500-09-030301-220
NO CONFIDENTIALITY

QUEBEC COURT OF APPEAL

On appeal from the judgment rendered by the Honourable Michel Yergeau of the Superior Court, District of Montreal, Civil Division, on October 25, 2022.

Nº : 500-17-114387-205 (C.S.)

ATTORNEY GENERAL OF QUEBEC

APPELLANT (Defendant)

c.

JOSEPH-CHRISTOPHER LUAMBA

INTIMED (Plaintiff)

and

ATTORNEY GENERAL OF CANADA

MIS EN CAUSE (Defendant)

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

CANADIAN ASSOCIATION OF BLACK LAWYERS

MISES EN CAUSE (Intervenantes)

BRIEF AND APPENDIX II OF THE RESPONDENT CANADIAN CIVIL LIBERTIES ASSOCIATION VOLUME 1, PAGES 1 TO 36

(as of August 30, 2023)

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[1] The police power to intercept any vehicle and its driver, at any time, in any place, and without the need to justify any reason for doing so, is a wide-open door to the arbitrary and discriminatory use of state powers, and a vehicle for racial profiling. The legal rules which authorize such interceptions[1] are manifestly unconstitutional.

[2] The extensive, converging, disturbing and otherwise largely uncontradicted evidence of the plaintiff and the CCLA demonstrated that this power is used in a discriminatory and disproportionate manner against black people. As the trial judge concluded, these daily injustices constitute direct affronts to these people's full citizenship and serve as a pretext for all manner of degrading and abusive treatment. Moreover, the detentions resulting from the impugned rules of law are by definition arbitrary, and constitute serious infringements of the right to liberty and security of the person.

[3] There is therefore no doubt that the impugned rules of law violate sections 7 and 9, as well as subsection 15(1) of the *Charter*. It is equally clear that they cannot be justified under section 1 of the Charter. During the trial, the Attorney General of Québec did not produce a shred of evidence to show that the power to carry out these interceptions was necessary or even useful.

[4] As recognized by the trial judge, these violations do not result from the erroneous or faulty application of an otherwise valid rule of law, but arise directly from the unmarked discretion contained in the rules of law themselves. Maintaining them would perpetuate a flagrant injustice and undermine public confidence in law enforcement and the justice system as a whole. The Superior Court's declaration of inoperability under section 52(1) of the *Constitution Act,* 1982[2] in this regard must therefore be upheld. The Superior Court's judgment contains no error, and this appeal should be dismissed.

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[1] Art. 636 of the *Highway Safety Code* [*C.s.r.*], RLRQ, c. C-24.2 (M.C._ACLC, Vol. 1, p. 35) and the *common law* rule established by *R. v. Ladouceur*, [1990] 1 RCS 1257 [*Ladouceur*] insofar as the *common law* power exists independently of art. 636 *C.s.r.*

[2] *Constitution Act, 1982,* Schedule B to *the Canada Act 1982* (U.K.), 1982, c. 11.

PART I: THE FACTS

[5] The trial in this case lasted twenty-one days. In an extensive 871-paragraph judgment, the Honourable Michel Yergeau, j.s.c., meticulously analyzed and summarized the qualitative, quantitative and expert evidence, as well as considerable documentary evidence establishing the applicable social context[3]. The respondent and the CCLA accept the factual findings of the judgment under appeal in their entirety, and draw this Court's attention to the following facts, which we group under five themes[4] :

The nature of racial profiling

[6] Racial profiling refers to any action taken by a person in authority against individuals targeted on the basis of their race, color or ethnic origin, rather than on the basis of actual motive or suspicion, with the effect of exposing them to differential treatment[5]. Racial profiling "also includes any action by persons in a position of authority who apply a measure disproportionately to segments of the population on the basis, in particular, of their actual or presumed racial, ethnic, national or religious affiliation "[6]. Racial profiling "occurs when race or racial stereotypes of criminality or dangerousness are used to any extent, consciously or unconsciously, in the selection of suspects or the treatment of individuals "[7]. Since racial profiling can result from unconscious bias, direct evidence of it in a "*traffic stop without probable cause* "[8] can be difficult, if not impossible, to prove[9].

[7] Society's awareness of racial profiling has greatly evolved since 1990. The phenomenon, as it is understood today, was undocumented in 1990, and has been the subject of major scientific developments over the past 30 years.

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[3] Judgment on appeal, par. 160, M.A., Vol. 2, p. 91.
[4] Part I of this brief is that of the respondent and the CCLA.
[5] Judgment under appeal, par. 42; see generally par. 27-51, M.A., Vol. 2, pp. 61-67.
[6] Judgment on appeal, par. 38, M.A., Vol. 2, p. 63.
[7] Judgment under appeal, para. 40 (M.A., Vol. 2, p. 64), citing *R. v. Le*, 2019 SCC 34 [*Le*].
[8] Judgment on appeal, par. 22, M.A., Vol. 2, p. 60.
[9] Judgment on appeal, par. 43-49, 153, 362, M.A., Vol. 2, pp. 65-66, 88, 121.

years and now has "its own distinctive features that make it easy to identify. racism "[10].

The impact of racial profiling during traffic stops in Quebec

[8] Racial profiling can exist without police officers being driven by racist [values11] , and is in fact rampant in police practice in [Quebec12]. Black people are subject to traffic stops at a much higher rate than white [people13]. Studies converge to the point of attributing to the phenomenon the expression "*Driving while black* "[14].

[9] Racial considerations thus "play a role in the selection of drivers forced to stop their vehicles for the sole purpose of verification without any real reason or reasonable suspicion "[15]. When it comes to black drivers, and especially young men, these "racial considerations" are informed by a series of well-known biases and stereotypes, including "preconceived ideas that associate black people with a propensity for criminality "[16].

The consequences of racial profiling in traffic stops without a real motive

[10] The contested rules of law have a clearly disproportionate and discriminatory impact on black [people17] , who perceive very early in life "that the law does not apply to them in the same way as to others, and that freedom is not guaranteed in the same way depending on whether you are black or white "[18]. Roadside interceptions without any real reason - even when they only result in a few minutes' detention - are a

[10] Judgment under appeal, paras. 391, 436, M.A., Vol. 2, pp. 129, 139; see also *Le*, 2019 SCC 34, para. 72-80.
[11] Judgment on appeal, par. 25, M.A., Vol. 2, p. 61.
[12] Judgment on appeal, par. 370, 373b), 559, 576, M.A., Vol. 2, p. 123, 162, 165.
[13] Judgment on appeal, paras. 391-464, 576, 737(a), 737(e), M.A., Vol. 2, pp. 129-145, 165, 196.
[14] Judgment on appeal, par. 417, M.A., Vol. 2, p. 135.
[15] Judgment under appeal, par. 755, M.A., Vol. 2, p. 201; see also 562(a), 737(b) and (c), M.A., Vol. 2, p. 162, 196.
[16] Judgment under appeal, par. 633, M.A., Vol. 2, p. 177; see also par. 30, 459, 737c), 822g), 825, M.A., Vol. 2, pp. 62, 144, 197, 215.
[17] Judgment under appeal, paras. 391-411 (see in particular paras. 397, 403 and 406), paras. 417-423, 576c),
737a) and f), 816, 822a), d), e) and f), 823, M.A., Vol. 2, pp. 129-137, 165, 196, 213, 216.
[18] Judgment on appeal, par. 7, M.A., Vol. 2, p. 58.

source of daily and repeated indignities. They provoke feelings of fear, injustice, powerlessness and loss of self-esteem. They are humiliating and dehumanizing for black people and their communities[19].

[11] These interceptions can damage the mental health, psychological safety and sense of belonging of the black people who experience them and their communities. The after-effects include the stress and ongoing fear of encountering a police car[20] , black parents' concern for the safety of their children on the road, particularly boys, leading them to warn them that they should expect to be arbitrarily intercepted[21]. Black drivers adopt strategies of "hypervigilance" - for example, filming their interactions with police officers, driving a vehicle that attracts less attention, or avoiding driving in certain neighborhoods[22].

