Court File No. 41605

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC
APPELLANT / RESPONDENT ON CROSS-APPEAL
(Appellant)

- and -

JOSEPH CHRISTOPHER LUAMBA
RESPONDENT / APPELLANT ON CROSS-APPEAL
(Respondent)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION
RESPONDENT
(Respondent)

- and -

CANADIAN ASSOCIATION OF BLACK LAWYERS
ATTORNEY GENERAL OF CANADA
RESPONDENTS
(Impleaded Parties)

- and -

BRITISH COLOMBIA CIVIL LIBERTIES ASSOCIATION
CLINIQUE JURIDIQUE DE SAINT-MICHEL
COMMISSION DES DROITS DE LA PERSONNE
ET DES DROITS DE LA JEUNESSE
INTERVENERS
(Interveners)

- and -

ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF MANITOBA
INTERVENERS

FACTUM OF THE RESPONDENT
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

This document is an unofficial courtesy translation of the factum as filed with the Supreme Court of Canada by the Respondent, the Canadian Civil Liberties Association, on September 22, 2025. It is provided only as a courtesy to media and the public. Where no official English translation of a quote cited in the original version was available, an unofficial translation has been provided. The authoritative position of the Canadian Civil Liberties Association in the present appeal remains the French factum as filed.

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** Part VI (confidentiality) is not applicable to this file*

PART I - RESPONDENT'S POSITION AND STATEMENT OF FACTS

A. Overview

1. Section 636 of the *Highway Safety Code*[1] permits a peace officer to stop any vehicle, at any time and without cause. This discretionary authority opens the door to arbitrary and discriminatory exercises of state power. As the Superior Court and a unanimous panel of the Court of Appeal concluded, this law violates section 9 as well as subsection 15(1) of the *Canadian Charter of Rights and Freedoms.*[2] These violations cannot be justified under section 1, and a declaration of constitutional invalidity is required.

2. The present appeal offers this Court an historic opportunity to correct the systemic injustices arising from its decision in *Ladouceur.*[3] The extensive, convergent and largely uncontradicted evidence adduced by Mr. Luamba and the CCLA over the course of a six-week trial demonstrates that the impugned power is a vector for racial profiling. Black and racialized people, particularly young men, are subjected to arbitrary detentions at a grossly disproportionate rate. These detentions have serious consequences, including repeated instances of humiliation, loss of confidence in the police and justice system, psychological harm, and the adoption of "hypervigilant" strategies by racialized communities. These realities are the concrete and damaging discriminatory effects of a facially neutral law. They constitute a paradigmatic example of adverse impacts discrimination.

3. At trial, the Attorney General of Quebec ("AGQ") adduced no evidence to show that the impugned power was necessary, deterrent, or even useful, while the evidence reveals that targeted, less intrusive alternative means — such as structured checkpoints — exist and are effective. The trial judge's factual findings — as confirmed by the Court of Appeal — are unequivocal: there is *no* evidence on the record to suggest that section 636 *H.S.C.* is necessary to ensure road safety or that it has any deterrent effect on impaired driving whatsoever.

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1 Section 636, *Highway Safety Code*, CQLR c C-24.2 ["***H.S.C.***"].
2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c 11 ["***Charter***"].
3 *R. v. Ladouceur,* [1990] 1 SCR 1257 [***"Ladouceur***"].

4. As the courts below concluded, the *Charter* violations in question do not stem from a misapplication of an otherwise valid law, but directly from section 636 *H.S.C.,* which confers a discretionary power devoid of any real constraint. Maintaining the contested power would perpetuate a flagrant injustice and undermine public confidence in the justice system as a whole. A declaration of invalidity is the only way to put an end to a shameful form of systemic abuse in Canada, a country that purports to value equality before the law.

B. The Impugned Power

5. Before assessing the constitutionality and consequences of the power in dispute, the Court must understand its origin. In this section, we briefly summarize the jurisprudential history of roadside interceptions without grounds.

6. In 1985, the Supreme Court rendered its decision in *Dedman*, in which it recognized a police power to stop vehicles "at random" for the purposes of a program promoting sober driving [R.I.D.E.].[4] As noted by the Court of Appeal, the facts of that case — which involved traffic stops at a fixed point as part of a specific program — occurred before the adoption of the *Charter.*[5] In *Dedman*, the Court concluded that there was no statutory provision authorizing the interceptions in question,[6] and therefore applied the *Waterfield* test[7] (now the "ancillary powers doctrine"[8]) to assess the existence and legality of an equivalent common law power. Although the Court recognized that the interceptions in question infringed the rights of innocent drivers, the R.I.D.E. program was not considered to be an unreasonable interference with their liberty interests, given the importance of deterring and preventing drunk driving.[9]

7. In the 1988 *Hufsky* case, this Court considered the constitutionality of random traffic stops at a specific location ("spot checks") as carried out by the police "for the purposes of checking driver's licences and proof of insurance, the mechanical fitness of vehicles and the condition

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4 *Dedman v. The Queen*, [1985] 2 SCR 2, pp. 23, 36 ["***Dedman***"].
5 *Attorney General of Quebec v. Luamba*, 2024 QCCA 1387, par. 18 ["**Judgment on appeal**"].
6 *Dedman, supra*, pp. 30-31.
7 *R. v. Waterfield*, [1963] 3 All E.R. 659, pp. 170-171.
8 *Fleming v. Ontario*, 2019 SCC 45, par. 43 ["***Fleming***"].
9 *Dedman, supra,* p. 36.

or 'sobriety' of drivers."[10] The power invoked was both more general and aimed at a greater number of objectives than the specific program [R.I.D.E.] at issue in *Dedman*. Although the Court confirmed that the detentions in question were arbitrary and therefore contrary to section 9 of the *Charter*, it nevertheless found them to be justified under section 1, given the importance of road safety.[11] As the Court of Appeal pointed out, although the Crown referred to the reasoning in *Dedman,*[12] the source of the roadside stop power at issue in *Hufsky* flowed from subsection 189a(1) of the Ontario *Highway Traffic Act.*[13]

8. As mentioned, the power at issue in the present case was first recognized by this Court in *Ladouceur*, rendered two years later. As in *Hufsky*, the power invoked by the police in that case was section 189a(1) of the Ontario *Highway Traffic Act*, a general statutory provision authorizing a police officer acting "in the lawful execution of his duties and responsibilities" to require a driver to stop.[14] Unlike in the *Dedman* and *Hufsky* decisions however, the traffic stop in *Ladocueur* was carried out "from a patrolling police vehicle and not from a fixed point as part of an organized program."[15] The police invoked the power to carry out these stops on a “completely random” basis[16] and in an entirely discretionary manner, without any suspicion that the driver was breaking the law.

9. The question before the Court in *Ladouceur* was whether the power invoked was compatible with sections 7, 8 and 9 of the *Charter* insofar as it authorized an arbitrary detention without reasonable grounds or any other specific basis to believe that an offence had been committed, outside of a structured program.[17] However, the Supreme Court only addressed the violation of section 9. Despite a powerful dissent, a five-judge majority declared this power to be

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[10] *R. v. Hufsky*, [1988] 1 SCR 621, p. 625 ["***Hufsky***"].
[11] *Hufsky, supra*, p. 636-37.
[12] *Hufsky, supra,* p. 631.
[13] Judgment on appeal, *supra*, par. 21.
[14] *Ladouceur, supra*, p. 1278; *Hufsky, supra*, p. 634; See the Court of Appeal's analysis of the question of implied or parallel authority in common law: Judgment on appeal, *supra*, par. 21 and *R. v. Griffin*, 1996 NLCA 11055, par. 46, motion for leave to appeal dismissed, April 24, 1997, SCC no. 25753.
[15] Judgment on appeal, *supra*, par. 23, 26 to 32.
[16] *Ladouceur, supra*, p. 1276.
[17] *Ibid*, p. 1271.

constitutional. In their view, although traffic stops such as the one to which Mr. Ladouceur had been subjected constituted arbitrary detentions, they were justified under section 1.[18]

10. In Quebec, the statutory equivalent of paragraph 189a(1) of the *Highway Traffic Act* is section 636 *H.S.C.*. As noted by the Court of Appeal in the present case,[19] section 636 *H.S.C.* was not introduced into the *H.S.C.* in 1990, but rather amended to remove the former requirement for an officer to have reasonable grounds to believe that an offence under the *Code* had been committed. This amendment was also intended to harmonize the legislative provision with the Ontario power that had just been validated by the Supreme Court in *Ladouceur.*[20] In the 1994 *Soucisse* case, the Court of Appeal confirmed that section 636 *H.S.C.* was constitutional following *Ladouceur.*[21]

11. Since *Soucisse*, it has been recognized that traffic stops without grounds[22] are authorized in Quebec for the purpose of verifying the mechanical condition of the vehicle, as well as the driver's license, registration papers, insurance and sobriety of the driver.[23] There is no requirement that such stops be based on a particular motive, suspicion, or belief. Section 636 *H.S.C.* "contains no criteria or standards that could guide the work of police officers in selecting which drivers to stop" and that "[t]here are no objective reasons or parameters to guide them in the exercise of their discretionary power."[24] The power at issue is purely arbitrary, and thus allows the stopping of "any vehicle, anywhere, anytime, without having any reason to do so."[25]

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[18] *Ladouceur, supra*, p. 1288; We note that in *R. v. Wilson,* [1990] 1 SCR 1291, heard at the same time, the majority recognized the existence of this same power under s. 119 of the *Alberta Highway Traffic Act*—although the judges agreed that the police had reasonable grounds to stop the driver: pp. 1293-1294 (Sopinka J.), p. 1297 (Cory J.).

[19] Judgment on appeal, *supra*, par. 36, 113.

[20] Journal des débats, Commissions parlementaires, Commission permanente de l'aménagement et des équipements, Étude détaillée du projet de loi 108 - Loi modifiant le Code de sécurité routière et d'autres dispositions législatives, December 18, 1990, p. 3731, excerpt quoted here: *Luamba c. Procureur général du Québec*, 2022 QCCS 3866, footnote 34 ["**Trial judgment**"].

