**English translation of the judgment of the Court by SOQUIJ**

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| Procureur général du Québec c. Luamba | 2024 QCCA 1387 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBECREGISTRY OF MONTREAL |
|  |  |
| No.: | 500-09-030301-220 |
| (500-17-114387-205) |
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| DATE: | October 23, 2024 |
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| CORAM: | THE HONOURABLE | JULIE DUTIL, J.A.SUZANNE GAGNÉ, J.A.LORI RENÉE WEITZMAN, J.A. |
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| ATTORNEY GENERAL OF QUEBEC |
| APPELLANT – Defendant  |
| v. |
|  |
| JOSEPH-CHRISTOPHER LUAMBA |
| RESPONDENT – Plaintiff |
| and |
| **CANADIAN CIVIL LIBERTIES ASSOCIATION** |
| RESPONDENT – Intervener |
| and |
| ATTORNEY GENERAL OF CANADA |
| IMPLEADED PARTY – Defendant |
| and |
| CANADIAN ASSOCIATION OF BLACK LAWYERS |
| IMPLEADED PARTY – Intervener |
| and |
| BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION CLINIQUE JURIDIQUE DE SAINT-MICHEL**COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE** |
| INTERVENERS |

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| JUDGMENT |
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1. This appeal concerns the constitutional validity of the power of police officers to stop a road vehicle randomly, outside of an organized spot check program and without any grounds to believe or suspect that an offence has been committed, a power confirmed by the Supreme Court in *R. v. Ladouceur*[[1]](#footnote-1) and codified in s. 636 of the *Highway Safety Code* (“*HSC*”).[[2]](#footnote-2)
2. In a detailed and carefully crafted judgment,[[3]](#footnote-3) the Honourable Michel Yergeau of the Superior Court concluded that the common law rule recognized in *Ladouceur* and s. 636*HSC*[[4]](#footnote-4) infringe ss. 7, 9 and 15(1) of the *Canadian Charter of Rights and Freedoms*,[[5]](#footnote-5) and that these infringements are not justified under s. 1 of the *Charter*. He declared the challenged provision inoperative and suspended the effective date of the declaration for six months, except with respect to pending cases in which the same law is being challenged.
3. The Attorney General of Quebec (“AGQ”) has appealed each of these conclusions. The AGQ alleges that the trial judge erred in law in concluding that racial profiling is an effect of the challenged provision, in setting aside *Ladouceur*, in determining that the challenged provision infringes ss. 7, 9 and 15(1) of the *Charter* and cannot be saved under s. 1, and last, in declaring the challenged provision inoperative under s. 52(1) of the *Constitution Act, 1982*.[[6]](#footnote-6) In the alternative, the AGQ argues that the judge should have suspended the effective date of the declaration of inoperability for 12 months.
4. The respondents, Joseph-Christopher Luamba and the Canadian Civil Liberties Association (“CCLA”),[[7]](#footnote-7) defend the conclusions of the trial judgment and ask the Court to dismiss the appeal. Their arguments are supported by an impleaded party, the Canadian Association of Black Lawyers (“CABL”). The debate on appeal was further enriched by the participation of three interveners, the British Columbia Civil Liberties Association (“BCCLA”), the Clinique juridique de Saint-Michel (“CJSM”) and the Commission des droits de la personne et des droits de la jeunesse (“CDPDJ”).[[8]](#footnote-8)
5. The Attorney General of Canada (“AGC”), who supported the AGQ at trial, did not participate in the appeal.
6. For the reasons below, the Court concludes that the trial judgment should be affirmed, except with respect to the declaration that the common law rule is inoperative and without it being necessary to determine whether the right guaranteed by s. 7 of the *Charter* has been infringed.

# I. BACKGROUND

1. The respondent, Mr. Luamba, is a young Haitian student who lives in Montreal. He has had a driver’s licence since 2019 and, while driving, was stopped three times in a little over a year. Each time, he was asked to identify himself and was released without being given a ticket.
2. Mr. Luamba believed that he was racially profiled during these stops and launched proceedings in November 2020 challenging the constitutionality of the common law rule granting the police [translation] “the power to stop a road vehicle and its driver without reasonable grounds to believe or suspect that an offence was committed” as well as the constitutionality of s. 636*HSC* insofar as it basically reproduces the common law rule.[[9]](#footnote-9)
3. The dispute does not concern traffic stops made as part of an organized program (e.g., a spot check such as a roadblock). Nor does it concern stops by peace officers other than the police.[[10]](#footnote-10) In short, it concerns only a very specific practice, that is, completely discretionary stops of drivers of road vehicles by the police. The trial judge described what is involved as follows:

[translation]

[22] The judgment therefore concerns a single specific police practice: police stops of motor vehicle drivers on public roads, where such stops are carried out in a completely discretionary manner, without factual grounds or even the mere suspicion of an offence, outside an organized program and in a way that is not governed or circumscribed by a legal rule, for the purpose of conducting checks in the interest of highway safety. […]

[Boldface and references omitted]

1. The judge coined the phrase [translation] “traffic stop without factual grounds” to refer to the issue here.[[11]](#footnote-11) In this judgment, the Court will instead use the expression “traffic stop with no required grounds”, which is more neutral and focussed on the conditions (or lack of conditions) for exercising the power to stop that is at issue here.
2. As stated above, the judge concluded that the challenged provision is inconsistent with the right not to be arbitrarily detained (*Charter*, s. 9), the right to liberty and security of the person (*Charter*, s. 7) and the right to equality (*Charter*, s. 15(1)), and that it cannot be saved by the application of s. 1. He therefore agreed with the respondents’ position that the common law rule established in *Ladouceur* and s. 636*HSC* [translation] “have been slowly perverted and distorted from their primary purpose of ensuring road safety”[[12]](#footnote-12) to become [translation] “a free pass allowing the police to racially profile Black drivers”,[[13]](#footnote-13) leading to repeated – and unjustified – violations of their fundamental rights.
3. At trial, the respondents called numerous Black individuals who had experienced traffic stops with no required grounds. Several of these witnesses stated that they had been racially profiled in this context and explained the harmful consequences of these experiences for them or their families. The evidence provided by these witnesses, which the judge believed, is not challenged on appeal. The AGQ does not dispute that these persons were racially profiled during traffic stops with no required grounds or that these experiences may have had serious negative consequences for them, their families, or their loved ones.[[14]](#footnote-14) However, the AGQ argues that the racial profiling does not arise from the challenged provision, but instead from derogatory acts committed by the police in the exercise of the power conferred by this law.
4. For the AGQ, the evidence of racial profiling is therefore irrelevant to the outcome of the dispute. The AGQ does not really contest how the judge defined racial profiling for the purpose of his analysis, although he challenges the judge’s conclusions therefrom (particularly the characterization of racial profiling as a new social fact that has arisen since *Ladouceur*).

# II. COMMON LAW RULE AND SECTION 636 *HSC*

1. Before considering the judgment under appeal and the issues, it is necessary to provide a general overview of the two laws challenged by the respondent at trial and, more particularly, to examine the basis of *Ladouceur* more closely.

## A. *Ladouceur*

1. The judge and the parties to the debate took the position that the Supreme Court, in *Ladouceur*, recognized a common law rule [translation] “granting the police the power to stop a road vehicle and its driver at random without reasonable grounds to believe or suspect that an offence was committed, when the stop is not part of an organized program”.[[15]](#footnote-15) In the conclusions of his judgment, the judge declared that both s. 636*HSC* and [translation] “the common law rule established by *R. v.* *Ladouceur*” are inoperative.[[16]](#footnote-16)
2. After this appeal was heard, the Court invited the parties to file additional written arguments on the following question:

[translation]

Does *Ladouceur* recognize a common law power to make traffic stops with no required grounds outside an organized program? More specifically, where does *Ladouceur* broaden the common law rule established in *Dedman v. The Queen* [1985] 2 SCR 2 – i.e., that there is common law “authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. program” (*Dedman* at 36)?

1. To answer this question, one must carefully examine *Dedman v. The Queen*,[[17]](#footnote-17) *R. v. Hufsky*,[[18]](#footnote-18) and *Ladouceur* to define, in each case, the issue before the Supreme Court.
2. In *Dedman*, rendered in 1985, the Supreme Court ruled for the first time on the existence of a power to make random traffic stops. Le Dain, J., on behalf of the majority, held that there was common law authority for “random vehicle stop[s] for the purpose contemplated by the [program to reduce impaired driving]”[[19]](#footnote-19) (in this instance, the “R.I.D.E. program”[[20]](#footnote-20) introduced in Ontario). The program’s aim was to “detect, deter and reduce impaired driving”.[[21]](#footnote-21) As part of the program, the police would go to a location where they believed they could stop several impaired drivers and position themselves there to make random stops. They would then ask each driver stopped for their driver’s licence and proof of insurance, while noting the general condition of the driver and the vehicle. The purpose of this request was to initiate conversation or contact with the driver to detect drinking drivers. Note that R.I.D.E. officers were equipped with approved roadside screening devices to permit them to make demands for breath “if they form[ed] the requisite grounds for a demand”[[22]](#footnote-22) after they initiated conversation or contact with the driver.
3. At the time of the facts giving rise to that case, the *Charter* had not yet entered into force and no law authorized the R.I.D.E. program. Le Dain, J., for the majority, applied the test laid down by Ashworth, J. of the English Court of Appeal in *R. v. Waterfield*[[23]](#footnote-23) and determined that the police had common law authority to stop a vehicle for the purpose of this program. He did not rule on whether there was common law authority to make random stops while on patrol – that is, outside an organized program – to conduct routine checks.
4. Three years later, in *Hufsky*, the Supreme Court considered the constitutionality of random stops of a vehicle by police officers in the course of “spot check duty”, at a given location, “for the purposes of checking driver’s licences and proof of insurance, the mechanical fitness of vehicles and the condition or ‘sobriety’ of drivers”.[[24]](#footnote-24) The Crown argued that the “spot check procedure” was authorized under s. 189a(1) of the Ontario *Highway* *Traffic Act*,[[25]](#footnote-25) worded as follows at the time:

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| **189a(1).** A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop. | **189a(1).** Un agent de police, dans l’exercice légitime de ses fonctions, peut exiger du conducteur d’un véhicule automobile qu’il s’arrête. Si tel est le cas, le conducteur obtempère immédiatement à la demande de l’agent identifiable à première vue comme tel. |

1. The Crown did not claim that there was federal statutory authority for the random stop or rely on the “common law authority for a random stop [of a driver] affirmed in *Dedman*”.[[26]](#footnote-26) The Crown instead referred to the reasoning in *Dedman* to argue in favour of the constitutionality of the random stop authority conferred by s. 189a(1) of the Ontario *Highway Traffic Act*.
2. The appellant, who was charged with refusing to provide a sample of breath into the roadside screening device (contrary to s. 234.1(2)*Cr.C.* in force at the time), claimed, among other things, that “the random stop and spot check procedure”[[27]](#footnote-27) authorized under s. 189a(1) infringed the right not to be arbitrarily detained guaranteed by s. 9 of the *Charter*. Le Dain, J., on behalf of the Court, determined that the detention resulting from “the random stop of the appellant for the purposes of the spot check procedure, although of relatively brief duration”,[[28]](#footnote-28) was necessarily arbitrary because there were “no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure”.[[29]](#footnote-29) Le Dain, J. concluded, however, that the infringement was justified under s. 1 of the *Charter*.
3. In *Ladouceur*, the Supreme Court was again asked to determine the constitutionality of s. 189a(1) of the Ontario *Highway Traffic Act*. The judgment was rendered two years after *Hufsky*. This time, the stop at issue was conducted from a patrolling police vehicle and not from a fixed point as part of an organized program, contrary to the circumstances considered in *Dedman* and *Hufsky*.
4. The Court unanimously concluded that s. 189a(1) infringed s. 9 of the *Charter* insofar as it authorized this type of traffic stop without grounds. According to the majority, this infringement was justified, however, under s. 1 of the *Charter*.
5. Of these three judgments, only *Dedman* determined that there is a common law police power. In *Hufsky* and *Ladouceur*, the Supreme Court’s analysis concerned a statutory provision, i.e., s. 189a(1) of the Ontario *Highway Traffic Act*. The Court did not have to determine whether there was a common law police power equivalent to the one conferred by this provision.
6. It is true that certain passages from *Ladouceur* may appear ambiguous regarding the common law rule laid down in *Dedman*. That is the case when Cory, J., on behalf of the majority, stated that in *Ladouceur* and *Hufsky*, the police actions “were authorized primarily by s. 189*a*(1) of the *Highway Traffic Act* which granted them absolute discretion to stop motorists if in the lawful execution of their duties”.[[30]](#footnote-30) The use of the word “primarily” might suggest that the police actions at issue were also authorized by another law. This wording therefore supports the idea that the police have common law authority to stop vehicles at random to conduct spot checks at predetermined fixed locations (*cf*. *Hufsky*) or routine checks from a roving patrol car (*cf*. *Ladouceur*). Another excerpt from the reasons of Cory, J. may be confusing in this regard:

The power of a police officer to stop motor vehicles at random is derived from s. 189*a*(1) of the *Highway Traffic Act* and is thus prescribed by law. See *Hufsky*, *supra*, at p. 634. The authority also has been justified by this Court in its decision in *Dedman, supra*, as a prescription of the common law.[[31]](#footnote-31)

[Underlining added]

1. These passages from *Ladouceur* may, however, be characterized as *obiter*. As Green, J.A. of the Court of Appeal of Newfoundland and Labrador, noted in *R. v. Griffin*,[[32]](#footnote-32) the power to stop at issue in *Ladouceur* was based on statutory authority and the Supreme Court did not have to rely on common law powers to decide the dispute. He stated the following:

[…] In *Dedman*, the court held that a random stop, conducted as part of an organized programme designed to deter and detect impaired driving was still within the general scope of police duties and was not an unjustifiable use of power associated with the performance of those duties. Thus, in the context of an organized stopping programme, random stops of motorists are authorized at common law. In *Ladouceur*, a 5:4 majority of the Supreme Court recognized that the power of the police to conduct random stops of motorists for the purpose of investigating drinking-driving offences could be extended to random roving stops that depended solely upon the decision of an individual officer outside of any organized programme. In *Ladouceur*, however, the authority for this came from statute: what was then s. 189a(1) of the Ontario *Highway Traffic Act*. Cory, J. also stated, however, in *obiter* that:

The power of a police officer to stop motor vehicles at random is derived from s. 189a(1) of the *Highway Traffic Act* and is thus prescribed by law... *The authority also has been justified by this court in its decision in Dedman, supra, as a prescription of the common law*. (Emphasis added)

It was suggested in argument that this statement amounted to an extension of the *Dedman* common law authorization from organized random stops to roving random stops. I do not accept that this is so. Reliance on common law authorization was not necessary for the decision in *Ladouceur* and indeed was only commented on incidentally. The discussion at this point in Cory, J.'s judgment occurred in relation to the power of a police officer to stop vehicles at random generally without particularizing, at that point in the discussion, whether the types of stops being talked about were organized or roving. In that context, the reference to *Dedman* can only be taken as a re-affirmation of what *Dedman* actually decided, namely, that organized random stops were authorized at common law.[[33]](#footnote-33)

[Underlining added]

1. Certainly, the Supreme Court’s reasoning in *Ladouceur* (and in *Hufsky*) is consistent with that of Le Dain, J. in *Dedman*. This is probably explained by the fact that the second part of the *Waterfield* test applied in *Dedman* ­– to determine whether the police conduct was *reasonably necessary* to carry out a police duty – is similar to the applicable justification test under s. 1 of the *Charter*. The factors considered by Le Dain, J. in the application of this part of the *Waterfield* test (the nature of the individual “liberty” interfered with and extent of the interference with that liberty, the importance of the public purpose served, the necessity of the interference for the performance of the police duty) overlap with the factors to be considered under a s. 1 analysis. In *Fleming*, the Supreme Court indeed expressly recognized the similarity between the two analytical frameworks:

[54] Certain concepts which play a significant role in the *Charter* justification context — such as minimal impairment and proportionality — have clear parallels in the ancillary powers doctrineanalysis […]. For example, the three factors from *MacDonald*[[34]](#footnote-34) require a proportionality assessment. Moreover, the concept of reasonable necessity requires that other, less intrusive measures not be valid options in the circumstances. If the police can fulfill their duty by an action that interferes less with liberty, the purported power is clearly not reasonably necessary (see *Clayton*, at para. 21).[[35]](#footnote-35)

 [Underlining added]

1. It might therefore be tempting to conclude that, in *Ladouceur*, the Supreme Court *implicitly* expanded the common law police power established in *Dedman*, or even that, by analogy, the reasons of Cory, J. in *Ladouceur* should be construed as satisfying the *Waterfield* test.
2. In the Court’s view, however, this approach must be rejected.
3. The recognition of common law police powers is clearly circumscribed. In *Fleming*, Côté, J., on behalf of the Supreme Court, urged caution before determining whether such powers exist. She stated that “the rule of law requires that strict limits be placed on police powers in this regard in order to safeguard individual liberties”.[[36]](#footnote-36) Because establishing and restricting police powers is within the authority of legislatures, “the courts should tread lightly when considering proposed common law police powers”.[[37]](#footnote-37) The courts, however, “cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist”.[[38]](#footnote-38) That said, it should be noted that there was no legislative gap to fill in *Hufsky* or *Ladouceur* because the challenged police power was based on s. 189a(1) of the Ontario *Highway Traffic Act*. These two judgments were therefore concerned with this statutory power, not a common law rule.
4. The Court concludes that *Dedman* recognized a limited common law police power, that is, the power to stop vehicles at random as part of an organized program (“for the purpose contemplated by the R.I.D.E. program”). The Court also finds that *Ladouceur* did not broaden this common law police power. The majority decision in that case is based on the legality of “statutorily authorized roving stops”.[[39]](#footnote-39) Consequently, the conclusions in the trial judgment regarding the common law rule will be modified.[[40]](#footnote-40)

## B. Section 636 *HSC*

1. In light of the foregoing, the Court here need only consider the challenge to s. 636*HSC*. This statutory provision grants Quebec police officers the power to make traffic stops without grounds to believe or suspect that an offence has been committed. It states:

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| **636.** Every peace officer recognizable as such at first sight may, in the performance of his duties under this Code, agreements entered into under section 519.65 and the *Act respecting owners, operators and drivers of heavy vehicles* (chapter P-30.3), require the driver of a road vehicle to stop his vehicle. The driver must comply with this requirement without delay. | **636.** Un agent de la paix, identifiable à première vue comme tel, peut, dans le cadre des fonctions qu’il exerce en vertu du présent code, des ententes conclues en vertu de l’article 519.65 et de la *Loi concernant les propriétaires, les exploitants et les conducteurs de véhicules lourds* (chapitre P-30.3), exiger que le conducteur d’un véhicule routier immobilise son véhicule. Le conducteur doit se conformer sans délai à cette exigence. |

1. In *R. c. Soucisse*,[[41]](#footnote-41) Steinberg, J.A. determined that s. 636*HSC* is very similar to the provision analyzed by the Supreme Court in *Ladouceur*. He concluded therefrom that the teachings of the Supreme Court in that judgment may be directly transposed to s. 636*HSC*, which therefore must be considered constitutionally valid:

In both cases the provision is incorporated into a law respecting highway safety, the police officer must be recognizable as such, and must be acting in the performance of his duties. Despite minor variances in the text, the similarity is so striking, that it compels the conclusion that the finding of the Supreme Court in Ladouceur applies equally to section 636 of the Highway Safety Code, and that section 636 is a justifiable infringement of section 9 of the Charter. Accordingly, section 636 of the Highway Safety Code is valid.[[42]](#footnote-42)

1. Steinberg, J.A. also rejected the argument that verifying the sobriety of drivers is not authorized under s. 636. In his view, verifying the sobriety of drivers is directly linked to the purpose of the *HSC*.[[43]](#footnote-43)
2. It is worth noting that s. 636*HSC* initially subjected a peace officer’s power to stop (or impound) a vehicle to the requirement that the officer have “reasonable cause to believe that an offence against [the *HSC*] has been committed and that it is required by the circumstances”.[[44]](#footnote-44) The Quebec legislature removed this requirement from the wording of s. 636 in 1990,[[45]](#footnote-45) a few months after *Ladouceur* was rendered, to reflect the guidance in that judgment. The wording of s. 636 has since been amended several times to specify the duties during which peace officers can exercise the discretion conferred by this provision. These latest amendments to s. 636 are irrelevant to the appeal’s outcome.[[46]](#footnote-46)

# III. Trial judgment

1. In an imposing 169-page judgment, the judge carefully analyzed the evidence and questions of law before him. A brief summary will be helpful.

