IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

JEROME CRAWFORD

Appellant

-AND-

NOVA SCOTIA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANT

COUNSEL FOR THE APPELLANT

TEAM 2

CONTENTS

PART I – OVERVIEW

[1] Racial discrimination in public sector hiring is unacceptable. Jerome Crawford has worked for years to become a police officer and make positive change in his community. On the basis of his race, the Halifax Regional Police denied him an equal opportunity to be hired.

[2] The "good character" requirement in the *Police Regulations* creates an adverse effect on Black applicants. In directing police departments to consider information gained from carding, which disproportionately targets Black individuals, the *Police Regulations* create a headwind for Black job seekers. This distinction fails to respond to the equal capacity of Black applicants to be moral and effective police officers. It perpetuates the stigmatization of Black individuals by law enforcement and exacerbates the disadvantage of Black Nova Scotians in obtaining stable employment.

[3] The heightened scrutiny of Black applicants is unjustifiable. While police forces should be able to select officers of high moral character, the differential treatment of Black applicants does not advance that goal. There are alternative ways of maintaining the integrity of the police force. The harm of racial discrimination to Mr. Crawford, Black applicants, and society in general greatly outweighs any benefit of the "good character" requirement.

[4] Mr. Crawford should be allowed to re-apply immediately to the police force and is entitled to a hiring process free from discrimination. A constitutional exemption from the consideration of carding information in hiring is a just and appropriate remedy to vindicate his right to equal treatment and his dignity.

PART II – STATEMENT OF FACTS

1. Factual Background

a. Jerome Crawford is motivated to work for change in his community as a police officer

[5] Jerome Crawford ("Mr. Crawford") has prepared for years to serve his community as a police officer with the Halifax Regional Police ("the HRP"). He has a Bachelor's degree in Commerce from St. Mary's University and a diploma in Police Foundations from Eastern College, Halifax. Throughout his adolescence and his education, Mr. Crawford worked part-time at his father's convenience store, Alvins. Mr. Crawford's father has encouraged him to work toward a well-paying, stable job, and Mr. Crawford's career goal is to make positive change in his community through police work.

Official Problem, Wilson Moot 2018 at pp 4, 3, 2, 5 [Official Problem].

[6] Police forces in Canada use street checks, or "carding," to collect information about individuals in the community outside the context of a specific investigation. Black people are disproportionately carded in Halifax. While they make up only 3.5% of Halifax's population, Black people make up 11% of individuals carded.

Official Problem, *supra* para 5 at pp 3, 7.

[7] Mr. Crawford and both his parents are Black. The family lives in North Preston, a neighbourhood in Halifax which is 70% Black. The police carded Mr. Crawford thirteen times from 2007 to 2014. His encounters with the HRP have made him feel like he was under suspicion, even though he has never been involved in any crime. In one instance, he felt the officer was accusing him of something. He never felt like he could walk away when approached

by police. His encounters with the HRP have made Mr. Crawford feel that young Black men like him are singled out by the police through carding.

Official Problem, *supra* para 5 at pp 2, 6, 3, 5-6, 4.

[8] Part of Mr. Crawford's motivation to become a police officer is to engage with the community in a more sensitive way than the officers who carded him. Adam Dobson, a sociologist from Dalhousie University, found that racially diverse police forces better understand the communities they work in, and individuals questioned or charged by officers of their race are less likely to think these actions are racially motivated. The HRP has stated the importance of building relationships between police officers and individuals in the communities they serve.

Official Problem, *supra* para 5 at pp 5-6, 7, 3.

b. The HRP rejected Mr. Crawford's application to become a police officer on the basis of carding information

[9] In keeping with his long-standing goal of becoming a police officer, Mr. Crawford applied for a position with the HRP. The HRP informed Mr. Crawford that applicants must generally be clear of any detected or undetected criminal activity and asked him a series of questions regarding his personal history and character. Mr. Crawford truthfully reported that he has never been arrested for, charged with, or convicted of a crime in Canada. He truthfully answered that he has never lied to a police officer during an investigation, hidden anyone from the police, or helped anyone avoid being arrested. Finally, he truthfully answered that he has not used any illegal drugs in the past three years.

Official Problem, *supra* para 5 at p 4.

[10] Police hiring in Nova Scotia is governed by the *Police Act* and the *Police Regulations*. Paragraph 4(1)(a) of the *Police Regulations* ("the Provision") states that a candidate must demonstrate good character in order to become a police officer. Under the Provision, the

assessment of good character "shall be made having regard to the information obtained through the criminal and background checks…and any other information about the candidate that is in the possession of the chief officer." By requiring reference to all information, the Provision mandates that police forces consider information gained from carding in assessing an applicant's character.

Police Regulations, NS Reg 90/2012, s. 4(1)(a).
Official Problem, *supra* para 5 at p 1.

[11] The HRP rejected Mr. Crawford's application on the grounds that he had failed the good character requirement. The police concluded that he had "affiliation with individuals known to the police for their involvement in criminal activity." In making this assessment, the police relied on information collected from the thirteen occasions when he was carded.

Official Problem, *supra* para 5 at pp 4-5.

[12] North Preston, the neighbourhood where Mr. Crawford grew up, is generally considered to have a higher crime rate than other neighbourhoods in Halifax. While being carded in March 2010 and September 2012, Mr. Crawford told police that he worked at Alvins alongside Clyde George and Gavin Benjamin. Mr. George and Mr. Benjamin are persons of interest to the HRP with respect to drug trafficking. Mr. Crawford's father had hired Mr. George and Mr. Benjamin when Mr. Crawford was a child. By the time Mr. Crawford reached adolescence, Mr. George and Mr. Benjamin had become involved in the recreational drug trade, selling small quantities of drugs to adult customers at Alvins and elsewhere. Because he saw them as loyal employees, Mr. Crawford's father had largely ignored their activities.