[12] In addition, traffic stops without any real reason are sometimes carried out in an excessive, abusive and violent manner[23]. These interceptions also contribute to the over-judicialization of black people. It is not uncommon for these interceptions to end in illegal arrests or in the issuing of excessive, dubious or legally unfounded statements of offence[24]. What's more, roadside interceptions without any real grounds have a detrimental impact on black people's confidence in the police and the justice system as a whole[25]. In short, the cumulative effect of these interceptions - whether they result in a conviction or not - implies serious psychological, practical, material and professional consequences for the individuals subjected to them and their communities[26].

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[19] Judgment on appeal, par. 6-7, 161, 211-214, 365-366, 438-439, 445, 455, 458, 576e), 737h), 822i), for specific illustrations: par. 180, 189, 207, 209, 211-214, 237, 239, 257, 294, M.A., Vol. 2, p. 58-216.
[20] Judgment on appeal, par. 268, 439, M.A., Vol. 2, pp. 107-108, 139-140.
[21] Judgment on appeal, par. 214, 235-236, 267, 274, 456, M.A., Vol. 2, p. 100, 103, 107-109, 143.
[22] Judgment on appeal, par. 214, 256, 272, 311, M.A., Vol. 2, p. 100, 106-108, 114.
[23] Judgment on appeal, paras. 190-192, 221-222, 249, 255, 270, 313-315, 323-326, M.A., Vol. 2, p. 96, 101, 105-108, 114-116.
[24] Judgment on appeal, par. 191-193, 315, 341-348, 377, 440, 737e), M.A., Vol. 2, p. 96, 114, 118-. 119, 125, 140, 196.
[25] Judgment on appeal, par. 445, 457, 737(h), 822(i), 825, M.A., Vol. 2, pp. 141, 143, 197, 216-217.
[26] Judgment under appeal, par. 445, M.A., Vol. 2, p. 141; see also *Le*, 2019 SCC 34, par. 95.

The case for racial profiling in traffic stops without real cause

[13] The infringements of rights found by the trial judge stem from the impugned rules of law[27]. Since the unmarked discretionary power[28] to stop any vehicle rests solely on the intuition of the police officer, his or her prejudices, conscious or unconscious, can be expressed without a trace. By the same token, the rule of law becomes a vehicle for racial profiling[29].

[14] Although "public safety leaders are aware of the perverse effects of racial profiling and the loss of confidence it generates among racialized people "[30] , the trial judge observed that the interceptions at issue "are not framed by any mandatory provision that can be held as a rule of law aimed at reducing and eliminating the contribution of racial profiling in the selection of motor vehicle drivers "[31].

[15] The infringements of rights caused by traffic stops without real cause cannot be mitigated by better police training or other voluntary measures[32]. Expert evidence showed that the only way to end the discriminatory effects was to restrict or eliminate the challenged discretionary power[33].

Lack of proof of usefulness of roadside interceptions without real grounds

[16] Roadside interceptions without a real reason do not achieve the otherwise valid objective of increasing road safety[34]. On the one hand, roadside interceptions without cause "have not demonstrated their effectiveness in crime prevention [... and] have not

[27] Judgment on appeal, par. 631-634, 737(b), 755, 822(b), M.A., Vol. 2, pp. 176-177, 196, 201-202, 215; see also paras. 25, 44, 379-384, 389, 436-437, M.A., Vol. 2, pp. 61, 65, 125-129, 139.
[28] Judgment on appeal, par. 606; see also par. 36, 737(b), M.A., Vol. 2, pp. 63, 172, 196.
[29] Judgment under appeal, par. 632-633, M.A., Vol. 2, p. 177.
[30] Judgment on appeal, par. 69, 507, 576(d), M.A., Vol. 2, pp. 72, 153, 165.
[31] Judgment on appeal, par. 576(f), 737(b) and (d), 822(b); see also par. 15, 321-322, 606, M.A., Vol. 2, pp. 115-116, 172.
[32] Judgment on appeal, par. 425, 460, M.A., Vol. 2, pp. 137, 144-145.
[33] Judgment on appeal, par. 394, 460, M.A., Vol. 2, pp. 129-130, 144-145.
[34] Judgment under appeal, par. 690, 754; see also par. 365 on the lack of relevant statistics, M.A., Vol. 2, pp. 122, 186-187, 201.

little or no dissuasive effect on the behaviour complained of "[35]. The appellant's expert, who was unaware before testifying that the case concerned racial profiling[36] , did not enable the Tribunal to establish any correlation between the contested power and road safety in general[37]. On the other hand, "the social costs associated with randomly stopping people in public spaces far outweigh the otherwise extremely limited benefits that could be obtained in terms of public safety "[38].

[17] The appellant has produced no evidence to support the conclusion that other less intrusive means would not achieve the same result[39] , nor any evidence of an exceptional situation that would justify, in the public interest, imposing on black victims of racial profiling the continuance of this unacceptable affront to their rights[40].

PART II: ISSUES IN DISPUTE

[18] The issues are as follows:

I. Did the trial judge err in concluding that the impugned rules of law violate the rights guaranteed by sections 7 and 9 and subsection 15(1) of the *Charter*?

II. Did the trial judge err in concluding that the conditions were met to review the rule authorizing roadside interceptions without probable cause established by *R. v. Ladouceur* and *R. v.* Soucisse[41]?

III. Did the trial judge err in concluding that *Charter* violations cannot be justified in a free and democratic society?

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[35] Judgment under appeal, par. 446; see par. 684 on proving the existence of alternatives, M.A., Vol. 2, pp. 141-142, 185.
[36] Judgment on appeal, par. 677, M.A., Vol. 2, p. 184.
[37] Judgment under appeal, par. 681-683, M.A., Vol. 2, p. 185.
[38] Judgment on appeal, par. 446, M.A., Vol. 2, pp. 141-142.
[39] Judgment under appeal, par. 772, M.A., Vol. 2, p. 205.
[40] Judgment on appeal, par. 773, M.A., Vol. 2, p. 205.
[41] *R. v. Soucisse,* 1994 CanLII 5821 (QC CA) [*Soucisse*].

IV. Did the trial judge err in declaring the challenged rules of law inoperative under subsection 52(1) of the *Constitution Act, 1982*?

[19] The answer to each of these four questions is no. The appeal should therefore be dismissed .

PART III: RESOURCES

The standard of review on appeal

[20] The standard of review applicable on appeal to a question of law is correctness[42]. With regard to findings of fact - whether they concern the facts in dispute, social facts or legislative facts[43] - the applicable standard of review is that of manifest and determining error[44]. Except where it is possible to identify a pure question of law, the trial judge's treatment of mixed questions of fact and law is also entitled to deference[45]. Where, as here, an issue on appeal "involves the trial judge's interpretation of all the evidence "[46] , the standard of review is manifest and determinative error.

I. The trial judge did not err in concluding that the contested rules of law violate the Charter.

a. Rules of law infringe section 15(1) of the *Charter*

[21] This case seeks to put an end to the systemic discrimination suffered by black people as a result of the unmarked police discretion contained in the impugned rules of law. As such, it presents a clear case of adverse effect discrimination that arises when, as in this case, a law in

[42] *Housen v. Nikolaisen,* 2002 SCC 33, par. 8 [*Housen*].
[43] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, par. 56 [*Bedford*].
[44] *Housen*, 2002 SCC 33, par. 10.
[45] *Housen*, 2002 SCC 33, par. 36.
[46] *Housen*, 2002 SCC 33, par. 36.

neutral appearance has a disproportionate impact on members of groups protected against discrimination[47]. The contested rules of law do not explicitly target black people, but in fact subject them to distinct and discriminatory treatment.