## A. *Ladouceur* and the rule of *stare decisis*

1. The judge determined that he could reconsider the Supreme Court’s conclusions in *Ladouceur* because the two exceptions to the vertical *stare decisis* rule set out in *Canada (Attorney General) v. Bedford*[[47]](#footnote-47) – a new legal issue or a significant change in the circumstances or evidence – were present. He was of the view that the legal issues based on ss. 7 and 15(1) of the *Charter* were new within the meaning of *Bedford*. Moreover, with regard to the justification of the infringement under s. 9 of the *Charter*, the evolution of social facts since *Ladouceur* fundamentally shifted the parameters and also justified revisiting this precedent.

## B. Section 9 of the *Charter*

1. Like the Supreme Court in *Ladouceur*, the judge found that traffic stops with no required grounds violate the right not to be arbitrarily detained guaranteed by s. 9 of the *Charter*. For the judge, there was therefore no doubt that s. 9 of the *Charter* [translation] “was repeatedly infringed” in this case.[[48]](#footnote-48) He further determined that this infringement is not the result of an improper application of the challenged provision, but instead results from the provision itself. The judge held that the infringement of the right guaranteed by s. 9 could not be justified under s. 1 of the *Charter*.
2. While this conclusion was sufficient to decide the dispute, the judge felt it useful to continue his analysis under ss. 7 and 15(1) of the *Charter*.[[49]](#footnote-49)

## V. Section 7 of the *Charter*

1. The judge was of the view that the challenged provision infringes the rights to liberty and security of the person guaranteed by s. 7 of the *Charter*. He stated that the form of liberty at issue here was to be distinguished from that protected by s. 9: while [translation] “s. 9 is concerned with physical liberty, s. 7 is instead related to [...] the liberty to make personal choices as an individual”.[[50]](#footnote-50) According to the judge, there was no doubt that the challenged provision violated the right of Black people [translation] “to live their lives as they please and to drive a vehicle to meet their needs without being harassed by the police solely on the ground of their skin colour”.[[51]](#footnote-51)
2. The judge determined that the deprivation of fundamental rights resulting from the challenged provision was not in accordance with the principles of fundamental justice. He again concluded that this deprivation could not be justified under s. 1.

## D. Section 15(1) of the *Charter*

1. According to the judge, the challenged provision is inconsistent with the right to equality guaranteed by s. 15(1) of the *Charter*. The provision is discriminatory because even though seemingly neutral, it has a disproportionate adverse impact on Black people, a protected group, and imposes a burden on them or denies them a benefit in a manner that has the effect of reinforcing [translation] “the systemic or historical disadvantages that Black communities must live and deal with”.[[52]](#footnote-52)
2. The judge concluded that the challenged provision could not be saved under s. 1 because the AGQ had not proved [translation] “that the relevance of the provision and its rational basis justify upholding [it]”[[53]](#footnote-53) despite its discriminatory nature.

## E. Remedy

1. The judge considered that the appropriate remedy lies under s. 52 of the *Constitution Act, 1982,* rather than s. 24 of the *Charter*. As such, he concluded that [translation] “the only possible outcome”[[54]](#footnote-54) was to declare the challenged provision inoperative pursuant to s. 52(1) of the *Constitution Act, 1982*. He suspended the effective date of his judgment, however, for six months to give the legislature time to remedy the situation (if necessary) and allow the authorities concerned to [translation] “inform police officers and implement a control measure that infringes less on the rights of the members of racialized communities”.[[55]](#footnote-55)

# IV. issues

1. The parties raise many questions and grounds on appeal, each one – or almost each one – having its own wording. In essence, the issues raised on appeal are as follows:
2. Did the judge err in concluding that the challenged provision gives rise to racial profiling?
3. Did the judge err in deciding that it was open to him to reconsider the ruling in *Ladouceur*?
4. If the Court answers the first two questions in the negative, did the judge err in concluding that the challenged provision unjustifiably infringes s. 9 of the *Charter*?
5. Did the judge err in concluding that the challenged provision unjustifiably infringes s. 7 of the *Charter*?
6. Did the judge err in concluding that the challenged provision unjustifiably infringes s. 15(1) of the *Charter*?
7. Did the judge err in declaring the provision inoperative and in suspending the effective date of the declaration for six months?

# V. ANALYSIS

## A. Did the judge err in concluding that the challenged provision gives rise to racial profiling?

1. The AGQ argues that the judge erred in determining that racial profiling is an effect of the challenged provision and not of its improper application by the police. The AGQ argues that, according to this provision, the power to stop is limited to very precise highway safety‑related purposes, that is, checking the driver’s sobriety, licence and insurance, and the mechanical fitness of the vehicle.[[56]](#footnote-56) It does not authorize stops for other purposes (e.g., for a criminal investigation) nor does it authorize racial profiling.
2. According to the AGQ, this error of law – on a critical issue – decides the entire appeal because if racial profiling is not an effect of the challenged provision, it cannot be concluded that the challenged provision infringes the rights protected by ss. 7 and 15 of the *Charter*. Moreover, if racial profiling is not an effect of the challenged provision, it also cannot be a deleterious effect of the provision when analyzing the justification of the infringement of the right protected by s. 9 of the *Charter*. Consequently, the evidence of racial profiling with respect to the justification is irrelevant and does not shift the parameters within the meaning of *Bedford,*[[57]](#footnote-57) *Carter v. Canada (Attorney General)*,[[58]](#footnote-58) and *R. v. Comeau*[[59]](#footnote-59) so as to allow *Ladouceur* to be reconsidered.
3. Since the Court has concluded that *Ladouceur* did not broaden the common law rule established in *Dedman*, which concerns only stops made during an organized program – and that is not the case here – the analysis of all the issues will deal strictly with s. 636*HSC*.

\* \* \*

1. Whether s. 636*HSC* is the source of racial profiling during traffic stops with no required grounds is determinative to the outcome of the appeal. The AGQ does not dispute the evidence that racial profiling occurs during traffic stops under s. 636*HSC*, but in the AGQ’s view, this does not render the provision constitutionally invalid because the racial profiling is caused by the misconduct of the police when applying the provision. The distinction is important when it comes to the remedy.
2. There are two kinds of *Charter* violations, those caused by legislation that is inconsistent with the *Charter* and those arising from an improper application of otherwise valid legislation.[[60]](#footnote-60) Only the first kind of violation may result in the legislation’s invalidity and a remedy under s. 52(1) of the *Constitution Act, 1982*.[[61]](#footnote-61) The second kind of violation concerns only the validity of a state act or decision. In principle, however, improper (illegal) conduct by state actors cannot render otherwise constitutional legislation unconstitutional.[[62]](#footnote-62) In that case, the remedy lies under s. 24 of the *Charter*.[[63]](#footnote-63) It is therefore essential to determine what kind of violation is at issue here.
3. The AGQ argues that, when considering the constitutionality of the challenged provision, the effect analyzed must be that caused by a legitimate and proper application of the provision. If racial profiling is the result of police misconduct, the remedy is that provided for in s. 24 of the *Charter*, not a declaration of inoperability under s. 52 of the *Constitution Act, 1982*.
4. The Court disagrees. The question of whether s. 636*HSC* is itself a vector for racial profiling, and therefore the source of the alleged *Charter* violations, is not only a legal issue, but a mixed question of law and of fact because the effects of the provision’s application must be considered to determine its constitutional validity. The judge did not err in this regard. Even 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. Therefore, it is s. 636*HSC* itself that is the source of the alleged *Charter* violations.
5. When legislation confers discretion, it must be interpreted and applied, insofar as possible, consistently with the *Charter*.[[64]](#footnote-64) However, this is not always possible. Not every provision conferring discretion may be interpreted consistently with the *Charter*.[[65]](#footnote-65) Sometimes it is impossible to conclude that the legislature did not intend to authorize the infringing conduct,[[66]](#footnote-66) or it is impossible to interpret legislation (so as to keep it within the bounds of the Constitution) without intruding on the legislature’s role. In *Hunter v. Southam Inc.*, Dickson, J. stated the following on this subject:

While the courts are guardians of the Constitution and of individuals’ rights under it, it is the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.[[67]](#footnote-67)

1. It therefore happens that statutory provisions or legal rules conferring discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize this infringement.[[68]](#footnote-68) In such cases, it will generally be the provision or legal rule itself that attracts *Charter* scrutiny.[[69]](#footnote-69)
2. The fact that the challenged provision confers discretion on officers or mandataries of the state not to apply the legislation “in those cases where, in [their] opinion, its application would be a violation of the *Charter*”[[70]](#footnote-70) is not sufficient on its own to save it.[[71]](#footnote-71) The trial judge relied on *Morgentaler,*[[72]](#footnote-72) *Hunter*, *Bain,* and *Nur,*[[73]](#footnote-73) which illustrate these principles.
3. In *Morgentaler*, the Supreme Court had to determine whether the *Criminal Code* provisions on abortion infringed s. 7 of the *Charter*. The Court analyzed the effects of s. 251*Cr.C.* which, at the time, criminalized abortion and created a “defence” for therapeutic abortions. Dickson, C.J., for the majority, stated that “[a]s is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions.”[[74]](#footnote-74)
4. Dickson, C.J. therefore investigated the evidence on the law’s operation across Canada. He acknowledged that “[u]nfair functioning of the law could be caused by external forces which do not relate to the law itself.”[[75]](#footnote-75) He nonetheless concluded from the evidence that many of the most serious problems with the functioning of s. 251*Cr.C.* were created by procedural and administrative requirements established in the law itself. He noted the following:

In other words, the seemingly neutral requirement of s. 251(4) that at least four physicians be available to authorize and to perform an abortion meant in practice that abortions would be absolutely unavailable in almost one quarter of all hospitals in Canada.[[76]](#footnote-76)

1. Other administrative and procedural requirements arising from s. 251(4)*Cr.C.* reduced the availability of therapeutic abortions, including in particular the failure to provide an adequate standard for physician committees when deciding whether to grant a therapeutic abortion. Under s. 251(4), the therapeutic abortion committee could grant a therapeutic abortion where it determined that a continuation of a pregnancy would be likely to endanger the “life or health” of the pregnant woman. Because the term “health” used in s. 251(4) was not defined, it was ambiguous, and committees across the country applied widely differing definitions.[[77]](#footnote-77) The Court concluded that the various problems in the application of this provision for access to therapeutic abortions – including the absence of any clear legal standard to be applied by the physician committees – resulted in a failure to comply with the principles of fundamental justice.[[78]](#footnote-78)
2. *Hunter* considered whether ss. 10(3) and 10(1) of the *Combines Investigation Act*[[79]](#footnote-79) were inconsistent with s. 8 of the *Charter*. The Supreme Court held that the discretion conferred by these provisions on the Restrictive Trade Practices Commission was unconstitutional because it provided no objective criterion for granting prior authorization to conduct a search or seizure.[[80]](#footnote-80) Dickson, J. (as he then was), on behalf of the Court, stated that it was the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements.[[81]](#footnote-81)
3. In *Bain*, the Supreme Court was asked to decide whether the *Criminal Code* provisions governing peremptory challenges and stand bys of jurors were inconsistent with s. 11(d) of the *Charter*, which protects an accused’s right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Pursuant to these provisions, the Crown had discretion to stand by prospective jurors without motive, at a ratio of 4.25 to 1 in favour of the Crown, when compared to the accused’s right to peremptorily challenge prospective jurors. When considering the constitutionality of the challenged provisions, the Court examined the irregular and unconstitutional way the Crown could use its discretion, that is, to select a jury favourable to it. A majority concluded that the protection of basic rights should not rely on the exemplary conduct of the holder of the discretionary power. Cory, J., for the majority, wrote the following in this regard:

It may well be correct that it would be impossible to prove that a jury selected after the Crown had exercised all its stand bys and peremptory challenges was in fact biased. Nonetheless the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection procedure. The jury is the ultimate decision maker. The fate of the accused is in its hands. The jury should not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be the guiding principle of justice and the hallmark of criminal trials. Yet so long as the impugned provision of the *Code* remains, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness. Members of the community will be left in doubt as to the merits of a process which permits the Crown to have more than four times as many choices as the accused in the selection of the jury.

Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.[[82]](#footnote-82)

[Underlining added]

1. A majority of the Supreme Court therefore declared the challenged provisions unconstitutional because they allowed a jury that appeared favourable to the Crown to be empanelled, which was inconsistent with s. 11(d) of the *Charter*.[[83]](#footnote-83)
2. *Nur* also illustrates the principle that the mere possibility that state agents might not use their discretion – and thereby would not infringe on fundamental rights – is insufficient to make a provision that is inconsistent with *Charter* rights constitutional.[[84]](#footnote-84)
3. In the case at bar, s. 636*HSC* contains no criteria or standards that could guide the work of police officers in selecting which drivers to stop. There are no objective reasons or parameters to steer them in the exercise of their discretionary power. That is precisely why, in *Ladouceur*, the Supreme Court concluded that the detention under s. 189a(1) of the Ontario *Highway Traffic Act*,[[85]](#footnote-85) deemed equivalent to s. 636*HSC*, was arbitrary.[[86]](#footnote-86)
4. In fact, even though s. 636*HSC* does not expressly authorize traffic stops with no required grounds based on racial profiling, it necessarily has the effect of allowing racial profiling to permeate the exercise of the police power it confers. The requirement – judicially created[[87]](#footnote-87) – that the power be exercised in the pursuit of highway safety does not suffice to prevent racial profiling from playing a role in the selection of drivers.
5. The Supreme Court, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.* *(Bombardier Aerospace Training Center),* explained racial profiling as follows:

[33] […] The concept of racial profiling was originally developed in the context of proceedings brought against the police for abuse of power, but it has since been extended to other situations:

Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.

Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.[[88]](#footnote-88)

[Underlining omitted]

1. It is important to note that racial profiling often results from subconscious conduct rather than overt racism, as the Court remarked in *Pierre-Louis c. Québec (Ville de)*.[[89]](#footnote-89) Here is what Mr. Luamba’s expert, Marie-Ève Sylvestre, whose testimony was not contradicted by the AGQ, stated in this regard:

[translation]

It is crucial to note that profiling is often subtle and insidious, rather than due to intentional and explicit conduct. In other words, the person in authority need not be explicitly racist or have racist motivations for profiling to occur. Profiling may exist even in the absence of racist values advocated by individuals within an organization. This is why profiling is detected when the actions, practices, and decisions of a person in authority have a disproportionate *impact* on identified and targeted groups.[[90]](#footnote-90)

[Italics in the original]

1. Racial profiling can also exist [translation] “despite the fact that the police conduct [...] may be justified without recourse to race-based negative stereotypes”.[[91]](#footnote-91)
2. Here, the trial judge found that it is the discretion conferred on the police by s. 636*HSC* that enables racial profiling to permeate the selection of drivers to stop. According to the judge, the exercise of this power depends solely on intuition (or a [translation] “police hunch”) and it is impossible to determine the mental process leading to the selection of a given driver. Racial profiling may therefore arise unconsciously:

[translation]

[632] In fact, the discretion to temporarily deprive a citizen of his or her freedom in this context is as arbitrary and as uncontrolled as can be. Reduced to its simplest terms, it depends solely on intuition because it requires neither factual grounds nor suspicion. It is the result of an unknowable mental process. As we have seen, it can take place without leaving a trace. It is subject to no specific framework other than a reminder given to police officers that racial profiling is prohibited. Even the new chapter of the *Guide de pratiques policières* (s. 2.1.7, *Interpellation policière*) does not specifically address it. It is in fact illusory to identify what triggers the intuition of police officers that leads to one traffic stop rather than another. Racial profiling is insidious, and the police officer is not necessarily driven by racist values. For the victims, establishing proof of this mindset, other than providing a list of indicators of racial profiling and circumstantial evidence when possible, is almost an insurmountable task.

[633] All of these factors are inherent in the law authorizing *traffic stops without factual grounds* outside an organized program. The law thus becomes a vector for racial profiling in and of itself […].

[Boldface and references omitted]

1. As the judge noted, proving racial profiling is highly complex. For example, even if a police officer who stops a Black driver does not ask that driver anything unrelated to the*HSC* and moreover follows the letter of the law, racial profiling may have played a role in the officer’s decision to stop that driver. Due to the total absence of criteria governing the selection of drivers and vehicles, even unconscious racial profiling may influence this selection. In many cases, the police are unaware that the driver’s race played a role in the vehicle being stopped.[[92]](#footnote-92) Indeed, according to expert Massimiliano Mulone, retained by Mr. Luamba, the vast majority of police officers believe that their work is not influenced by racial profiling.[[93]](#footnote-93)
2. The expert evidence and scientific literature, however, establish that racial profiling plays a role in traffic stops with no required grounds. As will be seen in greater detail in the part of this judgment addressing s. 15 of the *Charter*,[[94]](#footnote-94) expert Mulone explained that non-White people, and particularly Black people, [translation] “are systematically more often checked and/or stopped,[[95]](#footnote-95) wherever and however one looks at it, sometimes in much higher proportions (especially when you look at the young males in the analyses)”.[[96]](#footnote-96) According to Mulone, these disparities cannot be explained by a presumed differential involvement of Black people in crimes. Thus, [translation] “the results are the same no matter where you look or how you look (police data, public surveys, citizen testimonials, type of intervention, etc.), whatever the period being studied: Black people are disproportionately targeted by law enforcement”.[[97]](#footnote-97) He added that nothing suggests that [translation] “the disproportions revealed by recent Canadian studies could be explained by the fact that a majority of police officers approach their shift with the firm intention of discriminating against people based on their racialized identity”.[[98]](#footnote-98)
3. The evidence accepted by the judge confirms that racial profiling is often unconscious and fostered by the police discretion to make traffic stops with no required grounds. Expert Mulone also explained in detail how cognitive biases and the structural constraints associated with police work facilitate racial profiling. Among other things, he stated:

[translation]

By combining these two forms of explanation [...] it is clear how police work can result in racial discrimination without the police being aware of it. There are, in the way police work is organized, incentives that, while not driven by racist values, push officers to intervene in situations where their judgment is partly determined by biases. And the practices of street checks and traffic stops, based partly on prediction, are particularly sensitive to these biases because they are not necessarily generated by an easily identifiable offence. A return to the distinction made by the Ontario Human Rights Commission between racial profiling and criminal profiling[[99]](#footnote-99) shows that these are situations where the observable evidence of wrongful behaviour is generally weak, if not absent (which is even what defines street checks and some traffic stops), paving the way for “stereotypical assumptions”, especially when you consider that most of these assumptions are unconscious.[[100]](#footnote-100)

[...]

