**SCC File No. 41605**

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

B E T W E E N:

**ATTORNEY GENERAL OF QUEBEC**

Appellant (Appellant)
Respondent on Cross Appeal

- and -

**JOSEPH-CHRISTOPHER LUAMBA**

Respondent (Respondent)
Appellant on Cross-Appeal

- and -

**CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF BLACK LAWYERS, BRITISH COLOMBIA CIVIL LIBERTIES ASSOCIATION, CLINIQUE JURIDIQUE DE SAINT-MICHEL, COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE**

Interveners

- and -

**ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA**

Interveners

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# FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rules 22 and 37 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

1. According to the appellant, there is nothing at stake in this matter: 'tis but a brief detention on the side of the road to verify the sobriety of the driver and validity of their paperwork.[1]

2. This position taken by the appellant is the product of a view which separates *Charter* rights into watertight compartments, disregards the importance of *Charter* values and fundamental social values in constitutional litigation, fails to account for the social context in which this claim was brought, and accordingly divorces itself from reality and various jurisprudential trends.

3. **This case is about the continued social oppression of Black and racialized people by the state. It is about substantive equality.**

4. Any framing of this matter, whether it be under s.7, s. 9 or s. 15 of the *Canadian Charter of Rights and Freedoms,* which fails to grapple with this component of the claim will miss the mark.

5. The crux of the BCCLA's intervention in this matter is that substantive equality transcends the arid soils of s. 15 of the *Charter* and permeates constitutional analysis, as this Court has recognized on several occasions.

6. The BCCLA accordingly submits that notions of substantive equality are vital to the proper framing and understanding of the s. 7 challenge raised by the respondent and accepted by the Trial Judge.

7. This accords not only with the largely uncontested evidentiary record in this matter, but also with a constellation of various jurisprudential lines which all point the way to this one undeniable truth: equality is the soul of liberty.[2]

8. When the s. 7 analysis in this matter is infused and informed by substantive equality, as it must be and as the Trial Judge correctly did, it becomes immediately obvious that the appellant's characterization of this matter is reductionist and incorrect.

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[1] Appellant's factum, paras. 115, 116.
[2] Frances Wright.

## PART II – QUESTIONS IN ISSUE

9. In this intervention, the BCCLA takes position on two issues:

   i. The relevance of substantive equality in interpreting the scope and content of the rights protected by s. 7 of the *Charter*;

   ii. The application of this framework informed by substantive equality to the s. 7 analysis in the case at bar.

10. On the first issue, the BCCLA's position is that a s. 7 analysis, just like any analysis of a *Charter* claim, must be informed by substantive equality.

11. Substantive equality is the "animating norm" of s. 15. Its aim is to ensure that laws or policies do not subordinate groups who already face social, political, or economic disadvantages, recognizing that individuals may require different treatments to achieve equality.

12. Thus, at every stage of the s. 7 analysis, a Court must acknowledge the social and historical context within which laws operate, including concurrent, intersectional factors and how these interact with existing discriminatory systems and institutions, compounding disadvantage.

13. In the BCCLA's respectful submission, and turning to the second issue described above, this is precisely what the Trial Judge did when he situated his s. 7 analysis squarely in the social context evidence regarding racial profiling and its effect on the Black community.

14. This led the Trial Judge to conclude that this matter is of fundamental importance, as it involves the disproportionate surveillance of a racialized group by police authorities, leading to a violation of the personal autonomy of its members, and having harmful effects on the relationship of this group with the State by perpetuating historical oppression.

15. For the Trial Judge, this matter is not about a brief detention on the side of the road. It is and must be about the racial profiling of Black drivers leading to their mass unjustified surveillance by police authorities pursuant to a random power, and the harmful effects that these social realities have had not just on the respondent, but on the Black community more generally.

## PART III – STATEMENT OF ARGUMENT

### A. Equality and the s. 7 framework

16. The unfortunate reality is that s. 15 of the *Charter* is failing to fulfill the promise of substantive equality which it is meant to deliver. Indeed, commentators have noted, time and time again, the continued inability of s. 15 to deliver justice to marginalized groups.[3] Relevant legal norms are complex and ever shifting, as this Court's recent in decision in *Sharma*[4] illustrates.

17. Owing to this complex jurisprudence and the heavy evidentiary burden resuscitated by *Sharma*, the resources and time required to prove s. 15 claims are a well-known and significant barrier against access to justice for equality-seeking litigants.