[22] In line with the analytical framework applicable to situations of adverse-effect discrimination, the trial judge first considered whether the law creates or contributes to creating, on its face or through its effect, a distinction based on an enumerated or analogous ground[48] . To do this, there must be a link between the challenged law and the disproportionate effect on a protected group. This link can be established by reasonable inference, and consists in demonstrating that "the law has created *or contributed to* the disproportionate effect in question on a protected group "[49].

[23] In this regard, the trial judge concluded that "the rule of law, which allows a selection of drivers based exclusively on police intuition without any other reason, has a prejudicial effect considering the disproportionate impact of traffic stops without real reason on black people "[50]. In reaching this conclusion, he relied on the evidence as a whole, which demonstrated "disproportions in police stops" without real cause, which could not be explained "other than by racial profiling "[51]. He concluded that this distinction was caused by the rules of law[52] , which had a disproportionate effect on black people compared to white people, and therefore created, by their effect, a distinction based on race[53]. A finding of disproportionate effect commands deference on appeal[54].

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[47] *R. v. Sharma*, 2022 SCC 39, par. 29 [*Sharma*]; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, par. 30 [*Fraser*].
[48] *Sharma*, 2022 SCC 39, par. 28; *Fraser*, 2020 SCC 28, par. 27; *Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, par. 25 [*Alliance*]; *Centrale des syndicats du Québec v. Québec (Procureure générale)*, 2018 SCC 18, par. 22.
[49] *Sharma*, 2022 SCC 39, para. 49 [Italics in original].
[50] Judgment on appeal, par. 816, 822-823, M.A., Vol. 2, pp. 213, 215-216.
[51] Judgment on appeal, par. 822-823, M.A., Vol. 2, pp. 215-216.
[52] Judgment on appeal, par. 822, M.A., Vol. 2, pp. 215-216.
[53] Judgment under appeal, par. 821, M.A., Vol. 2, p. 215; *Fraser*, 2020 SCC 28, par. 52, 56-59; *Sharma*, 2022 SCC 39, par. 40.
[54] *Sharma*, 2022 SCC 39, par. 76-77.

[24] At the second stage, the trial judge analyzed the discriminatory effect of this distinction[55] , in light of the "systemic [and] historical disadvantages with which black communities must live and cope "[56] . It noted the significant effect of interceptions without probable cause "on the self-esteem, confidence in the police and justice system and sense of equality not only of those stopped, but also of their families, communities and black communities as a whole "[57]. He further concluded that the disproportionate number of traffic stops resulting from the rules of law perpetuates "an attitude of prejudice or social stereotyping towards [the] [black] community", often unconsciously, as associated with "crime, violence, pimping, drugs "[58]. As the trial judge pointed out, the decisive and uncontradicted expert evidence revealed that the perpetuation of such prejudices has serious consequences for black people and results in communities losing confidence in themselves[59]. On this basis, he concluded that the plaintiff had met its burden under the second prong of the test[60].

[25] The Attorney General nevertheless contests this analysis on the grounds that racial profiling would not be the effect of the contested rules of law, and adds that "it is inaccurate to assert that any roadside interception constitutes racial profiling "[61]. These arguments are wrong both in law and in fact, and must be rejected. The plaintiff's burden was certainly not to prove that every traffic stop constitutes racial profiling. The case law on subsection 15(1) is categorical. The impugned law need not affect all members of a protected group in the same way: "practices that are 'partially discriminatory' are no less discriminatory "[62].

[26] Furthermore, the suggestion that the discrimination suffered by black people is not the result of the challenged rules of law, but *solely* of acts

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[55] *Alliance*, 2018 SCC 17, par. 28 citing *Quebec (Attorney General) v. A*, 2013 SCC 5, par. 327 and 330.
[56] As required by *Fraser*, 2020 SCC 28, par. 76.
[57] Judgment on appeal, par. 822(i), M.A., Vol. 2, pp. 215-216.
[58] Judgment on appeal, par. 825, 828, M.A., Vol. 2, pp. 216-217.
[59] Judgment on appeal, par. 825, M.A., Vol. 2, pp. 216-217.
[60] Judgment on appeal, par. 829, M.A., Vol. 2, p. 217.
[61] Argumentation de l'appelant, par. 38 and 136, M.A., Vol. 2, pp. 63-64, 86.
[62] *Fraser*, 2020 SCC 28, par. 72.

The trial judge concluded that the rules of law constitute a "vector" for racial profiling, an open door to preconceived ideas about black people. In light of all the evidence before him, the trial judge concluded that the rules of law constitute a "vector" for racial profiling, an open door to preconceived ideas about black people[63]. The fact that derogatory acts may also, in some cases, be a cause of the discrimination suffered by black drivers does not change this. On the one hand, as the trial judge concluded, the impugned rules of law contribute to causing these derogatory acts by opening the door wide to them. On the other hand, the judge repeatedly noted the existence of unconscious racial prejudices expressed through the contested rules of law. It is indisputable that the expression of these prejudices is an effect of the legal rules, and that these rules therefore infringe the right to equality.

b. The rules of law infringe section 7 of the *Charter The law infringes on the freedom and safety of drivers*

[27] The trial judge concluded that the impugned rules of law infringed the rights of victims of racial profiling to liberty and security, rights protected by section 7 of the *Charter*, and that these infringements were not consistent with the principles of fundamental justice[64]. These conclusions are essentially factual and free of error.

[28] In *Bedford,* the Supreme Court stated that a law contravenes section 7 if there is a sufficient causal link between it and the infringement, on the understanding that the legislative measure need not be "the sole or principal cause of the injury "[65]. The central question under Article 7 is therefore a simple one: is there a sufficient causal link between the infringements and the rules of law[66]?

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[63] Judgment on appeal, par. 632-633, 862, M.A., Vol. 2, p. 177, 223.
[64] The test is set out in *Carter v. Canada (Attorney General)*, 2015 SCC 5, par. 55 ["*Carter*"].
[65] *Bedford*, 2013 SCC 72, par. 74-78.
[66] *Bedford*, 2013 SCC 72, par. 74-76; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, par. 60 [*Canadian Council for Refugees*].

[29] The right to liberty protects a sphere of personal autonomy: the right to make choices about one's life with dignity and independence[67]. Freedom is also undermined by the exercise of the state's power to compel someone to attend a particular place[68] , to do or not to do something[69] and by any physical coercion, including "freedom from detention, imprisonment or the threat thereof "[70]. For its part, the right to security protects all persons against acts of the state causing them, in particular, serious psychological harm[71]. The concern to protect autonomy and dignity underpins the rights enshrined in article 7[72].

[30] In this context, there can be no doubt that the impugned rules of law infringe on the liberty of any intercepted driver, especially since the rules of law are mostly aimed at innocent individuals[73]. The police power at issue necessarily involves the ability to restrict a driver's free movement under threat of physical restraint or legal sanctions for non-compliance. As the Supreme Court recently concluded, a "risk of detention is sufficient" to engage the rights guaranteed by article 7[74].

[31] The violation of these rights is all the more serious for black people, since it deprives them of "the fundamental freedom [...] to live their lives as they see fit and to drive to meet their needs without being harassed by the police solely on the basis of the color of their skin "[75]. As the trial judge concluded, the interceptions and increased surveillance of black drivers resulting from the rules of law also curtail their personal autonomy. They create a feeling of not being free and equal citizens, and have a negative impact on their lives.