[...] [C]ertain [police] practices are more likely to be sensitive to these biases. This is the case for street checks and traffic stops because in both these situations, the observable facts upon which the decision to intervene is made are necessarily less obvious than when an offence is observed being committed.

As I said, these types of discrimination are very insidious because they stem in part from implicit cognitive processes and are therefore unconscious. Thus, there is not necessarily a desire to target one group as opposed to another, but by allowing (and sometimes encouraging) practices that are too easily influenced by these unconscious biases, the door is opened to differential treatment within the Canadian population. […][[101]](#footnote-101)

1. Expert Marie-Ève Sylvestre reached the same conclusion: the police are more likely to be influenced by racist stereotypes when they act proactively, or when they are justified in acting based on criteria or [translation] “suspicions that are vague and ill‑defined”.[[102]](#footnote-102)
2. Therefore, the AGQ’s position that racial profiling is not an effect of the challenged provision cannot be accepted. The data available since *Ladouceur* reveals that where traffic stops with no required grounds are conducted for reasons related to “driving a car such as checking the driver’s licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle”,[[103]](#footnote-103) such reasons are not sufficient to prevent racial profiling in this type of stop. 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. This absence of sufficient guidelines in s. 636*HSC* is the source of the alleged *Charter* breaches because it fosters racial profiling.
3. In this regard, this case must be distinguished from *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*[[104]](#footnote-104) raised by the AGQ in support of his position. The challenged provisions in *Little Sisters* included sufficient guidelines to govern the discretion they conferred on the state representatives (customs officers). According to the majority, these provisions set out an appropriate standard to govern the discretion of customs officers, primarily because they referred to the definition of obscenity in s. 163(8)*Cr.C.* Contrary to what was alleged, nothing in the applicable legislation or in its necessary effects contemplated or encouraged any differential treatment based on sexual orientation, because the definition of obscenity operated without distinction between homosexual and heterosexual erotica.[[105]](#footnote-105) The alleged *Charter* violations arose from customs administration, not from the legislation itself. The differentiation was made at the administrative level in the implementation of the legislation.
4. In contrast, s. 636*HSC* confers absolute discretion on police officers in that it contains no express or implied criteria to govern its exercise.[[106]](#footnote-106) Even when the police act in the interest of highway safety, racial profiling may permeate the exercise of this discretion. The trial judge therefore did not err when he concluded that the problem stems from the challenged provision, not its improper application.
5. This ground of appeal is therefore dismissed.

## B. Did the judge err in deciding that it was open to him to reconsider the ruling in *Ladouceur*?

1. The *stare decisis* principle requires courts to follow decisions of courts of coordinate jurisdiction (horizontal *stare decisis*) or higher jurisdiction (vertical *stare decisis*).[[107]](#footnote-107) This principle applies solely to the *ratio decidendi* of a case.[[108]](#footnote-108) Only vertical *stare decisis* is involved here as *Ladouceur* was rendered by a higher court.
2. The *ratio decidendi* of *Ladouceur* may be stated thus: (1) the power to make traffic stops with no required grounds constitutes arbitrary detention and violates s. 9 of the *Charter*; and (2) this infringement is justified under s. 1 of the *Charter*.[[109]](#footnote-109) Thus, the constitutionality of the power to make traffic stops with no required grounds in light of ss. 7 and 15 of the *Charter* is not subject to any binding precedent and does not require the application of *stare decisis*.
3. More specifically, the Supreme Court in *Ladouceur* considered only the constitutionality of s. 189a(1) of the Ontario *Highway Traffic Act* in light of s. 9 of the *Charter*, as s. 15 of the *Charter* was not yet in force at the time of the facts of that case.[[110]](#footnote-110) It is therefore clear that Mr. Luamba’s argument based on s. 15 of the *Charter* is a new legal issue, as the trial judge concluded.[[111]](#footnote-111)
4. With respect to the argument based on s. 7 of the *Charter*, while the Supreme Court referred to it when formulating the constitutional issues, the reasons of the majority stated that it was unnecessary to decide this question due to the conclusions reached on s. 9.[[112]](#footnote-112) An overall reading of *Ladouceur* therefore leads to the conclusion that the argument based on s. 7 was not determined on the merits in that case. Consequently, the judge was right to characterize it as a [translation] “new legal issue”.[[113]](#footnote-113)
5. With respect to the arguments based on s. 9 of the *Charter* and the justification for the infringement of s. 9 under s. 1, the judge acknowledged that he was bound by vertical *stare decisis* to follow the reasoning in *Ladouceur*.[[114]](#footnote-114) However, under the exceptions to the principle stated by the Supreme Court in *Bedford*, *Carter*, and *Comeau*, he felt it was open to him to reconsider this precedent with respect to the application of s. 1 of the *Charter*.
6. According to these judgments, trial courts may reconsider binding settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate”.[[115]](#footnote-115)
7. The threshold for revisiting binding precedent must be high[[116]](#footnote-116) because it is an extraordinary exception to the principle of *stare decisis*.[[117]](#footnote-117) As this Court stated in *Organisation mondiale sikhe du Canada c. Procureur général du Québec*:

[translation]

[264] The “new legal issue” criterion sets a high threshold. In constitutional matters, the criterion may include new charter-based legal questions that were not put forward or examined in the precedent submitted for reconsideration, or arguments raised as a consequence of significant developments in the law. As the Supreme Court, *per* McLachlin, C.J., wrote in *Bedford*, a lower court “can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law […]”.

[...]

[300] The exception to the principle of *stare decisis* based on a change in circumstances or evidence that fundamentally shifts the parameters of the debate is also limited in scope:

[31] Not only is the exception narrow — the evidence must “fundamentally shif[t] the parameters of the debate” — it is not a general invitation to reconsider binding authority on the basis of *any* type of evidence. […][[118]](#footnote-118)

[References omitted]

1. It is not sufficient to characterize an infringement of a fundamental right differently for it to constitute a new legal issue.
2. With respect to the second situation allowing precedent to be reconsidered, “[neither] the more current evidentiary record [n]or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shift[s] the parameters of the debate”[[119]](#footnote-119) with respect to how jurists understand the legal issue in question.[[120]](#footnote-120) The Supreme Court contemplates a court departing from precedent where the circumstances establish a significant evolution in the foundational legislative and social facts that fundamentally shift the parameters. In *Comeau*, it wrote:

[31] [...] evidence of a significant evolution in the foundational legislative and social facts — “facts about society at large” — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.

[32] In *Carter*, for example, new evidence about the harms associated with prohibiting assisted death, public attitudes toward assisted death, and measures that can be put in place to limit risk was relevant. This evidence was unknowable or not pertinent, given the existing legal framework, when *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, was decided. These new legislative and social facts did not simply provide an alternate answer to the question posed in *Rodriguez*. Instead, the new evidence fundamentally shifted how the Court could assess the nature of the competing interests at issue.

1. In this case, the trial judge noted that it is [translation] “common ground” that traffic stops with no required grounds [translation] “are a form of arbitrary detention”[[121]](#footnote-121) contrary to s. 9 of the *Charter*. With respect to the justification of the infringement under s. 1, the judge concluded that the criterion of a new legal issue was met because the case asks [translation] “the question from a different perspective by relying on changes in the data and in the context”.[[122]](#footnote-122)
2. The judge further concluded that [translation] “the social facts and data have varied over time to change the context and shift ‘the parameters of the debate’ from what prevailed when *Ladouceur* was heard”.[[123]](#footnote-123)
3. The AGQ argues that this is an error that justifies the Court’s intervention. In the AGQ’s opinion, racial profiling has long been recognized in Canada, even though this term, now accepted, was not yet in use at the time of *Ladouceur*. Consequently, the AGQ argues that the judge erred in deciding that the evidence adduced before him “fundamentally shifts the parameters of the debate”.
4. The Court disagrees. On the contrary, given all the qualitative, quantitative, statistical, and expert evidence heard, the judge did not err in concluding that there is a new reality, well documented over the past 20 years, that fundamentally shifts the parameters of the debate.
5. The judge thoroughly analyzed the testimony of Mr. Luamba and several other [translation] “Black people who have experienced *traffic stops without factual grounds*”.[[124]](#footnote-124)
6. He accepted that this group of witnesses was sufficient in number [translation] “to provide diversified insights into traffic stops of Black drivers, to identify common traits, and to conclude that a police practice exists that, once these common traits are revealed, can only be associated with racial profiling”.[[125]](#footnote-125) In the judge’s view, this qualitative evidence was credible and conclusively established that racial profiling exists.[[126]](#footnote-126)
7. The quantitative, documentary and expert evidence was consistent with the evidence before the Supreme Court in *Le*, which the judge analyzed[[127]](#footnote-127) and in which the Supreme Court recognized the “disproportionate policing of racialized and low-income communities”.[[128]](#footnote-128) In this regard, as Cournoyer, J. (then of the Superior Court) explained in *Dorfeuille*:

[translation]

[32] Even though racial profiling has been the subject of many comments in the Supreme Court’s earlier judgments, *R. v. Le* is the first substantial decision on racial profiling surrounding police interventions.

[33] While divided on the outcome of the appeal, the Court unanimously took judicial notice of the existence of racial profiling during police interventions.[[129]](#footnote-129)

[References omitted]

1. Several quantitative American studies subsequent to *Ladouceur* examined racial profiling during traffic stops and illustrate how the police treat visible minorities differently.[[130]](#footnote-130) Many Canadian studies also examined how racial profiling taints street checks[[131]](#footnote-131) and traffic stops.[[132]](#footnote-132)
2. The Canadian literature now clearly establishes that Black people and members of other racialized groups are overrepresented in traffic stops. As described by expert Mulone in the excerpt from his report cited above:

[translation]

[...] with respect to racial discrimination by Canadian police, the convergence of results is extremely strong: the results are the same no matter where you look or how you look (police data, public surveys, citizen testimonials, type of intervention, etc.), whatever the period being studied: Black people are disproportionately targeted by law enforcement.[[133]](#footnote-133)

1. Ms. Sylvestre’s expert report also mentions a multitude of contemporary articles that discuss racial profiling and describe its personal and professional impact on victims.[[134]](#footnote-134)
2. After reviewing the contemporary literature on racial profiling, the judge made the following findings:
* The notion of “racial profiling” is now an integral part of the literature and has been the topic of in-depth discussion.[[135]](#footnote-135) It is now a subject of study distinct from the much broader concept of [translation] “racial discrimination” used at the time of *Ladouceur.*[[136]](#footnote-136) These studies focus more particularly on the process by which drivers are selected for “random” traffic stops;
* Quantitative data is now available and paints a more objective picture of the reality. It is no longer merely a question of anecdotes recounted in reports: numerous studies statistically establish the substantially increased prevalence of traffic stops involving Black people, with empirical data;
* Today, traffic stops are specifically studied in the Canadian context;
* The impact of racial profiling on victims has been more widely documented and demonstrates the harm victims suffer, including due to the frequency of stops.
1. It should be noted that in *Ladouceur*, Cory, J. stated that “[t]hese stops are and must be of relatively short duration, requiring the production of only a few documents. There is a minimal inconvenience caused to the driver.”[[137]](#footnote-137) In this case, however, the evidence adduced at trial shows that the inconvenience considered “minimal” in *Ladouceur* is totally inconsistent with today’s reality. Contemporary literature illustrates the considerable human toll of racial profiling on drivers who experience it: headaches, anger, insomnia, trauma, problems concentrating, loss of appetite, depression, anxiety, panic, missed work, psychological distress, etc.[[138]](#footnote-138)
2. Moreover, in *Ladouceur*, Cory, J. found that the fears that police officers might abuse their discretion “are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons”.[[139]](#footnote-139) However, the current literature and the evidence presented at trial unfortunately reveal a different picture: racial profiling is intertwined with legitimate concerns of fighting crime and highway safety,[[140]](#footnote-140) such that when combined with the absence of a requirement for grounds justifying a stop, the power codified in s. 636*HSC* opens the door to many documented abuses.
3. In *Comeau*, the Supreme Court noted that the new evidence exception that applies to *stare decisis* is “engaged where the underlying social context that framed the original legal debate is profoundly altered.”[[141]](#footnote-141)In this case, the judge addressed the changes in the social context since *Ladouceur* and noted that the repercussions of racial profiling were not sufficiently known when the Supreme Court made its ruling. He wrote:

[translation]

[50] Racial profiling as it is currently defined was unknown in 1990 when *Ladouceur* was rendered. That judgment plays a central role here because it established the common law rule whose constitutional validity is now being challenged by the applicant. At most, this key judgment contains the following two brief passages, the first written by Sopinka, J. for the minority and the second by Cory, J. for the majority judges of the Court:

By contrast, the roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A., racial considerations may be a factor too. My colleague states that in such circumstances, a *Charter* violation may be made out. If, however, no reason need be given nor is necessary, how will we ever know?

Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so as to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse.

[Underlining added by the trial judge]

[51] Read end-to-end, these two passages from *Ladouceur* shed light on the fact that when the Supreme Court rendered judgment, the risks of racial profiling, while they may have been sensed, were not yet sufficiently known to capture the highest court’s attention.

[Reference omitted]

1. The AGQ has identified no palpable and overriding error in the judge’s conclusions that led him to state [translation] “that the social facts and data have varied over time to change the context and shift ‘the parameters of the debate’ from what prevailed when *Ladouceur* was heard”,[[142]](#footnote-142) and that [translation] “racial profiling, in accordance with the parameters that distinguish it from racism itself, [...] was unknown by the Supreme Court at the time it decided *Ladouceur*”.[[143]](#footnote-143)
2. In fact, the judge rightly concluded that the risks of racial profiling, while they may have been sensed at the time, were not yet sufficiently known. He was therefore well founded in reconsidering *Ladouceur* and, consequently, the justification of the power to make traffic stops with no required grounds in light of s. 1 of the *Charter*.

## C. Did the judge err in concluding that the challenged provision unjustifiably infringes s. 9 of the *Charter*?

### 1. Infringement

1. Like the Supreme Court in *Ladouceur*, the judge concluded that the power to make traffic stops with no required grounds violates the right not to be arbitrarily detained guaranteed by s. 9 of the *Charter*.[[144]](#footnote-144) He noted that, according to the case law,[[145]](#footnote-145) intercepting a motor vehicle and ordering the driver to stop for verification is tantamount to forcibly depriving the driver of liberty to the extent that penal liability is incurred if the driver refuses to comply.[[146]](#footnote-146) Consequently, the judge determined that the stop authorized under s. 636*HSC* was a form of detention in that [translation] “there were serious legal consequences to not complying”.[[147]](#footnote-147) He also agreed with the Supreme Court’s position in *Ladouceur* that this detention is arbitrary. Because there is no criterion to guide police officers when selecting which drivers to stop, this choice is left entirely to their discretion. In that regard, “[a] discretion is arbitrary if there are no criteria, express or implied, which govern its exercise”.[[148]](#footnote-148)
2. The AGQ does not challenge the judge’s conclusion on the infringement of s. 9 of the *Charter*. There is therefore no need to discuss this any further. The infringement has been admitted and the Court must determine whether it is justified under s. 1.

### 2. Justification of the infringement

1. *R. v. Oakes*[[149]](#footnote-149) sets out the test to determine whether a *Charter* violation is justified in a free and democratic society. This test was recently summarized as follows by the Supreme Court in *R. v. Ndhlovu*:

[119] A breach of the *Charter* is justified under s. 1 when the challenged law has a “pressing and substantial object and . . . the means chosen are proportional to that object” (*Carter*, at para. 94). The law is proportionate where the means adopted are rationally connected to the law’s objective, minimally impairing of the right in question, and the law’s salutary effects outweigh its deleterious effects (*R. v. Oakes,* [1986] 1 S.C.R. 103, at pp. 136‑140). The focus of the analysis is on the infringing measures, not on the overall legislative scheme. […][[150]](#footnote-150)

1. With respect to the first part of the *Oakes* test, the judge accepted that the purpose of s. 636*HSC* is to ensure highway safety by responding to the legislature’s concerns related to this objective – that is, reduce the number of offences and road accidents and the number of deaths caused by them, reduce the compensation costs of insurers, and combat impaired driving. The judge concluded that the AGQ had convincingly established that these concerns remain pressing and substantial.[[151]](#footnote-151)
2. As for the second part, the judge found that the AGQ had not established that the limitation on the right guaranteed in s. 9 was proportionate to the objective. The judge was of the opinion that the data on which the majority had based its decision in *Ladouceur* had aged and had to be excluded.[[152]](#footnote-152)
3. In the judge’s view, because the AGQ had not met its burden of proving a correlation between the use of traffic stops with no required grounds and improved highway safety, the AGQ had failed to demonstrate that the challenged provision minimally impairs the guaranteed right and that its salutary effects outweigh its deleterious effects. He therefore decided that the challenged provision could not be saved under s. 1.
4. The AGQ argues that the judge erred in concluding that the infringement is not justified pursuant to s. 1, because each part of the *Oakes* test is met here.
5. We now consider this question.

#### Pressing and substantial objective

1. The first step in the analysis is to state the legislative objective of the infringing measure and determine whether it is pressing and substantial. This criterion is not demanding and is generally met.
2. The objective must be defined with an appropriate level of generality. The importance of the objective risks being exaggerated if stated too broadly. Conversely, an overly narrow definition of the purpose risks merely reiterating the means chosen by the legislature to achieve it.[[153]](#footnote-153)
3. Articulation of the legislative objective is related to the legislature’s intent at the time it was enacted.[[154]](#footnote-154) In this instance, the National Assembly of Quebec amended s. 636*HSC* to remove the requirement of reasonable grounds to believe that an offence had been committed, and it did so a mere six months after *Ladouceur*.[[155]](#footnote-155) The parliamentary debates surrounding the amendment refer specifically to that judgment.[[156]](#footnote-156) Pointing to these debates and to *Hufsky* and *Ladouceur*, the trial judge correctly identified the provision’s objective:

[translation]

[692] Ensuring highway safety, reducing the number of offences and serious road accidents, reducing the number of deaths related to serious road accidents, reducing the compensation costs of public and private insurers, and combatting impaired driving, which is still a significant cause of road accidents [...].

1. Between 2015 and 2019, alcohol-related accidents caused on average 85 deaths and 220 serious injuries annually in Quebec.[[157]](#footnote-157) It is perfectly legitimate for the legislature to give itself the means to eradicate problematic highway conduct.
2. Moreover, the case law confirms that highway safety,[[158]](#footnote-158) combatting impaired driving,[[159]](#footnote-159) and the integrity of the licensing system[[160]](#footnote-160) are pressing and substantial objectives.[[161]](#footnote-161) It is therefore uncontradicted that the objective of s. 636*HSC* is also pressing and substantial.