[21] *R. c. Soucisse,* 1994 QCCA 5821 ["***Soucisse***"].

[22] Judgment on appeal, *supra*, par. 10.

[23] *Soucisse, supra*, pp. 7-11.

[24] Judgment on appeal, *supra*, par. 64.

[25] *Ladouceur, supra*, p. 1264.

12. As an aside, it is worth noting here that Mr. Luamba initially challenged the constitutional validity of subsection 320.27(2) of the *Criminal Code.*[26] However, he withdrew this part of his claim at trial.[27] This provision authorizes the taking of a breath sample to test for the presence of alcohol by a peace officer "in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law." All parties (including the Attorney General of Canada) agree that this section, adopted in 2018,[28] is entirely subordinate to existing police powers, which vary from province to province. Consequently, the constitutionality of the power challenged in this case cannot be assessed in light of the federal objectives and distinct legislative context of subsection 320.27(2) of the *Criminal Code*.

C. The Facts

i. Preliminary Remarks and the Standard of Appellate Review

13. It should be noted at the outset that the AGQ puts forward a new theory in its factum, according to which *all* traffic stops relevant to the appeal are in fact disguised criminal investigations, noting that the prejudices of police officers that lead to racial profiling in the application of section 636 *H.S.C.* do not concern road safety.[29] This theory was not advanced by the AGQ in the Superior Court or before the Court of Appeal, and was therefore not the subject of an adversarial debate. In particular, the question of what proportion of traffic stops carried out under section 636 *H.S.C.* are in reality illegal criminal investigations was not debated and is not in evidence.

14. With respect, this is a false debate in any event, given that the overwhelming, convergent, and uncontested evidence shows that the racial profiling of Black men by police forces stems from and is justified by section 636 *H.S.C. in practice.*[30] In this context, it is difficult to understand

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[26] *Criminal Code,* R.S.C. 1985, c. C-46 ["***Criminal Code***"].
[27] Trial judgment, *supra*, footnote 5.
[28] Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, 1st session, 42nd Parliament. (assented to June 21, 2018).
[29] AGQ Factum, par. 5-9, 53, 70-74.
[30] Judgment on appeal, *supra*, par. 53.

how this new theory, if it had been advanced, debated, and accepted before the lower courts, would advance the AGQ's case. From the perspective of a victim of racial profiling, a racist stereotype regarding criminality led to their selection and detention under section 636 *H.S.C.* — how does the question of whether or not the stereotype relates to road safety change anything to the violations suffered, particularly in a context where the definition of racial profiling itself refers to stereotypes related to criminality?

15. Furthermore, the AGQ's new argument is based on the premise that one of the effects of the impugned *H.S.C.* provision is that police forces use it to conduct unfounded criminal investigations on a massive scale. This makes the *Charter* violations all the more obvious.[31] With this clarification in mind, it is worth recalling the standard of review before turning to the facts of the case.

16. The standard of review applicable to a question of law is correctness.[32] However, with regard to factual findings—whether they relate to the facts in dispute, social facts, or legislative facts[33]—the applicable standard of review is that of palpable and overriding error.[34] Except where it is possible to identify a pure question of law, the trial judge's treatment of mixed questions of law and fact must also be accorded deference.[35] When an issue on appeal involves "the trial judge's interpretation of the evidence as a whole," as is the case here, the standard of review is palpable and overriding error.[36]

17. The trial in this case lasted twenty-one days, involving the testimony and cross-examination of thirteen people stopped under this power, several senior Quebec government officials, representatives of numerous Quebec police forces, and four expert witnesses. The trial judge meticulously analyzed and summarized this evidence, along with considerable documentary evidence establishing the applicable social context.[37] Justice Yergeau synthesized this

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[31] *R. v. Mellenthin*, [1992] 3 SCR 615, p. 624: "Random stop programs must not allow for an unfounded general inquiry or an unreasonable search."
[32] *Housen v. Nikolaisen,* 2002 SCC 33, par. 8 ["***Housen***"].
[33] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, par. 56 ["***Bedford***"].
[34] *Housen, supra*, par. 10; *Eurobank Ergasias S.A. v. Bombardier inc*, 2024 SCC 11, par. 91; *Salomon v. Matte-Thompson*, 2019 SCC 14, par. 32 to 34 ["***Salomon***"].
[35] *Housen, supra*, par. 36.
[36] *Ibid*, par. 36.
[37] Trial judgment, *supra*, par. 160.

evidence into a series of specific, clear, and precise factual findings. These factual conclusions, found in a "detailed and carefully crafted judgment"[38] of 871 paragraphs, are supported by a 33-volume record and were unanimously accepted by three judges at the Court of Appeal.[39] They are entitled to deference before this Court.

18. Among these factual findings, the CCLA draws this Court's attention to the following.

ii. The Contested Traffic Stops Create a Vector for Racial Profiling

19. At the heart of the majority's reasoning in *Ladouceur* is the premise that the power to carry out the contested stops would be exercised "at random," that is, on a *truly* random basis. However, both the trial judge and the Court of Appeal concluded that the opposite is true: prejudice, whether conscious or unconscious, interferes with the exercise of the unbounded discretion conferred by section 636 *H.S.C.*, which constitutes a "vector for racial profiling."[40]

20. Racial profiling refers to an action taken by a person in authority towards persons targeted on the basis of their race, colour, or ethnic origin, rather than on the basis of actual motive or suspicion, which in effect exposes them to differential treatment.[41] This "occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment."[42] Racial profiling can exist without police officers being animated by overtly racist values[43] and is in fact widespread in police practices in Quebec.[44]

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[38] Judgment on appeal, *supra*, par. 2, 37.

[39] Moreover, we note that many of the relevant facts were not contested by the AGQ at trial, and no factual findings were formally appealed to the Court of Appeal - see, for example: Judgment on appeal, *supra*, par. 12, 13, 50, 174, 187.

[40] Judgment on appeal, *supra*, par 53, 175; Trial judgment, *supra*, par. 633.

[41] Judgment on appeal, *supra*, par 66; Trial judgment, *supra*, par. 42, 36 to 43; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc. (Bombardier Aéronautique Centre de formation)*, 2015 SCC 39, par. 33.

[42] *R. v. Le*, 2019 SCC 34, par. 76 ["***Le***"].

[43] Judgment on appeal, *supra*, par 67; Trial judgment, *supra*, par. 25.

[44] *Ibid*, par. 370, 373b, 559, 576.

21. The scientific and statistical evidence in the record confirms that police intuition is influenced by racial stereotypes and unconscious prejudice.[45] It also confirms that "racial considerations" play a role in the selection of drivers forced to immobilize their vehicles under the specific power in dispute.[46] For Black drivers, and especially young Black men, these considerations are informed by a series of well-known stereotypes, including " preconceptions that associate Black people with a propensity for crime."[47] The fact that these prejudices may relate to crime and not to road safety has no bearing on the analysis in this case. The definition of racial profiling expressly refers to stereotypes linked to criminality, and it is the unchecked police power itself that allows these stereotypes to be expressed.

22. The statistical and expert evidence in the file also demonstrates without the slightest ambiguity that the power in question is a major source of racial profiling in Quebec and Canada. As exhaustively summarized by the trial judge—and confirmed by the Court of Appeal—Black people are subject to traffic stops at a vastly higher rate than white people.[48] Clearly, this phenomenon is not limited to a particular city, police force, or to Quebec in particular, but rather is the inevitable result of unlimited discretion combined with widespread, systemic bias. Studies converge to the point of attributing the expression "*Driving While Black*" to the phenomenon.[49]

iii. The Law's Effects Are Serious and Systemic

23. The second — ultimately false — premise underlying the reasoning in *Ladouceur*, is that the traffic stops in question constitute only a minor inconvenience, with no particular consequences for the stopped driver. Instead, as the Court of Appeal noted, the evidence in the file shows that "the inconvenience considered ‘minimal’ in *Ladouceur* is totally at odds with today’s reality."[50]

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[45] Judgment on appeal, *supra*, par 69; Trial judgment, *supra*, par. 632.
[46] *Ibid*, par. 755; see also 737b and c.
[47] *Ibid*, par. 633; see also par. 30, 459, 737c, 822g, 825.
[48] Judgment on appeal, *supra*, par. 175; Trial judgment, *supra*, par. 391 to 464, 576, 737a, 737f, 737h.
[49] Judgment on appeal, *supra*, par. 177; Trial judgment, *supra*, par. 417.
[50] Judgment on appeal, *supra*, par. 98, 196.

