Court File Number 420-7-10

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

- and -

Ruby C. Hastings

(Appellant)

APPELLANT'S FACTUM

THE DON RIVER LAW SOCIETY
135 Overlea Blvd, Toronto, ON M3C 1B3

Sarah Ali
Adil Haider
Bridget Huh
Dhrumil Patel
Vishnu Sripathi
Anna Xia

Of Counsel for the Appellant
Telephone: (416) 396 2410
Fax: (416) 396 2407
Email: drls.mgci@gmail.com

Reasons for Judgement

PART I:
INTRODUCTION

1. This case is about whether evidence found through random roving stops for blood alcohol concentration by a breath testing of the appellant, Ruby Hastings, should be included in Ms. Hastings' trial for the charge of operating a motor vehicle with a blood-alcohol concentration in excess of the allowable limit. The appellant claims that s. 320.27(2) of the Criminal Code is an unconstitutional infringement of s. 8 of the Charter and that her breath readings should be excluded from being admitted into evidence pursuant to subsection 24(2) of the Charter. On behalf of the appellant, we submit that s. 320.27(2) of the Criminal Code breached s. 8 of the Charter and that it cannot be saved under s. 1 of the Charter. We further submit that due to the breach, Ms. Hastings breath readings should be excluded from being admitted into evidence under s. 24(2) of the Charter as the admission of it would bring the administration of justice into dispute.

PART II:
SUMMARY OF THE FACTS

2. Ruby Hastings is charged with operating a motor vehicle with a blood-alcohol concentration in excess of the allowable limit.

3. Section 320.27(2) of the Criminal Code of Canada provides:

> 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.

4. On December 28, 2018, shortly after 8 p.m., Constable Archer was operating a marked cruiser northbound on Temagami Road in Algonquin Highlands when she observed a vehicle, subsequently determined to have been operated by Ms. Hastings, approaching from the opposite direction.

5. Constable Archer observed that the vehicle was a bright yellow Bentley Continental GT. She testified that the vehicle caught her attention because of the rarity of the

model and its colour. There were also no other vehicles on the road at that time. She turned her cruiser around and caught up to the vehicle.

6. Constable Archer activated her emergency lights, causing the vehicle to pull over to the shoulder of the roadway. She then approached the driver's side of the vehicle, advised Ms. Hastings that she was conducting a routine stop to check for impairment and requested Ms. Hastings' driver's licence and insurance documents.

7. At this time, Constable Archer was in possession of an approved ASD. At trial she testified that she could not detect the odour of alcohol from within the vehicle and that when questioned, Ms. Hastings denied drinking any alcohol that day. Constable Archer made the following additional observations with respect to Ms. Hastings:
    a. her speech and movements appeared normal;
    b. her eyes appeared alert and clear; and
    c. she was chewing gum.

8. Nonetheless, and per s. 320.27(2) of the *Code*, Constable Archer requested that Ms. Hastings exit the vehicle and provide a breath sample.

9. Ms. Hastings complied with the ASD request and registered a "fail".

10. As a result, Constable Archer arrested Ms. Hastings and transported her to a police detachment for a further breath sample and analysis by a qualified technician. Ms. Hastings complied. The results confirmed that Ms. Hastings was driving with a blood-alcohol concentration exceeding the legal limit of 80 milligrams of alcohol per 100 millilitres of blood.

11. At trial, Ms. Hastings did not challenge these results, but raised *Charter* issues with respect to the sample and the legislation authorizing its collection by Constable Hastings. In particular, she requested that Weinstock J:

    a) declare that s. 320.27(2) of the *Criminal Code* is an unconstitutional infringement of s. 8 of the *Charter* on the basis that the provision purports to allow a police officer in possession of an Approved Screening Device ("ASD") to demand a breath sample from a driver without reasonable or probable grounds or reasonable suspicion that the driver has alcohol in their body; and

    b) find that such infringement was not saved under s. 1 of the *Charter*; and

    c) exclude her breath readings from being admitted into evidence in this proceeding pursuant to subsection 24(2) of the *Charter* because the arresting officer did not have reasonable or probable grounds or reasonable suspicion that there was alcohol in her body before making a demand for a breath sample.

