

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

N°: 500-17-114387-205

JOSEPH-CHRISTOPHER LUAMBA,
domiciled at 6441 Pascal Street, Unit 102,
Montreal, province of Quebec, district of
Montreal, H1G 1T5

Plaintiff

v.

ATTORNEY GENERAL OF CANADA,
having offices at 200 René-Lévesque
Boulevard West, East Tower, 9th Floor,
Montreal, province of Quebec, district of
Montreal, H2Z 1X4

and

ATTORNEY GENERAL OF QUEBEC,
having offices at 1 Notre-Dame Street East,
Suite 8.00, Montreal, province of Quebec,
district of Montreal, H2Y 1B6

Defendants

AMENDED ORIGINATING APPLICATION DATED 2 FEBRUARY 2021
(art. 33, 49 and 142 CCP, ss. 7, 8, 9, 10, 15(1) and 27 of the *Canadian Charter of Rights and
Freedoms*, and para. 52(1) of the *Constitution Act, 1982*)

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IN SUPPORT OF HIS APPLICATION, THE PLAINTIFF SUBMITS:

The plaintiff addresses the Superior Court in order to obtain a declaratory judgment declaring inoperative and unconstitutional the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code*¹ and section 636 of the *Highway Safety Code*², insofar as these provisions embed this common law rule, as such “laws” violate, *inter alia*, the right to liberty, the right to dignity, the right to equality, the right to be secure against unreasonable search and seizure, the right not to be arbitrarily detained and, on detention, the right to be informed promptly of the reasons therefor, as set out in sections 7, 8, 9 and 10 and subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (hereinafter, the “**Charter**”), and that these violations are neither justified under section 1 of the *Charter* nor—for the violations to section 7 of the *Charter*—in accord with the principles of fundamental justice.

I. PRELIMINARY REMARKS

1. All human beings are equal in worth and dignity, and are entitled to equal protection of the law³;
2. Crime prevention is fundamental to the maintenance of public safety, and law enforcement must have adequate resources and means to carry out this mission;
3. The trust of the civilian population towards law enforcement authorities is the pillar on which lies the legitimacy of the powers granted to law enforcement officers;
4. Racial profiling in the context of vehicle traffic stops is an abject practice that undermines fundamental values, including the right of all persons to be treated with dignity and fairness by those in authority;
5. Such a practice is an evil that ought to be eradicated, notably because it contributes to the perpetuation of odious and unfair stereotypes towards certain Canadians;
6. Racial profiling in the context of traffic stops stems from a systemic problem within law enforcement;

¹ *Criminal Code*, RSC 1985, c C-46.

² *Highway Safety Code*, CQLR c C-24.2.

³ *Charter of Human Rights and Freedoms*, CQLR, c C-12, preamble.

II. THE PLAINTIFF, MR. JOSEPH-CHRISTOPHER LUAMBA

7. The plaintiff, Mr. Joseph-Christopher Luamba, is 20 years old at the time of writing;
8. In June 2017, he received a high school diploma from *École secondaire Jean-Baptiste-Meilleur* located in the city of Repentigny;
9. Since August 2017, the plaintiff has been studying at *Collège Montmorency*, located in Laval, in pursuit of a college diploma in financial services and insurance;
10. As of the date hereof, the plaintiff resides with his mother and two sisters in Montreal;
11. On 18 March 2019, the *Société de l'assurance automobile du Québec* granted the plaintiff a class 5 driver's licence;
12. The plaintiff was the subject of racial profiling on several occasions since obtaining his class 5 driver's licence, notably during traffic stops in April 2019, October 2019, November 2019 and May 2020, as detailed below;

