L.Q.* 359, p. 362, 365-66, 372, 378.
[29] *Fleming v Ontario*, 2019 SCC 45, par. 84.

27. The highly discretionary nature of the powers in question also mean that it can be difficult or impossible for litigants to establish that an abuse has been committed on an individualized basis — whether in the context of a criminal trial, a direct claim for *Charter* damages, or through an administrative process such as a police ethics board or human rights tribunal.

28. This is because, in addition to more routine access to justice barriers, claims of improper police conduct generally require some evidence regarding the circumstances and rationale — or lack thereof — for the police encounter. Such evidence is necessarily less available in cases where the police power to authorize a stop or search requires only weak justification or (as is the case here) no justification whatsoever beyond the bare existence of a discretionary police power.

29. As observed by the majority of the Ontario Court of Appeal, the valid exercise of the power proposed by the Crown "depends entirely on whether, in the officer's own mind, the officer intended to stop the vehicle before it pulled off the highway".[30] Meaningful judicial oversight of a power that depends on the moment in time that a subjective intention crystalized in the mind of a police officer is illusory.

30. Finally, while subsection 48(1) of the HTA is limited to verifications of sobriety, this is not true for other closely related statutory and common law powers to intercept vehicles absent reasonable suspicion. Indeed, the governing jurisprudence currently permits arbitrary or "random" roadside stops for a number of other purposes, including random checks to verify a driver's identification, registration, insurance, and the mechanical condition of the vehicle.[31] In weighing whether to recognize a new police power in the instant case, the Court must consider the potential consequences of its decision for these other kinds of arbitrary stops.

31. It is noteworthy in that regard that the Superior Court of Québec heard evidence on this topic in a six week trial which concluded in July 2022 before Justice Michel Yergeau. In *Luamba*[32] the plaintiff and the CCLA, as conservatory intervenor, brought a direct constitutional challenge seeking to overturn the rule arising from *Ladouceur.* The challenge alleges that "random" police stops violate sections 7, 9 and 15 of the *Charter*. The sections 7 and 15

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30 *R v McColman*, 2021 ONCA 382 par. 75.
31 *R v Ladouceur,* [1990] 1 SCR 1257, p. 1287; *R v Mellenthin*, [1992] 3 SCR 615, p. 622.
32 *Luamba v Québec (AG)*, SCM case number 500-17-114387-205.

arguments are presented for the first time, and the s. 9 arguments are presented in conformity with the test set out by this Court in *Bedford*[33] and confirmed in *Carter*[34].

An Expansion of Suspicionless "random" stops would not be justifiable under s. 1 of the Charter

32. The Crown in this case *proposed* a police power that would allow officers to "complete [a] random sobriety check on private property."[35] A power being proposed does not exist. As the majority of the Court of Appeal concluded, the Crown's proposal would expand police power.[36] This central fact is difficult to reconcile with the rhetorical stance of the Appellant, as the Crown argues throughout its factum as if the power existed already, and that removing it would lead to drivers changing their behaviour and seeking sanctuary on private property.

33. As the police do not currently have the authority to stop vehicles without suspicion on private property, it follows that if it were true that motorists would respond to an absence of such authority by adopting evasive strategies, such a phenomenon would be happening now. The record is devoid of any evidence to that effect.

34. In addition, there is no evidence that the proposed expansion of police power is capable of deterring impaired driving; that any reduction in motor vehicle accidents, deaths, or impaired driving could be expected as a result of the proposed expansion of police power; or that the number of innocent persons likely to be stopped under the proposed power is proportionate to the number of individuals likely to be charged or convicted of driving while intoxicated.

35. It is revealing in this regard that there is no support whatsoever in legislative debates or history of a need for a truly unfettered discretionary power. For example, in the sentence that follows the one cited by the Appellant at paragraph 34 of its factum, Roy McMurtry explained that deterrence of impaired driving relied on the RIDE program:

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33 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, par. 42.
34 *Carter v. Canada (Attorney General)*, 2015 SCC 5, par. 44.
35 Memorandum of Argument of the Applicant, par. 3.
36 *R v McColman*, 2021 ONCA 382, par. 39.

> The use of roadside screening devices and the RIDE program -- to reduce impaired driving everywhere, of course -- is essential in increasing the level of apprehension of detection. Only in that area are we going to create any degree of deterrent.[37]

36. As the majority noted at paragraph 67 of the judgment at appeal, there exist many less intrusive *Charter* compliant means of enforcement to combat impaired driving, including the RIDE program and there is simply no evidence that extending unfettered discretionary stops onto private property would have any effect.

The Subsection 24(2) Test for "Unsettled" Powers Should be Clarified

37. With regard to the test for exclusion of evidence under subsection 24(2) of the *Charter*, the Court should clarify that situations where the law is so "unsettled" or "uncertain" that it weighs against a decision to exclude evidence will arise only in the rarest of cases.

38. The fact that a court has not explicitly rejected a claim for the recognition of a new police power or repudiated a certain kind of police conduct does not mean that it is lawful or that the law is "unsettled" in any meaningful sense for the purpose of the analysis under subsection 24(2). As the majority mentions at paragraph 91 of the judgment at appeal, police conduct that tests the limits of their authority should not be condoned by the courts.

39. Police officers are bound to know the law and must act within the constraints and scope of their recognized legal authority. While the general principle remains a relevant factor in cases where officers are acting in demonstrated good faith in a case of genuine "first impression" or in truly "unknown legal territory",[38] it cannot serve as an invitation for officers or prosecutors to push the limits of police powers until told otherwise.

PART IV — COSTS

40. The CCLA does not seek costs and asks that no costs be awarded against it.

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[37] Legislative Assembly of Ontario, First Session of the 32nd[nd] Parliament, Hansard – Official Report of Debates, December 10, 1981 at 8:30 p.m.

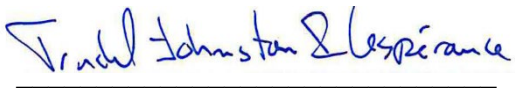
[38] *R v Paterson*, 2017 SCC 15, par. 46.

PART V — ORDER SOUGHT

41. The CCLA takes no position with respect to the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Montreal, Quebec, this 26th day of July 2022.



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PART VI — TABLE OF AUTHORITIES