18. Doubtlessly owing to this failure, marginalized and protected groups have sought to remedy the oppressions which they face through other rights, most notably s. 7 of the *Charter*. Indeed, most of this Court's recent s.7 jurisprudence is noteworthy for its equality-seeking component.

19. In the BCCLA's respectful submission, given this trend, it is particularly important that equality, vital as it is to our constitutional order and even recognized as a fundamental value of our society[5], continue to inform and infuse constitutional litigation, and in particular the s. 7 framework.

20. The perennity of substantive equality rests on shaky foundations if this concept is confined and siloed to s. 15. This case presents an opportunity for this Court to re-affirm the important role

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[3] See for example: Parkes, Debra and Lawrence, Sonia. *"R. v. Sharma: Reckoning with Destabilizing Truths in Constitutional Equality Adjudication."* The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 115. (2024); Young, Margot. "*Social Justice and the Charter: Comparison and Choice.*" Osgoode Hall Law Journal 50.3 (2013) : 669-698 [**Young, Social Justice**]; Froc, Kerri Anne. "*Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice.*" Ottawa Law Review, Vol. 42, No. 3, 2012 [**Froc, Constitutional Coalescence**]; Flader, Suzy. "*Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice Under Section 7 of the Charter*" (2020) 25 Appeal 43. See also Tanovich, David M.. "*The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System.*" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 40. (2008).

[4] *R v Sharma*, 2022 SCC 39.

[5] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 82, 90; See also *R v Labaye*, [2005] 3 SCR 728 at para 33.

to be played by substantive equality in the adjudication of constitutional rights, in particular as regards to s. 7.

21. As this Court noted in *Andrews v Law Society of British Columbia,* the section 15 guarantee is the broadest of all guarantees, it applies to and supports all other *Charter* rights.[6]

22. And indeed, this has proven to be true. The notion of equality, whether conceptualized as a *Charter* value, or as the animating norm of s. 15, has permeated courts' analysis in several areas of constitutional litigation, including, to name but a few examples, cases involving ss. 1[7], 2[8], 3[9], 7[10], 8[11], 12[12], or 24[13] of the *Charter*.[14]

23. The *Charter* having barely been proclaimed, Justice Dickson opined that "[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*."[15]

24. At its simplest, the BCCLA asks that this Court endorse the observations made by Justice L'Heureux-Dubé observed in *G(J):*

> *... equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. This Court has recognized the important influence of the equality guarantee on the other rights in the Charter ... All Charter rights strengthen and support each other ... The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15*

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[6] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
[7] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para 60; *R v Oakes*, [1986] 1 SCR 103 at para 64.
[8] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 94 [***Big M Drug Mart Ltd.***].
[9] *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158.
[10] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at paras 112-113 [***G (J)***]; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 377; *R v Darrach*, [2000] 2 SCR 443 at para 28.
[11] *R v Golden*, 2001 SCC 83 at paras 81-83; *R v Belnavis,* [1997] 3 SCR 341 at paras 63-66 (La Forest J dissenting).
[12] *R v Boudreault*, 2018 SCC 58 at paras 54-58.
[13] *R v Harris*, 2007 ONCA 574 at para 63.
[14] See also Hogg, Peter W. "*Equality As a Charter Value in Constitutional Interpretation.*" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 20. (2003).
[15] *Big M Drug Mart Ltd.* at para 94.

*and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.*[16]

25. If, as this Court stated in *Law*, s. 15 is concerned with the "realization of personal autonomy and self-determination"[17], then it stands to reason that notions of equality will indeed permeate the s. 7 analysis, which is also concerned with a sphere of personal autonomy.[18] This is precisely what occurred in this matter when the judge coalesced his analysis of substantive equality around the notion of autonomy which played a key role in his s. 7 analysis.

26. Situating the importance of equality in constitutional litigation is not a matter of pure theoretical nicety or nuance. The increasingly complex and polycentric issues brought before the courts defie an understanding of the *Charter* that isolates rights into watertight compartments and divorces the individual litigant before the Court from their membership in an oppressed or marginalized group. Justice, particularly in cases such as this one, transcends the individual litigant.