24. Indeed, the traffic stops at issue have a clearly disproportionate impact on Black people,[51] who perceive very early in life that "that the law does not apply to them as it does to others, and that liberty is not guaranteed in the same way depending on whether one is Black or white."[52] Even when they only result in a few minutes of interaction, these stops are a 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.[53]

25. These interceptions can damage the mental health, psychological safety, and sense of belonging of the Black people who suffer them. Their long-term consequences include the stress and ongoing fear of crossing a police car,[54] as well as parents' concern for their children's safety on the road, particularly for boys. The evidence reveals that parents in the Black community teach their children that they should expect to be treated differently by the police because of the colour of their skin.[55] Black drivers adopt strategies of "hypervigilance"—for example, videotaping their interactions with police officers, driving vehicles which attract less attention, or avoiding driving in certain neighbourhoods.[56]

26. In addition, the traffic stops in dispute are sometimes carried out in an abusive and violent manner[57] and contribute to the disproportionate policing of Black people.[58] It is not uncommon for these stops to end in illegal arrests or the issuing of excessive or unfounded tickets and fines.[59] Furthermore, these stops have a detrimental impact on Black people's trust in the police

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[51] *Ibid*, 197 to 200; Trial judgment, *supra*, par. 391 to 411 (see in particular 397, 403 and 406), par. 417 to 423, 576c; 737a and f, 816, 822a, d, e and f, 823.
[52] *Ibid*, par. 7.
[53] Judgment on appeal, *supra*, par. 142, 197; Trial judgment, *supra*, par. 6 to 7, 161, 365, 366, 438, 439, 455, 458, 576e, 737h, 822i; (specific examples: par. 180, 189, 207, 209, 211 to 214, 237, 239, 257, 294).
[54] Judgment on appeal, *supra*, par. 197; Trial judgment, *supra*, par. 268, 439.
[55] Judgment on appeal, *supra*, par. 197; Trial judgment, *supra*, par. 214, 235, 236, 267, 274, 456.
[56] Judgment on appeal, *supra*, par. 197; Trial judgment, *supra*, par. 214, 256, 272, 311.
[57] Judgment on appeal, *supra*, par. 197; Trial judgment, *supra*, par. 190 to 192, 221, 222, 249, 255, 270, 313 to 315, 323 to 326.
[58] Judgment on appeal, *supra*, par. 197 to 200, 207.
[59] See Trial judgment, *supra*, par. 191 to 193, 315, 341 to 348, 440, 737e.

and the justice system.[60] In short, the traffic stops at issue have serious psychological, material, and professional consequences for the individuals subjected to them and their communities.[61]

iv. The Contested Power Is the Cause of the Charter Violations

27. As the Court of Appeal rightly confirmed, the rights violations found by the trial judge flow directly from section 636 *H.S.C.*. The Court of Appeal summarized the causal dynamic as follows: "Racial profiling in traffic stops with no required grounds arises because s. 636 *HSC* includes no criteria to govern the exercise of discretion it confers on police officers. The problem lies in the absence of proper limits in the *HSC* regarding the exercise of this power. It is this absence of sufficient guidelines in s. 636 *HSC* which, by fostering (*favorisant*) racial profiling, is the source of the alleged *Charter* breaches."[62]

28. The fact that police officers' discretionary power to carry out these interceptions exempts them from the obligation to provide any justification to the driver, and the fact that the power is not checked by any objective legal criteria, thereby "fosters" (*favorise*) and facilitates racial profiling in the exercise of the power.[63] Indeed, police officers themselves are often not consciously aware that they are stopping a driver for reasons related to his or her race.[64] The evidence presented at trial on this point—confirmed by three experts—is convincing and unequivocal. Regardless of a police officer's intent, the broader the discretion and the greater the officer's reliance on his or her intuition (or "hunch") rather than a defined legal standard, the higher the rate of racial disparity in traffic stops.[65]

29. As the Court of Appeal concluded, the requirement that the traffic stops in question be related to road safety issues "are not sufficient to prevent racial profiling from becoming a factor in this type of stop" since the officer has no criteria that have to be followed.[66]

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[60] Judgment on appeal, *supra*, par. 197 to 198, 207 to 209; Trial judgment, *supra*, par. 445, 457, 737h, 822i, 825.
[61] Judgment on appeal, *supra*, par. 197 to 198; Trial judgment, *supra*, par. 445; *Le*, *supra*, par. 95.
[62] Judgment on appeal, *supra*, par. 74, see also footnote 87, par. 53, 65.
[63] *Ibid*, par. 72.
[64] *Ibid*, par. 72.
[65] *Ibid*, par. 69, 72 to 74; Trial judgment, *supra*, par. 44, 755.
[66] Judgment on appeal, *supra*, par. 74.

30. Although " the heads of public safety are aware of the perverse effects of racial profiling and the loss of confidence it generates among racialized people,"[67] the trial judge observed that the traffic stops at issue are not bounded by any law "aimed at reducing and eliminating the contribution of racial profiling in the selection of motor vehicle drivers."[68] Nor can the rights violations caused by the traffic stops at issue be mitigated by better police training or other voluntary measures.[69] Indeed, expert evidence confirms that the only way to end the discriminatory effects is to restrict or eliminate the contested discretionary power.[70]

v. The Contested Power Is not Useful, Deterrent, or Necessary

31. Traffic stops without cause are neither useful, nor deterrent, nor necessary.[71] On the one hand, the trial judge found that traffic stops without grounds "have not demonstrated their effectiveness in preventing crime" and "have little or no deterrent effect on the alleged misconduct."[72] In particular, the evidence "did not establish that traffic stops with no required grounds are more effective than roadblocks"[73] or over other powers allowing police to intervene for road safety considerations, including "roadblocks, designated regulated highway safety programs, public awareness campaigns, and methods to ensure that stops are truly random rather than discriminatory."[74]

32. The appellant's expert did not enable the trial judge to establish a correlation between the impugned power and road safety in general.[75] Nor was he able to establish the usefulness of the impugned power with regard to drunk driving, and he conceded that he was unaware of any study demonstrating the deterrent effect of roadside interceptions without cause in this regard.[76]

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67 Trial judgment, *supra*, par. 469, 507, 576d.
68 *Ibid*, par. 576f, 737b and d, 822b; see also par. 15, 321 to 322, 606.
69 *Ibid*, par. 425, 460.
70 *Ibid*, par. 427 to 428, 460; see also par 394.
71 *Ibid*, par. 690, 754, see also par. 365.
72 *Ibid*, par. 446, 690, 754; see also par. 365 on the absence of relevant statistics.
73 Judgment on appeal, *supra*, par. 133-134; Trial judgment, *supra*, par. 684.
74 Judgment on appeal, *supra*, par. 136.
75 Trial judgment, *supra*, par. 681.
76 Judgment on appeal, *supra*, par. 214; Trial judgment, *supra*, par. 678 to 683.

33. On the other hand, the trial judge also found that " 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."[77] In other words, there is no evidence that the impugned power—which causes serious and documented harm—is necessary or useful in order to protect public safety. The Court of Appeal concluded that "the record as constituted contains no evidence to allowing one to conclude that traffic stops with no required grounds are an effective means of ensuring highway safety."[78]

D. The Superior Court Decision (Yergeau, J.C.S.)

34. On October 25, 2022, the Superior Court rendered a judgment declaring that the conditions had been met to review this Court's precedent in *Ladouceur*, confirming that the impugned rules of law (under section 636 *H.S.C.* and under the common law) violated the rights guaranteed by sections 7 and 9 and subsection 15(1) of the *Charter* without being justifiable in a free and democratic society, and declared that they were therefore invalid and of no force or effect[79] under subsection 52(1) of the *Constitution Act, 1982.*[80] The trial judge also suspended, for a period of six months, the effective date of the invalidity.[81]

E. The Court of Appeal Decision (Dutil, Gagné and Weitzman JJ.C.A.)

35. On October 23, 2024, the Court of Appeal rendered a unanimous judgment upholding the trial judgment in almost all respects. The only significant departure from the Superior Court's reasoning was to clarify the non-existence of a parallel common law power to carry out the traffic stops at issue.[82] The Court chose not to rule on the violation of section 7, given its conclusion with regard to section 9.[83] In all other respects, the Court of Appeal upheld the

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77 *Ibid*, par. 446.
78 Judgment on appeal, *supra*, par. 210 (original emphasis).
79 Trial judgment, *supra*, par. 866 to 871.
80 Section 52(1), *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["***Constitution Act, 1982***"].
81 Trial judgment, *supra*, par. 870.
82 Judgment on appeal, *supra*, par. 14 to 32.
83 *Ibid*, par. 146 to 151.

Superior Court's judgment, also suspending the effective date of the declaration of invalidity for a period of six months.[84]

F. The Decision Refusing to Suspend the Declaration of Invalidity (Sansfaçon, J.C.A.)

36. In March 2025, the AGQ requested a stay of execution of the Court of Appeal's decision under article 390 al. 2 *C.C.P.* and article 65.1 of the *Supreme Court Act.* Justice Sansfaçon, applying the criteria of *RJR-MacDonald*, reiterated the Court of Appeal's conclusions concerning the deleterious effects of the contested power and the fact that there was nothing in the record to support the conclusion that the traffic stops at issue serve as an effective means of ensuring road safety.[85]

37. He concluded that the continued existence of the power "caused considerable harm" and " serious consequences of the direct and indirect effects of racial profiling on both the victims and their family members, as well as detrimental effects on the Black community as a whole."[86] According to the judge, maintaining section 636 *H.S.C.* in force pending a decision by this Court was " likely to have [...] negative repercussions on Black people far greater than the benefits to the general public as a result of the application of the measure during this period."[87] He added that "taking into account the public interest, that is, the interest of justice and the justice system, the disadvantages to the general public in refusing to suspend would be less than those to Black people in ordering a suspension."[88]

38. The Court therefore refused to extend the suspension of the declaration of invalidity, except in the limited circumstance of mandatory breath testing and with regard to roadside inspectors.[89] Thus, with the exception of these situations, as of March 31, 2025, police officers in Quebec no longer have the power to carry out traffic stops without grounds.

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[84] *Ibid*, par. 224, 218 to 221.
[85] *Procureur général du Québec c. Luamba*, 2025 QCCA 373, par. 19 ["**Suspension judgment**"].
[86] Suspension judgment, *supra*, par. 40.
[87] *Ibid*, par. 43.
[88] *Ibid*, par. 44.
[89] *Ibid*, par. 39.

PART II – QUESTIONS IN ISSUE

39. This appeal raises the following questions:

1. Did the Court of Appeal err in concluding that section 636 *H.S.C.* infringes the rights guaranteed by sections 15 and 9 of the *Charter*?

2. Did the Court of Appeal err in concluding that the violation of these rights cannot be justified in a free and democratic society?

3. Should this Court reconsider its precedent in *Ladouceur*?

4. Did the Court of Appeal err in declaring the impugned law invalid under subsection 52(1) of the *Constitution Act, 1982*?