12. Weinstock found that s. 320.27(20) of the *Criminal Code* infringes on s. 8 of the *Charter* as the provision authorized an invasive physical search that could be applied arbitrarily, as evidenced by the grounds for which Ms. Hastings was pulled over and

searched.

13. However, Weinstock found that the provision was saved by s. 1 of the *Charter* as it is effective in deterring impaired driving and thus helps to prevent fatal accidents caused by impaired driving. Furthermore, it is necessary to allow officers to screen for impaired driving without developing a reasonable suspicion since they are often unable to develop the necessary suspicion to stop impaired drivers. It was also found that requiring a breath sample was not excessively invasive as it only revealed whether a driver was complying with the common sense rules of the road.

14. Having found that s. 320.27(2) of the *Criminal Code* was constitutional, the breath readings were not excluded from being admitted into evidence under s. 24(2) of the *Charter* as excluding evidence resulting from a constitutionally sound provision would render the provision useless.

PART III
GROUNDS OF APPEAL

ISSUE ONE: DOES SECTION 320.27(2) OF THE CRIMINAL CODE INFRINGE THE RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE ENSHRINED UNDER S. 8 OF THE CHARTER?

15. Section 8 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> 8) Everyone has the right to be secure against unreasonable search or seizure.

The appellant submits that Section 320.27(2) of the Criminal Code infringes the right to be secure against unreasonable search and seizure under s. 8 of the *Charter*.

> ***Canadian Charter of Rights and Freedoms****, Schedule B, Constitution Act,* 1982, s 8.

16. In determining whether or not Ms. Hastings' s. 8 rights were violated, we must conduct a two step analysis: 1) has there been a "search" or a "seizure"? and if so, 2) was the search or seizure reasonable?

17. With regard to the first section of our analysis, in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* (hereinafter referred to as *Goodwin*), the Supreme Court of Canada stated that:

> [50]It is undisputed before this Court that the roadside breath demand constitutes a seizure within the meaning of s. 8 of the *Charter* .
>
> [51]It is also undisputed before this Court that drivers of vehicles have some expectation of privacy in their breath, even if a diminished one. The factors identified by this Court as "helpful markers" in *Tessling*, at paras. 43-62, support this conclusion. The seizure occurs in a vehicle (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 111 and 113); in the highly regulated context of driving on a public highway (*R. v. McKinlay Transport Ltd*., [1990] 1 S.C.R. 627, at pp. 647-48); and is relatively non-intrusive (*Grant*, at para. 111). While these factors support a diminished expectation of privacy, they do not eliminate any residual privacy interest in one's breath. Thus the demand to breathe into a roadside screening device constitutes a

seizure that infringes on an individual's reasonable expectation of privacy. The protection of s. 8 is engaged.

18. Given that the circumstances of *Goodwin* are exceedingly similar to those of Ms. Hastings, we can establish that a seizure did occur, and that it infringed upon appellant's expectation of privacy.

***Goodwin v. British Columbia**,* [2015] 3 SCR 250 at paras 50-51

19. As for the second question of whether the search or seizure was reasonable, three conditions of the search/seizure must be satisfied to prove reasonableness: (1) the search or seizure is authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search is carried out is reasonable.

R. v. Collins, [1987] 1 S.C.R. 265 at para. 23

R. v. Nolet, [2010] 1 S.C.R. 851 at para. 21

R. v. Shepherd, [2009] 2 S.C.R. 527 at para. 15

R. v. Chehil, [2013] 3 S.C.R. 220, at para. 22

20.. The specific search in this case was warrantless. As stated in *Hunter v. Southam, Nolet* at para. 21, and *Goodwin* at para. 99, a warrantless search or seizure is presumptively

unreasonable. The party seeking to justify a warrantless search bears the onus of rebutting the presumption by establishing that the search was:

> 1)authorized by law;
>
> 2)the law itself is reasonable; and
>
> 3)the manner in which the search or seizure takes place is reasonable
>
> ***R. v. Caslake***, [1998] 1 S.C.R. 51, at paras. 10-11
>
> ***R. v. Mann***, [2004] 3 S.C.R. 59 at para. 36

21. With regard to the first question, the seizure was clearly authorized by law as outlined by s.320.27(2) of the Criminal Code.