Clarifications to the Official Problem, Wilson Moot 2018 at para 5 [Clarifications to the Official Problem].
Official Problem, *supra* para 5 at pp 1, 5, 2.

[13] Police collected information from Mr. Crawford through carding on numerous other occasions. In June 2012, Mr. Crawford acknowledged that he knew individuals who use recreational drugs. In July 2013, police stopped Mr. Crawford while he was leaving a party where there had been a stabbing. In November 2013, he was carded while walking with Dennis Butcher, who had been convicted of aggravated assault but received a suspended sentence.

Official Problem, *supra* para 5 at pp 3, 5.

c. Black Nova Scotians face disadvantage in employment and stigmatization by law enforcement

[14] Dr. Nicos Tolios, an economist, found that Black Nova Scotians have historically faced difficulty securing and maintaining stable, well-paying jobs. This disadvantage persists to the present day. While 7.3% of non-visible minorities in Nova Scotia are unemployed, 14.5% of Black Nova Scotians are unemployed. Among employed Nova Scotians, the average after-tax income of non-visible minorities is $30,000, as opposed to only $23,000 for Black people.

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

[15] In addition, Sunny Mathai, a criminologist at Dalhousie University, found that police often target communities whose populations have a greater proportion of racialized people. Research shows that police officers have implicit biases and are more likely to associate Black men with crime.

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

[16] Mr. Crawford initially applied to the HRP in November 2014 and has not yet achieved his dream of working as a police officer. He applied to the courts to persist in his aspiration of changing his community as a member of the HRP.

Official Problem, *supra* para 5 at pp 4, 6, 11.

2. Procedural History

[17] Mr. Crawford applied to the Nova Scotia Supreme Court seeking a declaration that Paragraph 4(1)(a) violates section 15(1) of the *Charter* and is of no force and effect.

Official Problem, *supra* para 5 at p 2.

[18] Justice Lazier of the Nova Scotia Supreme Court granted Mr. Crawford's application. Justice Lazier held that Paragraph 4(1)(a) violates section 15(1) of the *Charter*. By requiring reference to information collected through carding, Paragraph 4(1)(a) creates a "headwind" for Black applicants. Justice Lazier held that the Provision could not be saved by section 1 of the *Charter*. He granted Mr. Crawford a constitutional exemption to re-apply to the HRP free from the consideration of carding information during the good character assessment.

Official Problem, *supra* para 5 at pp 9-10.

[19] The Nova Scotia Court of Appeal overturned Justice Lazier's decision. Justice Balantine, writing for the majority, held that Paragraph 4(1)(a) does not violate section 15(1), finding that there was no discriminatory distinction because the evidence on record indicates that the racial demographics of the HRP matches that of the population it serves. She held that if she was wrong about section 15(1), the regulation would be justified under section 1, because the Provision furthered the province's legitimate objective of ensuring that police hire officers have integrity, uphold the law, and are not affiliated with crime.

Official Problem, *supra* para 5 at pp 10-11.

PART III – STATEMENT OF POINTS IN ISSUE

[20] This appeal raises the following constitutional questions:

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

   Paragraph 4(1)(a) violates section 15(1) of the Charter. It creates a distinction on the enumerated ground of race through adverse effects. The distinction is discriminatory because it imposes a burden on Black applicants to the police that exacerbates their disadvantage and does not respond to their actual needs and capacities.

2. **If the answer to question 1 is yes, is Paragraph 4(1)(a) justified under section 1 of the *Charter*?**

   Paragraph 4(1)(a) cannot be justified under section 1. The distinction is not rationally connected to its goal of maintaining the integrity of the police force. The Provision is not minimally impairing because there are less-impairing alternatives for accomplishing its goal. The Provision's deleterious effects outweigh its benefits.

3. **If the answer to question 2 is no, the parties have agreed that a suspended declaration of invalidity would be appropriate. Should Mr. Crawford be granted a constitutional exemption under section 24(1) of the *Charter*?**

   A successful *Charter* litigant should have the immediate benefit of a ruling. Mr. Crawford therefore requires a constitutional exemption, and in this case it is appropriate to combine this personal remedy with a suspended declaration of invalidity. A constitutional exemption is fair to Mr. Crawford, as he would suffer financial, professional, and dignitary harm if forced to further delay his police career. Granting him a constitutional remedy does not undermine Parliament's objective in enacting the regulation, is within the Court's competency, and is fair to the government.

PART IV – ARGUMENT

Issue 1: Paragraph 4(1)(a) of the *Police Regulations* violates section 15(1) of the *Charter*

[21] The Supreme Court held in *Taypotat* that the test for section 15(1) has two steps. First, does the law, on its face or in its impact, create a distinction on an enumerated or analogous ground? Second, does the law impose arbitrary disadvantage, that is, does it fail to respond to the actual needs and capacities of the claimant group, and instead impose a burden or deny a benefit in a manner that reinforces, perpetuates, or exacerbates their disadvantage?

Canadian Charter of Rights and Freedoms, s. 15(1), being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 [*Charter of Rights and Freedoms*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 18-20, [2015] 2 SCR 548 [*Taypotat*].

1. Paragraph 4(1)(a) creates a substantive distinction on the basis of race through adverse effects

[22] Paragraph 4(1)(a) of the *Police Regulations*, despite being facially neutral, distinguishes Black applicants from non-Black applicants. In *Quebec*, the Supreme Court stated that section 15(1) protects not only against laws with discriminatory attitudes, but also against laws creating discriminatory impacts. The Supreme Court has found that facially neutral laws can violate section 15(1) through adverse effects discrimination (*Vriend*, *Eldridge*). The Provision creates a distinction on the basis of race because it requires that police during the hiring process consider information gained from carding, a practice that disproportionately targets Black people.

Quebec (AG) v A, 2013 SCC 5 at paras 323-4, 327-330, 333, [2013] 1 SCR 61 [*Quebec*].
Vriend v Alberta, [1998] 1 SCR 493 at paras 93, 103-4, 107, 156 DLR (4th) 385 [*Vriend*].
Eldridge v British Columbia (AG), [1997] 3 SCR 624 at paras 60, 77, 80, 151 DLR (4th) 577 [*Eldridge*].