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[67] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, par. 49; *Godbout v. Longueuil (Ville)*, [1997] 3 SCR 844, pp. 893-894 (per La Forest).
[68] *R. v. Ndhlovu,* 2022 SCC 38, par. 51 [*Ndhlovu*]; *R. v. Beare; R. v. Higgins*, [1988] 2 SCR 387, p. 402.
[69] See, for example, *Ndhlovu*, 2022 SCC 38 and *R. v. Heywood*, [1994] 3 SCR 761.
[70] *Canadian Council for Refugees*, 2023 SCC 17, par. 89; *R. v. Grant*, 2009 SCC 32, par. 54 [*Grant*].
[71] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, par. 116-120, 200 [*Chaoulli*]; *R. v. Morgentaler*, [1988] 1 SCR 30, par. 17-22 [*Morgentaler*]; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, par. 59 [*G. (J.)*]; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, par. 85-87.
[72] *Ndhlovu*, 2022 SCC 38, par. 51; *Carter*, 2015 SCC 5, par. 64.
[73] See *Fleming v. Ontario*, 2019 SCC 45, par. 6, paras. 5, 36, 67, 75-86.
[74] *Canadian Council for Refugees*, 2023 SCC 17 par. 89.
[75] Judgment under appeal, par. 738-739, M.A., Vol. 2, p. 197.

the perverse effect of encouraging them to modify their behaviour, to record their interactions with police officers and to educate their children in order to avoid the harassment resulting from the discretionary nature of the impugned legal rules[76]. Moreover, it is clear that these rules of law undermine their psychological security, since the interceptions they permit give rise to humiliating, degrading, dangerous and traumatizing interactions in a way that far exceeds "the ordinary anxieties that a person of reasonable sensibility would experience as a result of government action "[77].

[32] The appellant contests the judge's conclusion on the grounds that infringements of the right to liberty and security must be analyzed in the light of a non-discriminatory application of the rules of law by police officers[78]. This argument is circular. It would be absurd to accept that the constitutionality of a discretionary power should be assessed on the basis of the fiction that this power is only applied in accordance with the *Charter*, particularly when the facts demonstrate exactly the opposite. The effect of a rule of law on individuals is a highly factual matter that is determined by the evidence presented at trial. In light of this evidence, the trial judge concluded that the impugned rules of law infringe the freedom and safety rights of black drivers[79].

[33] Furthermore, in the same way as under subsection 15(1), the fact that the violation of the rights to liberty and security may *also* be the result of derogatory actions by certain police officers in no way affects the trial judge's conclusion that the law is *a cause of* the violation. This link is clear at trial, and the trial judge's conclusion in this regard is entitled to deference on appeal.

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[76] A sentiment that cannot be dissociated from its historical context, see Jugement dont appel, par. 454, M.A., Vol. 2, p. 143.
[77] *G. (J.)*, [1999] 3 RCS 46, par. 58-60; Judgment on appeal, par. 737-738, 761, M.A., Vol. 2, p. 196-. 197, 203.
[78] Appellant's argument, para. 107, M.A., Vol. 2, p. 80.
[79] Judgment on appeal, par. 761, M.A., Vol. 2, p. 203.

[34] The Attorney General also argues that there can be no infringement of the right to liberty, since "driving a vehicle is a regulated activity constituting a privilege rather than a right "[80]. On the one hand, as the first judge noted, this argument creates a false problem, since it is "not the right of black people to obtain a driver's license that is at issue", but the fact of making use of it without the rules of law becoming "a pretext for targeting people simply because they are black "[81]. The fact that restricting the ability to drive may not in itself constitute an infringement of liberty does not mean that a person's liberty cannot be infringed when driving. On the other hand, the fact that driving a vehicle is a

"Regulated activity" does not mean that everyone involved loses the protection of section 7. For example, although there is no constitutional right to immigrate to Canada, Article 7 ensures that the legislative regime in place protects the security and liberty rights of asylum seekers and immigrants[82]. Similarly, the fact that health care is a highly regulated field does not mean that legislated limits on care need not meet the requirements of section [783]. In short, the existence of a regulatory context does not exempt a field of activity from constitutional protection. The fact that an intercepted person is in a vehicle at the time of the violation of his or her rights is therefore irrelevant.

These infringements do not comply with the principles of fundamental justice

[35] The trial judge concluded that the infringements of the rights to liberty and security arising from the Act were not in accordance with the principles of fundamental justice, particularly since the Act was overbroad. This is a clear example of a law going "too far" to achieve its objective[84].

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[80] Appellant's argument, par. 101, M.A., Vol. 2, p. 27.
[81] Judgment on appeal, par. 736-737, M.A., Vol. 2, pp. 195-197.
[82] See for example *Canadian Council for Refugees*, 2023 SCC 17, par. 7, 8, 56; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, par. 27.
[83] See for example: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, par. 90-93 [*PHS*]; *Morgentaler*, [1988] 1 SCR 30, pp. 56-57, 104-106, 173-174; *Carter*, 2015 SCC 5, par. 57-69; *Chaoulli,* 2005 SCC 35, par. 110 et seq.
[84] *Bedford*, 2013 SCC 72, par. 107, citing Hamish STEWART, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, Toronto, Irwin Law, 2012, p. 151.

[36] The first step in the analysis is to identify the object of the impugned provision, as distinct from the means used to achieve it[85]. The Attorney General argues that the purpose of the law "is to ensure the application of the normative framework relating to driving, in order to ensure the safety of users of public roads "[86]. While this may reflect part of the legislator's intention in adopting article 636 *C.s.r.*, such a characterization of its purpose is inadequate, for two reasons.

[37] Firstly, "ensuring the application of the normative framework relating to driving" is not an objective in itself, but a means. However, failure to dissociate "the end sought from the means used to achieve it [...] precludes any separate analysis of the link between them", thus shielding the impugned provision "from review to determine whether it is overbroad "[87]. Secondly, "ensuring the safety of users of public roads" is clearly one of the underlying objectives of the *Highway Safety Code*, but is too general[88] to constitute the specific object of the impugned provision, which concerns only interceptions without real grounds.

[38] Since the purpose of the legislative amendment to art. 636 *C.s.r.* was simply to harmonize the legislative provision with the *Ladouceur* decision (as the trial judge concluded after analyzing the parliamentary debates[89]), it is appropriate to specify the objective to reflect the precise purposes of these interceptions. *For the* purposes of the section 7 analysis, the purpose is to increase road safety by verifying "[t]he mechanical soundness of the vehicle, the possession of a valid driver's licence and proof of appropriate insurance, and the sobriety of the driver "[90]. The means used to achieve this objective is to authorize roadside interceptions without real cause.

[39] Once the real purpose of the law has been identified, there can be no doubt that the law is overbroad, as the trial judge concluded. The rules of law

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[85] Ndhlovu, 2022 SCC 38, para. 59; *R. v. Appulonappa*, 2015 SCC 59, para. 27 [*Appulonappa*].
[86] Appellant's argument, par. 118, M.A., Vol. 2, p. 82.
[87] Ndhlovu, 2022 SCC 38, par. 72.
[88] *Ndhlovu*, 2022 SCC 38, par. 62; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, par. 27 [Safarzadeh-Markhali], citing *R. v. Moriarity,* 2015 SCC 55, par. 28.
[89] Judgment on appeal, par. 54, 654-655, M.A., Vol. 2, pp. 67-68, 180-181.
[90] *Ladouceur*, [1990] 1 RCS 1257, p. 1279-80; *R. v. Hufsky,* [1988] 1 RCS 621, p. 636 [*Hufsky*]; *Soucisse*, 1994 CanLII 5821 (QC CA), p. 12.

authorize the interception of "any vehicle, anywhere, anytime "[91] . Clearly, this power restricts the rights of certain individuals and impinges on behaviour that has no connection with its objective[92]. Not only does the law mostly target innocent individuals, but it authorizes their detention in the absence of any suspicion or belief that the driver does not have a valid license or insurance, is not sober or that the mechanical condition of his vehicle is problematic.

[40] The Attorney General nevertheless argues that the law is not overly far-reaching, because "every interception of a motorist contributes" to the dissuasive effect of the contested power[93]. This argument comes up against the inescapable reality that the dissuasive aspect of the contested legal rules is a pure question of fact[94] that was amply debated at first instance and was the subject of expert evidence both in the plaintiff's and the defendant's case. The judge concluded that there was no evidence of any dissuasive effect[95]. The appellant has not identified any manifest and decisive error in this respect.