III. FACTUAL CONTEXT

a) The March 2019 Interception

13. On an afternoon in April 2019, the plaintiff was driving on Renoir Street in Montreal on his way to *Collège Montmorency* for a study session;
14. The plaintiff was driving in a 2008 Ford Focus registered in the name of his uncle;
15. As he stopped his motor vehicle at a stop sign, the plaintiff noticed a patrol car in the opposite direction, a police officer from the *Service de police de la Ville de Montréal* (hereinafter, "**SPVM**") on board, also making a stop;
16. The plaintiff then noticed the police officer turning his attention to the plaintiff and his motor vehicle;
17. Having previously activated his right-side flashing light, the plaintiff then made a right turn and observed the police officer tailing his motor vehicle;
18. Almost immediately, the plaintiff noticed the patrol car's flashing lights being activated;
19. The plaintiff thus stopped his motor vehicle on the roadside;
20. The police officer stepped out of the patrol car and headed in the direction of the plaintiff's motor vehicle;
21. Once positioned near the driver's side door of the plaintiff's motor vehicle, the officer asked the plaintiff to identify himself for verification purposes;

22. After having verified the plaintiff's identity, the police officer ended the plaintiff's arbitrary detention;

b) The October 2019 Interception

23. On a day of October 2019, at or around 2:00 a.m., the plaintiff was leaving downtown Montreal after a night out with friends;
24. The plaintiff took a seat in a 2013 Hyundai Elantra motor vehicle and was accompanied by two (2) friends, one of whom was driving the vehicle;
25. While the vehicle was on Crémazie Boulevard, the plaintiff noticed the flashing lights of a patrol car located behind them;
26. The driver thus stopped the motor vehicle on the right-hand side of the road;
27. Two SPVM police officers stepped out of the patrol car and approached the motor vehicle;
28. After having questioned the driver on his alcohol consumption during the evening and after having verified his identity and registrations, the police officers ended the arbitrary detention of the driver, the plaintiff and the other passenger in the motor vehicle;

c) The November 2019 Interception

29. On a day in November 2019, at or around 9:00 p.m., the plaintiff left a pharmacy located at 6000 Henri-Bourassa Boulevard East, Montreal, and headed towards his residence in a 2017 Hyundai Elantra motor vehicle registered in the name of one of his relatives;
30. While driving north on Langelier Boulevard, the plaintiff stopped his motor vehicle at a red light at the intersection of Maurice-Duplessis Boulevard and found himself side by side with a patrol car driven by an SPVM police officer;
31. The plaintiff then noticed the police officer in the patrol car turning his attention to the plaintiff and the motor vehicle he was driving;
32. When the traffic light turned green, the plaintiff entered the intersection and noticed the patrol car waiting for the plaintiff's motor vehicle to enter the intersection before positioning itself behind the plaintiff's motor vehicle and tailing it;
33. A few seconds after being tailed, the plaintiff saw the flashing lights of the patrol car being activated;
34. The plaintiff thus stopped his motor vehicle on the right-hand side of the road;
35. The police officer stepped out of the patrol car and walked towards the plaintiff's motor vehicle;
36. The police officer then informed the plaintiff that he was stopped for verification purposes;

37. After questioning the plaintiff as to the name, address and relationship of the plaintiff with the owner of the motor vehicle and verifying the plaintiff's identity, the police officer ended the plaintiff's arbitrary detention;

d) The May 2020 Interception

38. On an early afternoon in May 2020, the plaintiff was driving in Gatineau in a 2011 Nissan Rogue registered in the name of one of his relatives and was heading to a restaurant to collect a take-out order;
39. While driving on the public road, the plaintiff crossed paths with a *Service de police de la Ville de Gatineau* patrol car at an intersection;
40. A few seconds after having passed the patrol car, the plaintiff notices that the patrol car was now positioned behind his motor vehicle and that the patrol car's flashing lights were activated;
41. The plaintiff therefore stopped his motor vehicle on the right-hand side of the street;
42. The police officer exited the patrol car and headed towards the plaintiff's motor vehicle;
43. Once positioned near the driver's side door of the plaintiff's motor vehicle, the officer informed the plaintiff that he had been stopped for verification purposes;
44. After having questioned the plaintiff as to the name, address and relationship of the plaintiff with the owner of the motor vehicle, the reasons for his presence in Gatineau and verifying the plaintiff's identity, the police officer ended the plaintiff's arbitrary detention;
45. The traffic stops described above are representative of a systemic problem affecting many Canadians, as attested to by the reports and research mentioned at paragraphs 81 and following of this application;

