SCC File No.

IN THE SUPREME COURT OF CANADA
(ON APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant
(Appellant)

- and -

WALKER McCOLMAN

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT OF THE APPLICANT,
HER MAJESTY THE QUEEN
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

Attorney General of Ontario
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Davin Michael Garg
Tel: 416.326.4600
Fax: 416.326.4656
Email: davin.garg@ontario.ca

Counsel for the Applicant,
Her Majesty the Queen

Borden Ladner Gervais LLP
World Exchange Plaza
1300 –100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Agent for the Applicant,
Her Majesty the Queen

ORIGINAL TO: **The Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K0A 0J1

COPY TO:

Orazietti & Orazietti
434 Albert Street East, Upstairs
Sault Ste. Marie, ON P6A 2J8

Donald Orazietti, Q.C.
Tel: 705.256.5601
Fax: 705.945.9427
Email: donaldorazietti@gmail.com

Counsel for the Respondent,
Walker McColman

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APPLICANT'S MEMORANDUM OF ARGUMENT

(Pursuant to Rule 25(c) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

PART I: OVERVIEW AND FACTS

A. Overview

1. This case has simple facts yet is packed with legal issues of public importance. The immediate issue – on which the provinces are split – concerns whether police can conduct a random sobriety check on private property. This issue extends into two broader questions. First, what is the correct approach to the statutory interpretation of public welfare legislation designed to protect people on our roads? Second, what is the role of the common law to fill gaps in the legislation under the ancillary powers doctrine? Answering these questions involves striking the suitable balance between the protection of individual liberty and the effective deterrence of crime.

2. This case also concerns the test under s. 24(2) for excluding evidence that is connected to a *Charter* breach. This case offers an opportunity for this Court to reiterate how courts must undertake a contextual balancing of factors in deciding whether the evidence shall be excluded.

3. It is well-settled that police are authorized to randomly stop drivers on public streets to

check their sobriety. At the Ontario Court of Appeal, the applicant Crown proposed a circumscribed power on when police can complete this random sobriety check on private property:

i. the police officer must observe the driver operating on a public street;

ii. the police officer must crystallize their intention to stop the driver for a random sobriety check while the driver is still on the public street; and

iii. although the driver leaves the public street and enters private property before the stop is conducted, the events must form one continuous investigative transaction.

4. A majority of the Ontario Court of Appeal (*per* Tulloch J.A., Feldman J.A. concurring) rejected this proposal. The majority held that the power to check the respondent's sobriety dissipated the moment he turned onto private property. The majority reasoned that neither Ontario's *Highway Traffic Act* nor the common law authorized the proposed police power. While the proposed power fell within the scope of police duties, it was not reasonably necessary to fulfill those duties. The majority therefore concluded that the sobriety check constituted an unlawful detention that violated s. 9 of the *Charter* and excluded all incriminating evidence under s. 24(2).

5. The dissent (*per* Hourigan J.A.) disagreed on all fronts, finding that both the *Highway Traffic Act* and the common law authorized the sobriety check, failing which the evidence ought to have been admitted under s. 24(2).[1]

6. Granting leave to appeal would allow this Court to resolve issues of public importance. This Court could settle the interprovincial disagreement on when police can complete a random sobriety check on private property. In addition, the scope of the majority decision is uncertain and does not equip police with workable direction. If left unaddressed, impaired drivers are encouraged to immunize themselves from a sobriety check by seeking the sanctuary of private property – *any private property* – whenever they see a police cruiser on the horizon or in their rearview mirror.

7. An appeal would also allow this Court to address s. 24(2) and the correct approach to good

[1] Notwithstanding the dissent at the Court of Appeal on questions of law, an appeal requires leave because the Crown proceeded by summary conviction at trial.

faith *Charter* breaches that occurred when police had mere seconds to decide what to do. The majority decision constructs an analytical straitjacket that situates every s. 9 breach on the "serious" and "significant" ends of the spectrum in the s. 24(2) analysis.

B. Facts and Summary of the Proceedings

8. The applicant relies on the trial judge's findings of fact in his *Reasons for Ruling on Charter Application*, which are thoroughly summarized in the majority and dissenting decisions of the Ontario Court of Appeal.