[41] Finally, the Attorney General's position that certain offences are difficult to detect without groundless interception[96] is based on considerations of "the practical utility of a measure in terms of enforcement" which cannot "refute an allegation of overbreadth "[97]. Similarly, the mere risk that some drivers will commit such offences, and the uncertainty as to their identity, does not satisfy the s. 7 test either. As the Supreme Court recently recalled, "if the existence of a risk is the factor that applies to bring a measure that deprives people of their liberty into conformity with s. 7, the rules of law on overbreadth would lose their normative value "[98]. In short, legal rules

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[91] *Ladouceur*, [1990] 1 RCS 1257, p. 1264.
[92] *Bedford*, 2013 SCC 72, par. 101, 112.
[93] Argumentation de l'appelant, par. 120, 125, M.A., Vol. 2, pp. 82-84.
[94] By analogy with the deterrent effect at issue in *R. v. Média Vice Canada Inc*, 2018 SCC 53, par. 27-30, the deterrent effect of a police power is a question of fact that cannot be presumed and must be proven.
[95] Judgment on appeal, par. 446, M.A., Vol. 2, pp. 141-142.
[96] Argumentation de l'appelant, par. 121-122, M.A., Vol. 2, p. 83.
[97] *Ndhlovu*, 2022 SCC 38, para. 103; *Safarzadeh-Markhali*, 2016 SCC 14, para. 53, citing *Bedford*, 2013. SCC 72, par. 113.
[98] *Ndhlovu*, 2022 SCC 38, par. 100.

The measures challenged in this case restrict the rights of many drivers in a way that does nothing to further the State's objective, and are therefore excessive in scope.

c. Legal rules infringe Article 9 of the *Charter*

[42] A discretionary power is arbitrary if there are no criteria governing its exercise[99]. It follows that the impugned rules of law authorize interceptions which, without exception, constitute arbitrary detentions that systematically infringe the right guaranteed by s. 9 of the Charter[100], as the trial judge concluded[101]. This conclusion alone justifies the trial judge's declaration of unconstitutionality, insofar as the violation is not justified under section 1 of the *Charter*.

II. The trial judge did not err in concluding that the conditions of the Carter/Bedford test were met in this case.

[43] The principle of *stare decisis* is not an absolute rule[102]. An approach that privileges the courts' ability to review precedents restricting rights and freedoms lies at the heart of our constitutional tradition. In *Carter*, the Supreme Court explained that trial courts may review decisions rendered by higher courts in any of the following circumstances: "(1) when a new legal question arises; and (2) when a change in the situation or evidence 'radically changes the picture'"[103]. In the present case, the trial judge correctly concluded that this test had been met.

[44] It is clear that the trial judge did not err in considering as new questions of law the compliance of the impugned rules of law with the rights guaranteed by s. 15(1) and s. 7. Moreover, and contrary to what

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[99] *Hufsky*, [1988] 1 RCS 621, pp. 632-633 and *Ladouceur*, [1990] 1 RCS 1257, p. 1277. See also : Judgment under appeal, par. 604, 606, M.A., Vol. 2, pp. 171-172.
[100] *Grant*, 2009 SCC 32, par. 54.
[101] Judgment under appeal, par. 607, M.A., Vol. 2, p. 172.
[102] See e.g. *Carter*, 2015 SCC 5, par. 44; *Bedford*, 2013 SCC 72, par. 47; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, par. 18; *Canada v. Craig*, 2012 SCC 43, par. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, par. 56-57; Malcolm ROWE and Leanna KATZ, "A Practical Guide to *Stare Decisis*", (2020), 41 *Windsor Rev. Legal and Soc. Issues* 1, p. 4.
[103] *Carter*, 2015 SCC 5, par. 44; *Bedford*, 2013 SCC 72, par. 42; *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 SCC 4, par. 32; *R. v. Comeau*, 2018 SCC 15, par. 27-29 [*Comeau*].

as set out in his brief[104] , the appellant had conceded at trial that arguments under these sections constituted novel issues within the meaning of Bedford[105]. In any event, in *Bedford*, the Supreme Court clearly stated that

"The trial judge may consider and then rule on a constitutional claim that was not raised in the previous case, in which case it is a new question of law "[106] . This is what happened in the present case.

[45] The trial judge was also justified in departing from *Ladouceur*'s conclusion that infringement of section 9 is justified under section 1 following the second prong of the *Carter/Bedford* test. Indeed, the majority's analysis in *Ladouceur took* for granted two central premises:

1) That the interceptions resulting from the challenged power were "random", in the sense that no sub-group of drivers would be unfairly or disproportionately affected[107];

2) That the interceptions resulting from the challenged power were "routine" in the sense that they were brief, innocuous and represented a minor inconvenience to drivers[108].

[46] In 1990, the risk of abuse was only a hypothesis raised by the dissent[109]. Today, it is clear that black people are disproportionately affected by the challenged rules of law because of the racial profiling they are subjected to, and that this power inflicts serious harm - both to individuals and to society as a whole. A traffic stop motivated by racial profiling is not truly random, and for the person subjected to it, it is not a minor inconvenience. The trial judge concluded that the evidence of this new reality was unknown to the Supreme Court in *Ladouceur*, and that it could not have been "accepted" by the Court.

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[104] Argumentation de l'appelant, par. 29, M.A., Vol. 2, pp. 61-62.
[105] Argument by Me Déom (for the Attorney General), July 29, 2022, M.A., Vol. 33, p. 11437.
[106] *Bedford*, 2013 SCC 72, par. 42.
[107] *Ladouceur*, [1990] 1 RCS 1257, p. 1283.
[108] *Ladouceur*, [1990] 1 RCS 1257, p. 1286.
[109] *Ladouceur*, [1990] 1 RCS 1257, p. 1267; *R. v. Ladouceur*, (1987) 35 C.C.C. (3d) 240, pp. 259 and 273 (Ont.C.A.).

known[110]. This evidence represents an "important evolution of fundamental legislative and social facts [...] of interest to society in general "[111] and justified a full re-examination of the debate by the first judge.

[47] The Attorney General's argument in this regard fails to consider the fundamental difference between conscious and unconscious prejudice. He frames the debate by asserting that the case concerns roadside interceptions "carried out at random "[112] , whereas the evidence retained by the trial judge shows that they are not carried out at random, but rather on the basis of racial considerations that may be unconscious. The appellant also quotes Dean Sylvestre to the effect that racial profiling and its consequences had been documented in Canada since the 1960s[13] , without referring to the following sentence from her testimony, in which she states that, prior to the 2000s, "we had a rather narrow definition of racial profiling, we understood that racial profiling existed only when the intervention or action of a person in a position of authority was explicitly based on racial grounds "[114]. For the rest, the appellant repeats whole sections of excerpts from exhibits that refer, without exception, to explicit and conscious prejudice[115].

[48] Racism and discrimination are clearly not new phenomena, just as the risks associated with sex work or physician-assisted death were not new phenomena when the Supreme Court handed down the decisions in *Bedford* and *Carter*. However, society's awareness of systemic discrimination and racial profiling, which often emanate from unconscious biases, and the judicial system's willingness and ability to address them, have changed profoundly[116]. The first judge meticulously analyzed the evidence to conclude that

[110] Judgment on appeal, par. 561-576, M.A., Vol. 2, p. 162-166.
[111] *Comeau*, 2018 SCC 15, par. 31.
[112] Appellant's argument, para. 7, M.A., Vol. 1, p. 2.
[113] Appellant's argument, par. 90, M.A., Vol. 1, p. 20.
[114] Expert testimony by Marie-Ève Sylvestre, M.A., Vol. 31, p. 10547.
[115] Argumentation de l'appelant, M.A., Vol. 1, pp. 21-25.
[116] *Comeau*, 2018 SCC 15, par. 31-34.

the existence of profound social and political changes over the last thirty years[117] and has not committed any reviewable error in this respect.