IV. LEGAL FRAMEWORK

46. A constitutional challenge under subsection 52(1) of the *Constitution Act, 1982*⁴ must seek to challenge the validity of a law. In this regard, as the Supreme Court recognized in *SDGMR v. Dolphin Delivery Ltd*⁵, the "law" referred to in subsection 52(1) of the *Constitution Act, 1982* refers to both statutory provisions and the common law;

➤ *SDGMR v. Dolphin Delivery Ltd*, [1986] 2 SCR 573, p. 593 and 598-599:

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the

⁴ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (hereafter the "Constitution Act").

⁵ *SDGMR v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit*". [...] To adopt a construction of s. 52(1) which would exclude from Charter application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

[Underlined in the original]

47. In the present case, the plaintiff is challenging the constitutionality of the common law rule granting police officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule.
48. This common law rule was recognized by the Supreme Court, notably in *R. v Ladouceur*⁶;

a) The Canadian Charter of Rights and Freedoms

49. The *Charter* states:
- *Canadian Charter of Rights and Freedoms*, sections 7, 8, 9, 10 and subsection 15(1):
 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
 8. Everyone has the right to be secure against unreasonable search or seizure.
 9. Everyone has the right not to be arbitrarily detained or imprisoned
 10. Everyone has the right on arrest or detention
 - a) to be informed promptly of the reasons therefor;
 - b) to retain and instruct counsel without delay and to be informed of that right; and
 - c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful
- [...]
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.
- [...]

⁶ *R. v Ladouceur*, [1990] 1 SCR 1257.

50. The *Charter* states:

- *Canadian Charter of Rights and Freedoms*, section 27:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

b) The *Constitution Act, 1982*

51. The *Constitution Act, 1982* states:

- *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, subsection 52(1):

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[...]

c) Subsection 320.27(2) of the *Criminal Code*

52. Subsection 320.27(2) of the *Criminal Code* states:

- *Criminal Code*, RSC 1985, c C-46, par. 320.27(2):

Testing for presence of alcohol or drug

320.27 [...]

Mandatory alcohol screening

(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

d) Section 636 of the *Highway Safety Code*

53. Section 636 of the *Highway Safety Code* provides for the power of police officers to stop a motor vehicle for the application of the *Highway Safety Code*;

- *Highway Safety Code*, CQLR c C-24.2, section 636:

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.

54. However, as the Honourable Guy Gagnon pointed out in *R. c Dault*⁷, this provision does not provide for the manner in which the power it confers may be exercised:

➤ *R. c Dault*, 2010 QCCA 986 at para 67:

[67] [TRANSLATION] [...] However, the provisions of the [*Highway Safety Code*] do not provide for the manner in which the powers conferred by these provisions may be exercised.

[68] [TRANSLATION] The Supreme Court emphasizes the importance of referring to common law principles where the statute does not explicitly define how the police are to apply it:

[45] [...] The scope of justifiable police conduct will not always be defined by express wording found in a statute but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable that common law principles will need to be invoked to determine the scope of permissible police action under any statute. [8]

[The second-level citation reference is reproduced herein as a footnote]

55. It was in 1990, in *Ladouceur*⁹, that the Supreme Court defined the scope of this power;

e) *Ladouceur*

56. In *Ladouceur*, the Supreme Court had to determine the legality of the police power to conduct random stops for the application of paragraph 189a(1) of the *Highway Traffic Act*¹⁰;

57. This provision read as follows:

➤ *Highway Traffic Act*, R.S.O. 1980, c 198 at para 189a(1):

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.

58. In a split decision, the Supreme Court held that this provision grants police officers the power to stop a motor vehicle and its driver at random without reasonable grounds to

⁷ *R. v Dault*, 2010 QCCA 986.

⁸ *R. v Elias*, 2005 SCC 37 at para 45.

⁹ *Supra* note 6.