22. The second and third questions are the ones relevant to this specific case, and the ones where the majority of our doubts lie. The appellant respectfully submits that the law itself is not reasonable and the manner in which the search and seizure takes place is not reasonable.

23. There is no hard and fast rule for the determination of whether or not a law is reasonable, but certain factors may be helpful in our analysis: specifically, the purpose and nature of the

legislative scheme, the mechanism employed, and the degree of its potential intrusiveness, and the availability of judicial oversight.

Del Zotto v. Canada, [1997] 3 F.C. 40 (C.A.)

24. The purpose of the law, to reduce impaired and drunk driving fatalities, is obviously pressing and substantial, and this factor of analysis weighs on the side of this law being reasonable.

25. The nature of the scheme is unprecedented in Canadian history, as it seeks to allow completely arbitrary bodily seizures for the assessment of criminal law. This requires a higher level of scrutiny be applied.

26. Furthermore, the chain of events leading to a search under s.320.27(2) is arbitrary on two levels.

27. First, the ability for a search to be conducted is relies an officer having an ASD on hand. As such, the application of this law depends upon the arbitrary factors of the circumstances of a particular officer patrolling a particular area having a device on hand and the policing policy of a particular police department. The latter is particularly problematic for the reason of the

creation of systemically differential enforcement rates based on geographical area, and in particular the entrenchment of racially biased enforcement detailed *infra* in areas of high minority and First Nations populations due to policies of increased ASD possession arising from racial stereotyping.

28. Second, the decision for an officer to conduct the search is done completely at his/her discretion and need not be based on any suspicion of impaired or drunk driving. In this particular case, the accused, Ms. Hastings, per the testimony of Constable Archer, was stopped solely for the unique nature of her vehicle. There was no indication of criminal conduct given for the administration of the test.

29. The respondent may argue that pursuant to *r v. Ladouceur* (Hereinafter referred to as *Ladouceur)* it is established that police officers have limitless power in a random roving stop to check for license and registration due to section 1. However, we submit that the use of an ASD represents a much more severe violation of the relevant section than a license and registration check detailed in *Ladouceur* in two respects.

30. First, this represents a violation of the charter under section 8. rather than section 9. As stated *supra* the absence of jurisprudence in allowing arbitrary search and seizure should

grant the violation of section 8. greater weight in consideration as per *Del Zotto.* (In contrast to there already exists of case law in favor of allowing section 8 under section 1- eg. *Dedman v. The Queen*)

31. Second, when a police officer conducts a roving stop to check for licence and registration per *Ladouceur*, the suspected individual only needs to hand over their license and registration. On the other had mechanism of seizure, in this case, includes multiple steps that are significantly more intrusive than a mere licence or registration check as per *Ladouceur*.

> In particular, the taking of breath samples is an invasive physical procedure that goes beyond simply exchanging information (such as licenses, ownership, and registration). Although it may not be required in all cases, drivers are compelled by the provision to remove themselves from their vehicles to accompany the police officer in order to take the breath sample. There also does not appear to be a limit on the number of samples that could be taken from the driver, which implies that the breath samples might take longer than a few seconds.
>
> **Official Problem**, Fall 2019 OJEN Charter Challenge, at para. 28

32. The disproportionate amount of time relative to a license and registration check that may be required for a police officer to conduct a search and seizure during a roving stop that tests for inebriation represents a more invasive seizure that is arbitrarily decided by the police officer in question. In this case, there was no lawful limit to the duration of Archer's roving stop. As a consequence, Archer was able to detain the appellant for approximately 40 minutes.