40. Mr. Luamba's cross-appeal raises the following questions:

1. In *Ladouceur*, did this Court recognize a parallel common law power permitting the impugned traffic stops?

2. If so, is this power unconstitutional for the same reasons?

41. For the reasons that follow, the CCLA submits that the Court of Appeal committed no error and that both the AGQ appeal and Mr. Luamba's cross-appeal should be dismissed.

42. In addition, in the motion submitted with this factum, the CCLA seeks leave to file a short factum as Respondent on the cross-appeal with regard to the alleged existence of a parallel common law power. Mr. Luamba and the AGQ both consider that such a power exists, while the CCLA is of the opposite view. Without the CCLA's observations on this point (which it submitted to the Court of Appeal upon its request and with which the Court of Appeal agreed[90]), this Court will not benefit from a full adversarial debate on the issue.

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[90] Judgment on appeal, *supra*, par. 15 to 32.

PART III - STATEMENT OF ARGUMENT

A. Overview

43. In the following sections, we demonstrate that the trial judge and the Court of Appeal were right to conclude that the power to conduct traffic stops without grounds is the source of clear and serious violations of sections 15 and 9 of the *Charter*. We also present some observations concerning the violations of section 7, which were upheld by the trial judge, but regarding which the Court of Appeal did not rule. We then examine the applicable standard under section 1 of the *Charter* and argue that the AGQ has failed to meet its burden of proof to show that the infringements of the rights in question are justified.

44. As mentioned, this case also raises the question of whether the Court should depart from its precedent in *Ladouceur*. However, this question relates only to the violation of section 9, given that, as the Court of Appeal noted, the constitutionality of the impugned traffic stop power with regard to sections 7 and 15 of *the Charter* is not the subject of any binding precedent.[91] Accordingly, we consider it more appropriate to address this issue after we have completed our analysis of the *Charter* violations. As explained below, this Court's jurisprudence on the principle of *stare decisis* argues strongly in favour of a review of *Ladouceur*.

45. Finally, we submit that a declaration of invalidity of section 636 *H.S.C.* under subsection 52(1) of the *Constitution Act, 1982* is the appropriate remedy. Indeed, it is the only remedy that will prevent future violations and end the devastating legacy of this Court's *Ladouceur* decision.

B. Section 636 *H.S.C.* Violates Subsection 15(1) of the *Charter*

i. General Principles and the Test Applied by Lower Courts

46. In the present case, the respondents' primary objective is to put an end to the systemic discrimination suffered by Black people as a result of the unchecked discretion created by the law. While section 636 *H.S.C.* does not explicitly target Black people, it subjects them, in practice, to distinct and discriminatory treatment in violation of subsection 15(1) of the

[91] *Ibid*, par. 79 to 81; *Bedford, supra*, par. 42.

Charter.[92] This is a clear case of adverse impacts discrimination, since a purportedly neutral law has a disproportionate impact on members of a protected group.[93]

47. The guarantee of section 15, more than any other, is intimately linked to human dignity.[94] In *Egan*, L'Heureux-Dubé J. recalled that at the heart of section 15 "is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving."[95] In *Swain*, the Chief Justice stated that the purpose of section 15 is to "remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[96] In *Law* and *Andrews*, the right protected by section 15 was described as "a guarantee against the evil of oppression" that was designed to "remedy the imposition of unfair limitations upon opportunities."[97] The provision does not protect theoretical equality or the right to identical treatment, but rather "*substantive* equality."[98] This distinction is central to the present case.

48. In keeping with the analytical framework applicable to situations of adverse effect discrimination, the trial judge and Court of Appeal correctly asked, first, whether the law creates or contributes to creating, on its face or by its effect, a distinction based on an enumerated or analogous ground.[99] To do this, there must be a link between the impugned law and a disproportionate effect on a protected group. This link can be established by reasonable inference and consists in demonstrating that "the law created *or contributed to* the

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92 Judgment on appeal, *supra*, par. 203, 216.

93 *R. v. Sharma*, 2022 SCC 39, par. 29 ["***Sharma***"]; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, par. 30, 43-45 ["***Fraser***"].

94 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, par. 48 ["***Law***"].

95 *Law*, *supra*, par. 49, citing *Egan v. Canada*, [1995] 2 SCR 513, par. 39.

96 *R. v. Swain*, [1991] 1 SCR 933, p. 992; see also *Fraser*, *supra*, par. 27, citing *Quebec (Attorney General) v. A*, 2013 SCC 5, par. 332 ["***A.***"].

97 *Law*, *supra*, par. 42, citing McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, p. 171 ["***Andrews***"].

98 Judgment on appeal, *supra*, par. 153 (emphasis ours); *Fraser*, *supra*, par. 40; *Québec (Procureure générale) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, par. 25 ["***Alliance***"].

99 Judgment on appeal, *supra*, par. 158 to 160; *Sharma*, *supra*, par. 28; *Fraser*, *supra*, par. 27; *Alliance*, *supra*, par. 25; *Centrale des syndicats du Québec v. Québec (Attorney General),* 2018 SCC 18, par. 22.

disproportionate impact on a protected group." The law need only be a cause, and not the sole or principal cause, of the violation.[100]

49. In this case, neither the Superior Court nor the Court of Appeal had the slightest hesitation in concluding that the impugned law had a prejudicial effect, given the disproportionate impact of the impugned traffic stops on Black people.[101] In reaching this conclusion, the trial judge relied on abundant and uncontested evidence establishing that "members of the Black community are systematically stopped more often by the police," a phenomenon which, according to Justice Yergeau, could not be explained "other than by racial profiling."[102] He concluded that this distinction was caused by the law itself, which in its effects created a distinction based on race.[103] A finding of disproportionate effect commands deference on appeal[104] and the Court of Appeal agreed with the entirety of the trial judge's analysis in this regard.

50. At the second stage, the trial judge analyzed the discriminatory effect of the distinction[105] in light of the " systemic [and] historical disadvantages with which Black communities must live and cope."[106] He noted the significant effect of the traffic stops at issue " 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, friends, and Black communities as a whole."[107] He further concluded that the disproportion of traffic stops arising from the law perpetuates" an attitude of social prejudice or stereotyping towards [the] [Black] community," often unconsciously, as being associated "with crime, violence, pimping, drugs."[108] 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 leads to a loss of confidence in the communities

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100 *Sharma*, *supra*, par. 49.
101 Judgment on appeal, *supra*, par. 176 to 193; Trial judgment, *supra*, par. 816, 822 to 823.
102 Judgment on appeal, *supra*, par. 177; Trial judgment, *supra*, par. 822 to 823.
103 *Ibid*, par. 821; *Fraser*, *supra*, par.52, 56 to 59; *Sharma*, *supra*, par. 40.
104 *Ibid*, par. 76 to 77.
105 *Alliance*, *supra*, par. 28 citing *A.*, *supra*, par. 327 and 330.
106 Trial judgment, *supra*, par. 828; Judgment on appeal, *supra*, par. 43, citing Trial judgment, *supra*, par. 828.
107 Trial judgment, *supra*, par. 822i.
108 *Ibid*, par. 825, 828.

themselves.[109] On this basis, he concluded that the plaintiff had met his burden under the second stage of the test.[110] The Court of Appeal's reasons restate and reinforce the trial judge's entire analysis in this regard.[111]

51. These conclusions are firmly anchored in the evidence in the record and present a complete and coherent application of the jurisprudence under subsection 15(1).

ii. The Causal Link between the Law and the Violations in Light of the Evidence

52. The AGQ devotes a single paragraph of its factum before this Court to its argument challenging the violation of section 15(1) of the *Charter.* In this paragraph, it concedes from the outset that "a person subjected to racial profiling sees their right to equality violated."[112] The AGQ's only argument is that the law itself is not the cause of the discriminatory effects and prejudice suffered by the Black drivers in this case, which (in its view) would be *solely* the result of derogatory acts by police officers. As was the case before the Court of Appeal, if the AGQ fails to convince the Court on this point, it will for all practical purposes be conceding a violation of section 15(1) of the *Charter.*[113]

53. Its argument in this regard is doomed to fail. The finding that section 636 *H.S.C.* is the source of the violations is a factual conclusion amply supported by the evidence and is entitled to deference. The fact that derogatory acts may also, in some cases, be a cause of the discrimination suffered by Black drivers does not change this. The law does not have to be the sole cause of a violation to contravene section 15. The AGQ did not identify any overriding and palpable error that would justify this Court's intervention.

54. Contrary to the Appellant's contention, establishing a causal link between a legislative provision and the violation of a right protected by the *Charter* is not a question of law. The Court of Appeal did not err in holding that, in this case, it is a question of mixed law and fact "because the effects of the provision's application must be considered to determine its

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[109] *Ibid*, par. 825.
[110] *Ibid*, par. 829.
[111] Judgment on appeal, *supra*, par. 192 to 202.
[112] AGQ Factum, par. 108.
[113] Judgment on appeal, *supra*, par. 175.

constitutional validity."[114] This conclusion reflects the consistent jurisprudence of this Court, which regards causation as a question of fact deserving deference on appeal. This is the case under both section 15[115] and section 7[116] of the *Charter*, as well as outside the context of the *Charter.*[117]

55. In this case, as mentioned, the evidence demonstrates that "[e]ven though s. 636 *HSC* does not expressly authorize traffic stops based on racial profiling, the evidence establishes that it has the effect of allowing racial profiling to permeate the exercise of the police discretion conferred by that provision" and that it is therefore "s. 636 *HSC* itself that is the source of the alleged *Charter* violations."[118] Justice Sansfaçon agreed with this reading, pointing out that the "significant (*imposante*)" evidence retained by the first judge and not challenged on appeal "also means that section 636 *H.S.C.*, although facially neutral, not only has a disproportionate and discriminatory *effect* on Black drivers compared with members of other groups, but also *that it creates*, or at least *contributes to* the creation of this disproportionate effect by virtue of a distinction based on a protected ground."[119]

56. Simply put, it is the very nature of the unlimited discretionary power provided by section 636 *H.S.C.* that allows racial profiling to influence its exercise and that constitutes, more generally, the source of the violations.[120] This clear and unequivocal conclusion is not based on purely legal reasoning, but rather on a meticulous analysis of the evidence. As Dickson C.J. stated in *Morgentaler*, "the straightforward reading of [a] statutory scheme is not fully revealing. In order to understand [their] nature and scope [...] it is necessary to investigate the practical operation of the provisions."[121]

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[114] *Ibid*, par. 53.
[115] *Sharma*, *supra*, par. 36.
[116] *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, par. 85 ["***Canadian Council for Refugees***"].
[117] *Salomon*, *supra*, par. 32-34; *3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, [2018] 3 SCR 8, par. 24; *Montreal (City) v. Lonardi*, 2018 SCC 29, par. 41.
[118] Judgment on appeal, *supra*, par. 53.
[119] Suspension judgment, *supra*, par. 40 (original emphasis).
[120] Judgment on appeal, *supra*, par., see also footnote 87, par. 74.
[121] *R. v. Morgentaler*, [1988] 1 SCR 30, p. 65 ["***Morgentaler***"].