¹⁰ *Highway Traffic Act*, RSO 1980, c 198 at para 189a(1); now *Highway Traffic Act*, RSO 1990, c H.8 at para 216(1).

believe or suspect that an offence has been committed, where such stop is not part of a structured program;

59. Like the dissenting judges, the majority of the Supreme Court concluded that a stop resulting from the above power constitutes an arbitrary detention and is therefore contrary to section 9 of the *Charter*. However, contrary to the dissenting judges, the majority considered that this violation of section 9 of the *Charter* was justifiable under section 1 of the *Charter*;
60. Dismissing the concerns raised by the dissenting judges, with respect to the dangers of granting such a power to police officers, the Honourable Peter Cory, writing for the majority, stated:

➤ *R. v Ladouceur*, [1990] 1 SCR 1257 at p. 1287:

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. Officers can stop persons only for legal reasons, in this case 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. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the Charter.

[As reproduced and underlined by the Honourable Guy Cournoyer in *R. c Dorfeuille*¹¹]

61. The dissenting judges, per the Honourable John Sopinka, formulate their concerns as follows:

➤ *R. v Ladouceur*, [1990] 1 SCR 1257 at p. 1267:

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? The officer need only say, "I stopped the vehicle because I have the right to stop it for no reason. I am seeking unlicensed drivers." If there are bound to be instances where admittedly Charter violations which cannot be justified will occur, can we overlook these and approve a practice even if in its general application Charter breaches can be justified? Moreover, the unlimited power has the potential of being much more intrusive and occasioning a greater invasion of privacy. Any perfectly law-abiding citizen travelling late at night on a lonely country road must be prepared to have a police car approach, perhaps, from the rear, siren blaring, lights flashing, and must then and there come to a stop to prove his or her legitimacy on the roadway. How many innocent people will be stopped to catch one unlicensed driver? We have no information on this, but the statistics show that, in 1984, 1 in 37 drivers in

¹¹ *R. c Dorfeuille*, 2020 QCCS 1449 at para 72.

Ontario was serving a licence suspension. The ratio, therefore, of licensed drivers to those driving while their licences were under suspension will be 37 to some fraction of 1. The probability is that in excess of 37 innocent motorists will be stopped for each offender.

[As reproduced and underlined by the Honourable Guy Cournoyer in *R. c Dorfeuille*¹²]

62. In 1994, in *R. v Soucisse*¹³, the Court of Appeal found that the Supreme Court's findings in *Ladouceur* were also applicable to section 636 of the *Highway Safety Code*, given the similarity between the wording of this provision and subsection 189a(1) of the *Highway Traffic Act*¹⁴;

➤ *R. v Soucisse*, 1994 CanLII 5821 (QC CA) at p. 10-11:

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.

63. However, while the conclusions of the Supreme Court in *Ladouceur* and those of the Court of Appeal in *Soucisse* are still applied as of the date hereof, the factual context as well as the approaches to the law have changed since those decisions were rendered;
64. As a result of these changes, we find ourselves in one of the situations where the jurisprudence of the Supreme Court, notably *Canada (Attorney General) v Bedford*¹⁵ and *Carter v Canada (Attorney General)*¹⁶, recognizes that trial courts may depart from such precedents;

f) *Bedford and Carter*

65. In *Bedford and Carter*, the Supreme Court discussed the criteria allowing for the overturning of a precedent;
66. In *Carter*, the Supreme Court notably stated that

➤ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44:

[44] [t]he doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, stare decisis is not a straitjacket that condemns the law to stasis. Trial courts may reconsider 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

¹² *Ibid* at para 73.

¹³ *R. v Soucisse*, 1994 CanLII 5821 (QC CA).

¹⁴ *Supra* note 10.

¹⁵ *Canada (Attorney General) v Bedford*, 2013 SCC 72.