[23] Paragraph 4(1)(a) acts as a "headwind" for Black applicants by requiring that police consider all available information about a candidate, including information obtained from carding. Black individuals are more likely to be subject to police scrutiny through carding. Only 3.5% of Halifax is Black, but 11% of individuals carded are Black. Thus, it is more likely that the police will have background information, including information from which they will draw negative inferences, about a Black applicant. Reference to all information available means something different for a Black applicant than it does for a non-Black applicant.

Official Problem, *supra* para 5 at pp 1, 7.

[24] Mr. Crawford's case demonstrates the adverse effect of the regulation. Mr. Crawford was carded thirteen times between 2007 and 2014, despite never having been arrested, charged with, or convicted of any offence. The HRP subsequently rejected his application based on information gleaned from this carding. It is unlikely that a non-Black applicant would have been carded as often as Mr. Crawford, if at all. The existence of this additional information creates a barrier that a non-Black applicant with Mr. Crawford's law-abiding record would not face.

Official Problem, *supra* para 5 at pp 3, 5, 7.

[25] Even if Paragraph 4(1)(a) has a valid purpose, it still creates a distinction on the basis of race due to its adverse effects, which is sufficient to find a distinction. In *Meiorin*, a human rights case, the Supreme Court held that a particular fitness requirement for firefighters made a distinction on the basis of sex because it adversely affected women firefighters. While the fitness test was connected to the job responsibilities, the unnecessarily high standard was discriminatory because women were more likely to fail. Similarly, Paragraph 4(1)(a) adversely affects Black applicants by creating a standard that is harder for them to meet, because of the additional background information obtained from racially disproportionate carding.

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3 at paras 1, 11, 69, 176 DLR (4th) 1 [*Meiorin*].

[26] Paragraph 4(1)(a) creates a distinction on the basis of race, and is unlike provisions that create distinctions based on characteristics that are not protected by section 15. In *Health Services*, the Court held that an Act that imposed limits on collective bargaining rights of non-clinical health care workers created a distinction based on "type of work" and not on sex. This was true, even though the non-clinical health care workers impacted by the provision were predominantly women.

Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 at para 165, [2007] 2 SCR 391 [*Health Services*].

[27] In contrast, there is no evidence that the disproportionate scrutiny of Black individuals under Paragraph 4(1)(a) is based on any characteristic other than race. Police disproportionately target Black individuals with carding, and individual officers tend to have implicit biases that make them affiliate Black men with crime. In fact, Mr. Crawford himself believes police targeted him for carding because of his race. By requiring reference to carding information, Paragraph 4(1)(a) replicates in the hiring process the disproportionate scrutiny of Black individuals. The evidence only shows that its effect is to distinguish Black applicants from non-Black applicants based on race, and not demonstrably on the basis of any other characteristic.

Official Problem, *supra* para 5 at pp 7, 9, 5-6.

[28] The additional hurdle that Black applicants face under Paragraph 4(1)(a) in the hiring process constitutes an adverse distinction regardless of the hiring result. The coincidence that the racial demographic of the HRP matches that of the population it serves fails to disprove this obstacle in the hiring process. The ability of Black individuals to overcome this hurdle and be hired does not mean that the hurdle does not exist.

Official Problem, *supra* para 5 at p 8.

[29] Additionally, Paragraph 4(1)(a) may have an adverse effect in the hiring result. First, the HRP only formalized carding in 2007. The lack of comprehensive carding information prior to 2007 could be the precise reason why the racial makeup of the HRP matches the racial makeup of the population. Black applicants would not have faced extra scrutiny in police hiring prior to 2007, because of the lack of comprehensive carding information. Second, the statistic does not reveal the relative rates of application of Black and non-Black applicants. Black applicants could apply and be rejected at a higher rate.

Official Problem, *supra* para 5 at pp 3, 8.

[30] The adverse effects stem from Paragraph 4(1)(a), not from the particular hiring decision of the HRP in Mr. Crawford's case. The Court in *Khawaja* held that Parliament is entitled to a presumption that its laws will be applied constitutionally by the public service. The HRP does not possess the discretion to ignore carding information. Therefore, there is no constitutional application of Paragraph 4(1)(a), because it will always have regard to information from carding, which disproportionately targets Black people.

R v Khawaja, 2012 SCC 69 at para 83, [2012] 3 SCR 555 [*Khawaja*].

[31] Paragraph 4(1)(a) is similar to the provisions in *Bain*, which the Supreme Court held were unconstitutional despite the discretion of the decision-maker. In that decision, which was upheld in *Little Sisters*, the Court found that the lack of even-handedness in the jury selection process created by the provisions was not mitigated by the Crown's discretion. Similarly, in this case, police discretion does not mitigate the disproportionate scrutiny of Black applicants under Paragraph 4(1)(a).

R v Bain, [1992]1 SCR 91 at paras 25, 1-12, 87 DLR (4th) 449 [*Bain*].

Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69 at para 131, [2000] 2 SCR 1120 [*Little Sisters*].

2. The distinction created by Paragraph 4(1)(a) discriminates against Black applicants to police forces in Nova Scotia

[32] Paragraph 4(1)(a) perpetuates arbitrary disadvantage and is therefore discriminatory. The Provision meets the two essential conditions for a finding of arbitrary disadvantage as identified in *Taypotat*. First, Paragraph 4(1)(a) imposes a burden on Black applicants that exacerbates their disadvantages in employment and stigmatization from law enforcement. Second, Paragraph 4(1)(a) does not respond to the actual needs and capacities of Black applicants. The Provision therefore breaches the substantive equality protected by section 15(1).

a. Paragraph 4(1)(a) imposes a burden on Black applicants that perpetuates their disadvantage

[33] Paragraph 4(1)(a) creates a headwind for Black people applying to become police officers. In *Parks*, the Ontario Court of Appeal stated that "[r]acism, and in particular anti-[B]lack racism, is a part of our community's psyche" and a "grim reality in Canada." Here, the Provision deepens this disadvantage that Black people already face, including in obtaining well-paying, stable employment and with heightened police scrutiny.