III. The trial judge did not err in concluding that these violations could not be justified under section 1 of the Charter.

[49] To meet its burden of demonstrating that a violation of a *Charter* right is constitutionally justified[118] , the government must show that the object of a legal rule is real and urgent, and that the means chosen are proportional to that object[119] . This justificatory obligation can only be met on the basis of demonstrable facts and evidence: "mere assertions are not enough "[120]. The CCLA submits that when the government claims the power to interfere with the rights of individuals who have done nothing wrong, pose no threat and are not suspected of any criminal activity, the standard of justification should be strict.

[50] In this case, as discussed under section 7, the objective of the impugned rules of law is to increase road safety by ensuring the good mechanical condition of vehicles, the possession of valid driver's licences and proof of appropriate insurance, and the sobriety of drivers. The CCLA does not dispute that this objective falls within the sphere of legitimate government concerns. However, it needs to be assessed precisely and in its current context.

[51] From the outset, a distinction must be made between the law itself and the various policies, plans, training, "culture change" initiatives and strategies evoked by the appellant during the trial. These measures, while potentially useful or laudable in some cases, are entirely discretionary and voluntary initiatives. As the trial judge recognized, they are therefore not limits prescribed "by law" within the meaning of section 1 of the *Charter*, and cannot be invoked to defend the constitutionality of a law[121].

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[117] Judgment on appeal, par. 123, 365-367, M.A., Vol. 2, p. 122.
[118] *Frank v. Canada (Attorney General)*, 2019 SCC 1, par. 42.
[119] *R. v. Oakes,* [1986] 1 SCR 103, pp. 138-139 [*Oakes*]; *Carter*, 2015 SCC 5, par. 94.
[120] *Ndhlovu*, 2022 SCC 38, par. 118.
[121] *R. v. Therens*, [1985] 1 SCR 613, p. 645; *Little Sister Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, par. 85 [*Little Sisters*]; *Greater Vancouver Transportation Authority v.*

[52] The requirement that the government's objective be rationally connected to the limitation of *Charter* rights is generally not difficult to meet[122]. Consequently, the outcome of this case really depends on the minimal impairment and proportionality tests. In this respect, and as the trial judge concluded, the Attorney General has by no means met his burden.

[53] At the minimum attainment stage, the analysis aims to answer the following question: [123] The onus is on the government to demonstrate that the infringing measure is "carefully tailored" and that it ensures that the infringement of Charter rights does not exceed what is reasonably necessary to achieve the state objective. The onus is on the government to show that the infringing measure is "carefully tailored" and ensures that the infringement of *Charter* rights does not exceed what is reasonably necessary to achieve the state's objective[124].

[54] In this case, the government has not only failed to demonstrate that the challenged power is necessary, it has not even been able to show that it is useful. Despite a careful review of the evidence, the Court found no measurable utility in the "purely arbitrary" and "least filtered "[125] authority at issue. Although the appellant produced some statistics relating to traffic offences and the dangers of drink-driving, the judge found no link between the interceptions carried out under article 636 *C.s.r.* and the achievement of the government's objectives in practice. For example, he was unable to find a single indication that a reduction in motor vehicle accidents, deaths, traffic offences or impaired driving was even partially attributable to the impugned rules of law[126]. Nor was the Attorney General able to demonstrate that the number of people intercepted under these rules was proportional to the number of individuals charged or convicted of driving without a license, insurance or a licence.

Canadian Federation of Students (British Columbia Section), 2009 SCC 31, par. 63; see also Judgment on Appeal, par. 553(e), 554-557, M.A., Vol. 2, pp. 161-162.
[122] *Little Sisters*, 2000 SCC 69, par. 228.
[123] *Carter*, 2015 SCC 5, par. 102.
[124] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, par. 160; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, par. 149.
[125] Judgment on appeal, par. 562, 632, M.A., Vol. 2, pp. 162, 177.
[126] Judgment on appeal, par. 681, 690, 693, 697, 754, M.A., Vol. 2, p. 185, 186-188, 201.

valid registration, in possession of a vehicle in a dangerous mechanical condition or with a level of intoxication above the legal limit[127].

[55] In addition, the judge concluded that the police have other powers that are more effective and less intrusive than the power at issue in order to achieve the government's objectives[128]. Indeed, during the trial, several experts - including the appellant's expert - referred to practices both in Quebec and abroad that would enable more targeted, effective and non-discriminatory intervention[129] . Among these strategies are roadblocks, designated and supervised road safety programs, public awareness initiatives (for example, during the holiday season) and various methodologies to ensure that interceptions are truly

"The appellant offered no justification for the need for the unlimited discretion provided for in the contested law. The appellant offered no justification for the need for the unlimited discretion provided by the impugned rules of law130, and even its own expert agreed that interceptions based on objective criteria were preferable to subjective and entirely discretionary interceptions[131].

[56] Furthermore, the Attorney General argues that the police power at issue is justified by its deterrent effect. As previously mentioned, this argument is irreconcilable with the evidence presented at trial and the trial judge's factual findings. In this case, the experts at trial - both plaintiff and defendant - all agreed that the strength of a deterrent effect depends on the perceived probability of being intercepted and the certainty of the consequences[132]. A deterrent effect therefore requires drivers to be aware of the existence of the alleged deterrent power. However, outside black and racialized communities (where such interceptions are notorious for racial profiling), the judge concluded that "the rule of law underlying the

[127] Judgment on appeal, par. 694-696, 773, M.A., Vol. 2, pp. 187-188, 205.
[128] Judgment under appeal, par. 684, 702, 772, M.A., Vol. 2, pp. 185, 188, 205; *Oakes*, [1986] 1 RCS 103, p. 138-140; *Ontario (Attorney General) v. G*, 2020 SCC 38, par. 74-75 [*G*].
[129] *Carter*, 2015 SCC 5, par. 103-104; *Lavoie v. Canada*, 2002 SCC 23, par. 68; Judgment under appeal, par. 428, 684, M.A., Vol. 2, pp. 137-138, 185.
[130] Judgment on appeal, par. 684, M.A., Vol. 2, p. 185.
[131] Interview with Douglas Beirness (June 14, 2022), M.A., Vol. 28, pp. 9566, 9591, 9650-9654.
[132] Judgment on appeal, par. 665-668, M.A., Vol. 2, p. 181.

roadside interceptions without real cause is unknown to the general population [...] as confirmed by the evidence "[133]. Moreover, the appellant has not shown that the existence of this power alters driver behaviour in any way with respect to the mechanical condition of vehicles on the road or the validity of drivers' licences and registrations, nor with respect to alcohol consumption[134]. It is also interesting to note that the evidence suggested that many alternative measures, and in particular roadblocks ("*checkpoints"*), appear to have a genuine deterrent effect[135]. In short, the judge correctly concluded that there was no deterrent effect associated with the challenged legal rules.

[57] The Attorney General nevertheless states that the dissuasive aspect of "roadside interceptions or routine checks [...] is well established in law "[136]. With respect, it is not in law that the deterrent effect should have been established, but in fact[137] , and not only as a general theory, but precisely in relation to the challenged power. A finding of fact is not binding according to the rule of *stare decisis*, which rather concerns findings of law forming part of the *ratio decidendi* of a decision[138].

[58] It is therefore erroneous to claim that the trial judge was bound by any general statement of the Supreme Court on deterrence. The trial judge weighed the evidence presented by the appellant on the alleged deterrent effect of the impugned rules of law, and was in no way persuaded by it. The fact that other courts have recognized that other police powers have a deterrent effect in other contexts has no bearing on the present case. Contrary to the Attorney General's contention, the trial judge could not infer the existence of a deterrent effect in this case from previous decisions, notably *Ladouceur.* In any event, and as the trial judge concluded, whether or not proof of a deterrent effect is required is a question of fact.