¹⁶ *Carter v Canada (Attorney General)*, 2015 SCC 5.

parameters of the debate" (Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[Our underlining]

67. However, in *Ladouceur*, the factual framework underlying the analysis that led the Supreme Court to conclude—under section 1 of the *Charter*—to the legality of the police power to conduct traffic stops at random no longer corresponds to the one that prevails today, as will be further demonstrated at trial;
68. Thus, we find ourselves in a situation in which the jurisprudence of the Supreme Court allows the Superior Court to make its own assessment of the state of the law and to depart, if necessary, from the existing jurisprudence;
69. Furthermore, in a detailed and insightful obiter in *Dorfeuille*, the Honourable Guy Cournoyer, then sitting at the Superior Court, stated the following with respect to the issue that the plaintiff is seeking to raise in the present proceeding;

➤ *R. c Dorfeuille*, 2020 QCCS 1499 at para 79-80:

[79] [TRANSLATION] [...] [T]he question of whether the Supreme Court's taking judicial notice of racial profiling in *Le* constitutes, within the meaning of *Carter v. Canada (Attorney General)*, a change in the situation or evidence that radically alters the situation, to the extent that it justifies a reassessment of the power to conduct routine roadside checks without any grounds, was not argued at the appeal hearing.

[80] [TRANSLATION] That said, the considerable scope of these powers certainly warrants a rigorous application of the teachings of *Le* in the context of routine random roadside checks.

[References omitted]

V. THE "NEW" FACTS SINCE *LADOUCEUR*

a) Jurisprudence

70. In *R. v Le*¹⁷, the Supreme Court stated the following in discussing the concept of racial profiling:

➤ *R. v Le*, 2019, SCC 34 at para 76-77:

[76] [...] [T]he concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment [...].

¹⁷ *R. v Le*, 2019 SCC 34.

[77] This Court adopted the following definition of racial profiling in Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v. Bombardier Inc. (*Bombardier Aerospace Training Center*), 2015 SCC 39, [2015] 2 S.C.R. 789:

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 [also] 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. [Emphasis deleted; para. 33.]

[The changes to the citation in paragraph 77 are those of the Supreme Court]

71. Since the *Le* decision, courts are required to take judicial notice of racial profiling;
72. The Supreme Court has specifically stated the following in this regard:
- *R. v Le*, 2019, SCC 34 at para 97:

[97] We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities (see D. M. Tanovich, “Applying the Racial Profiling Correspondence Test” (2017), 64 *C.L.Q.* 359). Indeed, it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions. [...]
73. It should be noted that, although divided on the outcome of the appeal, the Court is unanimous on the issue of taking judicial notice of racial profiling;
74. Indeed, writing for the dissent, the Honourable Michael J. Moldaver wrote the following on this matter:
- *R. v Le*, 2019, SCC 34 at para 260:

[260] [...] Credible reports, studies, and other materials on race relations may assist courts in understanding how racialized persons may experience police interactions differently, and courts may take judicial notice of such materials — which qualify as “social context” evidence — where the test set out in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, is met. Further, I do not dispute the accuracy of the materials my colleagues take judicial notice of, nor do I challenge their reliance on these materials. [...]
75. This new judicial notice clearly puts us in one of the situations described by the Supreme Court in *Bedford* and *Carter*, with respect to the precedents set by *Ladouceur* and *Soucisse*;

76. Moreover, the Supreme Court's findings in *Le* - including the taking of judicial notice of racial profiling - seems to support the concerns raised by the dissent in *Ladouceur*;
77. As noted by the Honourable Guy Cournoyer in *Dorfeuille*:

➤ *R. c Dorfeuille*, 2020 QCCS 1499 at para 75-77:

[75] [TRANSLATION] In this regard, even before *Le*, some authors expressed the view that *Ladouceur* should be re-evaluated and even reversed

[76] [TRANSLATION] The authors of the second edition of *Criminal Procedure in Canada* explain the need for this reassessment as follows:

§2.97 In our view, the majority in *Ladouceur* unduly downplayed the risk of abusive roadside detentions. Of particular concern is the leeway that the decision provides for "pretextual" stops. Under the guise of routine safety checks, police (who typically perceive themselves as being involved in a competitive, crime-fighting endeavour) may, under *Ladouceur*, stop motorists on the basis of unsubstantiated hunches. Such stops then give police the chance to develop grounds to justify further probing. If that fails, they may seek permission to search and worry later (if at all) about how to admit the fruits of the search if contraband is found.