#### Rational connection

1. The rational connection test “asks whether the law was a rational means for the legislature to pursue its objective”.[[162]](#footnote-162) The applicable test requires “*a* rational connection, not a complete rational correspondence”.[[163]](#footnote-163)
2. The analysis requires “some deference” to the legislature’s chosen means to advance a compelling state interest.[[164]](#footnote-164) In *RJR-MacDonald Inc. v. Canada (Attorney General),* a majority of the Supreme Court noted that this deference is owed more particularly when legislation is directed at changing behaviour within our society:

[154][...] Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective: *R. v. Keegstra,* [1990] 3 S.C.R. 697, at pp. 768 and 777; *R. v. Butler,* [1992] 1 S.C.R. 452, at p. 503. […][[165]](#footnote-165)

1. Ultimately, the legislature must show “that it is reasonable to suppose that the limit may further the goal, not that it will do so”.[[166]](#footnote-166)
2. The issue here is to determine whether the power to make traffic stops with no required grounds set out in s. 636*HSC* is a rational means to ensure highway safety and, more specifically, reduce the number of serious road accidents, reduce the number of deaths and injuries related to such accidents, reduce the compensation costs of public and private insurers, and combat impaired driving.
3. In *Ladouceur*, Cory, J. concluded that random stops were rationally connected to highway safety.[[167]](#footnote-167) In his view, the random licence checks, made possible by the challenged provision, might deter unlicensed drivers from getting behind the wheel. Police officers could also stop those who nevertheless decided to drive illegally.
4. In his analysis of the justification of the infringement of the right guaranteed by s. 9, the trial judge said that he disagreed with this conclusion. In his view, it had not been established that the means chosen by the legislature was rationally connected to its objective:

[translation]

[693] [...] In this case, there is no specific evidence establishing the connection between the type of stop authorized by *Ladouceur* and the gradual decrease since 1990 in the number of road accidents or *Highway Safety Code* and *Criminal Code* offences. Nor is there evidence establishing that putting an end to *traffic stops without factual grounds* would lead to an increase in serious road accidents related to alcohol, drugs, or unlicensed drivers. […]

[Italics in the original]

1. With respect, the judge is mistaken on the rational connection analysis. This test is not very onerous[[168]](#footnote-168) and did not impose the burden on the AGQ of proving a precise correlation between the infringing measure and [translation] “the drop in *Criminal Code* and *Highway Safety Code* offences”.[[169]](#footnote-169) As the Supreme Court stated in *Carter*, “where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks”.[[170]](#footnote-170)
2. Moreover, it is logical to think that impaired driving detection strategies contribute to deterring reckless drivers from getting behind the wheel when intoxicated.[[171]](#footnote-171)
3. In *R. v. Brown*,[[172]](#footnote-172) the Supreme Court acknowledged that deterrence is likely to provide a rational connection between the means and the objective of an infringing measure, even if the deterrent effect is limited. That case examined the constitutionality of s. 33.1*Cr.C.,* which precluded self-induced intoxication akin to automatism as a defence to charges of violent offences where the accused departed markedly from the standard of reasonable care described in s. 33.1(2)*Cr.C.*[[173]](#footnote-173) The Court concluded that s. 33.1*Cr.C.* infringed ss. 7 and 11(d) of the *Charter* and considered the rational connection test, which it summarized as follows: “[t]here must be ‘a causal connection between the infringement and the benefit sought on the basis of reason or logic’”.[[174]](#footnote-174) The Court then applied this test:

[131] I recognize Paciocco J.A.’s criticism that s. 33.1 fails to offer meaningful deterrence in support of Parliament’s protective purpose. In *Sullivan*, he wrote that “[e]ffective deterrence requires foresight . . . of the penal consequence” (para. 121). “I am not persuaded”, he continued, “that a reasonable person would anticipate the risk that, by becoming voluntarily intoxicated, they could lapse into a state of automatism and unwilfully commit a violent act” (*ibid.*).

[132][...] It is reasonable that Parliament would expect the provision to hold some modest deterrent effect for such individuals. This deterrent effect acts [translation] “upstream”, as Professor Parent writes (p. 187), to dissuade those contemplating this kind of intoxication. As such, s. 33.1 is rationally connected to its protective purpose.[[175]](#footnote-175)

 [Underlining added]

1. That said, while evidence of a decline in impaired driving offences may be used to establish a rational connection, the absence of this evidence is not decisive. A decline in highway offences might also indicate that the police power is not an effective means of detection and therefore contributes little or nothing to achieving the legislative objective. Ms. Sylvestre’s expert report notes that assessing whether traffic stops are a deterrent is complex because it is difficult to isolate the relevant variable.[[176]](#footnote-176) It is nevertheless logical to believe that impaired driving detection strategies contribute to deterring reckless drivers from getting behind the wheel when they are impaired, as expert Beirness submits.[[177]](#footnote-177)
2. The Court adds that the power to make random stops is intended not only to detect drunk drivers, but also unlicensed drivers or those without valid insurance as well as vehicles that are not mechanically fit. Logically, each stop likely to result in such a detection contributes to ensuring highway safety.
3. Consequently, the Court is of the view that the power to make traffic stops with no required grounds is a rational means of contributing to the legislative objective of highway safety.

#### Minimal impairment

1. The minimal impairment test consists in determining whether there are less drastic means of achieving the legislative objective “in a real and substantial manner”[[178]](#footnote-178) and whether “the limit on the right is reasonably tailored to the objective”.[[179]](#footnote-179) This is a critical step in the analysis under s. 1 of the *Charter*. This test is determinative in a significant proportion – if not a majority – of *Charter* disputes where a law is declared invalid.[[180]](#footnote-180)
2. Although the government is not required to pursue the least drastic means of achieving its objective,[[181]](#footnote-181) it still bears the burden of showing that the means chosen to achieve the objective of highway safety is necessary and the impairment of constitutional rights minimal.[[182]](#footnote-182) In this case, however, 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.
3. The AGQ essentially relies on the conclusions of the majority of the Supreme Court in *Ladouceur* that (1) the stopping of vehicles is “the sole method of checking a driver’s licence and insurance, or the mechanical fitness of a vehicle or whether the driver is impaired”;[[183]](#footnote-183) and (2) only “random” stops give rise to a real risk of detection of driving by unlicensed drivers to keep them off the road.[[184]](#footnote-184) Also in *Ladouceur*, Cory, J. noted that stops made as part of an organized program – such as a roadblock – will not deter drivers as effectively as the power to make “random” stops because a roadblock is frequently visible in advance and at well-known locations, which allows reckless drivers to avoid them.[[185]](#footnote-185) Moreover, in Cory, J.’s view, it would be more difficult to establish effective organized programs in rural areas.[[186]](#footnote-186) Lastly, a power to stop that can be used only where there is articulable cause would not have the same deterrent effect.[[187]](#footnote-187)
4. These observations can no longer be accepted today. As explained above,[[188]](#footnote-188) the evidence of racial profiling filed at trial compels the Court to reconsider the conclusions in *Ladouceur*. In particular, contrary to what Cory, J. stated at the time, traffic stops with no required grounds can no longer be viewed as “of relatively short duration” and a “minimal inconvenience caused to the driver”[[189]](#footnote-189) such that the enabling law meets the minimal impairment test.
5. The possibility of envisaging another legislative provision that would allow the objective of s. 636*HSC* to be achieved in a *substantial* manner, while limiting potential racial profiling, shows that this is not a minimal impairment. It should be noted that it is not necessary to define an alternative that would satisfy the objective to exactly the same extent or degree as the challenged provision.[[190]](#footnote-190)
6. In this case, the judge found that the evidence adduced did not establish that traffic stops with no required grounds are more effective than roadblocks. He wrote:

[translation]

[684] The defence’s evidence also does not help establish that the systematic implementation of roadside checkpoints would not achieve the same results as *traffic stops without factual grounds*, as proposed by the CCLA, which filed in this regard a research report prepared by the Insurance Institute for Highway Safety, based in Virginia, the main conclusion of which reads as follows:

This study demonstrated that a sobriety checkpoint enforcement program using only three to five police officers can be a very effective deterrent against drinking and driving in jurisdictions that are much more rural in nature. These checkpoints can be maintained over a long period of time without outside funding. Because of the simplicity and ease with which these checkpoints were conducted, police administration in the experimental communities have embraced the concept and continued the program after the conclusion of the formal research study. This is particularly important in more rural communities with fewer staff resources, but it also may be appropriate on certain roadways in more urban areas.

[References omitted; italics in the original]

1. The judge’s conclusion echoes the dissenting reasons of Sopinka, J. in *Ladouceur*. For Sopinka, J., the unrestricted power to make random roving stops of drivers was not a “necessary addition to the impressive array of enforcement methods which are available”.[[191]](#footnote-191) He noted that random organized check points (that in his opinion had already reached “the outer limits of s. 1”[[192]](#footnote-192)) were designed to serve enforcement while being less intrusive and not as open to abuse as the unlimited power sought to be justified. The Court is of the opinion that the passage of time has shown that Sopinka, J.’s concerns were founded.
2. It should further be noted that police officers also have other powers allowing them to stop drivers for highway safety or public safety considerations. For example, they may validly stop a vehicle pursuant to their power to detain for investigation when they have reasonable grounds to suspect that a driver is involved in a particular crime and should be detained.[[193]](#footnote-193) The common law ancillary powers doctrine also authorizes vehicles to be stopped when it is “reasonably necessary in the totality of the circumstances”.[[194]](#footnote-194) The sole “addition” under s. 636*HSC* is to empower the police to check drivers with no required grounds, outside an organized program.
3. Since no justification has been provided on the need to grant police officers almost unfettered discretion, the AGQ has failed to show that the judge erred in concluding that other strategies to achieve the legislative objective are available and will attain the same result[[195]](#footnote-195) (such as roadblocks, designated regulated highway safety programs, public awareness campaigns, and methods to ensure that stops are really random rather than discriminatory).
4. Ultimately, the judge did not err when he concluded:

[translation]

[772] The Crown has not established in any way that other means less likely to give free rein to racial profiling would not achieve the same result. It would have been difficult to do so because, as discussed above, the contribution of *traffic stops without factual grounds* to achieving the objectives of road safety or reducing motor vehicle accidents or *HSC* or *Criminal Code* offences has not been established. It was up to the Crown to prove the absence of less harmful means of achieving the objective of road safety in a real and substantial manner. It has not succeeded in meeting this burden.

[Italics in the original]

1. As the AGQ has failed to show that the means chosen to achieve the objective of s. 636*HSC* does not minimally impair the fundamental right guaranteed by s. 9 of the *Charter*, this infringement is not justified under s. 1 of the *Charter*.

#### Balancing the salutary and deleterious effects

1. This test “weigh[s] the harm to the claimant’s rights against the public benefits conferred by the challenged measure, by asking whether ‘the benefits which accrue from the limitation [of the claimant’s rights] are proportional to its deleterious effects’”.[[196]](#footnote-196)
2. Once it has been decided that the minimal impairment test has not been satisfied, there is no need to balance the salutary and deleterious effects to determine the justification pursuant to s. 1 of the *Charter.*[[197]](#footnote-197)
3. A few observations are nonetheless required. First, although the Court concludes that the challenged legislative provision is rationally connected to its objectives, in no way does this finding alter the judge’s conclusion on the lack of compelling evidence of the salutary effects of this legislation. The judge explained that the power to make stops with no required grounds has limited effectiveness and that the evidence does not concretely establish that this power contributes to highway safety.[[198]](#footnote-198) On the contrary, he wrote, the overview of the statistics filed in evidence does not [translation] “identify any data establishing a correlation between the specific use of *traffic stops without factual grounds* and the drop in *Criminal Code* and *Highway Safety Code* offences”.[[199]](#footnote-199)
4. Second, regarding the deleterious effects, the judge described in striking detail how the negative racial considerations that permeate the exercise of police discretion have a significant impact on Black people, their families and loved ones:[[200]](#footnote-200)

[translation]

[737] [...]

(h) Ultimately, *traffic stops without factual grounds* that disproportionately target a segment of the population affect both the hearts and minds of the Black individuals who are stopped, cause fear and humiliation for Black drivers in general and for their loved ones, and lead to the mistrust of police powers and the feeling of being treated differently and unfairly; […]

[Italics in the original]

1. The judge further noted that traffic stops with no required grounds arising from racial profiling are particularly unlikely to uncover an offence.[[201]](#footnote-201) In these situations, the remedy of excluding evidence under s. 24(2) of the *Charter* is of no use (whereas it was one of the considerations accepted by the majority in *Ladouceur*[[202]](#footnote-202)).
2. Balancing the salutary and deleterious effects of s. 636*HSC* therefore cannot justify the violation of s. 9 of the *Charter* under s. 1.[[203]](#footnote-203)
3. In conclusion, the trial judge was well founded in ruling that the infringement of the right guaranteed by s. 9 arising from s. 636*HSC* is not justified in a free and democratic society within the meaning of s. 1 of the *Charter*.[[204]](#footnote-204)

## D. Did the judge err in concluding that the challenged provision unjustifiably infringes s. 7 of the *Charter*?

1. Given the Court’s conclusion on the unjustified infringement of the right guaranteed by s. 9 of the *Charter*, there is no need to answer this question.
2. In fact, s. 9 guarantees everyone the right not to be arbitrarily detained or imprisoned. Like the other legal guarantees under ss. 8 and 10 to 14, it addresses a specific deprivation of the right to life, liberty and security of the person that is not in accordance with the principles of fundamental justice.[[205]](#footnote-205) It is designed “to protect, in a specific manner and setting, the right [...] set forth in section 7”.[[206]](#footnote-206)
3. In other words, and to paraphrase Lamer, J. (as he then was) in *Re B.C.* *Motor Vehicle Act*, s. 9 is illustrative of a deprivation to the right to life, liberty and security of the person in breach of the principles of fundamental justice.[[207]](#footnote-207)
4. Insofar as s. 9 is a more specific and complete illustration of the right guaranteed under s. 7 in the context considered in the case at bar, the Court’s finding that s. 636*HSC* unjustifiably infringes s. 9 renders a separate analysis under s. 7 redundant.[[208]](#footnote-208)
5. Indeed, in *Ladouceur*, the Supreme Court did not consider it necessary to decide whether random stops infringed s. 7, given that it had determined that they violated s. 9 of the *Charter*.[[209]](#footnote-209)
6. By refraining from answering this question, the Court issues no opinion on whether the judge’s analysis was correct.

## E. Did the judge err in concluding that the challenged provision unjustifiably infringes s. 15(1) of the *Charter*?

### 1. Infringement

1. Section 15(1) of the *Charter* guarantees equal treatment before and under the law without discrimination:

|  |  |
| --- | --- |
| **15.** **(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. | **15.** **(1)** La loi ne fait acception de personne et s’applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l’origine nationale ou ethnique, la couleur, la religion, le sexe, l’âge ou les déficiences mentales ou physiques. |

1. It is well established that this *Charter* provision protects substantive equality.[[210]](#footnote-210) In contrast to formal equality,[[211]](#footnote-211) substantive equality “recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages”.[[212]](#footnote-212) It “rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality”.[[213]](#footnote-213) In other words, substantive equality “rejects the mere presence or absence of difference as an answer to differential treatment”;[[214]](#footnote-214) unlike formal equality, it “insists on going behind the facade of similarities and differences”.[[215]](#footnote-215)
2. In application of this “animating norm”[[216]](#footnote-216) of substantive equality, the Supreme Court acknowledged that s. 15(1) protects against not only direct discrimination, but also indirect discrimination (or “adverse impact discrimination”).[[217]](#footnote-217) This form of discrimination “occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground”.[[218]](#footnote-218) Rather than directly singling out members of a protected group for differential treatment, “the law does so indirectly”.[[219]](#footnote-219)
3. That is the form of discrimination here: s. 636*HSC*, even though seemingly neutral, has a disproportionate and discriminatory impact on Black drivers.
4. The applicable test to rule on a s. 15(1) *Charter* claim has evolved over time.[[220]](#footnote-220) In *Sharma*, rendered shortly after the trial judgment, the Supreme Court clarified the law in this respect.[[221]](#footnote-221) First, it recalled the two-step test:

[28] The two‑step test for assessing a s. 15(1) claim is not at issue in this case. It requires the claimant to demonstrate that the impugned law or state action:

(a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and

(b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage [...].

[References omitted]

1. The form of discrimination alleged has no influence on the analysis: the same test applies, “regardless of whether the discrimination alleged is direct or indirect”.[[222]](#footnote-222) The application of this test might, however, present particular challenges when adverse impact discrimination is at issue.[[223]](#footnote-223) To limit the difficulties, the analysis at each step must remain distinct.[[224]](#footnote-224)
2. The first step examines whether the challenged law creates a disproportionate impact on the members of a protected group, as compared to non-group members.[[225]](#footnote-225)
3. In *Sharma*, the Supreme Court stated that “[t]he disproportionate impact requirement necessarily introduces comparison into the first step”.[[226]](#footnote-226) However, it no longer requires a “mirror comparator group”.[[227]](#footnote-227) The comparison is drawn “between the claimant group and other groups or the general population”.[[228]](#footnote-228) The comparison must show that “the claimant is treated differently than others, whether directly or indirectly”.[[229]](#footnote-229)
4. With adverse impact discrimination, the claimant must establish a causal connection between the challenged law and the discriminatory impact.[[230]](#footnote-230) This connection is established if the claimant proves that “the impugned law, in its impact, *creates or contributes* *to* a disproportionate impact on the basis of a protected ground”.[[231]](#footnote-231)
5. Two types of evidence are helpful in proving that a law has a disproportionate impact: evidence about the “full context of the claimant group’s situation”[[232]](#footnote-232) and evidence about the outcomes that the challenged law has produced in practice (actual) on the group.[[233]](#footnote-233)
6. Ideally, claims of adverse impact discrimination should be supported by both.[[234]](#footnote-234) In *Sharma*, the Supreme Court set out the factors courts must consider to decide whether claimants have met their burden of proof:

[49] [...] In that regard, courts should bear in mind the following considerations:

(a) No specific form of evidence is required.

(b) The claimant need not show the impugned law or state action was the *only* or the *dominant* cause of the disproportionate impact — they need only demonstrate that the law was *a* cause (that is, the law created *or contributed to* the disproportionate impact on a protected group).

(c) The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.

(d) Courts should carefully scrutinize scientific evidence [...].

(e) If the scientific evidence is novel, courts should admit it only if it has a “reliable foundation” [...].