33. Furthermore, the fact that an accused may have to leave their vehicle and interact with the officer for a longer period increases the intrusiveness of the search in two ways. First the experience of this greater degree of interaction with the police in the context of a search is itself more intrusive- particularly for members of marginalized communities who, as detailed *infra,* have a greater likelihood of experiencing hostile police interaction. Second, the proximity and length of the interaction create much greater potential for other charter infringing abuses of power in contrast with an in vehicle interaction, and as such require a degree of oversight that is not present- as explained *infra*.

34. The combination of these steps results in an unreasonably intrusive seizure of breath samples. Furthermore as outlined in *R v Chehil* (hereinafter referred to as *Chehil*):

> [51]A method of searching [or seizure] that captures an inordinate number of innocent individuals cannot be reasonable, due to the unnecessary infringement of privacy and personal dignity that an arrest would bring.
>
> ***R. v. Chehil***, [2013] 3 S.C.R. 220, at para. 51

35. As stated above, an ineffective seizure that results in an "inordinate number of innocent individuals" being suspected of a criminal offence is not minimally intrusive or narrowly tailored. There is an unreasonable tradeoff that violates the section 8 rights of innocent drivers, for a disproportionately low chance to catch a single impaired driver over the legal

maximum blood alcohol concentration. However, for this law to be enforced, police officers would have no other option but to perform unsupervised fishing expeditions that entail violating the section 8 rights of a large majority of 15.9 million Canadian commuters to catch an inappreciable 4% of Canadian drivers who are driving impaired.

Clermont, Yvan. "Impaired driving statistics." *SenCanada.ca*, Senate of Canada, 8 February 2018, https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/2018-LCJC_StatCan_e.pdf. Accessed 14 November 2019.

36. As for the availability of judicial oversight, we find it is completely lacking in this case. We have no way of knowing whether Cst. Archer pulled over Ms. Hastings for any objective reason of race, colour, class, sex, or any other enumerated or analogous *Charter* protected ground, aside from the Constable's word that she did not. Nothing more is required of the Constable, nor is she required to have any reason for conducting the seizure other than the presence of the appellant on the public highways.

37. To preemptively rebut the notion that *Charter* violations on the basis of protected grounds would be backed up by other evidence, we present this Court's previous judgement in *R v Brown* (hereinafter referred to as *Brown*) at paras 44-45

> [44] A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

> [45] The respondent submits that where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling. I accept that this is a way in which racial profiling could be proven. I do not think that it sets the hurdle either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under s. 9 of the Charter).
>
> ***R. v. Brown***, [1994] 3 S.C.R. 749, at para 45-45

38. *Brown* deals in particular with a traffic stop due to speeding, a case in which significantly more substantial record keeping is necessitated by law, and in which there is substantially more circumstantial evidence relating to the circumstances of the action in question. Despite this, it is still exceedingly difficult to make a determination of racial bias in speeding cases.

39. In this particular circumstance, even less of that evidence is available, and the officer is not required to give any statement as to the reasons for their seizure.

40. Thus, the court's ability to remedy serious *Charter* violations relies entirely on the continual good behaviour of every highway constable. As discussed by the Supreme Court in *R v Bain* (hereinafter referred to as *Bain*), this cannot always be relied upon:

> 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.

41. To conclude our analysis of the reasonableness of the law, we believe that, with the exception of the purpose of the legislative scheme, all sections of our analysis support the law being unreasonable.

42. Having established that, we do not believe that we have to deal with the manner in which a particular seizure was conducted.

ISSUE TWO: IF SO, IS IT NEVERTHELESS SAVED UNDER S. 1 OF THE *CHARTER*?

43. Section one of the Canadian Charter of Rights and Freedoms Constitution states that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ***Canadian Charter of Rights and Freedoms**, Schedule B, Constitution Act,* 1982, s 1.