§2.98 The dissenting justices in *Ladouceur*, in contrast, doubted that adding a power to conduct roving random stops would significantly enhance the deterrence provided by fixed-point stops. How many innocent drivers would be stopped, they questioned, to catch the few who are drunk, unlicensed, or uninsured? For the dissenters, the cost was too great:

[T]he 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, ... racial considerations may be a factor too.

When *Ladouceur* was decided there was almost no empirical basis for fears that racial bias might influence police detention decisions. As noted in Part 3(4)(a), above, a growing body of evidence has since emerged showing that police disproportionately detain Aboriginals and African-Canadians. In light of that evidence, it would now seem that the majority's optimism in *Ladouceur* was misplaced, and that the dissent's concerns were well founded. We hope that the Court will reconsider its section 1 analysis in light of this new evidence. Until then, the open-ended power of proactive road safety stops remains, as does its potential for abuse[48].

[The underline is added]

[77] [TRANSLATION] Author Steven Penney raises similar concerns in an article entitled *Driving While Innocent: Curbing the Excesses the "Traffic Stop" Power*.

As discussed, the Court in *Ladouceur* narrowly dismissed a challenge to legislation permitting police to conduct a "roving random stop," i.e., one conducted "as part of a routine check which was not part of any organized program. But as the post-*Ladouceur* cases reveal, roving traffic stops need not be either "random" or "routine." Police are not required to choose

vehicles randomly. Nor must they show that stops were conducted as part of a routine compliance audit. As we have seen, they may (and frequently do) stop vehicles because they suspect criminal offending but lack the requisite grounds to detain for that reason.

As Justice Sopinka suggested in *Ladouceur* dissent, this raises the spectre of discriminatory profiling. In the years since, evidence has accumulated that police pay disproportionate attention to certain racial minorities and that this may cause adverse, systemic, long-term harms to both the individuals targeted and their communities^[49]

[The underline is added]

[References omitted]

78. The findings of the authors cited by the Honourable Guy Cournoyer regarding the issue of racial profiling are based on extensive documentary evidence which did not exist when *Ladouceur* was decided;
79. Furthermore, we note that, over time, the courts seem to have recognized the problems that emerged from granting a police power that had no objectively verifiable safeguards;
80. On this point, in *R. v Viellot Blaise*¹⁸, the Honourable Katia Léontieff stated the following:
 - *R. v Viellot Blaise*, 2020 QCCM 26 at para 54:

[54] [TRANSLATION] The Court is aware that the very broad interception power of peace officers under s. 636 [of the *Highway Safety Code*] can easily be used as a convenient catch-all to conduct general and unfounded criminal investigations or to justify—after the fact—interventions motivated by racial profiling. [...]

b) The Reports and Studies

81. In light of the accumulation of reports and studies detailing the scope of the problem of racial profiling—notably the impact of this problem on certain minorities—it now seems undeniable that the analytical framework used by the majority of the Supreme Court in *Ladouceur* is no longer applicable;
82. Notably, in 2018, the Honourable Michael H. Tulloch, justice of the Court of Appeal for Ontario, published the *Independent Street Checks Review Report*¹⁹;
83. In this report, the Honourable Michael H. Tulloch outlined various Canadian studies on the issue of racial profiling, including the *Kingston Data Collection Project* and the *Traffic Stop Race Data Collection Project*. He discussed these two studies in the following terms:

¹⁸ *R. c Viellot Blaise*, 2020 QCCM 26.

¹⁹ The Honourable Michael H. Tulloch, *Independent Street Checks Review*, Toronto, Ontario, online: <<https://www.mcscs.jus.gov.on.ca/english/Policing/StreetChecks/ReportIndependentStreetChecksReview2018.html>>.

- The Honourable Michael H. Tulloch, *Independent Street Checks Review*, Toronto, Ontario, 2018, p. 44:

58. The 2005 Kingston Data Collection Project, one of the first studies in Canada on racial profiling in policing, concluded that Black residents in Kingston were over-represented in traffic stops (2.7 times) and in pedestrian stops (3.7 times) compared to their representation in the city's general population. [²⁰].