R v Parks, 15 OR (3d) 324 at paras 54, 42 [*Parks*].
Official Problem, *supra* para 5 at p 9.

[34] Paragraph 4(1)(a) reinforces the disadvantage faced by Black Nova Scotians in obtaining high-paying, stable jobs. It mandates that police consider information from carding to make hiring decisions, which results in a discriminatory hiring process for Black applicants.

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

[35] Paragraph 4(1)(a) also reinforces the disadvantage that Black people in Halifax experience due to stigma from heightened police scrutiny. Black people are carded at a higher

rate than non-Black people in Halifax. Police often target communities whose populations are disproportionately racialized, the result being that racialized people feel stigmatized by law enforcement. In *Vriend* the omission of sexual orientation as a protected ground under the *Individual Rights Protection Act* risked a "serious detrimental effect upon the sense of self-worth" of gay and lesbian people. Similarly, creating a barrier for Black people to participate in law enforcement risks damaging their self-worth and deepens the stigmatization they face from law enforcement.

Vriend, *supra* para 22 at paras 103-104.
Official Problem, *supra* para 5 at pp 7, 9.

[36] The Provision imposed a burden on Mr. Crawford when he applied for a job with the HRP in a way that exacerbated his disadvantage. He was blocked from employment because of the increased police scrutiny he has faced due to his race, perpetuating the difficulty of Black Nova Scotians in general in securing well-paying, stable employment. He was barred from working as a police officer under a statutory hiring regime that relies on information gained from racially-disproportionate carding, further stigmatizing him based on his race.

Official Problem, *supra* para 5 at pp 3, 9, 6, 7, 4-5.

b. Paragraph 4(1)(a) fails to respond to the actual needs and capacities of Black applicants

[37] The distinction that the Provision creates on the basis of race does not respond to the needs and capacities of Black applicants. The Supreme Court of Canada in *Quebec* stated that the "needs and capacities" test assesses the correspondence between "the ground or grounds on which the discrimination claim is based and the actual needs, capacity, or circumstances of the claimant or the affected group."

Quebec, *supra* para 22 at para 157.

[38] For example, in *Gosselin*, a law that set a minimum age of thirty to receive welfare responded on the basis of age to the needs and capacities of young people because it encouraged them to work and train for employment. In *Withler*, a law that distinguished on the basis of age in apportioning pensions responded to the actual needs and capacities of surviving spouses.

> *Gosselin v Quebec (AG)*, 2002 SCC 84 at paras 53-58, [2002] 4 SCR 429 [*Gosselin*].
> *Withler v Canada (AG)*, 2011 SCC 12 at paras 18, 73, 81-82, [2011] 1 SCR 396 [*Withler*].

[39] Paragraph 4(1)(a) fails this test because a distinction on the basis of race does not respond to the capacities of Black applicants and their ability to work effectively and with integrity as police officers. Black applicants are as likely as any other applicants to be moral and effective police officers. There is no reason to create a headwind for Black applicants through disproportionate scrutiny during the good character assessment. The distinction does not respond to Black applicants' capacities because it treats them as uniquely deserving of scrutiny.

[40] The distinction created by Paragraph 4(1)(a) widens the gap between Black Nova Scotians and the rest of society. The Supreme Court stated that "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory" (*Taypotat, Quebec*). Black Nova Scotians face disadvantage in obtaining well-paying, stable employment. The Provision creates a hurdle for Black applicants to the police force, thus failing to respond to their "overall needs and circumstances" (*Gosselin*).

> *Taypotat, supra* para 21 at para 20.
> *Quebec, supra* para 22 at para 332.
> *Gosselin*, supra para 38 at para 55.

[41] The distinction in Paragraph 4(1)(a) fails to respond to the actual characteristics of Black applicants by obscuring their merits and qualifications due to disproportionately available background information from carding. Section 15 protects the right of every person to participate

fully in society, regardless of characteristics attributed to the individual based on their membership in a particular group without regard to the individual's actual circumstances (*Gosselin*). Paragraph 4(1)(a)'s reliance on a disproportionate amount of carding information obscures consideration of relevant individual qualifications.

Gosselin, *supra* para 38 at para 20.

[42] Mr. Crawford is qualified and possesses the good character to be a police officer. He has a diploma in Police Foundations. He is not involved in any criminal activity. He wants to change his community through police work. However, like other Black people in Halifax, Mr. Crawford faced heightened police scrutiny in the form of carding. It was on the basis of this carding information that the HRP rejected his application under Paragraph 4(1)(a).

Official Problem, *supra* para 5 at pp 4-6, 7, 3.

Issue 2: The infringement is not justified under section 1 of the *Charter*

[43] The infringement of Mr. Crawford's section15(1) right is not justifiable under section 1 of the *Charter*. The Supreme Court held *in Oakes* that a limit on *Charter* rights can be upheld when it is prescribed by law, addresses a pressing and substantial objective, and is proportionate. Proportionality requires that the limit is rationally connected to the objective, that the provision minimally impairs the right, and that the salutary and harmful effects of the provision are balanced.

Canadian Charter of Rights and Freedoms, s. 1, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 [*Charter of Rights and Freedoms*].
R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].
Dagenais v Canada Broadcasting Corp, [1994] 3 SCR 835 at pp 887-88, 20 OR (3d) 816 [*Dagenais*].