57. Indeed, even the Appellant, while arguing that the source of the violations is a pure question of law,[122] nonetheless devotes several pages of its brief to reinterpreting the expert and testimonial evidence adduced at trial in support of its contention that "[r]acial profiling is not attributable to the challenged laws."[123] In doing so, as mentioned, it advances a new thesis by asserting that Black people are not "not overrepresented in traffic stops authorized by the impugned laws, but rather in criminal investigations with insufficient foundation."[124] With all due respect and as mentioned, this fact has not been advanced or debated and is not in evidence, but even if it were, it would do absolutely nothing to change the fact that section 636 *H.S.C.* is the source of the racial profiling at issue.

58. Moreover, it is obviously not open to the Appellant to rewrite the trial judge's factual conclusions without identifying an overriding and palpable error. While the AGQ makes a biased selection of certain evidence in order to suggest that each of the witnesses at trial was the subject of an illegal criminal investigation (and not a traffic stop without cause), it fails to point out an obvious fact which is central to the case. Whatever the officer's subjective intent — which remains unknowable — in almost every case cited by the AGQ, the officers in question expressly invoked section 636 *H.S.C.* and/or their right to conduct a "routine stop" in order to justify the arbitrary stop. Thus, the racial profiling to which the witnesses were subjected and of which they testified would not have been possible without the power emanating from section 636 *H.S.C.*

59. To cite just a few examples, it is true that Mr. Blot testified of an event in which he was detained, harassed, and threatened by police officers on private property, " while he was simply sitting in the passenger seat of an immobilized vehicle, with his feet outside the vehicle."[125] The AGQ does not mention, however, that when Mr. Blot asked the police on what basis they insisted on identifying him, he was informed that the fact that he had "care and custody of the vehicle" was sufficient[126] and that he received a ticket for " driving a road vehicle without

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[122] AGQ Factum, par. 42.
[123] *Ibid*, subtitle 2.1 and par. 51 to 75.
[124] *Ibid*, par. 9.
[125] *Ibid*, par. 56.
[126] June 8, 2022 hearing, Examination of Leslie Blot, **MA, vol. 26, p. 8967**.

having with him the registration certificate [...] or a copy thereof."[127] It is also true that on another occasion, "a police officer questioned him about the possible presence of drugs on the front passenger seat of his vehicle"[128] and treated him as a criminal suspect. However, the AGQ fails to mention that the officer justified this stop as being for identity verification purposes only, and that he expressly invoked section 636 *H.S.C.* to justify his behaviour, as evidenced by the video of the event and the transcript of his cross-examination.[129]

60. It is also true, as the AGQ admits, that the stops to which Mr. Bellefeuille was subjected involved clear racist stereotyping of Black men.[130] However, in a series of legal proceedings related to two separate incidents of racial profiling, both the police and lawyers for the municipalities involved expressly invoked section 636 *H.S.C.* and the *Ladouceur* decision to justify the discriminatory behaviour of the police officers in question when their other excuses were deemed not credible.[131]

61. Nor does the CCLA dispute that Mr. Augustin was "stopped, handcuffed and questioned about the presence of weapons or drugs in his car"[132] while walking down the street, after getting out of his vehicle. Any reasonable person would assume that the *Highway Safety Code does* not authorize such abuses. However, as Mr. Augustin revealed in his testimony at trial, at the end of this abusive and humiliating interaction, the police officer told him he was going to receive a ticket for failing to provide his vehicle documents, in violation of section 636 *H.S.C.* He did receive such a ticket, but only after filing an ethics complaint against the officers involved several months later.[133]

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[127] Trial judgment, *supra*, par. 315.
[128] AGQ Factum, par. 65.
[129] Trial judgment, 322; June 8, 2022 hearing, Cross-examination of Leslie Blot**, MA, vol. 26, p. 9065**, see also **9018**.
[130] AGQ Factum, par. 66.
[131] Exhibit IN-4, *Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) v. Ville de Longueuil,* 2020 QCTDP 21, **MA, Vol. 12, pp. 3970 ff** (see par. 35, 193-195); Exhibit IN-5, *Longueuil (Ville de) v. Debellefeuille*, 2012 QCCM 235, **MA, Vol. 13, pp. 4039 ff** (see par. 47, 70, 78).
[132] AGQ Factum, par. 56.
[133] Trial judgment, *supra*, par. 341 to 344; June 9, 2022 hearing, Examination of Schneider Augustin, **MA, vol. 26, pp. 9195, 9204 to 9208**.

62. This same theme emerges from almost all the testimony: even if a police officer's subjective and unverifiable intention is potentially to conduct an illegal criminal investigation, which is impossible to prove, traffic stops of Black drivers are systematically justified (both by the police and by the lawyers defending them) for "verification" purposes and described as "routine."[134] In other words, whatever the real reason, section 636 *H.S.C.* is the pretext invoked systematically to justify the detention, interrogation, search, and harassment of Black drivers. These examples, far from helping the AGQ's case, demonstrate that the Superior Court and the Court of Appeal were right to conclude that this power is a direct source of the *Charter* violations.

63. The fact that there is a blurred boundary between a traffic stop and a criminal investigation does not prove that the impugned law is not a cause of *Charter* violations. Rather, it is evidence of another dimension of the law's prejudicial consequences, which relegate Black drivers to the status of second-class citizens,[135] perpetuate the "vicious circular logic"[136] and contribute to the over-representation of Black people in the penal system.[137] In this case, the Court of Appeal and the Superior Court asked themselves the right question and arrived at the right answer: the source of the violations in question is not simply the illegal action of law enforcement officers, but the law itself, which provides the opportunity for racial prejudice to manifest. It is therefore only by declaring the law invalid that this Court can finally put an end to these abuses.

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[134] Further examples: Trial judgment, *supra*, par. 189, 191, 218, 238, 244, 272; May 31, 2022 hearing, Cross-examination of François Ducas, **MA, Vol. 25, pp. 8497-8499** (and Exhibit P-39A, **MA, Vol. 12, pp.** 3607-3608, par. 20, 31-32, 38); May 31, 2022 hearing, Examination of Papa Ndiako Guèye, **MA, Vol. 25, p. 8582**, **8584**; June 7, 2022 hearing, Examination of Mathieu Joseph, **MA, Vol. 26, p. 8827**.

[135] Judgment on appeal, *supra*, par. 197.

[136] *Ibid*, par. 199.

[137] *Ibid*, par. 95, 197.

C. Section 636 *H.S.C.* Violates Section 9 of the *Charter*

64. Given the absence of criteria governing its exercise, any use of the traffic stop power in section 636 *H.S.C.* is inherently arbitrary[138] and therefore infringes section 9 of the *Charter*[139] as the trial judge concluded.[140] The AGQ did not dispute this conclusion before the Court of Appeal.[141] The violation being admitted, the only question is whether it is justified under section 1.

D. Section 636 *H.S.C.* Violates Section 7 of the *Charter*

65. The trial judge concluded that section 636 *H.S.C.* also violates the rights to liberty and security protected by section 7, in a manner inconsistent with the principles of fundamental justice. Although the Court of Appeal chose not to decide this issue because of its finding under section 9,[142] the two sections are now recognized as protecting distinct interests.[143]

i. Section 636 H.S.C. *Violates the Right to Liberty and Security of the Person*

66. The unlimited discretionary power to stop "any vehicle at any time, in any place"[144] restricts drivers' freedom by its very nature[145] and compromises their psychological safety.[146] As the trial judge recognized, this power forces Black people to adapt their driving, to practice

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[138] *Hufsky*, *supra*, pp. 632-633 and *Ladouceur*, *supra*, p. 1277; Trial judgment, *supra*, par. 604, 606.
[139] *R. v. Grant*, 2009 SCC 32, par. 54 ["***Grant***"].
[140] Trial judgment, *supra*, par. 607.
[141] Judgment on appeal, *supra*, par. 104.
[142] *Ibid*, par. 146-151.
[143] See for exmaple *R. v. J.J.*, 2022 SCC 28, par. 115; *R. v. Brunelle*, 2024 SCC 3, par. 68 to 71.
[144] *Ladouceur*, *supra*, p. 1264.
[145] See *Fleming*, *supra*, par. 5-6, 36, 67, 75-86; *Canadian Council for Refugees*, *supra,* par. 89; *R. v. Ndhlovu,* 2022 SCC 38, par. 51 ["***Ndhlovu***"]; *R. v. Heywood*, [1994] 3 SCR 761; *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, par. 49; Trial judgment, *supra*, par. 738 to 739.
[146] *Morgentaler*, *supra*, par. 17 to 22; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, par. 59 ["***G. (J.)***"]; *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, par. 111 to 124, 200; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, par. 85 to 87.