44. We submit that the law cannot be saved under s. 1 of the *Charter*.

45. Pursuant to *R v. Oakes* (hereinafter referred to as *Oakes*), section one analysis shall be conducted by a three-pronged test, paraphrased below:

1. The limit must be prescribed by law.
2. There must be a pressing and substantial objective for the law or government action.
3. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant.

    i. The objective must be rationally connected to the limit on the Charter right.

    ii. The limit must minimally impair the Charter right.

    iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

46. With regard to the first element, the infringement of s. 8 is prescribed by law as it is set out in s. 320.27(2), that is not in question for the purpose of this appeal.

47. Impaired driving is a prevalent and serious issue due to the significant number of impaired driving cases that result in injury and death, among other severe consequences. The reduction of impaired driving is obviously a pressing and substantial objective.

48. We would challenge the law on the third prong of the Oakes on the grounds of elements two and three of the proportionality test. On the element of minimal impairment, we submit that (1) the crown does not present evidence that this specific measure is necessary for the attainment of the reduction as presented in as the pressing and substantive objective and (2) that there exist significantly less impairing ways for the conduction of the sobriety tests. On the element of proportionality we submit that the level of infringement is not proportional to the objectives of the law given by the crown due to (1) the severity of infringement to the privacy rights of the accused as discussed *supra* (2) the severity of the penalty attached to a impaired driving charge and (3) the risk of racial bias specifically against First Nations communities due to stereotypes around drunkenness that requires the accountability provided by judicial review that is removed by this law.

49. The examples the Crown provides of the scale of the reduction in impaired driving produced by this change provides no evidence as to the necessity of random roving stops in addition to checkpoint sobriety tests, given that frameworks in which only checkpoint sobriety tests are permitted are included in the Crowns examples. With regard to rational connection, The institution of mandatory screening at all lawful stops, including random roving stops, is

likely to produce a substantial deterrent effect, and enable the prosecution of several hitherto undiscovered impaired drivers, this is not in question.

50. The examples the crown provides of the scale of the reduction in impaired driving produced by this change provides no evidence as to the necessity of random roving stops in addition to checkpoint sobriety tests, given that frameworks in which only checkpoint sobriety tests are permitted are included in the Crown's examples. For example, the Crown cites Ireland's mandatory alcohol screening legislation as an effective remedy to drunk driving, wherein a police officer situated at a checkpoint may stop a passing vehicle and require the driver to provide a breath sample, rather than stop a vehicle at any point on the public roads, as the Crown proposes. There exists a substantially more minimally impairing route to achieve the goals of the state, specifically stationary checkpoints, as discussed in *R. v. Hufsky*. These would address many of the concerns raised *supra*.

51. First, multiple officers would be involved in the placing of a particular checkpoint, and the officer would be under the observation of his peers when choosing a car to stop, thus reducing the likelihood the seizure would be made on a *Charter* infringing ground, and increasing the quantity of circumstantial evidence for a *Brown* analysis should there be *Charter* infringement.

52. Second, as they are fixed in place, they would have a limited amount of time to decide who to stop, thus increasing the likelihood that the officer would either make stops on a truly random basis or that they would engage in a pattern of objective behaviour that could be puzzled out.

53. Third, with more planning involved in the location of checkpoints, the decision of who does and does not carry ASDs could be standardized, thus removing a significant quantity of violations, as discussed *supra*.

54. Fourth, the level of time pressure produced by a stationary checkpoint would force officers to conduct seizures with all necessary haste in order to proceed to their next stop, substantially mitigating the issues brought up *supra* with regard to the length of time a person is stopped for, and the number of seizures conducted per stop.

55. The appellant would also submit that the number of allowable seizures per stop should be read into the statute, in order to fully extinguish the possibilities for violations listed *supra*.

56. Per *supra*, this law permits searches which by nature represents a direct and substantial infringement of the privacy rights of the accused, as well as creating the potential for abuse that demands a level of oversight not provided.