[44] The onus lies on the government to prove that this infringement on equality rights is justifiable at each stage of the section 1 analysis. Although the Court may choose to afford some

degree of deference to the government's decisions in addressing the complex social problems of racial discrimination and police-community relations, this deference does not relieve the government of its burden to justify the limitation. Even under a deferential standard, the limitation on section 15 rights is not justified.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

[45] This limitation on rights is prescribed by law and addresses the pressing and substantial objective of ensuring the integrity of the police force. However, any benefits are not proportionate to the burden it places on Black applicants to the HRP. The rational connection between the additional barrier to Black applicants and this objective is tenuous at best. The Provision impairs the right to equality more than is reasonably necessary in the circumstances. Finally, its actual beneficial effects are negligible and do not justify the great cost it imposes on the equality of Black applicants to the police generally, and to Mr. Crawford in particular.

1. This limit is prescribed by law

[46] The Appellant acknowledges that this infringement on the *Charter* right to equality is prescribed by law. It is a direct effect of the operation of Paragraph 4(1)(a) of the *Police Regulations*, which are law for the purpose of section 1 analysis.

> *Charter of Rights and Freedoms*, s. 1.
> *Irwin Toy Ltd. v Quebec (AG),* [1989] 1 SCR 927 at pp 981, 58 DLR (4th) 577, Citing *R v Thomsen*, [1998] 1 SCR 640 at pp 650-651.

2. Paragraph 4(1)(a) has a pressing and substantial objective

[47] The Appellant acknowledges that the objective of the Provision is pressing and substantial. The objective as stated by Deputy Chief Jill Taylor is three-fold: to ensure that police officers are incorruptible, to ensure that only individuals of the highest moral character join the HRP, and to maintain the credibility of the HRP in the eyes of the public.

Official Problem, *supra* para 5 at p 6.

3**. The effects of the Provision are not rationally connected to its objective**

[48] There is no rational connection between the effects of the Provision and the objectives identified above. The rational connection test is not onerous and may be proven on the basis of reason or logic, without requiring proof (*Little Sisters*). It is not logically or reasonably likely that the use of information from carding to assess the "good character" of HRP applicants achieves its objectives. It does not lead to a better public perception of the police or the hiring of more qualified officers. Even if the Provision advances some of these objectives, the connection is tenuous and the benefits are minimal.

Little Sisters, *supra* para 31 at para 228.
RJR-MacDonald Inc. v Canada (AG), [1995] 3 SCR 199 at para 154, 127 DLR (4th) 1 [*RJR*].
Mounted Police Association of Ontario v Canada (AG), 2015 SCC 1 at paras 143-8, [2015] 1 SCR 3 [*Mounted Police*].

[49] The Provision is not rationally connected to its objectives for two reasons. First, because its effect is to overscrutinize Black applicants, the Provision is an underinclusive way of capturing "criminal affiliation" understood as the extent of an applicant's interaction with criminals. Second, the Provision relies on an unfounded assumption that this 'criminal adjacency' is an effective test of morality, incorruptibility, or public legitimacy.

a. The Provision is underinclusive because it scrutinizes only those who have been carded

[50] If criminal affiliation is relevant to assessing applicants, it is not rational to consider it only for some applicants. The discrimination created by the Provision does not advance its objectives. As Iacobucci J observed in *Benner*, "the relevant question is whether the discrimination is required by the legislative objective" [emphasis in original]. The Provision creates a two-tiered application system for Black and non-Black applicants. Black applicants are

assessed using more information about them than are non-Black applicants, based on carding, to which Black people are disproportionately subject.

> *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 95, 143 DLR (4th) 577 [*Benner*].

[51] The HRP does not have access to this detailed information for applicants who have not been carded in the past. Therefore, carding information is not a tool that the HRP uses to assess the good character of all applicants. It is a tool that the HRP uses to assess the good character of only those applicants who have been carded.

[52] It is not sufficient for the Respondent to show only that it is reasonable for prospective police officers to undergo a good character assessment using all available information. The Respondent must show that the distinction created by this requirement is justified by their objectives. In order for the impugned provision to be rationally connected to its goal, there would have to be a legitimate reason for creating this additional hurdle that applies disproportionately to Black applicants.

> *Benner*, *supra* para 51 at para 95.

b. Criminal adjacency is irrelevant to good character

[53] Unlike criminal and arrest history, the information uniquely available from carding is not helpful in assessing good character. The particular function of carding history is to give information about proximity to crime in which the applicant themself was not implicated.

[54] Information about "criminal adjacency" is not helpful in assessing morality, incorruptibility, or public legitimacy. In some cases, this may mean that the applicant is more inclined to be criminal or sympathize with criminals. In other cases, it may mean nothing at all about the character of an applicant. In cases such as Mr. Crawford's, it may demonstrate an

exceptional ability to resist crime while growing up in high crime neighbourhood. “Criminal adjacency” information could mean anything about the character of the applicant and therefore is not a rational method of assessing good character.

Clarifications to the Official Problem, *supra* para 12 at para 5.

4. The Provision is not minimally impairing

[55] The Provision infringes equality rights to a much greater degree than is necessary to fulfill its objectives. To be justifiable under section 1, a provision must impair a right as little as reasonably possible in order to achieve its objective.

R v Edwards Books and Art Ltd., [1986] 2 SCR 713, 58 OR (2d) 2 [*Edwards Books*].

[56] The Provision is overbroad and is therefore a “very crude instrument in achieving the government’s objective” (*Thomson Newspapers*). In its effort to exclude applicants of bad moral character, the consideration of carding information also bars applicants such as Mr. Crawford. He has demonstrated exceptional moral character by resisting criminality despite growing up surrounded by crime. He has pursued his aspiration of joining the police force throughout his education, motivated by his desire to improve his community. His experiences in a neighbourhood such as North Preston make him exactly suited to fulfill the HRP’s hiring objectives. He was nevertheless excluded by the discriminatory effects of the Provision. The heightened scrutiny that he faced because of his race is not reasonably necessary to accomplish the goals of the Provision.