"hypervigilance" and to suffer trauma far beyond the "ordinary stresses and anxieties" a person would experience when interacting with the state.[147]

67. Furthermore, and contrary to the AGQ's claim, no one has suggested that driving a vehicle is a distinct "liberty" protected by the *Charter*.[148] This in no way prevents a person from having their liberty infringed upon when driving.

ii. The Infringements Do Not Comply with the Principles of Fundamental Justice

68. The trial judge concluded that the infringements with the right to liberty and security arising from the law did not comply with the principles of fundamental justice, particularly given that the law was overbroad. The impugned law is a clear example of a law going "too far" to achieve its objective.[149]

69. In its analysis under section 1, the Court of Appeal confirms that the purpose of the legislative amendment to section 636 *H.S.C.* in 1990 was to harmonize the legislative provision with the *Ladouceur* decision in order to ensure road safety.[150] Clearly, this power restricts the rights of certain individuals and encroaches on behaviour unrelated to its objective.[151] 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. The AGQ nevertheless argues that the law is not overly broad, because "every traffic stop" contributes to the deterrent effect of the contested power.[152] As explained below, this argument runs up against the inescapable reality that the deterrent aspect of the power is a pure question of fact that was amply debated at trial and was the subject of expert evidence from both the plaintiffs and the defendant at trial. Although the Court of Appeal accepted that there was a reasonable basis for believing that the interceptions could have some deterrent effect under the undemanding "rational

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147 *G. (J.)*, *supra*, par. 58-60; Trial judgment, *supra*, par. 737-738, 761.
148 AGQ Factum, par. 112 to 113; see also Trial judgment, *supra*, par. 736 to 737.
149 *Bedford*, *supra*, par. 107 citing Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 151.
150 Judgment on appeal, *supra*, par. 113 to 115; Trial judgment, *supra*, par. 54, 654 to 655.
151 *Bedford*, *supra*, par. 101, 112.
152 AGQ Factum, par. 125.

connection" test,[153] it was categorical in its conclusions that there was no evidence as to the deterrent effect of such stops in practice, particularly in comparison with other measures such as checkpoints.[154] The AGQ does not identify any overriding and palpable error in this regard. The law restricts the rights of a large number of innocent individuals for reasons that have nothing to do with the legislator's objectives, and is therefore overbroad.

70. Section 636 *H.S.C.* therefore violates not only sections 9 and 15, but also section 7 of the *Charter*. These infringements, based on a discretionary power devoid of guidelines, cannot be justified in a free and democratic society.

E. The Infringements in Question Cannot be Justified Under Section 1

71. To meet its burden of demonstrating that a violation of a *Charter* right is constitutionally justified,[155] the government must establish that its objective is pressing and substantial, and that the means chosen are proportional to that goal.[156] This obligation to provide justification can only be met on the basis of demonstrable facts and evidence: "[b]are assertions will not suffice." [157]

72. The criterion that the government's objective must be rationally connected to the limit on *Charter* rights is not a demanding one.[158] As a result, the outcome of this case really depends on the minimal impairment and proportionality tests.[159] This appeal is not a difficult case in that regard: as the lower courts concluded, the AGQ has in no way met its burden under those steps of the test.

73. At the minimal impairment stage, it is up to the government to demonstrate that the infringing measure is "carefully tailored" and ensures that the infringement of *Charter* rights does not

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153 Judgment on appeal, *supra*, par. 124 to 125.
154 *Ibid*, par. 211 to 216.
155 *Frank v. Canada (Attorney General)*, 2019 SCC 1, par. 42.
156 *R. v. Oakes*, [1986] 1 SCR 103, pp. 138-139; *Carter v. Canada (Attorney General)*, 2015 SCC 5, par. 94 ["***Carter***"].
157 *Ndhlovu, supra*, par. 118.
158 Judgment on appeal, *supra*, par. 122; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69, par. 228 ["***Little Sisters***"]; *Carter*, *supra,* par. 100.
159 Judgment on appeal, *supra*, par. 128.

exceed what is reasonably necessary to achieve the state's objective.[160] As summarized in detail above, "the AGQ has not presented any argument or evidence on the minimal impairment, be it in his notice of appeal, in his appeal brief, or at the hearing."[161]

74. Moreover, there is no doubt in the evidence that the police have other, more effective, and less intrusive powers than the one at issue to achieve the government's objectives. As the Court of Appeal recognized, there are powers and practices both in Quebec and abroad—including checkpoints, designated and supervised road safety programs, and public awareness initiatives—which would allow for more targeted, effective, and non-discriminatory intervention.[162] Even the AGQ expert agreed that traffic stops based on objective criteria were preferable to subjective and entirely discretionary stops.[163] In addition, the police have a wide range of other statutory and common law powers to investigate crime, respond to emergencies, and ensure road safety.[164]

75. Furthermore, the AGQ argues that the impugned power is justified by its deterrent effect, for which it finds support in case law.[165] However, the existence and strength of such an effect require a highly factual analysis.[166] As explained by the Court of Appeal, the AGQ is no longer entitled to rely on the Court's conclusions in *Ladouceur* in this regard,[167] as its position on the deterrent effect of the power is now irreconcilable with the evidence on file.

76. As recognized by the AGQ,[168] the strength of a deterrent effect depends on the perceived probability of being stopped and the certainty of the consequences.[169] It therefore requires a certain number of traffic stops and that drivers be aware of the existence of the power in

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[160] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, par. 149.
[161] Judgment on appeal, *supra*, par. 129, 210; see also Suspension judgment, *supra*, par. 19; see also Trial judgment, *supra*, par. 681, 690, 693, 697, 754.
[162] Judgment on appeal, *supra*, par. 136; *Carter*, *supra,* par. 103 to 104; *Lavoie v. Canada*, 2002 SCC 23, par. 68; Trial judgment, *supra*, par. par. 428, 684, 772.
[163] Judgment on appeal, *supra*, par. 214; June 14, 2022 hearing, Examination of Douglas Beirness, **MA, Vol. 28, pp. 9591, 9650-9654, 9566**.
[164] Judgment on appeal, *supra*, par. 135.
[165] AGQ Factum, par. 100-102.
[166] See for example *R. v. Nur,* 2015 SCC 15, par. 113 to 114 ["***Nur***"].
[167] Judgment on appeal, *supra*, par. 130 to 131.
[168] AGQ Factum, par. 102.
[169] Trial judgment, *supra*, par. 665 to 668.

question.[170] Yet, outside of Black and other racialized communities (where the stops at issue are notorious for racial profiling), the trial judge concluded that this law is "unknown to the general population."[171] Furthermore, the AGQ has not demonstrated that the existence of this power alters drivers' behavior in any way with respect to the mechanical condition of vehicles or the validity of drivers' licenses and registrations, nor in relation to alcohol consumption.[172] Its own expert conceded that "he [knew] of no study showing the deterrent effect of traffic stops with no required grounds."[173] It is also interesting to note that the evidence suggested that many alternative measures, in particular roadblocks, have a genuine deterrent effect.[174]

77. On the other side of the scales, the evidence shows that traffic stops carried out under the impugned law result in serious infringements of *Charter* rights.[175] By claiming that this power is constitutionally justifiable, the AGQ is thus asking the Court to exchange the hypothetical safety of certain drivers for the dignity, liberty, full citizenship, and real safety of victims of racial profiling. Such an exchange is unacceptable in a free and democratic society.

F. It Is Time for the Supreme Court to Reconsider *Ladouceur*

78. The principle of *stare decisis*, whether vertical or horizontal, is not absolute. It must be applied in light of the Supreme Court's unique role and the evolution of the law and social context since the Court's decision in *Ladouceur.*[176]

79. In *Carter*, the Supreme Court explained that trial courts may review decisions rendered by higher courts in one or the other of the following circumstances: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally

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[170] Judgment on appeal, *supra*, par. 211 to 212.
[171] Trial judgment, *supra*, par. 737i.
[172] *Ibid*, par. 679 to 682.
[173] Judgment on appeal, *supra*, par. 214.
[174] *Ibid*, par. 133 to 135; Trial judgment, *supra*, par. 673, 677, 684.
[175] Judgment on appeal, *supra*, par. 139 to 145 and 207 to 210.
[176] See for example *Carter*, *supra,* par. 44; *Bedford*, *supra*, par. 43 to 44; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, par. 18; *Canada v. Craig*, 2012 SCC 43, par 24 to 27; Malcolm Rowe and Leanna Katz, "A Practical Guide to Stare Decisis", Windsor Review of Legal and Social Issues, Vol. 41, p. 4.

shifts the parameters of the debate."[177] Both the Court of Appeal and the trial judge correctly concluded that this test was met in this case.[178]

80. Section 15, which came into force in 1985,[179] was not applicable at the time of Mr. Ladouceur's stop. The Court had no legal or factual basis for examining the potentially discriminatory effects of the law, and the risk of abuse was only a hypothesis raised by the dissenting judges in *Ladouceur.*[180] With regard to section 7, although a violation of the right to liberty was invoked by Mr. Ladouceur, this issue was not decided by either the majority or the dissent.[181]

81. Although the constitutionality of the law under section 7 was before the Supreme Court in 1990, the jurisprudence on this provision has evolved so significantly that the questions submitted to the Court today are of an entirely different nature.[182] The principles of fundamental justice permitting invalidation on substantive grounds were still in their infancy at that time. As explained in *Bedford* in 2013, the principles of arbitrariness, overbreadth, and gross disproportionality "have, to a large extent, developed only in the last 20 years."[183]

82. With regard to section 9 of the *Charter*, the case law has also evolved significantly since the 1990s. In *Ladouceur* and *Soucisse*, there was already no doubt that the authorized traffic stops constituted arbitrary detention, which is not challenged by the AGQ. However, case law on the impact of race in the context of police street checks and traffic stops has radically evolved. The Supreme Court now recognizes that racialized and marginalized people are more likely to be subjected to unjustified "low visibility" police interventions, including arbitrary and unlawful detentions.[184] As a result, race and racism now exert a much greater influence on the