[Italics in the original]

1. In short, at the first step, the claimant must show that the challenged provision creates or contributes to a disproportionate impact on the claimant group based on a protected ground as compared to other groups.[[235]](#footnote-235) Although this burden is not undue, it must be fulfilled.[[236]](#footnote-236)
2. The second step of the analysis requires the claimant to prove that “the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group’s disadvantage”.[[237]](#footnote-237) Leaving the situation of a claimant group unaffected is insufficient.[[238]](#footnote-238) The goal at this step “is to examine the impact of the harm caused to the affected group”.[[239]](#footnote-239)
3. The focus is therefore “not on ‘whether a discriminatory attitude exists’, or on whether a distinction ‘perpetuates negative attitudes’ about a disadvantaged group, but rather on the discriminatory *impact* of the distinction”.[[240]](#footnote-240) As Abella, J. explained in *Quebec (Attorney General) v. A.*:

[332] The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. […][[241]](#footnote-241)

1. Harm “may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion”.[[242]](#footnote-242) Moreover, it must be examined in light of the historical or systemic disadvantages faced by the protected group.[[243]](#footnote-243)
2. The law must negatively impact the members of the group or worsen their situation:

[37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.[[244]](#footnote-244)

1. The law itself, however, does not have to be responsible “for creating the background social or physical barriers which [make] a particular rule, requirement or criterion disadvantageous for the claimant group”.[[245]](#footnote-245) In fact, “‘[i]t is not necessary to find that the legislation creates the discrimination existing in society’ to find a s. 15 breach”.[[246]](#footnote-246)
2. The contextual factors to be considered in the analysis will vary depending on the nature of each case. There is no “rigid template”[[247]](#footnote-247) or formula to follow. The presence of prejudice and stereotyping may be [translation] “an eloquent indicator”[[248]](#footnote-248) of the disadvantage and the discriminatory nature of the challenged law but is not an essential element.[[249]](#footnote-249) Similarly, “there is no burden on a claimant to prove that the distinction [created by the law] is arbitrary”,[[250]](#footnote-250) even though this factor may also be an indicator that the law is discriminatory.[[251]](#footnote-251)
3. Also in *Sharma*, the Supreme Court stated that judicial notice can play a role at this step.[[252]](#footnote-252) Moreover, “[c]ourts may infer that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence”.[[253]](#footnote-253)
4. Lastly, the Supreme Court asks courts to consider the “broader legislative context”[[254]](#footnote-254) to determine whether a distinction is discriminatory. The relevant considerations in this regard include “the [legislative] objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors”.[[255]](#footnote-255)

\* \* \*

1. Now that these principles have been set out, how do they apply to this case?
2. The judge concluded that the respondents discharged their burden of proof at each of the two steps and that the challenged provision therefore infringes s. 15(1) of the *Charter*.
3. The AGQ does not challenge the judge’s findings of fact or analysis. The AGQ merely states that not every traffic stop constitutes racial profiling, and that this determination must be made on a case-by-case basis, according to the circumstances of the stop at issue. This is consistent with the AGQ’s argument on the first issue – namely, that racial profiling is not the result of the challenged provision.
4. The Court, as previously stated, is of the view that the judge did not err in concluding that s. 636*HSC* is itself a vector of racial profiling. The analysis of the ground of appeal based on s. 15(1) of the *Charter* could therefore end here. However, a few words are in order regarding the evidence adduced at trial, which convincingly shows that the respondents did in fact discharge their burden at both steps of the analysis.

#### Step 1: Demonstrate that the law creates, on its face or in its impact, a distinction based on a protected ground

1. As the trial judge noted, [translation] “the challenged [provision] appears neutral because it allows the police to randomly stop any vehicle, without grounds or suspicion, to conduct a routine check”.[[256]](#footnote-256) In reality, however, it has a markedly disproportionate impact on Black drivers (as compared to other groups of drivers, including White drivers).
2. As previously stated, the evidence of expert Mulone – uncontradicted by the AGQ – reveals that members of the Black community are systematically stopped more often by the police.[[257]](#footnote-257) The expert reports that the studies establishing overrepresentation of Black drivers in (discretionary) traffic stops [translation] “are so numerous and the results so convergent that a specific expression has emerged in the English-speaking world: driving while Black”.[[258]](#footnote-258)
3. Expert Mulone relied on several recent Canadian studies[[259]](#footnote-259) to shed light on the differential treatment of Black people in police street checks in general and traffic stops in particular. In this regard, it is helpful to note the results of studies conducted in Ottawa (2016/2019), Montreal (2019), and Repentigny (2021).
4. The Ottawa studies reveal that the total number of traffic stops on the city’s territory dropped drastically between 2013 and 2018. However, the overrepresentation of Black people who were stopped (compared to White people) generally remained stable over time. Indeed, between 2013 and 2015, Black drivers were stopped 2.3 times more often than White drivers (in relation to their demographic weight). Between 2015 and 2018, they were still stopped 2.2 to 2.3 times more often than White drivers.[[260]](#footnote-260) It is true that disproportionate stops involving Black drivers declined for young drivers (16-24 years) during the relevant period, going from a ratio of 8.3 to 6.7 (in relation to their demographic weight). Nonetheless, overrepresentation of young Black drivers in traffic stops remains unacceptably high.[[261]](#footnote-261)
5. The Montreal and Repentigny studies focus specifically on the role played by the racialized identity of people who are subjected to street checks or traffic stops by the police. They rely primarily on statistical data gathered by the Montreal (“SPVM”) and Repentigny (“SPVR”) police forces. The Montreal data concerns almost exclusively street checks (reference period: 2014-2017), whereas the Repentigny data concerns both street checks and traffic stops (reference period: 2016-2019).
6. As part of these studies, in which expert Mulone participated, researchers developed two racial profiling indicators: (1) a street check risk disparity index (“ICDI”), which measures the disproportion between the population of people street checked (or stopped) and the overall population; and (2) the “over-street check” index for offences (“ISRI”), which measures the disproportion observed in street checks (or stops) in relation to the relative weight of each group out of the total offences registered by the police.[[262]](#footnote-262)
7. In Montreal, the results found that:

[translation]

* Black people are 4.24 times more likely to be street checked than White people (ICDI = 4.24).
* These disparities cannot be explained by the presumed participation (based on official crime statistics) of Black people in crime. These individuals are over‑street checked by 66% in relation to their alleged involvement in criminal offences (ISRI = 1.66). They are over‑street checked by 137% in relation to their alleged involvement in municipal by-law offences (ISRI = 2.37).
* While these disparities are more marked for youth (between 15 and 34 years) and men, they apply to every age group and gender of the Black community overall (in comparison, discrimination against the Arab population is limited to young men between 15 and 24 years).
* Discrimination against Black people has remained stable over time, at least for the four years studied.
* Geographic disparities are also relatively stable [...].
* That being said, there are significant variations between the different neighbourhoods [...].
* While criminality does not appear to be correlated to these variations, it is partly explained by ethnocultural diversity. Thus, in less diverse neighbourhoods, Black people are 7.91 times more likely to be street checked than White people, a rate that goes back down to 3.22 in very diverse neighbourhoods.[[263]](#footnote-263)
1. Expert Mulone stated that even though the Montreal study focuses primarily on police street checks, [translation] “there is every reason to believe that the disproportions observed in street checks are reflected to a varying degree in traffic stops”.[[264]](#footnote-264)
2. The Repentigny study reveals that:

[translation]

* Black people are 2.61 to 3.29 times more likely to be street checked than [White] people (ICDI = 2.61 or 3.29, depending on how the reference population is calculated).

[...]

* Regardless of the calculation method (excluding the floating population, excluding people with criminal records, excluding street checks around places of interest such as bars or motels, known for criminal activities, etc.), Black people are still two to three times more likely to be street checked than White people.
* As in Montreal, the presumed participation in crime of the groups concerned does not explain these disparities. Indeed, Black people are over-street checked by 61% in relation to their alleged involvement in crime (ISRI = 1.61). This result is bolstered by the fact that the disparate treatment remains relatively stable if individuals with a criminal record are excluded from the IDCI calculation: Black people without a criminal record are 2.43 to 3.07 times more likely to be street checked than White people without a criminal record.[[265]](#footnote-265)

[Reference omitted]

1. Ultimately, expert Mulone concluded that [translation] “Black people are disproportionately targeted by law enforcement in Canada”,[[266]](#footnote-266) including during traffic stops with no required grounds. He noted that there are no studies showing [translation] “results that contradict these strong temporal and geographic reiterations of disparate treatment”[[267]](#footnote-267) of Black people. He unequivocally rejects the [translation] “rotten apple theory”: he has no doubt that the problem is structural (systemic) and stems from racial profiling.[[268]](#footnote-268)
2. The evidence of expert Sylvestre is consistent with that of expert Mulone. She also concluded that Black people are stopped (and street checked) more often than White people and are racially profiled during traffic stops with no required grounds.[[269]](#footnote-269) In light of the results of her research project into racial profiling during traffic stops, she concluded that [translation] “police officers abuse their discretion and use pretexts and tricks that are clear indicators of racial profiling”.[[270]](#footnote-270)
3. The evidence of experts Mulone and Sylvestre is also supported by the testimony of Mr. Luamba and several other ordinary witnesses. This evidence, analyzed in detail by the judge,[[271]](#footnote-271) concretely illustrates the disadvantages faced by Black people as a group in their interactions with the police (in particular during traffic stops with no required grounds).[[272]](#footnote-272) The judge characterized this evidence as credible and found that it [translation] “conclusively establishes that racial profiling exists”.[[273]](#footnote-273) As previously stated, the AGQ does not challenge these factual conclusions, which require a high degree of deference on appeal.[[274]](#footnote-274)
4. This quantitative and qualitative evidence, uncontradicted by the AGQ, is bolstered by other studies that show how racial profiling taints police interventions.[[275]](#footnote-275) It is also supported by government commission reports and the case law. Here are a few examples.
5. In a report published in 2020, the Ontario Human Rights Commission (“OHRC”) found that Black people were grossly overrepresented in charges relating to “out-of-sight” driving offences (that is, offences which only surface after an officer decides to check a driver’s licence plate or “randomly” stop the vehicle). The OHRC noted that in proportion to their representation in the Toronto population, Black people were four times more likely to be charged for such an offence.[[276]](#footnote-276) Paradoxically, they were also less likely to be convicted of the offence alleged than White people. According to the OHRC, this finding is consistent with the idea that “due to racial bias, Black people are more likely to face low-quality charges with a low probability of conviction”.[[277]](#footnote-277) This finding also refutes the argument that the disproportions observed could be explained by the greater propensity of Black people to criminality.
6. The CDPDJ made the same finding: Black people are overrepresented in police street checks (or stops). According to the CDPDJ, the disproportion is particularly marked for young Black people. Their overrepresentation among people street checked (or stopped) by the police has clearly increased since the SPVM started to prioritize [translation] “fighting street gangs” in the mid-2000s.[[278]](#footnote-278)
7. Lastly, in *Le*, the Supreme Court recognized that “[m]embers of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada”.[[279]](#footnote-279)
8. Thus, the judge did not err in replying in the affirmative to the question of whether the challenged provision creates, by its effect, a distinction based on an enumerated ground, i.e., race.[[280]](#footnote-280) The Court agrees with the judge’s conclusion at the first step of the analysis:

[translation]

[823] At this first step, the Court finds that the law, which permits the selection of drivers based exclusively on a police officer’s intuition without other grounds, has a prejudicial effect in view of the disproportionate impact of *traffic stops without factual grounds* on Black people. Moreover, the Court is not required to determine whether the applicant succeeded in establishing that Black drivers are stopped in this way based on skin colour. Evidence of the disproportionate impact on the protected community is sufficient.

[Boldface omitted; italics in the original]

1. As we have just seen, this conclusion is amply supported by the evidence.

#### Step 2: Demonstrate that the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage

1. According to the Court, the evidence also shows that the adverse effect of s. 636*HSC* reinforces, perpetuates and exacerbates the disadvantage (historic and systematic) experienced by Black persons.
2. Historically, Black communities have had different perspectives and experiences with policing practices such as [translation] “routine” street checks and [translation] “random” traffic stops. As the OHRC noted:

It is a little known fact that Black people were considered “property” well into the 1800s here in Canada. Canada has its own legacy of slavery, notwithstanding Lieutenant Governor John Graves Simcoe’s call in 1792 for an end to its “practice.” A system of slave patrols, sanctioned by the United States Congress’ Fugitive Slave Act of 1850, pursued slaves and monitored Black people in general as far north as Canada.

It is within this historical context that the Black communities’ relationship with the police was formed and initially defined.[[281]](#footnote-281)

1. This context must be taken into account to properly understand how s. 636*HSC* reinforces, perpetuates and exacerbates Black people’s disadvantage. This is especially important given that the subjective experience of Black persons repeatedly subjected to street checks or traffic stops by the police tends to be minimized.[[282]](#footnote-282) The effects of racial profiling (and of [translation] “over‑street checking”), however, are not trivial for Black people (and communities).
2. The expert evidence, scientific literature, and government commission reports show that racial profiling in police interventions (including routine street checks and [translation] “random” traffic stops) has multiple and profound consequences for its victims.[[283]](#footnote-283) This evidence establishes in particular that:
* Black people “often feel humiliation, fear, anger, frustration and helplessness as a result of perceived racial profiling”.[[284]](#footnote-284) Frequent exposure to street checks, traffic stops and searches by the police may have negative (and sometimes lasting) effects on their physical[[285]](#footnote-285) and mental health;[[286]](#footnote-286)
* Black people who experience racial profiling may, for example, develop trauma (even post-traumatic stress disorder)[[287]](#footnote-287) or suffer from depression or anxiety;[[288]](#footnote-288)
* Many racialized families change [translation] “the way they raise their children to prepare them to respond to these interactions with the police, which are considered unavoidable”.[[289]](#footnote-289) Many people develop “strategies” to protect themselves from racial profiling and arbitrary traffic stops (e.g., filming traffic stops, avoiding going to certain neighbourhoods or driving certain models of cars, being extremely careful and vigilant while driving, etc.);[[290]](#footnote-290)
* Racial profiling undermines Black people’s trust in the police and public institutions.[[291]](#footnote-291) It creates a feeling of distrust, even hostility,[[292]](#footnote-292) towards law enforcement and the justice system;[[293]](#footnote-293)
* Loss of trust in the legitimacy, integrity, and objectivity of the police and the justice system may lead some people to refuse to cooperate with the police[[294]](#footnote-294) and even to develop antisocial behaviour (e.g., they might refuse to obey the law or might participate in crime).[[295]](#footnote-295) Moreover, people who fear the police or question their legitimacy are less likely to call them when necessary,[[296]](#footnote-296) [translation] “which reinforces their vulnerability and increases their rates of victimization”;[[297]](#footnote-297)
* Racial profiling negatively affects the self-esteem of Black people[[298]](#footnote-298) (e.g., feeling of being a [translation] “criminal”, [translation] “garbage”,[[299]](#footnote-299) or a [translation] “second-class citizen”[[300]](#footnote-300)). It may also negatively impact their motivation at school or work and their access to education or employment;[[301]](#footnote-301)
* Racial profiling reduces Black people’s identification with Quebec society.[[302]](#footnote-302) Over‑street checking of Black people [translation] “produces or accentuates [...] civic disengagement (Lerman & Weaver, 2014) and ultimately increases insecurity in members of the targeted population (Livingstone, Rutland & Alix, 2018; Livingstone, Meudec & Harim, 2020)”;[[303]](#footnote-303)
* Racial profiling may cause Black people to internalize negative stereotypes about themselves and the Black community;[[304]](#footnote-304)
* Racial profiling [translation] “paves the way for increased judicialization”[[305]](#footnote-305) of Black people and “reinforces social exclusion and marginalization”[[306]](#footnote-306) of Black communities;
* In some cases, the traffic stops may [translation] “derail into physical abuse”.[[307]](#footnote-307) It should be noted that Black people are grossly overrepresented in police interactions involving the use of force.[[308]](#footnote-308)
1. Once again, the case law echoes the evidence. In *Le*, the Supreme Court recognized that “[t]he impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience”.[[309]](#footnote-309) According to the Supreme Court, this practice “takes a toll on a person’s physical and mental health. It impacts their ability to pursue employment and education opportunities” and “contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization”.[[310]](#footnote-310)
2. With respect to the discriminatory impact of the distinction, the evidence establishes that racial profiling has the effect of perpetuating and reinforcing discrimination against Black people. Expert Mulone aptly described the dynamic that underlies proactive policing (such as traffic stops with no required grounds) and the [translation] “vicious circle logic” that means racial discrimination leads to other racial discrimination. It is worthwhile reproducing this lengthy passage from his expert report:

[translation]

Street checks and traffic stops (and all proactive police practices) are basically an exercise in prediction. This involves predicting whether an individual who raises police suspicion is actually hiding something and warrants police action. Sometimes the prediction is correct. Sometimes it is wrong (and confirmation bias, discussed above, means that the good predictions are recalled much more often than the wrong ones). What is certain, however, is that the prediction tools lead to what Bernard Harcourt calls a “ratchet effect” (Harcourt, 2007; 2011). This self‑fulfilling prophecy is constructed as follows: police officers try to “target” their intervention as accurately as possible (intervene with someone who has actually done something wrong); to know who should be prioritized, they might refer to police crime statistics (but also their own experience, what they were taught, their biases, or other elements such as daily broadcast sheets [...]); however, these statistics show that certain racialized groups are more criminalized than others, and this visible feature becomes one of the criteria to target the [translation] “right people”; since one group is being watched more closely (viewed as more criminal), individuals from this group are necessarily caught more often; at the end of the year, when reviewing the statistics, the police realize that they were absolutely right to prioritize that group over another; in fact, their participation in crime statistics should even have increased; as a result, even more resources will be assigned to target this community.

This dynamic is important to discuss for at least two reasons. One, because it follows a vicious circle logic and as such, is extremely difficult to break. Next, because as long as this logic is not actively countered, it will reproduce and exacerbate prevailing racial discrimination. In the same way it is logical to imagine that police action is increased in areas where crime is higher and/or more serious (Tiratelli, Quinton & Bradford, 2018), increased street checks and traffic stops of a given population will necessarily increase the number of criminal offences detected (Hinkle & Weisburd, 2008). Thus, discriminatory practices will in turn lead to discrimination. In other words, racial discrimination will justify further racial discrimination (Balibar, 2007; Bessone, 2013).[[311]](#footnote-311)

[Underlining added]

1. Along the same lines, the CDPDJ notes that:

[translation]

[u]nequal and discriminatory application of the law within a context of public security gives a false picture of reality. As a result, individuals who belong to a “profiled” community have a greater risk of being stopped, arrested, charged and exposed to different and unequal treatment during every step of the judicial process.[[312]](#footnote-312)

[Reference omitted]

1. The trial judge rightly stated that [translation] “[i]t is not the applicant’s burden to explain why the law has this domino effect or to establish why Black drivers suffer a particular disadvantage”.[[313]](#footnote-313) It suffices to note that the challenged provision, because it [translation] “opens the door to the differential treatment of Black drivers”,[[314]](#footnote-314) widens the gap between Black people (a historically disadvantaged group) and the rest of society.[[315]](#footnote-315)
2. Like the judge, the Court concludes that the respondents have discharged their burden at the second step of the analysis.

\* \* \*

1. To summarize, there is abundant evidence to establish that s. 636*HSC* creates a distinction based on a ground enumerated in s. 15(1) – i.e., race[[316]](#footnote-316) – in a way that reinforces, perpetuates or exacerbates the disadvantage experienced by Black people. The infringement of the right to equality guaranteed by s. 15(1) is therefore proved.
2. What remains to be determined is whether the AGQ has established that this infringement of the right protected by s. 15(1) is justified under s. 1 of the *Charter*.