Police intended to stop the respondent while he drove on the public street

9. Constable Lobsinger was patrolling the Thessalon First Nation in a police cruiser. He saw a motor vehicle idling in the parking lot of a convenience store. The officer observed that the vehicle was about to leave the parking lot and proceed onto a public street, or "highway".[2]

10. The trial judge found as fact that the officer formed the intention to stop the motor vehicle and check the driver's sobriety while the driver was on the highway. The officer was relying on his authority under s. 48(1) of Ontario's *Highway Traffic Act*. The officer acknowledged that he did not have grounds to suspect that the driver was impaired, nor did he see the driver commit any traffic infractions.[3]

11. The police made a U-turn to pursue and stop the driver for the sobriety check. At the moment when the police caught up to the driver, the driver left the highway and stopped on a private driveway that served commercial and residential properties. There was no suggestion that the driver was trying to evade the police or thwart their ability to check his sobriety. The police followed the driver onto the driveway and activated the cruiser's roof lights. The entire encounter

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[2] *Reasons of the ONCA*, 2021 ONCA 382 at para. 9 (Application Record, Tab 8 at p. 54). In Ontario, a "highway" includes any street intended for the passage of vehicles by the general public: *R. v. Hajivasilis*, 2013 ONCA 27 at para. 10.

[3] *Reasons for Ruling on Charter Application* at paras. 52, 54 (Application Record, Tab 3 at p. 16); *Reasons of the ONCA*, 2021 ONCA 382 at para. 102 (Application Record, Tab 8 at p. 86)

thus far, from observing the driver in the parking lot to him pulling into the driveway, took less than a minute.[4]

Police immediately observed indicia of impairment

12. The police officer watched the driver exit the driver's seat and walk to the passenger side. The driver was "very obviously unsteady on his feet" and his knees were wobbling despite hanging onto the side of the vehicle. The officer smelled a strong odour of alcohol on the driver's breath, who was slurring his words. The officer asked the driver to step away from the vehicle, and the driver stumbled towards the officer, stopping about a foot from his face. The officer asked if he had consumed any alcohol; the driver replied, "I've had a few beers … Well I might've had 10".[5]

13. The officer identified the driver as the respondent. It turned out that the respondent had reached the driveway of his parents' house. The officer did not know this fact when he followed the vehicle onto private property, since the driveway also served another convenience store.[6]

14. The respondent ultimately provided two samples of his breath registering 120 and 110 mg of alcohol in 100 mL of blood.[7]

Ontario Court of Justice (Villeneuve J.)

15. The trial judge held that the police had acted within the scope of the *Highway Traffic Act* – the officer's authority to check the respondent's sobriety under s. 48(1) continued after the respondent had turned onto private property. The trial judge thus did not address a common law

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[4] *Reasons for Ruling on Charter Application* at paras. 53, 57 (Application Record, Tab 3 at p. 16); *Reasons of the ONCA*, 2021 ONCA 382 at paras. 10, 103 (Application Record, Tab 8 at pp. 54, 87).

[5] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 12, 104 (Application Record, Tab 8 at pp. 55, 87).

[6] *Reasons for Ruling on Charter Application* at para. 18 (Application Record, Tab 3 at p. 11); *Reasons of the ONCA*, 2021 ONCA 382 at paras. 10, 147 (Application Record, Tab 8 at pp. 54, 108).

[7] *Reasons for Judgment on Trial* at paras. 9-10, 23 (Application Record, Tab 4 at pp. 21, 23); *Reasons of the ONCA*, 2021 ONCA 382 at para. 13 (Application Record, Tab 8 at p. 55).

authority or s. 24(2).[8] The trial judge found the respondent guilty of both impaired and "over 80" operation of a motor vehicle.[9]

Summary Conviction Appeal Court (Gareau J.)

16. The respondent appealed to the Summary Conviction Appeal Court (SCAC). The appeal judge disagreed with the trial judge's conclusion that the *Highway Traffic Act* authorized the sobriety check. The appeal judge held that the police had no authority for the sobriety check under statute or common law. As a result, the appeal judge found a breach of s. 9, excluded all evidence under s. 24(2) that resulted from the check (*i.e.*, the indicia of impairment and the breath readings), and entered an acquittal on all counts.[10]

Ontario Court of Appeal (Feldman and Tulloch JJ.A., Hourigan J.A. (dissenting))

17. As outlined above, the majority affirmed the conclusions of the appeal judge and upheld the acquittals. The dissent would have restored the conviction imposed at trial.

PART II: QUESTIONS IN ISSUE

18. Granting leave to appeal would permit this Court to resolve the following questions of public importance:

i. Was the random sobriety check authorized by the *Highway Traffic Act*?

ii. Was the random sobriety check authorized by the common law?

iii. Did the majority of the Ontario Court of Appeal err in law by failing to conduct a contextual s. 24(2) analysis and overlooking relevant factors?