27. A section 7 analysis which is divorced from the intersectional vulnerabilities and protected characteristics of a claimant, regardless of its result, will fail to deliver justice, as it "condemns courts to overly simplistic, thin, and ultimately unsatisfactory contemplation of the social injustices these cases foreground."[19]

28. Thus, for example, the majority decisions in *R v Morgentaler,* by failing to consider substantive equality, sterilized what was to be a case concerning the continued patriarchal subordination of women via the regulation of their reproduction to a comparatively vapid but certainly less destabilizing conversation about bodily integrity and procedural considerations.[20]

29. This case, and the appellant's reductionist stance, underscores the condition precedent for substantive access to section 7 by subordinated persons: their material deprivations must be interpreted in their social context.[21]

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[16] *G (J)*.
[17] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.
[18] *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 15.
[19] Young, Social Justice.
[20] Froc, Constitutional Coalescence.
[21] Froc, Kerri Anne. "*Will "Watertight Compartments" Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms.*" Cambridge University Press; 2012: 132-148.

30. With this in mind, the BCCLA turns to its submissions on the section 7 analysis.

## B. Application to Section 7

*Liberty and Security of the Person*

31. The appellant's central argument is twofold:

i. the ability to drive is a privilege and not a right protected by s.7 of the *Charter*;

ii. this matter involves a brief detention with limited to no impact on the liberty and security of the person.

32. As indicated above, this position is reductionist and fails to properly situate this matter in the social fact of racial profiling and what this reality means for Black people, as was explicitly done by the Trial Judge based on the evidentiary record before the court.[22]

33. An abundance of literature recognizes the collateral effects of over-incarceration and constant surveillance of racialized communities, which include physical and severe psychological harm (in some cases death), isolation, alienation and mistrust, behaviour changes, breakdown of or damage to family and social networks, and labour market exclusion. As Prof. Tanovich notes, in many ways, colonialism, slavery and segregation are now reproduced through both of these modern-day systems of control and incapacitation.[23]

34. And indeed, the Trial Judge held that with time, such roadside stops without grounds that disproportionately target Black drivers has scarred their hearts and minds, created fear and humiliation amongst Black drivers and their entourage in general, sows mistrust towards police powers from as well as the feeling of treated differently and unfairly.[24]

35. The Trial Judge correctly discarded the appellant's "privilege" argument, describing the liberty interest in this matter in uncontroversial terms, as the **liberty to move around on a road or otherwise, without police interception based solely on race**. Is well-established law that the

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[22] *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at para 737 [**QCCS Judgment**].
[23] Tanovich, David M.. "*The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System.*" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 40. (2008).
[24] QCCS Judgment at para 737(h).

liberty to make fundamental personal decisions as protected by s. 7 includes the liberty to move freely[25], "a value as ancient as literature and the common law"[26], much like the liberty from obligations to appear at a specific time and place[27].

36. More importantly, the Trial Judge found that the Impugned Rules infringed upon the liberty of Black people, described as the fundamental freedom for Black people to live their lives as they choose and to drive a vehicle to meet their needs without being harassed by the police solely because of the color of their skin. The weight of added surveillance and control affecting Black people violated their right to personal autonomy.

37. As for the right to security, it includes both bodily integrity[28] and protection from serious state-imposed psychological stress.[29] The question on this front is whether there is a profound effect on a person's psychological integrity, meaning that the effect "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety"[30]. Here again, the concept of substantive equality allows the analysis to transcend a characterization of the matter involving just a series of stops or Mr. Luamba, but indeed the clear and continued subordination of a class of people by the State in manifestly chilling circumstances.

38. Due to their racial underpinning, the First Instance Judge found that the impact of police interceptions in the case at bar on the psychological security of those affected was of sufficient gravity to warrant s. 7's protection.

39. In so doing, the First Instance Judge correctly integrated substantive equality considerations in his analysis of s. 7.

40. As the Supreme Court found in *Le,* a decision cited by the First Instance Judge in his assessment of the facts[31], "[t]he impact of the over-policing of racial minorities […] without any reasonable suspicion of criminal activity is more than an inconvenience". Such a practice not only "takes a

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[25] *R v Heywood*, [1994] 3 SCR 761 at para 45.
[26] *Ogden Entertainment Services v. United Steelworkers of America, Local 440*, 1998 CanLII 14755 (ON SC) at para 20.
[27] *R v Beare; R. v. Higgins*, [1988] 2 SCR 387.
[28] *R v Morgentaler*, [1988] 1 SCR 30 [**Morgentaler**].
[29] *Morgentaler*, page 56.
[30] *G (J), supra* note 10 at para 60.
[31] QCCS Judgment at para 385.

toll on a person's physical and mental health", but "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". [32]

*Principles of fundamental justice: arbitrariness*

41. The Trial Judge correctly identified this Court's ruling that the principles of fundamental justice are naught but an attempt to capture the basic values underpinning our constitutional order.[33] As equality, autonomy and respect for human dignity are clearly some of these values, it is unsurprising – and indeed expected – that a law which inherently leads to the racial profiling and increased police surveillance of a protected group will run afoul of principles of fundamental justice and the basic values of our constitutional order. To hold otherwise would be a flagrant denial of substantive access to the rights guaranteed by s. 7. Liberty for some is no liberty at all.