### 2. Justification of the infringement

1. As previously stated,[[317]](#footnote-317) the Court is of the view that the objective of s. 636*HSC* is pressing and substantial and that the means chosen by the legislature, that is, to authorize traffic stops with no required grounds, is rationally connected to that objective. The minimal impairment test, however, has not been met.
2. While this last conclusion suffices to reject the defence of justification, a few comments are warranted here regarding the balancing of salutary benefits and deleterious effects in connection with the infringement of the right to equality.
3. Section 636*HSC* has numerous and serious negative effects on Black drivers (physical and mental health issues, feeling of exclusion, marginalization and [translation] “overjudicialization”, loss of trust in the police and the justice system, civic disengagement, perpetuation and reinforcement of racist stereotypes, etc.).[[318]](#footnote-318) These effects cannot be taken lightly.
4. Racial profiling and the “over-street checking” of Black persons also have a negative impact on society as a whole. Studies show that there is a “clear link” between public confidence in policing and public safety. For example, the OHRC notes that “[p]eople are less likely to cooperate with police investigations and provide testimony in court if they have negative perceptions of police”.[[319]](#footnote-319) In another report, the OHRC observed that one of the social costs of racial profiling is increased mistrust of our institutions:

A social cost of racial profiling that is closely related to “compromising our future” is the significant mistrust that develops, both in children and adults, of our key institutions.

No one would argue that public faith in institutions and systems such as the criminal justice system, law enforcement, customs and border control and the education system is a cornerstone to democracy, order and a harmonious society. All of these institutions require citizens to work positively and cooperatively with them to maximize their success in fulfilling their mandate. For example, a strong justice system requires citizens to have confidence in the fairness of the process; community policing relies on individuals trusting the police and being wiling to work with them […].[[320]](#footnote-320)

1. Expert Mulone explained that the population’s view that the police lack legitimacy can also result in increased violent crime (in certain cases).[[321]](#footnote-321)
2. By contrast, the salutary effects of s. 636*HSC* are rather tenuous. As previously stated,[[322]](#footnote-322) the record as constituted contains no evidence to conclude that traffic stops with no required grounds are an effective means of ensuring highway safety.[[323]](#footnote-323) Yet, the AGQ had the burden of proving “the good which the law may achieve in relation to the seriousness of the infringement”.[[324]](#footnote-324)
3. It is true that from a strictly logical point of view, stopping a single drunk or unlicensed driver is liable to contribute to highway safety by “removing” this driver from the road. But like Sopinka, J., dissenting in *Ladouceur*, the Court wonders “[h]ow many innocent people” will have to be stopped to “catch” one delinquent driver.[[325]](#footnote-325) The AGQ provided no information in this regard.
4. Lyne Vézina, the director general of highway safety research and development at the Société de l’assurance automobile du Québec (“SAAQ”), admitted that she does not know if there are any statistics or studies showing a link between traffic stops with no required grounds and improved highway safety.[[326]](#footnote-326)
5. The record also contains no evidence on the deterrent effect of traffic stops with no required grounds (compared to stops at a fixed location during roadblocks or other organized programs).
6. Douglas Beirness, the AGQ’s expert, conceded that he knows of no study showing the deterrent effect of traffic stops with no required grounds.[[327]](#footnote-327) In fact, in his view, stops at a fixed location during roadblocks or other types of organized programs (visible, known and/or publicized operations) achieve the objective of general deterrence:

The value of the large checkpoint program is that you’re having an impact on drivers who are not stopped as well as those who are. The random patrol point is only having an impact on those drivers who are stopped.[[328]](#footnote-328)

1. Ms. Vézina also stressed the importance of deterrence, primarily by increasing the perceived risk of being stopped (and the probability of actually being stopped). She highlighted the importance of [translation] “concerted national operations with law enforcement”[[329]](#footnote-329) and the [translation] “visibility” of traffic stops in this regard.[[330]](#footnote-330) Her testimony therefore also tends to confirm the effectiveness of roadblocks and other types of organized stops without in any way leading to the conclusion that traffic stops with no required grounds have the same salutary effects.
2. Ultimately, the Court cannot conclude that the “benefits” of traffic stops with no required grounds outweigh their deleterious effects. The infringement of s. 15(1) of the *Charter* is therefore not justified under s. 1.

## F. Did the judge err as to the remedy?

1. As the Court has concluded that racial profiling results from s. 636*HSC*, that this provision infringes the rights guaranteed by ss. 9 and 15 of the *Charter,* and that this infringement is not justified under s. 1, the appropriate remedy is a declaration of invalidity based on s. 52(1) of the *Constitution Act, 1982*.
2. The judge suspended the declaration of invalidity for a period of six months. The AGQ asks the Court to extend the suspension to 12 months. The AGQ has, however, submitted no grounds that justify intervening in this respect.
3. Suspending the declaration of invalidity of a law is an “extraordinary step”,[[331]](#footnote-331) since its effect is to maintain a law that infringes the *Charter*. This suspension should be granted only rarely, that is, when the government[[332]](#footnote-332) can demonstrate that “an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration’s effect”.[[333]](#footnote-333) The government must also “demonstrate the appropriate length of time”.[[334]](#footnote-334)
4. Extending the suspension of a declaration of constitutional invalidity “is even more problematic”[[335]](#footnote-335) because it further perpetuates the *Charter* breach. A government that seeks such an extension must show “extraordinary circumstances”[[336]](#footnote-336) or a “compelling reason”[[337]](#footnote-337) to justify an extension. Here, the AGQ has not discharged this burden.
5. Therefore, this ground of appeal also fails.

# VI. CONCLUSION

1. The Court concludes that s. 636 *HSC*, which authorizes traffic stops with no required grounds outside of an organized program, results in racial profiling. This provision breaches ss. 9 and 15 of the *Charter* and is not justified under s. 1. There is no need to determine whether the provision also violates s. 7 of the *Charter*.

**FOR THESE REASONS, THE COURT:**

1. **ALLOWS** the appeal in part;
2. **REVERSES** the trial judgment in part, solely to amend paragraphs 866 to 870 as follows:

[866] **GRANTS,** in part, the re-amended originating application;

[867] **DECLARES** that the conditions for reconsidering the ruling in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 have been met;

[868] **DECLARES** that section 636 of the *Highway Safety Code* infringes the rights guaranteed by sections 9 and 15 of the *Canadian Charter of Rights and Freedoms* and is not demonstrably justified in a free and democratic society, such that it is therefore invalid;

[869] **DECLARES** that section 636 of the *Highway Safety Code* is inoperative;

[870] **SUSPENDS** the effective date of the declaration of inoperability for a period of six months from the notification of the notice of judgment, with the exception of any court case in which section 636 of the *Highway Safety Code* has been challenged and in which the proceedings are still ongoing;

1. **THE WHOLE,** with legal costs against the Attorney General of Quebec.

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|  | JULIE DUTIL, J.A. |
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|  | SUZANNE GAGNÉ, J.A. |
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|  | LORI RENÉE WEITZMAN, J.A. |
|  |
| Mtre Michel DéomMtre Luc-Vincent Gendron-BouchardAurélie Fortin, articling student |
| bernard, roy (justice - québec) |
| For the appellant Attorney General of Quebec |
|  |
| Mtre Mike Siméon |
| mike siméon, avocat |
| For the respondent Joseph-Christopher Luamba |
|  |
| Mtre Bruce JohnstonMtre Lex GillMtre Louis-Alexandre Hébert-Gosselin |
| trudel johnston & lespérance  |
| For the respondent Canadian Civil Liberties Association |
|  |
| Mtre Joshua WilnerMtre Claude JoyalMtre Rym Laoufi |
| justice canada |
| For the impleaded party Attorney General of Canada |
|  |
| Mtre Karine JoizilMtre Bianca Annie MarcelinMtre Sajeda Hedaraly |
| mccarthy tétrault |
| For the impleaded party Canadian Association of Black Lawyers |
|  |
| Mtre Ivan da FonsecaMtre Claire K.A. Peacock |
| delegatus services juridiques |
| For the intervener British Columbia Civil Liberties Association |
|  |
| Mtre Fernando Belton |
| belton avocats |
| Mtre Sarah Warda El Alaoui |
| lafortune cadieux |
| For the intervener Clinique juridique de Saint-Michel |
|  |
| Mtre Christine CampbellMtre Emma Tardieu |
| bitzakidis clément-major fournier |
| For the intervener Commission des droits de la personne et des droits de la jeunesse |
|  |
| Dates of hearing: |  March 5 and 6, 2024 |

1. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [*Ladouceur*]. [↑](#footnote-ref-1)
2. *Highway Safety Code,* CQLR, c. C-24.2 [*HSC*]. [↑](#footnote-ref-2)
3. *Luamba c. Procureur général du Québec*, 2022 QCCS 3866 [Trial judgment]. [↑](#footnote-ref-3)
4. [TRANSLATOR’S NOTE: The translation of the following footnote departs slightly from the same footnote in the original French judgment.] The trial judge used [translation] “challenged law” in the singular to refer to [translation] “the combined effect of the common law rule and s. 636 *HSC*” (Trial judgment, para. 52). A majority of the parties on appeal, however, used [translation] “challenged laws”, in the plural. Given the Court’s conclusion that there is no common law rule authorizing traffic stops with no required grounds, below at paras. [14] to [32], the Court will simply refer to s. 636 *HSC* as the “challenged provision”. [↑](#footnote-ref-4)
5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (UK), 1982, c. 11 [*Charter*]. [↑](#footnote-ref-5)
6. *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*]. [↑](#footnote-ref-6)
7. Initially designated as an impleaded party in the appeal proceedings, the CCLA presented an application to change its status to respondent. This application was granted on September 19, 2023, by a judge of the Court: *Procureur général du Québec c. Luamba*, Montreal C.A., No. 500‑09‑030301‑220, September 19, 2023, Schrager, J.A. [↑](#footnote-ref-7)
8. The BCCLA, CJSM and CDPDJ were authorized to intervene as friends of the court: *Procureur général du Québec c. Luamba*, 2023 QCCA 1243 (Schrager, J.A.). [↑](#footnote-ref-8)
9. Note that Mr. Luamba initially contested the constitutional validity of s. 320.27(2) of the *Criminal Code*, R.S.C. (1985), c. C-46. However, he discontinued this part of his application during oral arguments at trial: Trial judgment, footnote 5. [↑](#footnote-ref-9)
10. *Id.*,para*.* 26. [↑](#footnote-ref-10)
11. *Id.*, para. 22. [↑](#footnote-ref-11)
12. *Id.*, para. 16. [↑](#footnote-ref-12)
13. *Id.*,para. 18. [↑](#footnote-ref-13)
14. See in particular: notice of appeal, November 25, 2022, para. 13. [↑](#footnote-ref-14)
15. Amended originating application, February 2, 2021, para. 47. See also: Trial judgment, paras. 22, 52 and 54. [↑](#footnote-ref-15)
16. Trial judgment, para. 869. [↑](#footnote-ref-16)
17. *Dedman v. The Queen*, [1985] 2 S.C.R. 2 [*Dedman*]. [↑](#footnote-ref-17)
18. *R. v. Hufsky*, [1988] 1 S.C.R. 621 [*Hufsky*]. [↑](#footnote-ref-18)
19. *Dedman v. The Queen*, [1985] 2 S.C.R. 2, p. 36. [↑](#footnote-ref-19)
20. The acronym stands for “Reduce Impaired Driving Everywhere”. [↑](#footnote-ref-20)
21. *Dedman v. The Queen*, [1985] 2 S.C.R. 2, p. 25, citing “the stated case”. [↑](#footnote-ref-21)
22. *Ibid.* [↑](#footnote-ref-22)
23. *R. v. Waterfield*, [1963] 3 All E.R. 659 [*Waterfield*], p. 661, cited in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, p. 33 [underlining added]:

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. [...]

This test, also called the “ancillary powers doctrine”, was further described and applied in numerous subsequent cases. See in particular: *Fleming v. Ontario*, 2019 SCC 45 [*Fleming*], paras. 43ff.; *R. v. Reeves*, 2018 SCC 56, paras. 77–78 (concurring reasons of Moldaver, J.); *R. v. MacDonald*, 2014 SCC 3. [↑](#footnote-ref-23)
24. *R. v. Hufsky*, [1988] 1 S.C.R. 621, p. 625. Note that the facts giving rise to this case occurred after the *Charter* came into force. [↑](#footnote-ref-24)
25. At the time, the *Highway Traffic Act*, R.S.O. 1980, c. 198. [↑](#footnote-ref-25)
26. *R. v. Hufsky*, [1988] 1 S.C.R. 621, p. 631. [↑](#footnote-ref-26)
27. *Id.*, p. 628. [↑](#footnote-ref-27)
28. *Id.*, pp. 631-632. [↑](#footnote-ref-28)
29. *Id.*, p. 633. [↑](#footnote-ref-29)
30. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1275. [↑](#footnote-ref-30)
31. *Id.*, p. 1278. [↑](#footnote-ref-31)
32. *R. v. Griffin* (1996), 111 C.C.C. (3d) 490 (N.L. C.A.), leave to appeal to SCC refused, April 24, 1997, No. 25753. [↑](#footnote-ref-32)
33. *Id.*, p. 509. See, however: Wayne Gorman, “Arbitrary Detentions and Random Stops”, (1999) 41 C.L.Q. 41, p. 52. [↑](#footnote-ref-33)
34. In *R. v. MacDonald*, 2014 SCC 3, the Supreme Court stated, at para. 37, that the following three factors must be weighed to determine whether the second part of the *Waterfield* test is satisfied:

1.  the importance of the performance of the [police] duty to the public good (*Mann* at para. 39);

2.  the necessity of the interference with individual liberty for the performance of the duty (*Dedman* at p. 35; *Clayton* at paras. 21, 26 and 31); and

3.  the extent of the interference with individual liberty (*Dedman,* at p. 35). [↑](#footnote-ref-34)
35. *Fleming v. Ontario*, 2019 SCC 45. See also: John Burchill, “A Horse Gallops Down a Street…Policing and the Resilience of the Common Law”, (2018) 41:1 Man. L. J. 161, p. 175; Richard Jochelson, “Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory”, (2013) 43:3 Ottawa L. Rev. 355, pp. 366–367. [↑](#footnote-ref-35)
36. *Fleming v. Ontario*, 2019 SCC 45, para. 38. [↑](#footnote-ref-36)
37. *Id.*, para. 41. [↑](#footnote-ref-37)
38. *Id.*, para. 42 [underlining added]. [↑](#footnote-ref-38)
39. *R. v. McColman*, 2023 SCC 8, para. 29. [↑](#footnote-ref-39)
40. The parties took the erroneous position that *Ladouceur* recognized the existence of a common law police power to make traffic stops with no required grounds. Given this position, no party asked the Court to determine whether such a common law power actually exists. The Court is therefore not ruling on this matter. [↑](#footnote-ref-40)
41. *R. c. Soucisse*, [1994] R.J.Q. 1546 (C.A.) [*Soucisse*]. [↑](#footnote-ref-41)
42. *Id.*, pp. 1550–1551. [↑](#footnote-ref-42)
43. *Id.*, p. 1551. See also: *LSJPA – 1530*, 2015 QCCA 1315, para. 28; *Éthier c. R*., 2022 QCCS 535, para. 72. [↑](#footnote-ref-43)
44. The initial version of s. 636*HSC*, enacted in 1986, stated:

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| **636.** Every peace officer who, in the performance of the duties conferred on him under this Code, has reasonable cause to believe that an offence against this Code has been committed and that it is required by the circumstances, may, without the owner’s permission, take possession of a road vehicle, drive it and impound it at the expense of the owner. | **636**. Tout agent de la paix qui, dans l’exécution des fonctions qui lui sont conférées en vertu du présent code, a un motif raisonnable de croire qu’une infraction à ce code a été commise et que les circonstances l’exigent, peut sans la permission du propriétaire, prendre possession d’un véhicule routier, le conduire et le remiser aux frais du propriétaire. |

The subsequent version of s. 636, enacted in 1987, stated:

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| **636.**  Every peace officer who, in the performance of the duties conferred on him under this Code, has reasonable cause to believe that an offence against this Code has been committed and that it is required by the circumstances, may(1)  stop a road vehicle;(2)  without the owner’s permission, take possession of a road vehicle, drive it and impound it at the expense of the owner. | **636**. Tout agent de la paix qui, dans l’exercice des fonctions qui lui sont conférées en vertu du présent code, a un motif raisonnable de croire qu’une infraction à ce code a été commise et que les circonstances l’exigent, peut:1°  faire immobiliser un véhicule routier;2°  sans la permission du propriétaire, prendre possession d’un véhicule routier, le conduire et le remiser aux frais du propriétaire. |