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[8] *Reasons for Ruling on Charter Application* at paras. 52, 54-55 (Application Record, Tab 3 at p. 16).
[9] *Reasons for Judgment on Trial* at paras. 22-23, 41 (Application Record, Tab 4 at pp. 23, 26).
[10] *Reasons of the SCAC*, 2019 ONSC 5359 at paras. 15-51 (Application Record, Tab 5 at pp. 31-51); *Decision of the SCAC on Impaired Operation Count* at pp. 2-4 (Application Record, Tab 6 at pp. 43-45).

PART III: ARGUMENT

19. To orient the arguments specific to each question, the applicant first outlines the overarching legal context that governs random sobriety checks.

A. The Legal Context of Random Sobriety Checks

20. It is uncontroversial that police officers, acting in the lawful execution of their duty, are authorized to randomly stop drivers on public streets to check their sobriety. The authority is found both at statute and the common law. No suspicion of impairment or alcohol consumption is required. The stop can stem from an organized program of roadside spot checks or from an officer's routine to check random vehicles. When the stop is made pursuant to statute, the resulting detention is arbitrary because the decision to stop lays in the absolute discretion of the police officer. However, the s. 9 intrusion is reasonably and demonstrably justified in a free and democratic society under s. 1 of the *Charter*.[11] When the stop is made under the common law, it is authorized by the ancillary powers doctrine, also known as the *Waterfield* test for police powers.[12]

21. There are similarities in the factors that justify the random sobriety check under s. 1 and authorize it under the ancillary powers doctrine.[13] Both analyses consider the nature of the liberty at stake and the intrusion upon it.[14] Driving is a licensed and regulated activity, the sobriety checks are relatively short, the driver is minimally inconvenienced, and the officer's investigation is restricted to the purpose of the check. Further investigative steps require the requisite grounds.[15]

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[11] *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 25-64, [1990] 1 S.C.R. 1257 at 1271-1289; *R. v. Hufsky*, 1988 CanLII 72 at paras. 9-21, [1988] 1 S.C.R. 621 at 630-637.

[12] *Dedman v. The Queen*, 1985 CanLII 41 at paras. 62-69, [1985] 2 S.C.R. 2 at 30-36.

[13] Vanessa A. MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012), 57 S.C.L.R. 225 at 229-232: "In the past three decades, the Supreme Court of Canada has developed a doctrine of ancillary powers that is virtually indistinguishable from the justification analysis prescribed by *Oakes*".

[14] *R. v. Orbanski; R. v. Elias*, 2005 SCC 37 at para. 54; *Fleming v. Ontario*, 2019 SCC 45 at paras. 46-47.

[15] *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 58-60, [1990] 1 S.C.R. 1257 at 1285-1287; *Dedman v. The Queen*, 1985 CanLII 41 at paras. 68-69, [1985] 2 S.C.R. 2 at 34-36.

Both analyses also evaluate the connection between the intrusion and the purpose it intends to achieve.[16] This Court in *Ladouceur* found "overwhelming" evidence on the relationship between serious accidents and driving under the influence of alcohol or drugs. Random checks are rationally connected to reducing those accidents. They cause some people to think twice before getting behind the wheel after drinking or consuming drugs. "Without random routine checks, impaired drivers could easily avoid the consequences of their dangerous misconduct".[17]

22. Random sobriety checks remain equally important today to tackle the scourge of impaired driving.[18] The *threat* posed by impaired driving to life and safety, the significance of *deterring* it, and the fact it is a *privilege* to operate a motor vehicle, were all recently codified in the *Criminal Code*.[19]

23. In Ontario, the statutory authority for random sobriety checks starts at s. 48(1) of the *Highway Traffic Act* (the *HTA*). The version in force at the time of this incident read:

> A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the *Criminal Code* (Canada).[20]

This provision authorizes a sobriety check because the "demand under s. 254" refers to impaired-related investigative procedures.[21]

24. Section 48(1) of the *HTA* permits police to stop a "driver", which is defined in s. 1(1) as "a person who drives a vehicle on a highway". "Highway", in turn, is defined as places "… intended

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[16] *R. v. Orbanski; R. v. Elias*, 2005 SCC 37 at para. 54; *Fleming v. Ontario*, 2019 SCC 45 at para. 47.