Corbiere v Canada (Minister of Northern and Indian Affairs), [1999] 2 SCR 203 at para 77, 173 DLR (4th) 1 [*Corbiere*].
Thomson Newspapers co. v Canada (AG), [1998] 1 SCR 877 at para 111, 159 DLR (4th) 385 [*Thomson Newspapers*].

[57] There are a number of alternatives that do not infringe on equality that the government could use to ensure the integrity of the police force. An alternative good character requirement

could uphold the morality, incorruptibility, and public legitimacy of the police without referring to carding information.

[58] For example, the HRP could administer an ethics test to assess the moral character of its applicants. This could involve hypothetical situations that the applicant may encounter as a police officer. This would have the benefit of testing all applicants equally for moral character, regardless of whether they have been carded. Additionally, it would provide more relevant qualitative information about how an applicant would act as an officer, rather than at any time in their past in any context in which they may have been carded.

[59] The HRP could require personal references from individuals who are able to speak to the moral character and incorruptibility of applicants. This may be included in the background check at the initial stage of assessment. A personal reference check would apply equally to all applicants and would provide information about their past behaviour and character.

[60] To address the specific concern of incorruptibility, the HRP could conduct in-person interviews. Police forces could ask every applicant about their past associations, whether they know anyone who commits crimes, and the nature of those relationships. Interviews could provide important context which is not available through street check information, which generally consists of brief interactions and "yes or no" answers.

[61] Finally, the HRP could pursue these objectives outside the hiring process as well. To address the concern of public confidence and legitimacy, the HRP could conduct public outreach and education campaigns to build trust between the police and the communities they serve. Additionally, a police force that is able to relate to the community in which it works through face to face interaction may be more likely to be perceived as legitimate by the public.

5. The deleterious effects of the Provision outweigh its benefits

[62] Finally, even if the Court finds the regulation to be rationally connected to its objective and minimally impairing of equality rights, it is still not justified. For a rights-limiting measure to be justifiable, there must be proportionality between its deleterious and salutary effects. In *Dagenais* the Court held that where the connection between a law and its objective is tenuous, proportionality must be assessed by balancing the harm against the good that the law actually accomplishes, instead of against its objective. The harm the Provision poses to equality rights outweighs its marginal salutary effects.

Dagenais, supra para 43 at pp 887-88.
Hutterian Brethren, supra para 44 at para 76.

a. The benefit to police hiring objectives is marginal

[63] The benefit of the Provision must be assessed according to its effectiveness in achieving its purpose (*Dagenais).* In *Thomson Newspapers,* Bastarache J found that a ban on the publication of election polls infringed on free speech and was not justifiable based on its benefit that "an indeterminate number of voters might be able to spot an inaccurate poll result and might rely to a significant degree on the error" (*Thomson Newspapers,* emphasis in original). This was a marginal and speculative benefit that did not validate the rights infringement.

Thomson Newspapers, supra para 56 at para 127.

[64] There is a marginal and speculative benefit from considering information that only carding can provide. For the vast majority of applicants, the relevant information will be available from background and criminal record checks, the answers provided on the questionnaire, and personal interviews. There is little if any benefit to considering carding information in addition to these reliable sources. This benefit applies to a very specific class of

applicant, and the government has brought no evidence that it is a large enough class to make the effect of the law significant.

Official Problem, *supra* para 5.
Hutterian Brethren, supra para 44.
Thomson Newspapers, supra para 56 at paras 127 and 129.

b. The harm to equality is significant

[65] In contrast, the harmful effects of the Provision on Mr. Crawford, Black applicants, and society in general, are significant. It has had a severe effect on Mr. Crawford by preventing him from pursuing the career that he has been working towards for much of his life. This has replicated the sense of stigma and the harm to his dignity he experienced in the thirteen times he was targeted for police carding.

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

[66] The discriminatory effects of the Provision are also detrimental to Black applicants in general. The Provision sends the message that Black applicants are deserving of higher suspicion and unqualified to be police officers, and justifies this based on the results of discriminatory police conduct that they have already faced. Finally, it is harmful to society to allow this inequality to continue, sanctioned by the institution of the police force itself.

Elmardy v Toronto Police Services Board, 2017 ONSC 2074 at para 34 [*Elmardy*].

Issue 3: The Court should order a suspended declaration of invalidity and a constitutional exemption for Mr. Crawford

[67] Mr. Crawford should be granted a constitutional exemption from the Provision under section 24(1) of the *Charter*. As Justice Lazier ordered, Mr. Crawford should be allowed to re-apply to the HRP and have his application reassessed without regard to the information obtained from when he was carded.

[68] The parties have agreed that a suspended declaration of invalidity under section 52 is an appropriate remedy. A suspension would allow the Governor-in-Council time to create new provisions that do not infringe the *Charter*. During the period of suspension, a constitutional exemption from the Provision's effects is a just and appropriate remedy to vindicate Mr. Crawford's right to equal treatment and his dignity.

> *Constitution Act, 1867* (UK), 30&31 Vict, c.3, s 52(1), reprinted in RSC 1985, Appendix II, No. 5.
> *Charter of Rights and Freedoms*, *supra* 46 s 24(1).
> Official Problem, *supra* para 5 at p 11.

1. This is an appropriate case to combine remedies

[69] This is an appropriate situation to combine remedies under sections 24(1) and 52(1). Mr. Crawford requires a personal remedy to vindicate his right, in addition to the general remedy provided by the declaration. Although the Supreme Court has held in some cases that combined remedies are "rarely granted" (*Schachter*), the courts have granted them in cases similar to Mr. Crawford's.

> *Schachter v Canada*, [1992] 2 SCR 679 at p 720, 93 DLR (4th) 1 [*Schachter*].
> *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter 2016*].
> *Corbiere*, *supra* para 56 at para 122.
> *R v Guignard*, 2002 SCC 14, [2002] 1 SCR 472 [*Guignard*].
> *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, [2009] 3 SCR 208 [*Nguyen*].