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[133] Judgment on appeal, par. 737(i), M.A., Vol. 2, p. 195.
[134] Judgment under appeal, par. 679-682, M.A., Vol. 2, p. 184.
[135] See, for example, Jugement dont appel, par. 673, 677, M.A., Vol. 2, p. 183-184.
[136] Appellant's argument, par. 128, M.A., Vol. 2, p. 35.
[137] By analogy with the deterrent effect at issue in *R. v. Média Vice Canada Inc*, 2018 SCC 53, par. 27-30, the deterrent effect of a police power is a question of fact that cannot be presumed and must be proven.

[138] *R. v. Henry*, 2005 SCC 76, par. 55-56.

deterrent associated with groundless interception has or has not been administered in Ladouceur[139] , such evidence would have become obsolete 35 years later[140].

[59] Finally, the appellant has an obligation to justify not only that the power created by the impugned rules of law is necessary in this case, but also to explain why the benefits of such a power outweigh the manifest harms that result[141]. As set out above, the Superior Court was unable to identify any measurable benefit from the impugned rules of law. Insofar as the Court is entitled to assume that at least some people who are intercepted under the impugned power may be legally sanctioned (for example, because their licence has expired), this is by no means sufficient to justify a violation of *Charter* rights[142]. For example, the ability to search any home at any time would undoubtedly lead to more convictions, but the idea is clearly incompatible with our constitutional order. The same applies to the serious violations of the *Charter* discussed here.

[60] On the other side of the scale, the evidence shows that the vehicle interceptions carried out under the impugned rules of law result in serious infringements of *Charter* rights. By claiming that this power is constitutionally justifiable, the appellant is asking the Court to exchange the hypothetical safety of certain drivers for the dignity, freedom, full citizenship and real safety of the victims of racial profiling. Such an exchange can never be acceptable in a free and democratic society.

IV. The court of first instance did not err in declaring the contested rules of law inoperative.

[61] From the foregoing, it is clear that the contested rules of law produce effects that unjustifiably violate the rights guaranteed by sections 7 and 9 and subsection 15(1) of the *Charter.* The first judge was therefore right to declare them invalid.

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[139] Which does not seem to be the case: see *R. v. Ladouceur*, (1987) 35 C.C.C. (3d) 240, pp. 257-258. (Ont.C.A.).
[140] Judgment on appeal, par. 648-649, M.A., Vol. 2, pp. 179-180.
[141] *Oakes*, [1986] 1 RCS 103, p. 140.
[142] *R. v. Mann,* 2004 SCC 52, par. 35.

inoperative. Indeed, any rule of law incompatible with the *Charter* "by its object or effect" gives rise to a remedy under s. 52(1)[143].

[62] Whether the violation of the right protected by article 9 is attributable to the law cannot really be disputed: by its very nature, article 636 *C.s.r.* authorizes arbitrary detention. With regard to articles 7 and 15, as mentioned, the applicable analytical frameworks require the plaintiff to establish that the law is a cause, and not the sole or principal cause, of the violation.144 This is precisely the conclusion reached by the trial judge in light of all the evidence at trial. This determination is primarily factual, since the demonstration of a causal link depends on the evaluation of the evidence. The appellant makes no claim that the judge erred in the standard of proof required. It follows that the trial judge's declarations of inoperability are clearly well-founded.

[63] Nevertheless, part of the appellant's argument revolves around the distinction between the remedies available under sections 52(1) and 24 of the *Charter.* The CCLA therefore considers it useful to deal with this issue separately in this section.

a. Discretionary power may violate the *Charter*

[64] Referring to *Little Sisters*, the Attorney General argues that the judge erred in ordering a remedy under s. 52(1) instead of concluding that the plaintiff and other victims could only obtain individual reparations145. In addition to being irreconcilable with the trial judge's factual findings, the Attorney General's position is wrong in law.

[65] The *Little Sisters* decision *does* not have the scope that the appellant would like to attribute to it and is not applicable in the context of this appeal because the facts showed that the *Charter* violations at issue resulted from problems related to the administration of customs and not from the

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[143] *G*, 2020 SCC 38, par. 85, 86.
[144] *Bedford*, 2013 SCC 72, par. 74-78; *Sharma*, 2022 SCC 39, par. 49.
[145] Argumentation de l'appelant, par. 65-72, M.A., Vol. 2, pp. 13-15.

law itself - which contained a clear and restrictive legal standard ("obscenity") circumscribing any infringement of *Charter* rights in a constitutional manner[146]. In this case, the trial judge concluded on the basis of the evidence before him that the violation of *Charter* rights was the direct and foreseeable result of the untrammelled discretion conferred by the rules of law. The violations were not the result of maladministration of an administrative regime or isolated errors, but of the absence of guidelines in the rules of law.

[66] In this respect, it is important to recall that in *Little Sisters*, the Supreme Court did grant relief under s. 52(1) in respect of part of the challenged legislative scheme, concluding that a "reverse onus "[147] provision did not offer adequate constitutional protection. According to the majority, this rule allowed customs officers to violate the rights of individuals without any real justification on the part of the State, and obliged them to contest the decision of the customs authorities.
- if they had the resources to do so - after the fact[148]. If any part of *Little Sisters* is analogous to the present case, it is this decision to invalidate an unjust and unconstitutional standard under s. 52(1)[149] , not the Court's reluctance to intervene in the operational matters of an administrative agency.

[67] On the other hand, the fact that a power conferred by a rule of law can be exercised without infringing the *Charter* in certain cases does not make the law constitutional. If this were the case, a discretionary power - no matter how extensive or intrusive - could never be invalidated under s. 52(1), because a police officer or other agent of the state would always have the choice not to use it to its full extent. In reality, a declaration of inoperability is necessary when the statutory limits restricting state power are non-existent or constitutionally insufficient. For example, in *Hunter*, a power to conduct investigative searches and seizures was declared inoperative because the statute did not contain criteria

[146] *Little Sisters*, 2000 SCC 69, par. 41-44, 69 (discussion par. 45-68), par. 124.
[147] *Little Sisters*, 2000 SCC 69, par. 97-105.
[148] *Little Sisters*, 2000 SCC 69, par. 101; see also 92 (re: *mandamus*).
[149] *Little Sisters*, 2000 SCC 69, par. 97-105, 159.

objectives to frame and control such an intrusion.150 Obviously, in *Hunter*, the search power could have been used by state agents in a constitutional manner: i.e., with prior authorization based on reasonable and probable grounds to believe. This did not prevent the Supreme Court from declaring the law inoperative151.

[68] Similarly, in *Canfield*, the Alberta Court of Appeal struck down a provision of the *Customs Act* granting officers broad powers to search electronic devices at the border. The provision imposed no adequate standard to justify such an intrusive search, which - like the power challenged in that case
- could be made on a "random", "arbitrary" or otherwise discretionary basis152. In this case, the Court issued a declaration of inoperability under s. 52(1) and did not hesitate to reject an analogy with the *Little Sisters* case153.