[17] *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 42-57, [1990] 1 S.C.R. 1257 at 1279-1285; *Dedman v. The Queen*, 1985 CanLII 41 at paras. 68-69, [1985] 2 S.C.R. 2 at 34-36.

[18] *Reasons of the ONCA*, 2021 ONCA 382 at para. 93, (Application Record, Tab 8 at p. 83).

[19] *Criminal Code*, s. 320.12.

[20] The current version of s. 48(1) only updates the *Criminal Code* provisions to sections 320.27 and 320.28 to correspond with recent amendments to the *Criminal Code*. This legislative update has no practical impact on the issues of this case.

[21] See: *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 26, 40, [1990] 1 S.C.R. 1257 at 1271-1272, 1278.

for or used by the general public for the passage of vehicles". Section 48 also contains its own definition of "driver" in s. 48(18) to include "a person who has care or control of a motor vehicle".

25. Other provinces feature similar legislation that will be canvassed in the argument below.

26. In this case, the respondent drove on a "highway" after leaving the convenience store, prior to turning onto private property. As a result, the police were authorized under s. 48(1) of the *HTA* to stop the respondent, without grounds, and check his sobriety. The only question is whether the police officer, having crystallized his intention to check the respondent's sobriety while he drove on the highway, could still conduct the check seconds later when the respondent left the highway and turned onto private property.

B. The Random Sobriety Check was Authorized by the *Highway Traffic Act*

27. The applicant advances three arguments to demonstrate the public importance in deciding whether the random sobriety check was authorized by statute: (i) there is divergence amongst the provinces on how to govern this fact scenario, which arises with some regularity; (ii) the law needs clarity on the purposive approach to statutory interpretation; and (iii) the Court of Appeal did not consider the import of the s. 48(18) definition of "driver".

There is interprovincial disagreement on a recurring issue

28. All provinces have enacted legislation similar to Ontario's *Highway Traffic Act* to regulate activity on the roads. Ontario is not alone in legislating random sobriety checks on public streets. Some provinces feature analogous provisions to Ontario, yet their jurisprudence diverges from the majority decision of the Ontario Court of Appeal and sanctions the applicant Crown's proposal on when police can complete a random sobriety check on private property.

29. This interprovincial conflict needs to be settled. Similar laws ought to be interpreted in the same fashion across the country, especially when there is no principled reason for the law to differ by province. The courts across this country are interpreting analogous provisions, and applying the legal principles outlined by this Court, yet arriving at conflicting conclusions.

30. Saskatchewan: The interprovincial disagreement is most stark between Ontario and Saskatchewan, because the two provinces share similar statutory provisions and have litigated the issue on the same facts to their respective courts of appeal. In Saskatchewan, the authority to conduct random sobriety checks is found in s. 209.1 of *The Traffic Safety Act*. While the wording of the provision does not constrain random sobriety checks to the highway in the same manner as Ontario's provisions, the Saskatchewan Court of Appeal has held that s. 209.1 only applies to the highway.[22] Nonetheless, in a case called *Anderson*, the Saskatchewan Court of Appeal applied the "pragmatic approach" from *Orbanski* and held that s. 209.1 authorizes police to conduct a random sobriety check on private property when the officer formed the intention to stop the driver prior to the driver turning onto private property.[23] "The police officer must be allowed sufficient flexibility in carrying out his duties to complete that lawful activity".[24]

31. Québec: In Québec, the *Highway Safety Code* (*Code de la sécurité routière*) is generally limited to the use of vehicles on public highways (*les chemins publics*).[25] Drivers must carry certain documents and remit them to a peace officer upon request.[26] Peace officers, in the performance of their duties under this *Code*, are authorized to randomly stop drivers and demand these documents.[27] The Québec Court of Appeal has extended this power to include random sobriety checks.[28]

32. The jurisprudence of Québec conflicts with the majority decision of the Ontario Court of Appeal. The *Highway Safety Code* permits police in Québec to complete a random check on private property if their intention to stop the driver crystallized while the driver was driving on the public

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[22] *R. v. Lux*, 2012 SKCA 129 at paras. 30-37.
[23] *R. v. Anderson*, 2014 SKCA 32 at paras. 2-6, 23-25.
[24] *R. v. Anderson*, 2014 SKCA 32 at para. 24.
[25] *Code de la sécurité routière*, art. 1.
[26] *Code de la sécurité routière*, art. 35-36.
[27] *Code de la sécurité routière*, art. 636.
[28] *R. c. Soucisse*, 1994 CanLII 5821, [1994] J.Q. no 544 (QCCA) at paras. 10-12, 28-34. Also see: *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 39-48, [1990] 1 S.C.R. 1257 at 1278-1282. The statutory provision at issue in *Ladouceur* is now s. 216 of the *HTA*.