42. The appellant again ignores this important dimension of the case, and instead argues that the Impugned Rules are not arbitrary because there is a clear and self-evident connection between the obligation to immobilise one's vehicle and the purpose of the Impugned Rules, increasing road security.[34] The appellant also argues that each single police interception increases the public's perception of police control and therefore acts as "real" deterrence.[35]

43. Finally, and crucially, the Appellant again characterizes the effect of the Impugned Rules as a brief roadside detention.

44. However, the fundamental principle of justice against arbitrariness requires "a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose".[36] To this one might add that notions of substantive equality beckon consideration of the law's effect on Black drivers more generally when considering whether it conforms with the principles of fundamental justice, and as described by the Trial Judge.

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[32] *R v Le*, 2019 SCC 34 at para 95. See also *R. v. Harris*, 2007 ONCA 574, para. 63.
[33] QCCS Judgement at para 750, citing *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 96 [**Bedford**].
[34] Appellant's factum at para 119.
[35] Appellant's factum at para 125.
[36] *Bedford* at para 111 [**Bedford**].

45. In this case, the effects on the individual are the limits on liberty and security identified by the Trial Judge, as well as the significant harms visited on Black drivers who are subjected to increased detentions by reason of racial profiling. These effects are not caused by any single isolated police intervention, nor by the sum-total of these interactions, but rather were found to flow directly from the power to conduct random and without grounds police interceptions.

46. The question is therefore not whether there is a connection between road security and the abstract concept of a police interception, or even between road security and each police interception, but whether there is a connection between road security and random police interceptions, with no cause and outside any structured program, in light of this social context and reality.

47. Based on the evidence before him, including the social context evidence, the Trial Judge found not only the Impugned Rules give rise to police interventions which are arbitrary, but the Impugned Rules bear no rational connection with the purpose sought.[37]

48. Lastly, the appellant also argues that the Trial Judge contradicted himself by declaring that his analysis was done without regard to "efficacity" all the while clearly basing his reasoning on an absence of efficacity.[38]

49. The BCCLA submits that there is no contradiction when this Court's decisions in *Bedford* and *Carter* are read attentively.

50. Both *Bedford* and *Carter* clearly establish a distinction between s. 7 and s. 1: only the latter allows justifications of an infringement based on competing social interests or public benefits.[39]

51. Thus, when the Court rejected "efficacy" from its s. 7 analysis in *Bedford*, what it rejected is the efficacy (or usefulness) of the purpose of the law towards a greater good, and not the efficacy of the measure disputed towards the purpose of the law.[40]

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[37] QCCS Judgment at paras 754-755.
[38] Appellant's factum at para 120.
[39] *Bedford* at paras 123 and 125; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 79.
[40] *Bedford* at para 127.

52. The rejection of efficacy happens at the stage of the "inquiry into the purpose of the law". Claimants are not required to assess whether a purpose is efficacious or not, or whether it is good or bad "in terms of society as a whole"[41], but simply what the purpose is.

53. It is indeed only with the intent of stressing the above-mentioned distinction between s. 1 and s. 7 that the *Carter* decision refers to that excerpt in *Bedford*.[42]

54. As such, the First Instance Judge was well-founded in basing his conclusion of arbitrariness on the lack of rational connection between the Impugned Rules and the objective sought, while stating that his analysis of arbitrariness was conducted without regard to "efficacity", as the Supreme Court did in *Bedford*.[43]

## PART IV – COSTS

55. The BCCLA takes no position on the ultimate outcome of this appeal.

56. The BCCLA seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September, 2025 at Whitehorse, in the Yukon Territory.

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[41] *Bedford* at para 126.
[42] *Carter v. Canada (Attorney General),* 2015 SCC 5 at para 80.
[43] QCCS Judgment at paras 754, 759.

## PART V – AUTHORITIES

| **Case law** | Paragraph where cited |
|---|---|
| *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 | 21 |
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| *Carter v. Canada (Attorney General)*, 2015 SCC 5 | 49-50, 53-54 |
| *Godbout v Longueuil (City)*, [1997] 3 SCR 844 | 25 |
| *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 | 22, 22 |
| *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 | 25 |
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