[69] With regard to the *Nur* and *Bain* decisions, the Attorney General misunderstands the implications of this jurisprudence. These decisions simply reflect the well-established principle that the constitutionality of a rule of law is not assured by the fact that a state official has the discretion not to use the full extent of the power granted to him by law154. This case law also demonstrates that it is not necessary for a rule of law to have an unconstitutional effect in every situation or for every person for a declaration under s. 52(1) to be available155. Similarly, in *Appulonappa*, the Supreme Court held that a minister's discretion not to prosecute certain individuals in a manner that would violate their section 7 rights did not address the problem of overbreadth created by the statute156. As Lamer J. explained in *Smith*, to do so would be to "totally ignore section 52 [...] which states that the Constitution renders inoperative the inconsistent provisions of

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150 *Hunter et al v. Southam Inc*, [1984] 2 SCR 145, pp. 166-168 [*Hunter*].
151 *Hunter*, [1984] 2 RCS 145, p. 169.
152 *R. v. Canfield*, 2020 ABCA 383, application for leave to appeal dismissed, SCC, No. 39376 [*Canfield*].
153 *Canfield*, 2020 ABCA 383, par. 69.
154 *R. v. Bain*, [1992] 1 SCR 91, p. 103-104; *R. v. Nur*, 2015 SCC 15, par. 91 [*Nur*]; *R. v. Ferguson*, 2008 SCC 6, par. 72 [*Ferguson*].
155 *Bedford*, 2013 SCC 72, par. 134-136; see also *Ferguson*, 2008 SCC 6, par. 38, 59; *Nur*, 2015 SCC 15, par. 51, citing *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 295, p. 313.
156 *Appulonappa*, 2015 SCC 59, par. 74.

any other rule of law, and the courts have a duty to declare that this is so; they cannot leave it to the prosecution or anyone else to avoid a violation "[157].

b. The appellant's position is based on a false dichotomy

[70] Finally, the appellant's position in relation to *Little Sisters* rests on a false dichotomy between individual remedies, particularly under section 24(1) of the *Charter*, and section 52(1). The latter provides that any law inconsistent with the Constitution is of no force or effect. Section 24(1) of the *Charter* empowers the court to grant a "suitable and just" remedy for a violation of Charter [rights158]. In *Sullivan*, the Court clarified this relationship, noting that a remedy under s. 24(1) of the *Charter* has "remedial effect on a case-by-case basis", whereas a declaration under s. 52(1) applies *erga* [omnes159].

[71] Although the Supreme Court has historically suggested that these remedies would rarely be granted [together160] , it has adopted a much more flexible approach in recent [years161]. These remedies are therefore not mutually exclusive, and the fact that an administrative or constitutional remedy may be available at the individual level does not eliminate the right to seek a declaration under s. 52(1). As a result, the current situation is much more akin to the *CCLA* and *Brazeau* cases, two recent appeals from Ontario.

[72] In *CCLA*, the Ontario Court of Appeal considered the constitutionality of the administrative segregation regime in federal [prisons162]. Despite voluminous evidence of systemic abuses resulting from a lack of legislative safeguards, the

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[157] *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045, pp. 1078-1079.
[158] *Vancouver (City) v. Ward*, 2010 SCC 27, par. 16-22 [*Ward*]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, par. 52-59.
[159] *R. v. Sullivan*, 2022 SCC 19, par. 52-54.
[160] *R. v. Ferguson*, 2008 SCC 6, par. 35.
[161] *R. v. Bissonnette*, 2022 SCC 23, par. 137; *Ndhlovu*, 2022 SCC 38, par. 140-141; *R. v. Albashir*, 2021 SCC 48, par. 61-69; *G.*, 2020 SCC 38, par. 141-147; *R. v. Boudreault*, 2018 SCC 58, par. 109; *Carter v. Canada* (Attorney General), 2016 SCC 4, par. 5-7; *Ward,* 2010 SCC 27, par. 39; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* 2002 SCC 13, par. 79-81. [162] *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 [*CCLA*].

The Attorney General of Canada argued that Parliament was entitled to presume that its enactments would be applied constitutionally, and that the fact that the scheme was poorly administered could not render it unconstitutional.[163] In rejecting this argument and ordering a declaration of invalidity under subs. 52(1), Benotto J. concluded that the absence of limits or guarantees in the law itself was at the root of *Charter* violations[164] and that *Little Sisters does* not apply to cases, such as this one, where the law opens the door to a *Charter* violation without putting in place sufficient protections.

[73] The fact that the rules of law permitting indefinite administrative segregation were declared unconstitutional in *CCLA did* not immunize the state against individual claims for abuses committed under this regime, whether under s. 24(1) of the Charter, the writ of habeas corpus or other internal administrative mechanisms of the correctional system. 24(1) of the *Charter*, the writ of *habeas corpus* or other internal administrative mechanisms of the correctional system.[165] This fact was specifically confirmed by the Ontario Court of Appeal in *Brazeau*, one of many class actions arising from these violations.[166]

[74] In short, the fact that an individual who has suffered a violation of his or her rights may have access to certain administrative remedies or seek individual redress does not change the fact that the challenged rules of law must be declared inoperative.

PART IV: CONCLUSIONS

[75] A declaration under section 52(1) is necessary to safeguard the rights at issue. Individual remedies are of a fundamentally different nature from what is sought in this case - namely, a declaration invalidating the discriminatory power that led to these abuses in the first place - and will always be

[163] *Little Sisters,* 2000 SCC 69, par. 71*; CCLA*, 2019 ONCA 243, par. 35, 116 et seq.
[164] *CCLA*, 2019 ONCA 243, par. 117-19.
[165] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888, par. 421-433*; CCLA*, 2019 ONCA 243, par. 15, 94, 100.
[166] *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, par. 46-61.

inadequate to protect the rights in question[167]. The reality is that even the rare victims of the infringements of their rights described in this case who have succeeded in obtaining a satisfactory result before an administrative body or a court have no guarantee that the next time they drive, they will not be intercepted on the basis of the color of their skin.

[76] Unlike the *Little Sisters* case, where the Court found that the government had Although the government has "corrected the institutional and administrative problems experienced by the appellants "[168] , the government, although aware of the existence and seriousness of the problem, has no practical power to control the abuses in question. In short, the appellant proposes to allow police forces to continue subjecting innocent individuals to arbitrary, humiliating and discriminatory roadside interceptions for the foreseeable future. The victims of the impugned rules of law have a constitutional right to put an end to this practice, not just to obtain remedies after the fact.

[77] As the trial judge noted in concluding the judgment under appeal, "we cannot as a society expect a segment of the population to continue to suffer in silence" the application of a rule of law through which "that insidious form of racism" known as racial profiling is engulfed[169].

ACLC ASKS THE COURT OF APPEAL TO :

REJECT the present appeal;

ALL with legal fees. August 30,

2023 in Montreal

[167] *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) v. Ville de Gatineau*, 2021 QCTDP 1, par. 471-473, 478, 501, permission to appeal denied, 2021 QCCA 339.
[168] *Little Sisters*, 2000 SCC 69, par. 157.
[169] Judgment on appeal, par. 861-862, M.A., Vol. 2, p. 223.

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PART V: SOURCES

Paragraphs

Case law

Doctrine

APPENDIX II:
LEGISLATION

636. A peace officer, prima facie identifiable as such, may, within the scope of the duties he performs under this Code, the agreements entered into under article
519.65 and the Act respecting owners, operators and drivers of heavy vehicles (chapter P-30.3), require the driver of a road vehicle to stop his vehicle. The driver must comply with this requirement without delay.

1986, c. 91, a. 636; 1987, c. 94, a. 98; 1990, c. 83, a. 236; 1998, c. 40, a. 148; 2005, c. 39, a. 52; 2008, c. 14, a. 90.

636. Every peace officer recognizable as such at first sight may, in the performance of his duties under this Code, agreements entered into under section 519.65 and the Act respecting owners, operators and drivers of heavy vehicles (chapter P-30.3), require the driver of a road vehicle to stop his vehicle. The driver must comply with this requirement without delay.

1986, c. 91, s. 636; 1987, c. 94, s. 98; 1990, c. 83, s. 236; 1998, c. 40, s. 148; 2005, c. 39, s. 52; 2008, c. 14, s. 90.

THE CERTIFICATE

THE CERTIFICATE

The undersigned attorneys certify that this factum complies with the *Rules of the Court of Appeal of Québec in Civil Matters* applicable in this case and that its technological version complies in all respects with the requirements.

Counsel attest that no sealing orders, publication bans or restrictions on access to documents are in effect in this file.

Time required for oral presentation of arguments: to be determined following case management.

Signed in Montreal, August 30, 2023,

(Me Bruce W. Johnston) (Me Lex Gill)
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