street. The driver's move to private property does not extinguish the officer's power to check the driver's documents, which in turn may give rise to grounds to check their sobriety.[29]

33. Manitoba: Sections 74 and 76.1 of Manitoba's *Highway Traffic Act* authorize police to stop drivers on the highway. In contrast to the majority decision of the Ontario Court of Appeal, the Manitoba jurisprudence permits police to follow the driver off the highway and onto their private property to conduct the stop.[30]

34. The following chart provides a sampling of Canadian cases with facts and issues that are similar to the present case. To support granting leave, this chart highlights how the law is unsettled in Canada and demonstrates how the fact scenario arises with some regularity:

Ontario decisions	**Statute authorizes sobriety check?**
R. v. Calder, [2002] O.J. No. 3021 (ONSC) at paras. 2-4, 11-13, 23, 53-58, aff'd 2004 CanLII 36113 (ONCA)	Yes
R. v. Alrayyes, 2013 ONSC 7256 at paras. 2-6, 9, 17, 20, 24, 31	Yes
R. v. Nield, 2015 ONSC 5730 at paras. 4-9, 19-29	No
R. v. McGregor, 2015 ONCJ 692 at paras. 2-11	Yes
R. v. Warha, 2015 ONCJ 214 at paras. 2, 4-8, 12, aff'd 2016 ONSC 93 at paras. 2-3	Yes
R. v. McColman, 2021 ONCA 382 at para. 44	No

[29] See: *R. c. Viellot Blaise*, 2020 QCCM 26 at paras. 2-3, 10-28, 36-42, 120-127, 140 (the stop was random and not premised on the police having reasonably suspecting anything: paras. 121-122); *Laval (Ville de) c. Cleophat*, 2011 QCCS 6065 at paras. 3-10 (while the police had observed some damage on the vehicle's bumper, the trial judge treated the stop as random: para. 7); *R. c. Bergeron*, 2015 QCCQ 5714 at paras. 4-8, 11-15, 22-23, 38-46; *R. c. Lepage*, 2019 QCCQ 2139 at paras. 2-30.

[30] See: *R. v. Law*, 2012 MBQB 321 at paras. 2-4, 9-17 (while the police observed some peculiarities, the judge did not hold that they reasonably suspected the commission of an offence), leave to appeal denied 2013 MBCA 49.

Saskatchewan decisions	Statute authorizes sobriety check?
R. v. Anderson, 2014 SKCA 32 at paras. 2-6, 23-25	Yes
R. v. Fosseneuve, 2014 SKPC 129 at paras. 15-23	Yes[31]

Manitoba decisions	Statute authorizes sobriety check?
R. v. Law, 2012 MBQB 321 at paras. 2-4, 9-17, leave to appeal denied 2013 MBCA 49	Yes

Québec decisions	Statute authorizes sobriety check?
R. c. Lacasse, [1993] J.Q. no 2350 (QCCS) at paras. 1-12, 50-61	No
R. c. Jacques, 2010 QCCQ 18773 at paras. 13-21	Yes
Laval (Ville de) c. Cleophat, 2011 QCCS 6065 at paras. 3-10	Yes
R. c. Bergeron, 2015 QCCQ 5714 at paras. 4-8, 11, 38-46	Yes
R. c. Lepage, 2019 QCCQ 2139 at paras. 2-30	Yes
R. c. Viellot Blaise, 2020 QCCM 26 at paras. 2-3, 10-28, 36-39	Yes
R. c. Trahan, 2020 QCCQ 2312 at paras. 1-4, 6, 8-21	Yes

New Brunswick decisions	Statute authorizes sobriety check?
R. v. Caissie (1999), 214 NBR (2d) 360 (CA) at paras. 4-9, 14-18	No[32]
R. v. Pelletier, 2001 NBBR 180 at paras. 3-5, 39, 46-64	Yes[33]

Nova Scotia decisions	Statute authorizes sobriety check?
R. v. Eldridge, [1999] N.S.J. No. 513 (NSPC) at paras. 6-13, 23-37	No
R. v. Peel, 2003 NSPC 66 at paras. 2-5, 8-12	No[34]

[31] The judge, however, was not satisfied the police were intending to act pursuant to the statute.