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[177] *Carter*, *supra,* par. 44; *Bedford*, *supra*, par. 42; *R. v. Comeau*, 2018 SCC 15, par. 29 to 34 ["***Comeau***"].
[178] Judgment on appeal, *supra*, par. 82 to 102; Trial judgment, *supra*, par. 151.
[179] Art. 32(2), *Charter*.
[180] *Ladouceur*, *supra*, p. 1267; see also *R. v. Ladouceur*, 1987 ONCA 6863, pp. 259, 273 ["***Ladouceur* ONCA**"].
[181] *Ladouceur*, *supra*, p. 1278 (Cory J.), not dealt with by Sopinka J.
[182] *Bedford*, *supra*, par. 42.
[183] *Bedford*, *supra*, par. 45, 94 to 97; see also *Carter*, *supra,* par. 44 to 46.
[184] *Le, supra,* par. 87; *Grant, supra*, par. 154; *R. v. Golden*, 2001 SCC 83, par. 83; see also *R. v. Brown*, 2003 ONCA 52142, par. 7 to 9.

analysis under section 9, both in relation to the characterization of what constitutes detention, and in relation to the analysis of the gravity and proportionality of the violation.[185]

83. As far as the evolution of the factual context is concerned, it is clear that the *Carter* and *Bedford* criteria are satisfied. We mention again that the majority's reasons in *Ladouceur* rest on two central factual premises: (1) that the stops resulting from the impugned power were truly "random" in the sense that no sub-group of drivers would be unfairly or disproportionately affected[186] and (2) that the stops resulting from the impugned power were "routine" in the sense that they were brief, trivial, and represented a minor inconvenience to drivers.[187]

84. The evidence in this case unequivocally refutes both premises. It demonstrates that police power is not exercised randomly, as Black and racialized people are targeted by the impugned power at a massively disproportionate rate.[188] The evidence also demonstrates that the stops do not constitute minor inconveniences, as the exercise of this power causes serious harm, both to individuals and their communities and to society as a whole.[189] As the Court of Appeal summarized, the studies, experts, statistical data, and the social sciences context were not available to this Court in 1990.[190] Today however, this evidence completely undermines the majority's reasoning in *Ladouceur*.[191]

85. As far as the section 1 analysis is concerned, this Court has a much more complete and detailed record than that which was available to the panel in *Ladouceur*. As explained by Sopinka J. for the dissenting justices, and by Tarnopolsky J. for the Ontario Court of Appeal, the government had relied on a hypothesis based on general statistical evidence to demonstrate that the power at issue deterred drunk driving and promoted road safety.[192] The Superior Court came to the conclusion—confirmed by the Court of Appeal—that this hypothesis had not been

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[185] *Le, supra,* par. 72 to 137; *R. c. Dorfeuille*, 2020 QCCS 1499, par. 71 to 80; Judgment on appeal, *supra*, par. 93; see also *Dowd c. Lemay-Terriault*, 2021 QCCQ 4884, par. 81 to 85.
[186] *Ladouceur*, *supra*, pp. 1278, 1283.
[187] *Ibid*, p. 1286.
[188] Judgment on appeal, *supra*, par. 99.
[189] *Ibid*, par. 98.
[190] *Ibid*, par. 90 to 102.
[191] *Carter*, *supra,* par. 47.
[192] *Ladouceur*, *supra*, pp. 1263-1264; see also *Ladouceur* ONCA, *supra,* pp. 259 and 273.

proven: there is no evidence that the impugned police power is necessary or even useful in this respect.[193]

86. Contrary to the AGQ's argument, the fact that the phenomenon of racial profiling existed in 1990 has no bearing on the analysis in this case.[194] Racism and discrimination are clearly not new phenomena, any more than the risks associated with sex work or assisted suicide were when the Supreme Court rendered its decisions in *Bedford* and *Carter*. Rather, as the Court of Appeal concluded, citing *Comeau*, the present case is one in which "the underlying social context that framed the original legal debate is profoundly altered."[195]

87. The lower courts made no error in their application of the test set out in *Carter*, *Bedford*, and *Comeau*, and rightly departed from *Ladouceur* according to the principles of vertical *stare decisis*. tAs a result, there can be no doubt that this Court is entitled to depart from its own precedent in the present circumstances.[196] In particular, the Court may depart from precedent "where there is a compelling reason to do so," including in circumstances where the basis of precedent has been eroded by a significant societal or legal change.[197]

88. The principle of *stare decisis* serves to protect (1) legal certainty and stability, "allowing people to plan and manage their affairs," (2) the rule of law, "such that people are subject to similar rules," and (3) the legitimate and effective exercise of judicial power.[198] The lower court decisions departing from the *Ladouceur* precedent embody these principles, and the Court should follow their lead.

89. In this case, the impugned power permits discriminatory and arbitrary state conduct, whereby individuals suffer differential treatment based on the colour of their skin. If the principle of *stare decisis* "serves to take the capricious element out of law and to give stability to a society," "demands [that] like cases be treated alike," and is intended to ensure that the same rule is not

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193 Judgment on appeal, *supra*, par. 210.
194 AGQ Factum, par. 90 ff.
195 Judgment on appeal, *supra*, par. 100; *Comeau*, *supra*, par. 31; Trial judgment, *supra*, par. 561 to 576.
196 *R. v. Kirkpatrick*, 2022 SCC 33, par. 122 to 126, 132, 181 ["***Kirkpatrick***"].
197 *Canada (Attorney General) v. Power*, 2024 SCC 26, par. 98 ["***Power***"]; *R. v. Henry*, 2005 SCC 76, par. 44; *Kirkpatrick*, *supra*, par. 202.
198 *Ibid*, par. 183.

"applied in the morning, but not in the afternoon,"[199] then it can in no way be invoked to defend the impugned power in the present case. Insofar as the principle of *stare decisis* is intended to protect public confidence in the judicial system,[200] a decision to uphold this precedent despite evidence of its harmful effects would undermine the legitimacy of the justice system as a whole.

G. The Appropriate Remedy Is a Declaration of Invalidity under s. 52(1)

iii. A Declaration of Invalidity is Necessary in this Case

90. The only appropriate remedy in this case is a declaration of constitutional invalidity under s. 52(1). As the Court of Appeal recognized, the factual question of whether section 636 *H.S.C.*—and not just the police officers' unlawful conduct in applying it—is the source of the alleged *Charter* violations is central to the remedy and determinative of the outcome of this appeal.[201] From the foregoing, it is clear that section 636 *H.S.C.* produces effects that unjustifiably violate the rights guaranteed by the *Charter*.[202] Indeed, any law that is incompatible with the *Charter* in purpose or effect gives rise to a remedy under subsection 52(1).[203] The lower courts therefore correctly declared section 636 *H.S.C.* inoperative.

91. In order to circumvent this reality, the Appellant asks this Court to consider the fiction that the unlimited discretionary power provided for in section 636 *H.S.C.* is only applied in accordance with the *Charter*, despite the fact that the evidence accepted by the lower courts demonstrates precisely the opposite. This argument is therefore problematic in several respects.

92. First, by arguing that section 636 *H.S.C.* "excludes" or "prohibits" racial profiling,[204] the AGQ is attempting to rewrite not only the evidence adduced at trial, but also the statutory power at issue, by including in it constraints that are simply not there. As mentioned, the lower courts

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[199] *Ibid,* par. 184 to 185.
[200] *Ibid*, par. 188.
[201] Judgment on appeal, *supra*, par. 50.
[202] See also *Canadian Council for Refugees*, *supra,* par. 83; *Bedford*, *supra*, par. 74 to 78; *Sharma*, *supra,* par. 49.
[203] *Ontario (Attorney General) v. G.*, 2020 SCC 38, par. 85, 86 ["***G.***"]; *R. v. Ferguson*, 2008 SCC 6, par. 59 ["***Ferguson***"]; *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 295 ["***Big M Drug Mart***"].
[204] AGQ Factum, par. 41 to 42.

have concluded that the requisite causal link exists not only in light of the actual effects of section 636 *H.S.C.,* but also of the text of the provision itself, which contains no objective criteria or safeguards to prevent its discriminatory or prejudicial application.

93. Secondly, the AGQ's argument is simply not consistent with section 9. As discussed, *every* traffic stop without cause authorized by section 636 *H.S.C.* contravenes this provision, since a detention without cause is, by definition, arbitrary.

94. Third, the AGQ's argument is circular. From a purely logical point of view, the AGQ cannot assume that *every* violation of section 636 *H.S.C.* is not in fact due to section 636 *H.S.C.* but rather of the derogatory action of a police officer, such that section 636 *H.S.C.* would respect the *Charter*. The AGQ does not have the option to assess the constitutionality of the power at issue by evaluating only the stops it likes. To conclude otherwise would be to require that a law contravene the *Charter* in every situation or for every person in order for it to be declared inoperative, which obviously fails to correspond to the state of the law under either section 15 or section 7.[205]

95. Finally, it has been settled case law since *Big M Drug Mart* that a law may violate the *Charter* not only by its object, but also by its effects.[206] Insofar as the unjustified violation of a right flows from a law—in other words, is caused by it—the law violates the *Charter*. The adverse effect violation of the right to equality found in this case is the consecration of this principle. To require that a law, before it can be declared inoperative, require or authorize not only the state conduct giving rise to the violation of a right protected by the *Charter*, but also the violation itself, would be tantamount to requiring that the intention of the legislature be to authorize racial profiling in order to be found in violation of the *Charter*, which is clearly contrary to the case law.[207]

96. For example, the Quebec legislature could very well have added a sentence at the end of section 636 *H.S.C.* to specify the following: "A peace officer may not engage in racial profiling under

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[205] *Bedford*, *supra*, par. 134-136; see also *Ferguson*, *supra*, par. 38, 59; *G.*, *supra*, par. 96; *Nur*, *supra*, par. 51 citing *Big M Drug Mart Ltd., supra,* p. 313.
[206] *Big M Drug Mart Ltd., supra,* par. 88.
[207] *Fraser*, *supra,* par. 171; *Law*, *supra*, par. 80.

this provision." Clearly, in those circumstances section 636 *H.S.C.* would not specifically authorize racial profiling. However, the inevitable consequence of the unlimited discretion provided for in the very text of section 636 *H.S.C.* would nonetheless create a vector for racial profiling in the course of authorized stops without grounds. Section 636 *H.S.C.* would continue to authorize those stops; it would therefore remain both the source of the violation and the constitutional problem to be corrected.