[70] A successful *Charter* claimant should have the immediate benefit of the ruling in his or her favour. When the Court orders a prospective remedy, it "has always allowed the party bringing the case to take advantage of the finding of unconstitutionality" (*Remuneration of Judges Reference*). This is not an exceptional case where Mr. Crawford, as the person who brought the action, should be denied immediate relief.

Reference re the Remuneration of Judges of the Provincial Court of PEI, 1998 1 SCR 3 at para 20, 155 DLR (4th) 1 [*Remuneration of Judges Reference*].
Corbiere, *supra* para 56 at para 122.
Carter 2016, *supra* para 69.

[71] The Court has combined sections 24(1) and 52(1) remedies to grant an individual claimant a constitutional exemption from a suspended declaration of invalidity in several cases. In *Corbiere*, McLachlin J (as she then was) recognized that "in general, a successful *Charter* litigant should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended." The Court has subsequently applied this reasoning to grant litigants exemptions during periods of suspension (*Guignard*, *Nguyen*). Even further, in *Carter 2016* the Court extended the availability of combined remedies to entire classes of applicants when warranted in the circumstances.

Corbiere, *supra* para 56 at para 122 (although in that case such a remedy was not warranted because of exceptional administrative difficulty).
Guignard, *supra* para 69.
Nguyen, *supra* para 69.
Carter 2016, *supra* para 69.

[72] Courts have declined to combine remedies under sections 24(1) and 52(1) in cases where the exemption would interfere with a complex area of criminal law, or would apply to an indeterminately broad class of people. In *Demers*, the exemption would have provided an absolute discharge for a man accused of sexual assault who was found unfit to stand trial. The weighing of the potential benefits and harms of providing this discharge was a complex social task best left for Parliament. That is not the case for Mr. Crawford, who poses no threat to society if he is allowed to re-apply to the police.

R v Demers, 2004 SCC 46 at para 105, [2004] 2 SCR 489 [*Demers*].

[73] In *Carter 2015*, the Court declined to provide a constitutional exemption during the suspension of its declaration. There, the exemption would have applied to the entire class of

people meeting the Court's criteria for assisted dying. In contrast, Mr. Crawford is asking for an exemption that would apply only to himself, the *Charter* litigant. Neither of these cases is a departure from the general rule in the *Remuneration of Judges Reference* that successful *Charter* litigants should be granted immediate relief.

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 129, [2015] 1 SCR 331 [*Carter 2015*].
> *Remuneration of Judges Reference, supra* para 70.

2. Remedial principles require an exemption

[74] The remedial principles of the *Charter* require that Mr. Crawford receive immediate relief through a constitutional exemption from the Provision. His right to equality has been violated. He should not continue to face discrimination while the Governor-in-Council crafts a new good character requirement that complies with the *Charter*. The factors weighing against the provision of constitutional exemptions do not apply strongly to his case. They are outweighed by the need to vindicate his right.

[75] Based on the remedial principles the Supreme Court outlined in *Doucet-Boudreau, Ferguson,* and *Schachter,* a temporary exemption for Mr. Crawford, limited to the period of suspension, is just and appropriate. The exemption is necessary to vindicate his right. It is appropriate in the framework of a constitutional democracy, does not intrude on the role of Parliament, and draws on the functions and powers of a court. Finally, it is fair to the government and respects the rule of law.

> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at paras 55-59 [*Doucet-Boudreau*].
> *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 [*Ferguson*].
> *Schachter, supra* para 69.

a. The exemption is necessary to vindicate Mr. Crawford's right to equality

[76] Without an exemption Mr. Crawford will remain excluded from the HRP on an unjustifiably discriminatory standard. He will continue to be subject to the consequences of racial inequality. This ongoing discrimination imposes serious financial, professional, and dignitary harms on him. Accordingly, a suspended declaration alone is not a meaningful vindication of his right to equal treatment.

[77] The *Carter* cases recognized that extreme suffering and the risk of irreparable harm were sufficient to warrant constitutional exemptions. It did not make them necessary conditions. The threshold for providing interim exemptions to a successful litigant should remain, as in the above cases, the unjustifiable continued violation of the claimant's rights during the period of suspension. Mr. Crawford meets this threshold.

> *Carter 2015*, *supra* para 73.
> *Carter 2016*, *supra* para 69.

[78] Mr. Crawford will suffer short- and long-term harm if he is subject to this Provision during the period of suspension. Like other Black Nova Scotians, Mr. Crawford already faces disadvantage in employment. During the period of suspension, he will lose the opportunity to advance his career and will suffer financially. He can neither pursue his dream career, nor make long-term alternative plans, during this period of time. He may well continue to work at Alvins, at a lower wage than he would earn as a police officer.

[79] He will continue to suffer the stigma of being labelled an insufficiently good person to join the police force, based on a stereotype that applies to him because of his race and socioeconomic circumstances. This is a serious injustice. It should not continue. Mr. Crawford's right to equal treatment can be vindicated only if the Court denounces this discrimination in the police force and grants him an immediate remedy.

b. The exemption is appropriate in a constitutional democracy and does not intrude on the role of parliament

[80] An interim constitutional exemption would not undermine the role of Parliament. The suspension of the declaration of invalidity allows the Governor-in-Council time to craft new provisions that comply with the *Charter*. This acknowledges the expertise of the executive branch in creating laws that balance competing interests.

Schachter, supra para 69 at para 707.

[81] Interim exemptions are limited to the period of suspension and are distinct from permanent constitutional exemptions. In *Ferguson,* McLachlin CJC noted that interim exemptions, provided alongside suspended declarations of invalidity, are ancillary remedies that do not usurp the role of Parliament in the same way. In that case, the Court was concerned with a "free standing" exemption that would permanently alter the operation of an otherwise valid mandatory minimum provision. This would have usurped the role of Parliament in pursuing its legislative objectives. Here, Mr. Crawford is requesting an interim exemption, which would not usurp the role of the executive. Unlike a permanent and general exemption, it does not have the effect of rewriting the law. The new provision will be given full effect once it comes into force.