[32] The Court did leave open, however, whether the principle of hot pursuit could apply.

[33] The judge found it significant when the police activated their lights: paras. 3, 57-62.

[34] In addition, the judge was not satisfied the police were intending to act pursuant to the statute.

The law needs clarity on the purposive approach to statutory interpretation

35. This Court in *Orbanski*, invoking common law principles to define statutory powers, held that "any enforcement scheme must allow sufficient flexibility to be effective".[35] The *HTA*, like all public welfare legislation, is remedial and must be interpreted in a manner that best achieves its purpose.[36] This approach is legislatively mandated in Ontario:[37]

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

36. The conflicting court of appeal decisions illustrate how guidance is necessary on how to execute this purposive approach to statutory interpretation. As compared to the dissent at the Ontario Court of Appeal or the Saskatchewan Court of Appeal in *Anderson*, the majority focused on the precise moment that police conducted the sobriety check, regardless of when their intention to conduct the check had crystallized.[38] The majority did not consider whether the well-settled power to randomly check sobriety on the highway would be frustrated if that power dissipated when the driver shifted to private property.[39] Nor did the majority consider the effect of this upshot on the *HTA*'s purpose "to protect those who use the roads of the province".[40]

The Court of Appeal did not consider the import of the s. 48(18) definition of "driver"

37. Neither the majority nor the dissent at the Court of Appeal delved into the argument that s. 48(18) of the *HTA* supported the lawfulness of the sobriety check.[41] The application of the *HTA*

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[35] *R. v. Orbanski; R. v. Elias*, 2005 SCC 37 at para. 45.
[36] *R. v. Hajivasilis*, 2013 ONCA 27 at paras. 48-51. Also see: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 6.
[37] *Legislation Act, 2006*, s. 64(1).
[38] *Reasons of the ONCA*, 2021 ONCA 382 at para. 37 (Application Record, Tab 8 at p. 62).
[39] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 43, 116, 118, 131-134 (Application Record, Tab 8 at pp. 65, 93-94, 101-103). The majority *did* consider this overall picture when addressing the proposed common law power: paras. 66-73.
[40] *R. v. Hajivasilis*, 2013 ONCA 27 at para. 50.
[41] The majority twice averted to s. 48(18) but did not explain how it impacted their analysis: *Reasons of the ONCA*, 2021 ONCA 382 at paras. 27, 32 (Application Record, Tab 8 at p. 60).

is ordinarily restricted to highways pursuant to the s. 1(1) definition of "driver". However, s. 48 contains a further definition at (18) that a driver "includes a person who has care or control of a motor vehicle". It is unclear whether (18) broadens the territorial application of s. 48 beyond the highway or simply clarifies that driving includes both operation and care or control. Campbell J. in a case called *Ndaye* worked through the *HTA* and its history to land on the former – that s. 48(18) permits police to conduct random sobriety checks on private property.[42]

38. The applicant does not suggest that s. 48(18) permits police to enter all private property at any time to randomly check the sobriety of anyone driving there. The *stopping power* to conduct a sobriety check does not necessarily equate with the *entry power* onto private property.[43]

C. The Random Sobriety Check was Authorized by the Common Law

39. The applicant advances three arguments to demonstrate the public importance of deciding whether the random sobriety check was authorized by the ancillary powers doctrine of the common law: (i) the scope of the majority decision is uncertain and gives rise to public safety implications; (ii) an appeal would clarify the role of the common to fill gaps in legislation; and (iii) this case presents an opportunity to clarify the scope of the implied license doctrine.

The scope of the majority decision is uncertain and raises public safety concerns

40. Random sobriety checks occur everyday in every jurisdiction across this country. Police require clear direction on the contours of their powers. The public needs to know what constitutes a lawful stop. Yet the scope of the majority decision is unclear on where and when police can complete a random sobriety check on private property. Litigation on the precise bounds of the decision ought not to be left for the trial courts to deal with for many years to come.

41. The majority decision gives rise to two broad uncertainties. *First*, there is uncertainty on

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[42] *R. v. Ndaye*, 2019 ONSC 4967 at paras. 70-71.