57. Second, we note that per Bill C-46, the sentence for impaired driving carries a criminal record, minimums of a $1000 fine, 30-day imprisonment, and 120-day imprisonment on the first second and third offences respectively, and a maximum sentence of 10-year imprisonment in all circumstances. The potential severity of consequence, for the accused, means that procedural accountability and the protection of the rights of the accused in the collection of evidence is of utmost importance. As such the arbitrary application of this law, as detailed, as well the lack of judicial review detailed *supra* is unacceptable.

58. Finally, we submit that in the context of Canadian law there the application of this law creates systemic racial bias. per *Brown*, the standard for determining the presence of racial bias in the application of a law is that of a reasonable apprehension of bias. There is a specific stereotype of drunkenness held against First Nations communities in Canada and due to that we submit that a reasonable person would anticipate this law to be applied in a racially discriminatory matter. This is an element which aggravates the extent to which the powers of random ASD tests afforded by the law represents a section 8 violation- especially

when the potential for racial bias is combined with the previously discussed length of sentence (given that the existence of harsher penalties would institute more severe systemic bias). However, even if this does not influence the severity of the violation represented by the search process itself, the potential for bias would require a process of judicial review of police conduct for any search conducted that this law removes (as detailed *supra*).

ISSUE THREE: SHOULD THE BREATH READINGS IN THIS CASE BE EXCLUDED FROM EVIDENCE PURSUANT TO S. 24(2) OF THE CHARTER?

59. Section 24(2) of the *Charter* reads as follows:

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
>
> ***Canadian Charter of Rights and Freedoms****, Schedule B, Constitution Act,* 1982, s 24(2)

The appellant submits that the breathalyzer evidence should be excluded pursuant to this section

60. The purpose of s. 24(2) is to maintain the integrity of the justice system, from the beginning of the investigation to the end of sentencing. As such, the focus of the section is on societal or systemic effects as opposed to oversights and violations on the individual scale. In *R v Grant* (hereinafter referred to Grant), the court set out three points to be considered in assessing the effect of admitting the evidence on public confidence in the judicial system:

(1) the seriousness of the *Charter*-infringing state conduct

(2) the impact of the breach on the *Charter*-protected interests of the accused, and

(3) society's interest in the adjudication of the case on its merits.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 61

61. With regard to the first element of the *Grant* analysis, we concede that Cst. Archer believed she was acting within her lawful authority, however, the seriousness of the police conduct must extend to the overarching pattern of behaviour.

62. Cst. Archer did not pull over Ms. Hastings in the pursuance of any lawful purpose, such as a sobriety screening program; she pulled her over on a whim while she was driving down the highway.

63. Police officers are imbued with immense societal trust in order to enforce the laws of the land, particularly on the public roadways, where they act on the lowest threshold of suspicion, and with exceedingly minimal oversight. That trust is given with the expectation that they always act in full knowledge of the weight of their actions.

64. Pulling someone over while engaged in no lawful purpose other than transiting from one place to another, for no purpose other than their car was interesting may be technically legal, but it was certainly not within the spirit of the trust imbued in our police forces on the public roadways.

65. Had this lack of care been applied in any other circumstances, say with a marginalised individual, it could have resulted in an even more severe *Charter* violation.

66. Thus it is the submission of the appellant that this lack of due care by the state should be rebuked, and that the analysis of this section should weigh on the side of exclusion.

67. In regards to element 2 of the Grant test, the appellant's section 8 rights have undoubtedly been violated due to the breach in question had a substantial impact on the right of the accused to be secure against unreasonable government search and seizure while on the public highway.

68. The entirety of the prosecution's case, by their own admission, was based on the breathalyzer sample taken at the police station, evidence which exists only due to the initial unconstitutional ASD test at roadside. The evidence is derivative of a seizure that has been

proved to be unconstitutional, and would not be discoverable without said unconstitutional seizure. This not only infringes on the appellant's charter protected rights but also condones the possession and exercise of unchecked power.