97. To conclude otherwise would be to deny this Court's jurisprudence on adverse effect discrimination. What matters is that section 636 *H.S.C.* authorizes traffic stops without grounds, and that these stops have a disproportionate and discriminatory effect on Black people, in addition to constituting arbitrary detentions and infringements of liberty and security.

98. The AGQ cites *Little Sisters* in support of its position, but this judgment does not have the scope that the Appellant seeks to attribute to it and has no application in the present case. Indeed, the facts demonstrated that the *Charter* violations at issue resulted from problems of Customs administration and not from the law itself—which contained a clear and restrictive legal standard ("obscenity") circumscribing any infringement of *Charter* rights in a constitutional manner.[208]

99. Nothing in the necessary effects of the provision at issue contemplated or encouraged differential treatment based on sexual orientation. In this case, on the contrary, the necessary effect of section 636 *H.S.C.* is to "[allow] racial profiling to permeate the exercise of the police discretion conferred by that provision."[209] The violation of rights guaranteed by the *Charter* is therefore the necessary, direct, and foreseeable result of the unbounded discretionary power conferred by section 636 *H.S.C.* The violations at issue in the present case do not arise from the maladministration of an administrative regime, or from isolated errors, but from the absence of any standard provided for in section 636 *H.S.C.*

100. In this respect, it is important to recall that in *Little Sisters*, the Supreme Court did grant relief under section 52(1) in respect of part of the contested legislative scheme, concluding that a

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[208] *Little Sisters, supra*, par. 41 to 44, 69 (discussion par. 45 to 68), 124.
[209] Judgment on appeal, *supra*, par. 53.

"reverse onus" provision[210] did not offer adequate constitutional protection. According to the majority, this rule allowed customs officers to violate individuals' rights without any real justification on the part of the state and forced individuals to challenge a decision after the fact—when they had the resources to do so.[211] If any part of *Little Sisters* is analogous to the present case, it is in the decision to invalidate, under subsection 52(1), an unjust and unconstitutional standard,[212] and not in the Court's reluctance to intervene in operational matters within the purview of an administrative agency.

101. *Khawaja* also fails to support the AGQ's position. It is quite true, as the AGQ points out, that the Supreme Court stated in paragraph 83 that "improper conduct by the state actors charged with enforcing legislation [cannot] render what is otherwise constitutional legislation unconstitutional."[213] The AGQ fails to mention, however, that in paragraph 81, the Supreme Court specifically explained that the law at issue in that case was constitutional because "a causal connection between the motive clause and the chilling of expression of religious or ideological views [had] not been demonstrated."[214] Rather than supporting the AGQ's position, this decision confirms—as exhaustively set out above—that the applicable test for determining the source of a violation of a *Charter* right is indeed that of causation.

iv. A Discretionary Power Can Violate the Charter

102. The fact that a power conferred by a law can, on occasion, be exercised without violating the *Charter* does not make it constitutional. If this were the case, the AGQ's argument could be used to justify *any* discretionary state power. Such an authority—no matter how extensive or intrusive—could never be invalidated under section 52(1), since it would suffice to say that a police officer or other agent of the state could simply choose not to make full use of it.

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[210] *Little Sisters, supra*, par. 97 to 105.
[211] *Ibid*, par. 101; see also 92 (re: *mandamus*).
[212] *Ibid*, par. 97 to 105, 159.
[213] *R. v. Khawaja*, 2012 SCC 69, par. 83 ["***Khawaja***"].
[214] *Ibid*, par. 81.

103. However, the constitutionality of a rule of law is not ensured by the fact that a state agent has the discretion not to use the power conferred on him by law to the fullest extent.[215] As Lamer J. explained in *Smith*, to do so would be to "totally ignore s. 52 [...] which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter."[216]

104. A declaration of invalidity is necessary when the statutory limits restricting state power are non-existent or constitutionally insufficient. This was the case in *Hunter,* where a power to conduct investigative searches and seizures was declared of no force or effect because the statute did not contain an objective test to frame and control such an intrusion.[217] Obviously, in *Hunter*, the search power could have been used by state agents in a constitutional manner: that is, with prior authorization based on reasonable and probable grounds. This, however, did not prevent the Supreme Court from declaring the law of no force or effect.[218] As in *Hunter*, and contrary to the Appellant's contention, the law in this case was not declared of no force or effect "because of an abusive application by state agents"[219] but because the law itself was the source of the violation.

105. 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 the present case—could be carried out on a "random," "arbitrary," or otherwise discretionary basis.[220] In that case, the Court issued a declaration under subsection 52(1) and did not hesitate to reject an argument analogous to the Appellant's in the present case.[221]

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[215] *R. v. Bain*, [1992] 1 RCS 91, pp. 103-104; *Nur*, *supra*, par. 91; *Ferguson*, *supra,* par. 72; *R. v. Appulonappa*, 2015 SCC 59, par. 74; Judgment on appeal, *supra*, par. 63.
[216] *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045, pp. 1078-1079.
[217] *Hunter et al v. Southam Inc*, [1984] 2 SCR 145, pp. 166-168 ["***Hunter***"].
[218] *Ibid*, p. 169.
[219] AGQ Factum, par. 79.
[220] *R. v. Canfield*, 2020 ABCA 383, motion for leave to appeal dismissed, March 11, 2021, SCC no. 39376 ["***Canfield***"].
[221] *Ibid,* par. 69.

106. Contrary to the Appellant's claims, this logic is not limited to section 8 of the *Charter*. In *Morgentaler*, for example, Dickson C.J. concluded that the impugned delays in and limitations on abortion access were the result of seemingly neutral administrative and procedural requirements established by the law itself.[222] While acknowledging that "unfair functioning of the law could be caused by external forces which do not relate to the law itself," he determined that it was the law itself, as in this case, that was the source of the violation of section 7.[223]

107. Finally, in *CCLA*, the Ontario Court of Appeal considered the constitutionality of the administrative segregation regime in federal prisons.[224] Despite voluminous evidence demonstrating that systemic abuses and prolonged administrative segregation (over fifteen consecutive days) resulted from a lack of legislative safeguards, the Attorney General of Canada argued that Parliament was entitled to presume that its legislation would be applied constitutionally, and that the fact that the regime was poorly administered could not render it unconstitutional.[225] Indeed, nothing in the law required correctional services to keep inmates in segregation for more than fifteen days. According to the Attorney General, it could therefore be interpreted in a constitutional manner.

108. In rejecting the argument and ordering a declaration of invalidity under section 52(1), Benotto J.A. concluded that the absence of limits or guarantees in the law itself was at the root of the *Charter* violations[226] and that *Little Sisters* did not apply to cases, such as this one, where the law opens the door to a *Charter* violation without putting in place sufficient protections. The same logic applies here.

v. The Appellant's Position Rests on a False Dichotomy

109. Finally, the AGQ's position on the remedy suggests a false dichotomy between individual remedies for profiling (such as a claim under section 24(1) of the *Charter*, an administrative remedy, or an ethics complaint) and a remedy under section 52(1) of the *Constitution Act,*

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[222] *Morgentaler*, *supra*, pp. 59-60.
[223] Judgment on appeal, *supra*, par. 58 to 59.
[224] *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 ["***CCLA***"].
[225] *Little Sisters, supra*, par. 71*; CCLA*, *supra*, par. 35, 116 ff.
[226] *Ibid,* par. 117 to 119.

1982. The latter provides that any law inconsistent with the Constitution is of no force or effect and applies *erga omnes.*[227]

110. Although the Supreme Court has historically suggested that remedies under subsection 52(1) and individual remedies under the *Charter* would rarely be granted together, in recent years it has adopted a much more flexible approach.[228] 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 subsection 52(1). This is all the more true in cases such as this one, where evidence demonstrates that individual remedies or complaints have very little chance of success due to the very nature of the power being challenged.

111. Moreover, individual remedies are of a fundamentally different nature to that which is sought in the present case — namely, a declaration invalidating the discriminatory power that led to these abuses in the first place — and will always be inadequate to protect the rights at issue. The reality is that even the rare individual victims who succeed before an administrative body or a court have no guarantee that the next time they get behind the wheel, they will not be stopped again on the basis of the colour of their skin.

112. The CCLA respectfully asks this Court to dismiss the AGQ's appeal and uphold the unanimous judgment of the Court of Appeal. Section 636 *H.S.C.* violates sections 15, 9 and 7 of the *Charter* in a manner that cannot be justified in a free and democratic society. Only a declaration of invalidity under subsection 52(1) can put an end to these systemic violations, ensure substantive equality before the law, and preserve public confidence in the justice system.

PART IV – SUBMISSIONS ON COSTS

113. The CCLA seeks no particular order as to costs.

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[227] *R. v. Sullivan*, 2022 SCC 19, par. 52 to 54.
[228] *Power*, *supra*, par. 45.

PART V - ORDERS SOUGHT

114. The CCLA asks this Court to dismiss the present appeal and to confirm the judgment of the Court of Appeal in its entirety, with immediate effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montreal, September 22, 2025

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PART VII - TABLE OF AUTHORITIES

Legislation	**Paragraph(s)**
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Jurisprudence	**Paragraph(s)**
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Secondary Sources	**Paragraph(s)**
Malcolm Rowe and Leanna Katz, "A Practical Guide to Stare Decisis", Windsor Review of Legal and Social Issues, Vol. 41, pp. 1-27	78