[43] A comparison can be made to how s. 495 of the *Criminal Code* authorizes a warrantless arrest but does not permit police to enter a dwelling house to make such an arrest: *R. v. Feeney*, 1997 CanLII 342 at para. 49, [1997] 2 S.C.R. 13 at 51.

what type of private property it covers. Does the decision apply to private parking lots, or only residential driveways?[44] Is the scope even more narrow, in that the driver must have some legitimate connection to the driveway?[45] It is unlikely that the majority decision is restricted to residential property because: (a) the driveway in this case also served a commercial establishment; (b) the majority concluded that a random stop "on private property", without qualification, was not reasonably necessary; and (c) in dismissing the concern of drivers fleeing to the sanctuary of private property, the majority did *not* say that the concern was unfounded because the driver would need to reach *their own* private property, or even *residential* private property.[46] The dissent also did not interpret the majority decision as narrow in scope: "This property need not be a place to which [the driver has] any connection … As long as the driver gets their vehicle onto a stretch of private property, sanctuary applies".[47]

42. *Second*, the majority decision leaves uncertainty on *when* police are permitted to finish a sobriety check on private property. The majority seems to leave open that police can continue the check if they "initiated" it on the public street.[48] But "initiated" offers vague guidance. Is it enough if police activated their lights and sirens, irrespective of whether the driver would have noticed them before steering to private property? Regardless, it is not clear that activating lights and siren would suffice. The majority appears to require the police officer to believe that the driver is attempting to evade the stop before they can follow the driver onto private property.[49]

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[44] *Reasons of the ONCA*, 2021 ONCA 382 at para. 48 (Application Record, Tab 8 at p. 67): "The question … is whether the common law authorizes … a random sobriety check on a *private driveway*" [emphasis added].

[45] *Reasons of the ONCA*, 2021 ONCA 382 at para. 61 (Application Record, Tab 8 at p. 71): "… an individual has greater liberty to do as they wish *at home* than they do on a public highway" [emphasis added].

[46] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 68-70 (Application Record, Tab 8 at pp. 73-74).

[47] *Reasons of the ONCA*, 2021 ONCA 382 at para. 96 (Application Record, Tab 8 at p. 84).

[48] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 58, 71 (Application Record, Tab 8 at pp. 70, 74-75).

[49] *Reasons of the ONCA*, 2021 ONCA 382 at para. 70 (Application Record, Tab 8 at p. 74): "In a true case of escape, the police may well have the authority to continue pursuing that person".

43. Broad application of the majority decision gives rise to the public safety dangers highlighted by the dissent.[50] The point is not whether *this respondent* was trying to avoid the sobriety check (there is no suggestion that he was). The point is that the majority decision empowers impaired drivers to steer onto private property anytime they think they see a police cruiser to immunize themselves from a potential sobriety check. Their move to private property, *on its own*, would fall short of the "escape" the majority decision requires to authorize the sobriety check.[51] The deterrent effects of random sobriety checks are realized when drivers know they can be stopped *at any time* when they drive on the street. The scheme is compromised if the driver maintains some control on whether they can be stopped.[52]

This Court should clarify the role of the common to fill gaps in legislation

44. This Court incrementally developed police powers over a period of decades when the power was necessary for police to carry out their duties.[53] Courts have denied proposed police powers in recent years.[54] Nonetheless, "the courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist".[55] An appeal would ask this Court to determine whether the common law ought to recognize the applicant Crown's proposal to fill the gap on scenarios that arise at the margins between a public street and private property. This Court's answer

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Furthermore, focusing on whether police activated their lights and siren does not address the majority's concern that the lawfulness of a random sobriety check rests on the officer's stated intention: para. 75. If lights and siren were the touchstone, courts would still need to test the officer's evidence on why they activated them.

[50] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 93-96, 144-148 (Application Record, Tab 8 at pp. 83-84, 107-108).
[51] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 42, 70 (Application Record, Tab 8 at pp. 64, 74).
[52] *R. v. Ladouceur*, [1990] S.C.J. No. 53 at paras. 54-55, [1990] 1 S.C.R. 1257 at 1284-1285; *Reasons of the ONCA*, 2021 ONCA 382 at para. 146 (Application Record, Tab 8 at p. 108).
[53] See: *Dedman v. The Queen*, 1985 CanLII 41 at paras. 64-69, [1985] 2 S.C.R. 2 at 32-36; *R. v. Clayton*, 2007 SCC 32 at paras. 19-41; *R. v. Kang-Brown*, 2008 SCC 18 at paras. 52-57.
[54] See: *Fleming v. Ontario*, 2019 SCC 45 at paras. 88-95; *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at paras. 6-7, 55-59.
[55] *Fleming v. Ontario*, 2019 SCC 45 at para. 42.

to that question would clarify the line going forward on what constitutes appropriate development of police powers through the common law, and what proposed powers are confined to the exclusive domain of the legislature.