69. Thus it is the submission of the appellant that this lack of due care by the state should be rebuked, and that the analysis of this section should weigh on the side of exclusion.

70. With regard to society's interests in the adjudication of the case on its merits, we must consider that traffic stops are one of the most common types of interactions people have with police, and one where the police have overwhelming power given to conduct arbitrary detentions and engage in questioning on the lowest threshold of suspicion.

71. There must therefore be no appearance of the state condoning abusive behaviour by police on the roadways, in order to maintain that lest they lose faith in their most common interaction with the justice system.

72. This principal also applies to the level of societal sanction involved, in this case the potential for up to 10 years in prison, and Serious Offender Status. As discussed in *Grant*:

> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the

> greater society's interest in its prosecution (para. 226). **In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways**[Emphasis added]**.** Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in Burlingham, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in Collins, "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, **it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high**[Emphasis added]**.**
>
> ***R. v. Grant***, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 84

73. Thus, it is the submission of the appellant that this analysis should weigh on the side of exclusion

74. As all three sections weigh on the side of exclusion, we believe the evidence should be excluded

APPLICATION TO THIS CASE

75. We hereby find that s. 320.27(2) of the *Criminal Code* is an infringement of s. 8 of the *Charter* and cannot be saved by s. 1 of the *Charter*. As such evidence resulting from

searches conducted during random roving stops should be excluded under s. 24(2) of the *Charter* as it is authorized by an unconstitutional provision, The law is unreasonable due to the non-minimally infringing nature of the mechanism of seizure and the complete absence of judicial oversight. The government's objectives can be achieved through more minimally impairing means, and the violations of the current means have been found schemes have to be disproportionate with the government of the current scheme. Finally, the lack of care used by the officer in question, and society's interest in the unimpeachability of roadway officers means the evidence should be excluded.

PART IV

ORDER REQUESTED

76. It is respectfully requested that the decision of the trial/application judge be overturned and the evidence against Ms. Ruby Hastings (the appellant) be excluded at trial.

ALL OF WHICH is respectfully submitted by

Sarah Ali

Adil Haider

Bridget Huh

Dhrumil Patel

Vishnu Sripathi

Anna Xia

Of Counsel for the Appellant

DATED AT MARC GARNEAU COLLEGIATE INSTITUTE

this 15th Day of November, 2019

APPENDIX A

AUTHORITIES TO BE CITED

Legislation

Canadian Charter of Rights and Freedoms, s 8, Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Canadian Charter of Rights and Freedoms, s 1, Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.e

Canadian Charter of Rights and Freedoms, s 24(2), Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Jurisprudence

Del Zotto v. Canada, [1997] 3 FC 40, 1997 CanLII 6349 (FCA)

Goodwin v. British Columbia, 2015 SCC 46, [2015] 3 SCR 250

R. v. Bain, [1992] 1 SCR 91

R. v. Brown, [1991] 2 SCR 518

R. v. Caslake, [1998] 1 SCR 51

R. v. Chehil, 2013 SCC 49, [2013] S.C.R. 220

R. v. Collins, [1987] 1 S.C.R. 265

R. v. Grant, 2009 SCC 32, [2009] 2 SCR 353

R. v. Hufsky, [1988] 1 SCR 621

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

R. v. Mann, 2004 SCC 52, [2004] 3 SCR 59

R. v. Nolet, 2010 SCC 24, [2010] 1 SCR 851

R. v. Oakes, [1986] 1 SCR 103*R. v. Oakes*, [1986] 1 SCR 103

R. v. Shepherd, [2009] 2 SCR 527

Miscellaneous

Clermont, Yvan. "Impaired driving statistics." SenCanada.ca, Senate of Canada, 8 February 2018,

https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/2018-LCJC_StatCan_e.pdf. Accessed 14 November 2019.

Government of, Canada. "Victimization and Offending among the Aboriginal Population in Canada." Stats Canada, 2006,

www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2006003-eng.pdf?st=6rjKkcdG.