59. The Ottawa Police Service's 2016 *Traffic Stop Race Data Collection Project* found that Black drivers were stopped 2.3 times more than expected based on the driving population. Middle Eastern drivers were stopped 3.3 times more. Young Black drivers (ages 16-24) were stopped 8.3 times more than expected and young Middle Eastern drivers were stopped 12 times more than expected. [²¹]

[The references in the report for this excerpt are reproduced *ad litteram* and *in extenso* in footnotes 20 and 21 of this document]

84. More specifically in Montreal, in September 2019, an independent research team published a report entitled *Les interpellations policières à la lumière des identités racisées des personnes interpellées (Police stops in light of the racialized identities of those stopped)*²²;

85. In this report, the authors Armony, Hassaoui and Mulone found that:

- Victor ARMONY, Mariam HASSAOUI and Massimiliano MULONE, *Police stops in light of the racialized identities of those stopped*, Independent research team, 2019, p. 84 and 117:

[TRANSLATION] aboriginal and black people have very high levels - between 4 and 5 times higher than white people - of average likelihood of being stopped by the SPVM.

[...]

Variations in black people's chances of being stopped are not explained by local crime levels, while the ethnic composition of the neighborhood appears to have an impact on their chances of being stopped.

²⁰ Scot Wortley & Lysandra Marshall, *Bias Free Policing: The Kingston Police Stop Data Collection Pilot Project Final Results* (Kingston, Ontario : Kingston Police Services Board, 2005), online: <<http://hdl.handle.net/1974/8655>>.

²¹“Traffic Stop Race Data Collection Project (TSRDPC)”, online: *Ottawa Police Service* <<https://www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDPC.asp>>. See also “OHRC Response to the Race Data and Traffic Stops in Ottawa Report” (28 November 2016) at Ch. 5, online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/ohrc-response-race-data-and-traffic-stops-ottawa-report/5-context-report-findings>> [OHRC, “Traffic Stops in Ottawa”] (it should be noted that both Ottawa Police Service and Kingston Police Service implemented measures to promote bias-free policing following these studies).

²² Victor Armony, Mariam Hassaoui & Massimiliano Mulone, “Les interpellations policières à la lumière des identités racisées des personnes interpellées” (2019), online : *Équipe de recherche indépendante* <<https://cridaq.uqam.ca/publication/les-interpellations-policieres-a-la-lumiere-des-identites-racisees-des-personnes-interpellees/>>.

[Italicized and bolded in the original]

86. These authors also point out that:

- Victor ARMONY, Mariam HASSAOUI and Massimiliano MULONE, *Police stops in light of the racialized identities of those stopped*, Independent research team, 2019, p. 22:

[TRANSLATION] [i]n fact, the literature that has examined the discrimination experienced by the Black community while driving is so abundant that it has a specific name: *Driving While Black* [...]

87. On 7 October 2019, following the publication of the independent research team's report²³, the SPVM issued a press release in which it mentioned, among other things, that:

- SERVICE DE POLICE DE LA VILLE DE MONTRÉAL, *Independent report on the data analyzing police stops; the SPVM announces concrete measures*, press release, 7 October 2019:

[TRANSLATION] [T]he Service's Directorate humbly accepts all the findings of this report.

88. In the same press release, the SPVM also stated the following:

- SERVICE DE POLICE DE LA VILLE DE MONTRÉAL, *Independent report on the data analyzing police stops; the SPVM announces concrete measures*, press release, 7 October 2019:

[TRANSLATION] The results of the report demonstrate the presence of systemic or organizational biases that result in disparities in the practice of police stops in the SPVM.

89. Thus, in the presence of a police power which lacks any objectively verifiable safeguards which results in the distinct and inequitable treatment of Canadians before the law, which affects the human dignity of many citizens, and which impairs their development within society, it seems undeniable that the common law rule challenged herein has created a situation of abuse that the Superior Court must remedy;

VI. *CHARTER VIOLATIONS*

a) **Violation of Section 7 of the *Charter***

90. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection

²³ "Independent report on the data analyzing police stops; the SPVM announces concrete measures" (7 October 2019), online : *Service de police de la ville de Montréal* <<https://spvm.qc.ca/fr/Communiqués/Détails/14555>>.