 [↑](#footnote-ref-44)
45. *Act to amend the Highway Safety Code and other legislative provisions*, S.Q. 1990, c. 83, s. 236. This provision came into force on January 1, 1991: *Id.*, s. 263. [↑](#footnote-ref-45)
46. According to the 1990 amended version of s. 636*HSC*, a peace officer had the power to stop a vehicle “in the performance of his duties under this Code”. The most recent version of s. 636 states that a peace officer has this power in the performance of his duties under the*HSC*, agreements entered into under s. 519.65 and the *Act respecting owners, operators and drivers of heavy vehicles*, CQLR, c. P‑30.3. [↑](#footnote-ref-46)
47. *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*]. [↑](#footnote-ref-47)
48. Trial judgment, para. 607. [↑](#footnote-ref-48)
49. *Id*., para*.* 705. [↑](#footnote-ref-49)
50. *Id.*,para*.* 734. [↑](#footnote-ref-50)
51. *Id.*,para*.* 738. [↑](#footnote-ref-51)
52. *Id.*, para*.* 828. [↑](#footnote-ref-52)
53. *Id.*,para*.* 831. [↑](#footnote-ref-53)
54. *Id.*, para*.* 847. [↑](#footnote-ref-54)
55. *Id.*, para*.* 857. [↑](#footnote-ref-55)
56. The AGQ relies on the following judgments: *R. v*. *McColman*, 2023 SCC 8, para. 30; *R. v*. *Nolet*, 2010 SCC 24, paras. 3, 22, and 25; *R. v*. *Mellenthin*, [1992] 3 S.C.R. 615, pp. 628–629. [↑](#footnote-ref-56)
57. *Canada (Attorney General) v. Bedford*, 2013 SCC 72. [↑](#footnote-ref-57)
58. *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*]. [↑](#footnote-ref-58)
59. *R. v. Comeau*, 2018 SCC 15 [*Comeau*]. [↑](#footnote-ref-59)
60. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 20. [↑](#footnote-ref-60)
61. *R. v. Ferguson*, 2008 SCC 6, para. 59. [↑](#footnote-ref-61)
62. *R. v. Khawaja*, 2012 SCC 69, para. 83. [↑](#footnote-ref-62)
63. *R. v. Ferguson*, 2008 SCC 6, para. 61; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6thed., Cowansville, Yvon Blais, 2014, p. 1053, No.XII-4.42. [↑](#footnote-ref-63)
64. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 22. See also: *R. v. Adams*, [1996] 3 S.C.R. 101, para. 53; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, pp. 1077–1078. [↑](#footnote-ref-64)
65. See for example: *Canada (Procureur général) c. Way*, 2015 QCCA 1576, paras. 61 and 72–73, appeal to SCC discontinued, September 7, 2016, No. 36746. [↑](#footnote-ref-65)
66. See for example: *R. v. Swain*, [1991] 1 S.C.R. 933, pp. 1010–1013 (reasons of Lamer, C.J.). [↑](#footnote-ref-66)
67. *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 [*Hunter*], p. 169. [↑](#footnote-ref-67)
68. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 30. See for example: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*], pp. 60–62 and 64–73 (reasons of Dickson, C.J.) and pp. 920ff. (reasons of Beetz, J.). [↑](#footnote-ref-68)
69. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 30. [↑](#footnote-ref-69)
70. *R. v. Smith*, [1987] 1 S.C.R. 1045, p. 1078 (reasons of the majority by Lamer, J., as he then was). [↑](#footnote-ref-70)
71. *R. v. Appulonappa*, 2015 SCC 59, para. 74; *R. v. Nur*, 2015 SCC 15 [*Nur*], paras. 87ff.; *R. v. Anderson*, 2014 SCC 41, para. 17; *R. v. Bain*, [1992] 1 S.C.R. 91 [*Bain*], pp. 103–104. [↑](#footnote-ref-71)
72. *R. v. Morgentaler*, [1988] 1 S.C.R. 30. [↑](#footnote-ref-72)
73. *R. v. Nur*, 2015 SCC 15. [↑](#footnote-ref-73)
74. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, p. 65. [↑](#footnote-ref-74)
75. *Ibid.* [↑](#footnote-ref-75)
76. *Id.*, p. 66. [↑](#footnote-ref-76)
77. *Id.*, pp. 68–69. [↑](#footnote-ref-77)
78. *Id.*, pp. 69–70. [↑](#footnote-ref-78)
79. R.S.C. 1970, c. C‑23. [↑](#footnote-ref-79)
80. *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, pp. 165–168. [↑](#footnote-ref-80)
81. *Id.*, p. 169. See also: *R. v. Canfield,* 2020 ABCA 383, leave to appeal to SCC refused, March 11, 2021, No. 39376. [↑](#footnote-ref-81)
82. *R. v. Bain*, [1992] 1 S.C.R. 91 [*Bain*], pp. 103. [↑](#footnote-ref-82)
83. *Id.*, p. 104 (reasons of Cory, J.); see also: p. 156 (reasons of Stevenson, J.). [↑](#footnote-ref-83)
84. *R. v. Nur*, 2015 SCC 15, para. 91. [↑](#footnote-ref-84)
85. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, pp. 1276. [↑](#footnote-ref-85)
86. *R. c. Soucisse*, [1994] R.J.Q. 1546 (C.A.), pp. 1550–1551. [↑](#footnote-ref-86)
87. See in particular: *R. v. McColman*, 2023 SCC 8, para. 30; *R. v. Nolet*, 2010 SCC 24, para. 22; *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, para. 41; *R. v. Mellenthin*, [1992] 3 S.C.R. 615, pp. 624ff.; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1287; *R. c. Soucisse*, [1994] R.J.Q. 1546 (C.A.), p. 1551. [↑](#footnote-ref-87)
88. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39. The citation is taken from: Commission des droits de la personne et des droits de la jeunesse, *Racial profiling: Context and Definition* (2005), p. 13 (Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, appendix MM‑53). The Supreme Court used this definition in *R. v. Le*, 2019 SCC 34 [*Le*], para. 77. This definition was also used by the judge in this case: Trial judgment, paras. 38–41. [↑](#footnote-ref-88)
89. *Pierre-Louis c. Québec (Ville de)*, 2014 QCCA 1554, para. 59, leave to appeal to SCC refused, June 16, 2015, No. 36055. See also: *R. v. Dudhi*, 2019 ONCA 665, para. 75; *Peart v. Peel Regional Police Services* (2006), 43 C.R. (6th) 175 (Ont. C.A.), paras. 93 and 95, leave to appeal to SCC refused, March 29, 2007, No. 31798; *R. v. Brown* (2003), 173 C.C.C. (3d) 23 (Ont. C.A.), para. 8. [↑](#footnote-ref-89)
90. Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, p. 12. [↑](#footnote-ref-90)
91. *R. c. Dorfeuille*, 2020 QCCS 1499 [*Dorfeuille*], para. 46. See also: *R. c. Ngarukiye*, 2023 QCCS 4677, para. 136; *R. v. Sitladeen*, 2021 ONCA 303, para. 52; *R. v. Dudhi*, 2019 ONCA 665, paras. 62, 64 and 85; *Peart v. Peel Regional Police Services* (2006), 43 C.R. (6th) 175 (Ont. C.A.), paras. 91 and 95, leave to appeal to SCC refused, March 29, 2007, No. 31798; Exhibit P-32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, p. 10. [↑](#footnote-ref-91)
92. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, appendix MM-48, David M. Tanovich, *The Colour of Justice: Policing Race in Canada*, Toronto, Irwin Law, 2006, p. 144. See also: *R. v. Sitladeen*, 2021 ONCA 303, para. 54. [↑](#footnote-ref-92)
93. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 16 and 29. [↑](#footnote-ref-93)
94. Below, paras. [152] to [216]. [↑](#footnote-ref-94)
95. A street check corresponds to any intervention where a police officer seeks [translation] “information on one or more individuals […] for an operation […], without the authority to compel the citizen to answer” (Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 2). The officer’s request for information does not, in principle, involve an obligation for the citizen. As a general rule, a street check is not a form of detention contemplated by s. 9 of the *Charter* because, by definition, the person checked is free to leave. This is not true of a traffic stop, which involves a form of coercion (see in this regard: below,paras. [103] and [104]). [↑](#footnote-ref-95)
96. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 16. [↑](#footnote-ref-96)
97. *Id.*, p. 18. See also: Steven Penney, “Driving While Innocent: Curbing the Excesses of “Traffic Stop” Power”, (2019) 24 Can. Crim. L. Rev. 339, pp. 363–367. [↑](#footnote-ref-97)
98. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 23. [↑](#footnote-ref-98)
99. The Ontario Human Rights Commission differentiates racial profiling and criminal profiling: “[...] racial profiling differs from criminal profiling which isn’t based on stereotypes but rather relies on actual behaviour or on information about suspected activity by someone who meets the description of a specific individual. In other words, criminal profiling is not the same as racial profiling since the former is based on objective evidence of wrongful behaviour while racial profiling is based on stereotypical assumptions”: Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling – Inquiry Report*, 2003, p. 6. [↑](#footnote-ref-99)
100. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 27. [↑](#footnote-ref-100)
101. *Id.*, p. 29. [↑](#footnote-ref-101)
102. Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, p. 17. [↑](#footnote-ref-102)
103. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1287 (majority reasons of Cory, J.). [↑](#footnote-ref-103)
104. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 [*Little Sisters*]. [↑](#footnote-ref-104)
105. *Id.*, para. 125. [↑](#footnote-ref-105)
106. *Cf*. *R. v. Hufsky*, [1988] 1 S.C.R. 621, p. 633, cited in: *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1277. [↑](#footnote-ref-106)
107. *R. v. Kirkpatrick*, 2022 SCC 33, para. 178; *R. v. Sullivan*, 2022 SCC 19, para. 64. [↑](#footnote-ref-107)
108. *R. v. Henry*, 2005 SCC 76, paras. 54–59; *R. c. Lapointe*, 2021 QCCA 360, para. 33, leave to appeal to SCC refused, March 24, 2022, No. 39655. [↑](#footnote-ref-108)
109. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1271. [↑](#footnote-ref-109)
110. *Charter*, s. 32(2). [↑](#footnote-ref-110)
111. Trial judgment, para. 146. [↑](#footnote-ref-111)
112. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1278. Cory, J. on behalf of the majority, wrote: “Since it has been determined that routine check random stops violate s. 9 of the *Charter*, it is unnecessary to decide whether these random stops infringe s. 7.” [↑](#footnote-ref-112)
113. Trial judgment, para. 141. [↑](#footnote-ref-113)
114. *Id.*,paras. 87–123. *Stare decisis* applies here, not only in light of the *ratio decidendi* of *Ladouceur*, but also that formulated by the Supreme Court in a related appeal, *R. v. Wilson,* [1990] 1 S.C.R. 1291, and by this Court in *R. c.* *Soucisse,* [1994] R.J.Q. 1546 (C.A.). [↑](#footnote-ref-114)
115. *R. v. Comeau*, 2018 SCC 15, para. 29; *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 44; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 42. [↑](#footnote-ref-115)
116. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 44. [↑](#footnote-ref-116)
117. *R. v. Comeau*, 2018 SCC 15, para. 26. [↑](#footnote-ref-117)
118. *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254, leaves to appeal and to cross-appeal to SCC, No. 41231. The quotation is from *R. v. Comeau*, 2018 SCC 15, para. 31. [↑](#footnote-ref-118)
119. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 46. [↑](#footnote-ref-119)
120. *R. v. Comeau*, 2018 SCC 15, para. 34. [↑](#footnote-ref-120)
121. Trial judgment, para. 144. [↑](#footnote-ref-121)
122. *Id.*, para. 145. [↑](#footnote-ref-122)
123. *Id.*, para. 148. [↑](#footnote-ref-123)
124. *Id.*, para. 160 [italics in the original] (see also paras. 161–370). [↑](#footnote-ref-124)
125. *Id.*, para. 166 [boldface omitted]. [↑](#footnote-ref-125)
126. *Id.*, para. 370. [↑](#footnote-ref-126)
127. *Id.*, paras*.* 379–390. [↑](#footnote-ref-127)
128. *R. v. Le*, 2019 SCC 34, para. 97. [↑](#footnote-ref-128)
129. *R. c. Dorfeuille*, 2020 QCCS 1499. [↑](#footnote-ref-129)
130. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, appendix MM-54, Patricia Warren *et al*., “Driving While Black: Bias Processes and Racial Disparity in Police Stops”, (2006) 44:3 Criminology709, schedule MM-38, Richard J. Lundman & Robert L. Kaufman, “Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions”, (2003) 41:1 Criminology195, and appendix MM-41, Albert J. Meehan & Michael C. Ponder, “Race and Place: The Ecology of Racial Profiling African American Motorists”, (2002) 19:3 Justice Quarterly 399. [↑](#footnote-ref-130)
131. Exhibit P‑24, Service de Police de la Ville de Montréal (Victor Armony, Mariam Hassaoui & Massimiliano Mulone), *Les interpellations policières à la lumière des identités racisées des personnes interpellées : Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d’indicateurs de suivi en matière de profilage racial*, August 2019; Exhibit P‑27, Nova Scotia Human Rights Commission (Dr. Scot Wortley), *Halifax, Nova Scotia: Street Check Report (and appendices)*, March 2019; MM‑39, Vancouver Police Department (Drazen Manojlovic), *Understanding Street Checks: An Examination of a Proactive Policing Strategy*, September 2018; Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, appendix MES-080, Curt Taylor Griffiths, Ruth Montgomery & Joshua J. Murphy, *City of Edmonton Street Checks Policy and Practice Review*, June 2018. [↑](#footnote-ref-131)
132. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, appendix MM-19, Lorne Foster, Lesley Jacobs & Bobby Siu, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts*, October 2016. [↑](#footnote-ref-132)
133. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 18. [↑](#footnote-ref-133)
134. Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, pp. 49-54. [↑](#footnote-ref-134)
135. To this effect, see the enlightening expert report of Marie-Ève Sylvestre, who discusses in detail the notion of racial profiling, its appearance, its definition, and its recognition: *Id.*, pp. 8–16. [↑](#footnote-ref-135)
136. The judge noted that racial profiling is now well defined and distinguished from racism: Trial judgment, paras. 391 and 573. [↑](#footnote-ref-136)
137. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1286. [↑](#footnote-ref-137)
138. Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, pp. 49–54. See also: *R. v. Le*, 2019 SCC 34, para. 95. [↑](#footnote-ref-138)
139. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1287. [↑](#footnote-ref-139)
140. The expert report of Massimiliano Mulone describes the confusion that may arise in law enforcement between racial profiling and criminal profiling: Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 20. [↑](#footnote-ref-140)
141. *R. v. Comeau*, 2018 SCC 15, para. 31. [↑](#footnote-ref-141)
142. Trial judgment, para. 148. [↑](#footnote-ref-142)
143. *Id.*, para. 573. [↑](#footnote-ref-143)
144. This is also what was decided precisely in relation to s. 636*HSC* in *R. c. Soucisse*, [1994] R.J.Q. 1546 (C.A.), pp. 1550–1551. [↑](#footnote-ref-144)
145. *R. v. Grant*, 2009 SCC 32; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1287; *R. v. Hufsky*,[1988] 1 S.C.R. 621; *R. v. Thomsen,* [1988] 1 S.C.R. 640; *R. v. Therens*, [1985] 1 S.C.R. 613; *Trask v. The Queen,* [1985] 1 S.C.R. 655; *Rahn v. The Queen,* [1985] 1 S.C.R. 659; *Hogan v. The Queen*, [1975] 2 S.C.R. 574, p. 587. [↑](#footnote-ref-145)
146. Trial judgment, para. 604. [↑](#footnote-ref-146)
147. *Id.*, para. 605. [↑](#footnote-ref-147)
148. *R. v. Hufsky*, [1988] 1 S.C.R. 621, p. 633, cited in: *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1277. This principle has been reiterated several times. See for example: *R. v. Morales*, [1992] 3 S.C.R. 711, p. 740; *R. v. Pearson*, [1992] 3 S.C.R. 665, pp. 699-700; *LSJPA – 1530*, 2015 QCCA 1315, para. 19; *R. v. Donnelly*, 2016 ONCA 988, para. 70. [↑](#footnote-ref-148)
149. *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]. [↑](#footnote-ref-149)
150. *R. v. Ndhlovu*, 2022 SCC 38 [*Ndhlovu*]. [↑](#footnote-ref-150)
151. Trial judgment, para. 692. [↑](#footnote-ref-151)
152. *Id.*, para. 693. [↑](#footnote-ref-152)
153. *Frank v. Canada (Attorney General)*, 2019 SCC 1, para. 46. [↑](#footnote-ref-153)
154. *La Presse inc. v. Quebec*, 2023 SCC 22, para. 50. [↑](#footnote-ref-154)
155. *Act to* *amend the Highway Safety Code and other legislative provisions*, S.Q. 1990, c. 83, s. 236. [↑](#footnote-ref-155)
156. National Assembly, Standing Committee on Planning and Infrastructures, *Journal des débats,* 34thLeg. 1st Sess., No.65, December 18, 1990, pp. 3730–3731. [↑](#footnote-ref-156)
157. Exhibit PGQ-16, Portrait alcool au volant SAAQ, April 26, 2022, p. 2. [↑](#footnote-ref-157)
158. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras. 45–47; *R. v. Hufsky*, [1988] 1 S.C.R. 621, p. 636. [↑](#footnote-ref-158)
159. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, para. 80; *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, para. 55. [↑](#footnote-ref-159)
160. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras. 45–47. [↑](#footnote-ref-160)
161. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1280. [↑](#footnote-ref-161)
162. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 126. [↑](#footnote-ref-162)
163. *R. v. Ndhlovu*, 2022 SCC 38, para. 121 [italics in the original]. [↑](#footnote-ref-163)
164. *Lavoie v. Canada*, 2002 SCC 23, para. 59. [↑](#footnote-ref-164)
165. *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. [↑](#footnote-ref-165)
166. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 48. See also: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, para. 70. [↑](#footnote-ref-166)
167. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, pp. 1283–1284. [↑](#footnote-ref-167)
168. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69, para. 228. [↑](#footnote-ref-168)
169. Trial judgment, para. 690. [↑](#footnote-ref-169)
170. *Carter v. Canada (Attorney General),* 2015 SCC 5, para. 100. See also: *Procureur général du Québec c. Gallant*, 2021 QCCA 1701, para. 211. [↑](#footnote-ref-170)
171. See for example: Exhibit PGQ-27, Expert report of Douglas Beirness, Expert Report, May 19, 2022. [↑](#footnote-ref-171)
172. *R. v. Brown*, 2022 SCC 18. [↑](#footnote-ref-172)
173. *Id.*, para. 76. [↑](#footnote-ref-173)
174. *Id.*, para. 128, citing: *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 153. [↑](#footnote-ref-174)
175. *R. v. Brown*, 2022 SCC 18. [↑](#footnote-ref-175)
176. Exhibit P-4, Expert report of Marie-Ève Sylvestre, February 7, 2022, p. 39. [↑](#footnote-ref-176)
177. Exhibit PGQ-27, Expert report of Douglas Beirness, May 19, 2022. As for expert Mulone, he believes that police practices based on prediction are ineffective because their targeted nature delegitimizes law enforcement within the targeted communities and because groups that are not watched within the population more easily escape detection: Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 30–32. [↑](#footnote-ref-177)
178. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 55. See also: *R. v. K.R.J.,* 2016 SCC 31, para. 70. [↑](#footnote-ref-178)
179. *Carter v. Canada (Attorney General),* 2015 SCC 5, para. 102. [↑](#footnote-ref-179)
180. Errol P. Mendes, “Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?”, in Errol Mendes & Stéphane Beaulac (eds.), *Canadian Charter of Rights and Freedoms*, 5th ed., Markham (Ont.), LexisNexis, 2013, 293, p. 318. The Supreme Court acknowledged this in *R. v. K.R.J.,* 2016 SCC 31, para. 79. [↑](#footnote-ref-180)
181. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para. 149; *Canada (Attorney General) v. JTI-Macdonald Corp.,* 2007 SCC 30, para. 43. [↑](#footnote-ref-181)
182. *R. v. Ndhlovu*, 2022 SCC 38, para. 118; *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 136–137. [↑](#footnote-ref-182)
183. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1284. [↑](#footnote-ref-183)
184. *Ibid.* [↑](#footnote-ref-184)
185. *Id.*, pp. 1284–1285. [↑](#footnote-ref-185)
186. *Id.*, p. 1285. [↑](#footnote-ref-186)
187. *Ibid.* [↑](#footnote-ref-187)
188. Above, paras. [78] to [102]. [↑](#footnote-ref-188)
189. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1286. [↑](#footnote-ref-189)
190. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 55. [↑](#footnote-ref-190)
191. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1266. [↑](#footnote-ref-191)
192. *Ibid.* [↑](#footnote-ref-192)
193. Hugues Parent, *Traité de droit criminel,* t. IV: “Les garanties juridiques”, 2d ed.,Montreal, Wilson & Lafleur, 2021, pp. 524ff. [↑](#footnote-ref-193)
194. *R. v. Aucoin*, 2012 SCC 66, para. 36. See also: *R. v. Clayton*, 2007 SCC 32, paras. 32, 33 and 40–41. [↑](#footnote-ref-194)
195. Trial judgment, paras. 684, 702, and 772. [↑](#footnote-ref-195)
196. *R. v. Ndhlovu*, 2022 SCC 38, para. 130, referring to: *R. v. K.R.J*., 2016 SCC 31, para. 77, citing *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, para. 125. [↑](#footnote-ref-196)
197. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 122. [↑](#footnote-ref-197)
198. Trial judgment, paras. 681–697 and 772. [↑](#footnote-ref-198)
199. *Id.*, para. 690 [italics in the original]. [↑](#footnote-ref-199)
200. See in particular: *Id.*, paras. 438–440, 445–446, 455–460, and 737. [↑](#footnote-ref-200)
201. *Id.*, para. 839; see also: Exhibit P-1 Expert report of Massimiliano Mulone, January 31, 2022, p. 7. [↑](#footnote-ref-201)
202. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1287. [↑](#footnote-ref-202)
203. The Court will return to the balancing test in greater detail in its analysis of the justification of the infringement of the right to equality guaranteed by s. 15(1) of the *Charter* (below, paras. [207] to [216]). [↑](#footnote-ref-203)
204. Trial judgment, para. 704. [↑](#footnote-ref-204)
205. *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, pp. 502–503. [↑](#footnote-ref-205)
206. *Id.*, p. 502. [↑](#footnote-ref-206)
207. *Ibid.* [↑](#footnote-ref-207)
208. This is also the Supreme Court’s conclusion in *R. v. Swain*, [1991] 1 S.C.R. 933, p. 1012. See also, in relation to an infringement of s. 8 of the *Charter*: *R. v. Rodgers*, 2006 SCC 15, paras. 23–24. [↑](#footnote-ref-208)
209. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1278. [↑](#footnote-ref-209)
210. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 40; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, para. 25; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 17. [↑](#footnote-ref-210)
211. With respect to formal equality, see in particular: *Ontario (Attorney General) v. G*., 2020 SCC 38, para. 44; *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 2; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 166. [↑](#footnote-ref-211)
212. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 17. [↑](#footnote-ref-212)
213. *Ibid.* See also: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 164–168; *Procureur général du Québec c. Centre de lutte contre l’oppression des genres*, 2024 QCCA 348, para. 111 (majority reasons of Marcotte and Hogue, JJ.A.) and para. 219 (concurring reasons of Hamilton, J.A.). [↑](#footnote-ref-213)
214. *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 39. [↑](#footnote-ref-214)
215. *Ibid.* [↑](#footnote-ref-215)
216. *Id.*, para. 2. [↑](#footnote-ref-216)
217. See in particular: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, paras. 43–45; *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 64; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 61; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 82–83; *Ontario Human Rights Commission v. Simpson‑Sears Ltd.*, [1985] 2 S.C.R. 536, p. 551. [↑](#footnote-ref-217)
218. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 30. See also: *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 64. [↑](#footnote-ref-218)
219. *R. v. Sharma*, 2022 SCC 39 [*Sharma*], para. 29. See also: *Procureur general du Québec c. Kanyinda*, 2024 QCCA 144, para. 83, leave to appeal to SCC granted, October 3, 2024, No. 41210. [↑](#footnote-ref-219)
220. *Cf*. Trial judgment, paras. 777–812. [↑](#footnote-ref-220)
221. *R. v. Sharma*, 2022 SCC 39, para. 33. [↑](#footnote-ref-221)
222. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 48 (see also para. 49). [↑](#footnote-ref-222)
223. *R. v. Sharma*, 2022 SCC 39, para. 29. [↑](#footnote-ref-223)
224. *Id.*, para. 30. [↑](#footnote-ref-224)
225. *Id.*, paras. 31 and 40; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 52; *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, para. 84, leave to appeal to SCC granted, October 3, 2024, No. 41210. [↑](#footnote-ref-225)
226. *R. v. Sharma*, 2022 SCC 39, para. 41. [↑](#footnote-ref-226)
227. *Ibid.*; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 94; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, para. 27; *Withler v. Canada (Attorney General)*, 2011 SCC 12, paras. 55–64; *Procureure générale du Québec c. Association des juristes de l’État*, 2017 QCCA 103, para. 35. [↑](#footnote-ref-227)
228. *R. v. Sharma*, 2022 SCC 39, para. 31. [↑](#footnote-ref-228)
229. *Id.*, para. 41. [↑](#footnote-ref-229)
230. *Id.*, para. 44. [↑](#footnote-ref-230)
231. *Id.*, para. 42 [italics in the original]. [↑](#footnote-ref-231)
232. *Id.*, para. 49; *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 43. Evidence on the group’s situation may come from the claimant (or other ordinary witnesses), from expert witnesses, or through judicial notice: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 57. [↑](#footnote-ref-232)
233. *R. v. Sharma*, 2022 SCC 39, para. 49. The outcomes of the law may be demonstrated using statistical evidence, “especially if the pool of people adversely affected by a criterion or standard includes *both*members of a protected group *and* members of more advantaged groups”: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 58 [italics in the original]. [↑](#footnote-ref-233)
234. *R. v. Sharma*, 2022 SCC 39, para. 49. But both kinds of evidence are not always required: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 61. [↑](#footnote-ref-234)
235. *R. v. Sharma*, 2022 SCC 39, para. 50. [↑](#footnote-ref-235)
236. *Ibid.* [↑](#footnote-ref-236)
237. *Id.*, para. 51. [↑](#footnote-ref-237)
238. *Id.*, para. 52. [↑](#footnote-ref-238)
239. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 76. [↑](#footnote-ref-239)
240. *Quebec (Attorney General) v.* *Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, para. 28 [italics in the original], citing *Quebec (Attorney General) v. A.*, 2013 SCC 5, paras. 327 and 330. Similarly, it is not necessary to prove a discriminatory purpose or intention for s. 15(1) to be infringed: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 62. [↑](#footnote-ref-240)
241. *Quebec (Attorney General) v. A.*, 2013 SCC 5. [↑](#footnote-ref-241)
242. *R. v. Sharma*, 2022 SCC 39, para. 52. [↑](#footnote-ref-242)
243. *Ibid.*; *Ontario (Attorney General) v. G*., 2020 SCC 38, para. 40; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 76; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, para. 22. [↑](#footnote-ref-243)
244. *Withler v. Canada (Attorney General)*, 2011 SCC 12. See also: *R. v. Sharma*, 2022 SCC 39, para. 52. [↑](#footnote-ref-244)
245. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 71. [↑](#footnote-ref-245)
246. *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, para. 32, citing: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 84 [underlining in the original]. [↑](#footnote-ref-246)
247. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 76; *Quebec (Attorney General) v. A.*, 2013 SCC 5, para. 331 (Reasons dissenting in result of Abella, J.); *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 66. [↑](#footnote-ref-247)
248. *R.O. c. Ministre de l’Emploi et de la Solidarité sociale*, 2021 QCCA 1185, para. 43, leave to appeal to SCC refused, March 31, 2022, No. 39880. [↑](#footnote-ref-248)
249. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 78. [↑](#footnote-ref-249)
250. *Id.*, para. 80. [↑](#footnote-ref-250)
251. *R. v. Sharma*, 2022 SCC 39, para. 53. See also: *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, para. 202. [↑](#footnote-ref-251)
252. *R. v. Sharma*, 2022 SCC 39, para. 55(b). [↑](#footnote-ref-252)
253. *Id.*, para. 55(c) [italics omitted]. *Cf*. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 75. [↑](#footnote-ref-253)
254. *R. v. Sharma*, 2022 SCC 39, para. 56. [↑](#footnote-ref-254)
255. *Id.*, para. 59. [↑](#footnote-ref-255)
256. Trial judgment, para. 815. [↑](#footnote-ref-256)
257. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, p. 16. [↑](#footnote-ref-257)
258. *Id.*, p. 5. See also: Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 9. [↑](#footnote-ref-258)
259. See: Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, appendix MM‑16, Ontario Human Rights Commission, *Under suspicion: Research and consultation report on racial profiling in Toronto,* April 2017, MM‑19, Lorne Foster, Lesley Jacobs & Bobby Siu, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts*, October 2016, MM‑25, Curt Taylor Griffiths, Ruth Montgomery & Joshua J. Murphy, *City of Edmonton Street Checks Policy and Practice Review*, June 2018, MM‑39, Vancouver Police Department (Drazen Manojlovic), *Understanding Street Checks: An examination of a proactive policing strategy*, September 2018, MM‑56, Scot Wortley, *Racial Disparity in Arrests and Charges: An analysis of arrest and charge data from the Toronto Police Service*, July 2020 and MM-57, Scot Wortley, *Use of force by the Toronto Police Service*, July 2020; Victor Armony, Mariam Hassaoui & Massimiliano Mulone, *Portrait de recherche sur les interpellations dans le dossier profilage : Rapport présenté au Service de police de la Ville de Repentigny (SPVR)*, June 2021 (online); Exhibit P‑23, Ottawa Police Services Board and Ottawa Police Service (Dr. Lorne Foster and Dr. Les Jacobs), *Traffic Stop Race Data Collection Project II – Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa*, November 2019; Exhibit P‑24, Service de Police de la Ville de Montréal (Victor Armony, Mariam Hassaoui & Massimiliano Mulone), *Les interpellations policières à la lumière des identités racisées des personnes interpellées : Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d’indicateurs de suivi en matière de profilage racial*, August 2019; Exhibit P‑27, Nova Scotia Human Rights Commission (Dr. Scot Wortley), *Halifax, Nova Scotia: Street Check Report (and appendices)*, March 2019; Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, November 2018; Exhibit P-31, Ontario Human Rights Commission, *Under suspicion – Research and consultation report on racial profiling in Ontario*, April 2017. [↑](#footnote-ref-259)
260. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, p. 7; Exhibit P‑23, Ottawa Police Services Board and Ottawa Police Service (Dr. Lorne Foster and Dr. Les Jacobs), *Traffic Stop Race Data Collection Project II – Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa*, November 2019, p. 40. [↑](#footnote-ref-260)
261. Exhibit P‑23, Ottawa Police Services Board and Ottawa Police Service (Dr. Lorne Foster and Dr. Les Jacobs), *Traffic Stop Race Data Collection Project II – Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa*, November 2019, p. 41. [↑](#footnote-ref-261)
262. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 12–13. [↑](#footnote-ref-262)
263. *Id.*, pp. 13–14. [↑](#footnote-ref-263)
264. Testimony of Massimiliano Mulone, June 20, 2022. [↑](#footnote-ref-264)
265. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 15–16. [↑](#footnote-ref-265)
266. *Id.*, p. 18. [↑](#footnote-ref-266)
267. *Ibid.* [↑](#footnote-ref-267)
268. Testimony of Massimiliano Mulone, June 20, 2022; Exhibit P‑24, Service de Police de la Ville de Montréal (Victor Armony, Mariam Hassaoui & Massimiliano Mulone), *Les interpellations policières à la lumière des identités racisées des personnes interpellées : Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d’indicateurs de suivi en matière de profilage racial*, August 2019, p. 20. See also: Exhibit P‑4, Expert report of Marie-Ève Sylvestre, February 7, 2022, p. 13. [↑](#footnote-ref-268)
269. Exhibit P‑4, Expert report of Marie-Ève Sylvestre, February 7, 2022, pp. 43ff. [↑](#footnote-ref-269)
270. *Id.*, p. 64. [↑](#footnote-ref-270)
271. Trial judgment, paras. 168–370. [↑](#footnote-ref-271)
272. Certain recent decisions of the lower courts also illustrate this situation. See for example: *R. c. Sale Nkouendji*, 2024 QCCM 26 and *Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) c. Ville de Longueuil*, 2020 QCTDP 21. [↑](#footnote-ref-272)
273. Trial judgment, para. 370. [↑](#footnote-ref-273)
274. See in particular: *Eurobank Ergasias S.A. v. Bombardier inc*., 2024 SCC 11, para. 91; *Salomon v. Matte‑Thompson*, 2019 SCC 14, paras. 32–33; *Housen v. Nikolaisen*, 2002 SCC 33, paras. 10–37; *J.G. c. Nadeau*, 2016 QCCA 167, paras. 76–77, leave to appeal to SCC refused, March 2, 2017, No. 36924. [↑](#footnote-ref-274)
275. See in particular: Exhibit P‑4, Expert report of Marie-Ève Sylvestre, February 7, 2022, appendix MES‑055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, pp. 9–10. [↑](#footnote-ref-275)
276. Exhibit P‑19, Ontario Human Rights Commission, *A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, August 2020, p. 6. [↑](#footnote-ref-276)
277. *Id.*, p. 7. [↑](#footnote-ref-277)
278. Exhibit P-32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, p. 26. [↑](#footnote-ref-278)
279. *R. v. Le,* 2019 SCC 34, para. 90, citing: Robin T. Fitzgerald & Peter J. Carrington, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth”, (2011) 53:4 Can. J. Crimin. & Crim. Jus. 449, p. 450. [↑](#footnote-ref-279)
280. Trial judgment, para. 821. [↑](#footnote-ref-280)
281. Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018, citing Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Toronto, Queen’s Printer for Ontario, 2017, p. 26. See also: Exhibit IN‑3, Expert report of Robert S. Wright, April 1, 2022, pp. 2–3. [↑](#footnote-ref-281)
282. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 31–32; Exhibit IN‑3, Expert report of Robert S. Wright, April 1, 2022, p. 13. [↑](#footnote-ref-282)
283. Exhibit P‑4, Expert report of Marie-Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, pp. 17ff. [↑](#footnote-ref-283)
284. Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-284)
285. Exhibit P-31, Ontario Human Rights Commission, *Under suspicion – Research and consultation report on racial profiling in Ontario*, April 2017, p. 84. [↑](#footnote-ref-285)
286. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, pp. 33 and 49–50; Exhibit P‑29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, November 2018. [↑](#footnote-ref-286)
287. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 33; Exhibit IN‑3, Expert report of Robert S. Wright, April 1, 2022, p. 6; Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-287)
288. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, pp. 32 and 48, and appendix MES‑055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, p. 47. [↑](#footnote-ref-288)
289. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 32. [↑](#footnote-ref-289)
290. *Id.*, pp. 55ff.; Exhibit P-31, Ontario Human Rights Commission, *Under suspicion – Research and consultation report on racial profiling in Ontario*, April 2017, pp. 84-85. [↑](#footnote-ref-290)
291. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, pp. 49 and appendix MES‑055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, pp. 22ff.; Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, p. 11. [↑](#footnote-ref-291)
292. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 32. [↑](#footnote-ref-292)
293. *Id.*, p. 53; Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-293)
294. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 37; Exhibit P‑27, Nova Scotia Human Rights Commission (Dr. Scot Wortley), *Halifax, Nova Scotia: Street Checks Report (and appendices)*, March 2019, p. 16. [↑](#footnote-ref-294)
295. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, pp. 32 and 37–38; Exhibit IN‑3, Expert report of Robert S. Wright, April 1, 2022, p. 5; Exhibit P‑28, The Honourable Michael H. Tulloch, *Report of the Independent Street Checks Review*, 2018, para. 68. [↑](#footnote-ref-295)
296. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, p. 26. [↑](#footnote-ref-296)
297. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 38. See also: Exhibit IN‑3, Expert report of Robert S. Wright, April 1, 2022, p. 14; Exhibit P-32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, p. 32. [↑](#footnote-ref-297)
298. Exhibit P-32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, pp. 15 and 24. [↑](#footnote-ref-298)
299. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 50. [↑](#footnote-ref-299)
300. *Id.*, p. 53. [↑](#footnote-ref-300)
301. *Id., pp. 3*2, 49, and 51. [↑](#footnote-ref-301)
302. *Id.*, pp. 49 and 53ff.; Exhibit P‑32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, pp. 15 and 24. See also: Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, pp. 30ff. [↑](#footnote-ref-302)
303. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, p. 32. [↑](#footnote-ref-303)
304. Exhibit P-31, Ontario Human Rights Commission, *Under suspicion – Research and consultation report on racial profiling in Ontario*, April 2017, p. 83; Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* *– Inquiry Report*, 2003, pp. 35–37. [↑](#footnote-ref-304)
305. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 33. [↑](#footnote-ref-305)
306. Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-306)
307. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 49. [↑](#footnote-ref-307)
308. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 8–9; Exhibit P‑29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-308)
309. *R. v. Le*, 2019 SCC 34, para. 95. [↑](#footnote-ref-309)
310. *Id.* The issue in that judgment was carding, but the Court’s remarks are relevant regarding excessive traffic stops of Black persons. See also: *R. v. Morris*, 2021 ONCA 680, para. 1; *R. v. Dudhi*, 2019 ONCA 665, para. 65, citing a passage from *Peart v. Peel Regional Police Services* (2006), 43 C.R. (6th) 175 (Ont. C.A.), leave to appeal to SCC refused, March 29, 2007, No. 31798. [↑](#footnote-ref-310)
311. Exhibit P‑1, Expert report of Massimiliano Mulone, January 31, 2022, pp. 26–27. See also: Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, p. 14. [↑](#footnote-ref-311)
312. Exhibit P-32, Commission des droits de la personne et des droits de la jeunesse (Québec), *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences*, March 2011, p. 25. [↑](#footnote-ref-312)
313. Trial judgment, para. 827. [↑](#footnote-ref-313)
314. *Id.*, para*.* 816. [↑](#footnote-ref-314)
315. *Quebec (Attorney General) v. A.*, 2013 SCC 5, para. 332. [↑](#footnote-ref-315)
316. It could also be argued that s. 636*HSC* creates a distinction based on colour (another prohibited ground of discrimination under s. 15(1) of the *Charter*). [↑](#footnote-ref-316)
317. Above, paras. [111]–[138]. [↑](#footnote-ref-317)
318. Above, paras. [98], [142]–[143] and [197]–[198]. [↑](#footnote-ref-318)
319. Exhibit P-29, Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service,* November 2018. [↑](#footnote-ref-319)
320. Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling*, 2003, pp. 22–23. [↑](#footnote-ref-320)
321. Exhibit P-1, Expert report of Massimiliano Mulone, January 31, 2022, p. 31. See also: Exhibit P‑4, Expert report of Marie‑Ève Sylvestre, February 7, 2022, appendix MES-055, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling – Inquiry Report*, 2003, pp. 27–28. [↑](#footnote-ref-321)
322. Above, para. [141]. [↑](#footnote-ref-322)
323. See, by analogy: *R. v. Ndhlovu*, 2022 SCC 38, para. 131ff. [↑](#footnote-ref-323)
324. *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 129. See also: *R. v. Bryan*, 2007 SCC 12, para. 67. [↑](#footnote-ref-324)
325. *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, p. 1267. [↑](#footnote-ref-325)
326. Testimony of Lyne Vézina, June 17, 2022. [↑](#footnote-ref-326)
327. Testimony of Douglas Beirness, June 14, 2022. [↑](#footnote-ref-327)
328. *Ibid.* [↑](#footnote-ref-328)
329. Testimony of Lyne Vézina, June 17, 2022. [↑](#footnote-ref-329)
330. *Ibid.* [↑](#footnote-ref-330)
331. *Carter v. Canada (Attorney General)*, 2016 SCC 4, para. 2. [↑](#footnote-ref-331)
332. *Ontario (Attorney General) v. G*., 2020 SCC 38, para. 126. [↑](#footnote-ref-332)
333. *Id.*, para*.* 83. [↑](#footnote-ref-333)
334. *Id.*, para*.* 135. [↑](#footnote-ref-334)
335. *Carter v. Canada (Attorney General)*, 2016 SCC 4, para. 2. [↑](#footnote-ref-335)
336. *Ibid.* [↑](#footnote-ref-336)
337. *R. v. Powley*, 2003 SCC 43, para. 52. See also: *Procureure générale du Canada c. Descheneaux*, 2017 QCCA 1238, para. 37. [↑](#footnote-ref-337)