Ferguson, supra para 75 at para 46.

[82] An exemption for Mr. Crawford is compatible with the underlying purpose of the good character requirement. In *Ferguson,* the court declined to grant an exemption from a mandatory minimum sentence because it would undermine the very purpose of the law. It is an essential characteristic of mandatory minimum laws that they apply categorically to a certain class of crimes. In contrast, it is not an essential characteristic of the "good character" requirement that it make reference to carding information. Relieving Mr. Crawford from the reference to carding

would not be antithetical to the purpose of the provision. An exemption would limit the information available to the HRP only to the extent necessary to comply with the *Charter*.

Ferguson, supra para 75 at para 52.
Schachter, supra para 69 at para 707.

c. This remedy is fair to the government and easily implemented

[83] Granting Mr. Crawford an interim exemption from the good character requirement is fair to the government. It does not "impose substantial hardships that are unrelated to securing the right" (*Doucet-Boudreau*). It is not administratively difficult; Mr. Crawford would simply re-apply to the HRP like any other applicant, and the HRP would be precluded from considering his carding information. The exemption would not interfere with the rest of the hiring process, including all other requirements for qualification and a personal interview. Unlike the exemption granted in *Carter 2016,* this exemption would not apply to an indeterminate number of people. Unlike the exemption contemplated in *Corbiere*, it would not interfere with the executive's ability to create or implement new provisions. This is not an exceptional case in which administrative difficulties should prevent the litigant from accessing immediate relief.

Doucet-Boudreau, supra para 75 at para 58.
Corbiere, supra para 56 at paras 122, 124.

d. The exemption would respect the rule of law

[84] Granting Mr. Crawford an interim exemption would not undermine the certainty and predictability of the law. The scope of this remedy is limited to Mr. Crawford and for a fixed period of time. It would be a clear, predictable and intelligible adjustment to the hiring process. It would create a precise carve out from the existing unconstitutional effects of the Provision. Such a change does not produce uncertainty about where or how the law will apply.

Schachter, supra para 69 at para 70.

[85] In *Carter 2016*, the Court granted constitutional exemptions from the assisted dying prohibition in the *Criminal Code* to all people who met its qualifying criteria. This was a much broader remedy than the Appellant is requesting in this case. Because the exemption in *Carter 2016* applied to an indeterminate number of people, it presented a greater threat to the certain and predictable application of the law. Nevertheless, the Court recognized that the harm to *Charter* rights imposed by the law's continued operation outweighed the concern for the rule of law. The same logic applies even more strongly in favour of granting Mr. Crawford an exemption in this case.

Carter 2016, *supra* para 69 at para 6.

[86] The rule of law principles do not impose a standard of perfect internal logical coherence on the legal system. Similarly, remedies do not need to be logically perfect. The practical effects of this exemption are very minor. The Court should not preserve the conceptual perfection of the law at the expense of infringing rights.

R v Laba, [1994] 3 SCR 965 at para 34, 120 DLR (4th) 175 [*Laba*].

[87] Granting an exemption to Mr. Crawford fosters the principles of the rule of law. As the Supreme Court held in *Ward*, respect for *Charter* rights is itself a "foundational principle of good governance." Ensuring its hiring processes respect Mr. Crawford's right to equal treatment is a fundamental responsibility of the executive. Although the Court may defer to the executive's balancing of competing interests, this deference ends where the constitutional rights that the courts are charged with protecting begin. The Court must uphold the foundational principles of the rule of law and vindicate Mr. Crawford's right.

Vancouver (City) v Ward 2010 SCC 27 at para 38, [2010] 2 SCR 28 [*Ward*].
Doucet-Boudreau, *supra* para 75 at para 36.

PART V – ORDER SOUGHT

[88] The Appellant requests that the appeal be allowed. The parties have agreed that the appropriate remedy in this case is a suspended declaration that Paragraph 4(1)(a) of the *Police Regulations* is invalid and of no force and effect. The Appellant also requests that he be granted a constitutional exemption to re-apply to the Halifax Regional Police during the period of suspension.

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

Team 2

Counsel for the Appellant

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	44, 62, 64
Benner v Canada (Secretary of State), [1997] 1 SCR 358, 143 DLR (4th) 577.	50, 52
British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3, 176 DLR (4th) 1.	25
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331.	
Carter v Canada (Attorney General), 2016 SCC 4, [2016] 1 SCR 13.	69, 70, 71, 77, 84, 86
Corbiere v Canada (Minister of Northern and Indian Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1.	56, 69, 70, 71, 84
Dagenais v Canada Broadcasting Corp, [1994] 3 SCR 835, 20 OR (3d) 816.	43, 62, 63
Doucet-Boudreau v Nova Scotia (Minister of Education), [2003] 3 SCR 3.	75, 83, 87
Eldridge v British Columbia (AG), [1997] 3 SCR 624, 151 DLR (4th) 577.	22
Elmardy v Toronto Police Services Board, 2017 ONSC 2074.	65
Gosselin v Quebec (AG), 2002 SCC 84, [2002] 4 SCR 429.	38, 40, 41
Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27, [2007] 2 SCR 391.	26
Irwin Toy Ltd. v Quebec (A.G), [1989] 1 SCR 927, 58 DLR (4th) 577.	46
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.	21, 40

LEGISLATION	PARAGRAPHS
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.	21, 43, 68
Constitution Act, 1867 (UK), 30&31 Vict, c.3, reprinted in RSC 1985, Appendix II, No. 5.	68
Police Regulations, NS Reg 90/2012.	10

OFFICIAL WILSON MOOT SOURCES	PARAGRAPHS
Official Problem, Wilson Moot 2018.	5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 27, 28, 29, 33, 34, 35, 36, 42, 47, 65, 68
Clarifications to the Official Problem, Wilson Moot 2018.	12, 13, 54