320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule, violate the rights guaranteed by section 7 of the *Charter*, as will be further demonstrated at trial;

91. This violation of section 7 of the *Charter* does not accord with the principles of fundamental justice, nor is it justified under section 1 of the *Charter*, as will be further demonstrated at trial;

b) Violation of Section 8 of the *Charter*

92. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule, violate the rights guaranteed by section 8 of the *Charter*, as will be further demonstrated at trial;
93. This violation of section 8 of the *Charter* is not justified under section 1 of the *Charter*, as will be further demonstrated at trial;

c) Violation of Section 9 of the *Charter*

94. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule, violate the rights guaranteed by section 9 of the *Charter*, as will be further demonstrated at trial;
95. This violation of section 9 of the *Charter* is not justified under section 1 of the *Charter*, as will be further demonstrated at trial;

d) Violation of Section 10 of the *Charter*

96. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule, violate the rights guaranteed by paragraphs 10(a) and 10(c) of the *Charter*, as will be further demonstrated at trial;
97. This violation of paragraphs 10(a) and 10(c) of the *Charter* is not justified under section 1 of the *Charter*, as will be further demonstrated at trial;
98. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as

these provisions embed this common law rule, violate the rights guaranteed by paragraph 10(b) of the *Charter*, as recognized by the Supreme Court in the *R. v. Orbanski*; *R. v. Elias*²⁴ and as will be further demonstrated at trial;

99. This violation of paragraph 10(b) of the *Charter* is not justified under section 1 of the *Charter*, as will be further demonstrated at trial;

e) Violation of Subsection 15(1) of the *Charter*

100. The common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule, violate the rights guaranteed by subsection 15(1) of the *Charter*, as will be further demonstrated at trial;
101. This violation of subsection 15(1) of the *Charter* is not justified under section 1 of the *Charter*, as will be further demonstrated at trial;

VII. REMEDIES

102. Thus, the plaintiff is well justified in asking the Court to declare inoperative and unconstitutional the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule;

VIII. NOTICE PURSUANT TO ARTICLES 76 AND 77 CCP

103. Consider this application as a notice of intention to challenge the operability, the constitutionality or the validity of the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, as well as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed this common law rule;

²⁴ 2005 SCC 37.

IX. CONCLUSIONS

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this application;

DECLARE that the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, violate the rights guaranteed by section 7 of the *Charter*;

DECLARE that this violation of the rights guaranteed by section 7 of the *Charter* is not in accord with the principles of fundamental justice, nor justified under section 1 of the *Charter*;

DECLARE that the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, violate the rights guaranteed by sections 8, 9 and 10 and subsection 15(1) of the *Charter*;

DECLARE that this violation of the rights guaranteed by sections 8, 9 and 10, and subsection 15(1) of the *Charter*, is not in accord with the principles of fundamental justice, nor justified under section 1 of the *Charter*;

DECLARE inoperative and unconstitutional the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program;

DECLARE inoperative and unconstitutional subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code*, insofar as these provisions embed the common law rule declared inoperative and unconstitutional according to the above declarations;

SUBSIDIARILY:

AMEND the common law rule granting certain peace officers the power to stop a motor vehicle and its driver without reasonable grounds to believe or suspect that an offence has been committed, when such stop is not part of a structured program, in order to make it consistent with sections 7, 8, 9, 10, and subsection 15(1) of the *Charter*;

DECLARE that, insofar as subsection 320.27(2) of the *Criminal Code* and section 636 of the *Highway Safety Code* embed the common law rule cited above, these provisions embed this common law rule only as amended with the above conclusion;

DECLARE all other things that the Court finds necessary to ensure the protection of the constitutional rights of the plaintiff;

ORDER the execution of the judgment notwithstanding appeal;

THE WHOLE with legal costs in favour of the plaintiff, notwithstanding the outcome of litigation.

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