This Court should clarify the scope of the implied license doctrine

45. This case provides an opportunity for this Court to clarify the scope of the implied license doctrine.[56] Neither the majority nor dissent at the Court of Appeal explained whether it applied here. The dissent held it did – but only when considering the second *Grant* factor, not in recognizing the common law power in the first place (or, alternatively, how the power works in conjunction with the implied license).[57] It remains an open question whether following a vehicle onto a driveway to check the driver's sobriety is "a speculative criminal investigation" (outside the license), or whether it is "to question the owner/occupier for the purpose of furthering a lawful investigation" (within the license).[58] Lower courts in Ontario have proceeded on the basis that the license *applies*.[59] While police in those cases usually possessed reasonable suspicion that the accused had committed an offence, that factor is not determinative of whether the police conduct respected or exceeded the license.[60]

D. The Majority of the Court of Appeal Erred in its Approach to Section 24(2)

46. The applicant advances two arguments to demonstrate the public importance of deciding whether the majority erred in law in its approach to s. 24(2): (i) the majority approach results in a *de facto* exclusionary rule for s. 9 breaches; and (ii) this Court ought to reiterate the thorough analysis demanded by s. 24(2).

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[56] See: *R. v. Lotozky*, 81 O.R. (3d) 335, 2006 CanLII 21041 (CA) at paras. 21-42.
[57] *Reasons of the ONCA*, 2021 ONCA 382 at para. 180 (Application Record, Tab 8 at p. 121).
[58] *R. v. Le*, 2019 SCC 34 at paras. 125-127, 209-214.
[59] See: *R. v. Maciel*, [2003] O.J. No. 126 (CJ) at paras. 6-18; *R. v. Killeen*, 2014 ONCJ 296 at paras. 26-30, aff'd 2014 ONSC 6184 at paras. 17-18; *R. v. Mali*, 2017 ONCJ 140 at paras. 18-22.
[60] See: *R. v. Le*, 2019 SCC 34 at para. 212.

The majority approach results in an automatic exclusionary rule for s. 9 breaches

47. The effect of the majority decision is to create a *de facto* rule of exclusion for any s. 9 breach. If a s. 9 breach always constitutes serious misconduct by the police, and if its impact on the individual is always significant, then the evidence will always be excluded, no matter its reliability or importance to the case.[61]

48. This approach constitutes legal error.[62] It eschews the direction from this Court in *Grant*, reiterated in *Le*, for courts to carefully consider all lines of inquiry in weighing the effect of admitting the evidence on society's long-term confidence in the justice system.[63]

49. Seriousness of the *Charter*-infringing state conduct (first *Grant* factor): The majority held that the state violation was "serious" and the police conduct "brazen" for detaining the respondent when they lacked authority, notwithstanding the absence of bad faith. The majority also found that any uncertainty in the law worked *against* the police.[64]

50. *First*, most s. 9 breaches will occur because police lacked authority to detain or arrest the accused in the manner that they did. The mere fact that police acted outside their authority cannot, on its own, render the breach serious.[65] Otherwise just about every s. 9 breach would be "serious".

51. *Second*, the majority erred in finding that legal uncertainty aggravated the police conduct. For starters, the weight of the jurisprudence at the time, both in Ontario and across Canada,

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[61] *R. v. McGuffie*, 2016 ONCA 365 at para. 63.
[62] *R. v. MacMillan*, 2013 ONCA 109 at paras. 87-93; *R. v. Côté*, 2011 SCC 46 at para. 44; *R. v. Strauss*, 2017 ONCA 628 at paras. 38, 49, 52.
[63] *R. v. Grant*, 2009 SCC 32 at paras. 67-71, 102-103; *R. v. Le*, 2019 SCC 34 at paras. 140-142, 304-310.
[64] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 84-85 (Application Record, Tab 8 at p. 79).
[65] While some s. 9 breaches will occur where police initially had authority for the detention but the authority then dissipated (*e.g.*, where the detention exceeded reasonable duration; see: *R. v. Mann*, 2004 SCC 52 at paras. 33-34, 45), the fact remains that police lacked authority at the moment they infringed the person's liberty.

supported the lawfulness of the police conduct.[66] Furthermore, even if the law were uncertain, it is unfair to characterize as "brazen" the police decision to not abandon their investigation in the moments they had to think once the respondent moved to private property.[67]

52. Impact of the breach on *Charter*-protected interests (second *Grant* factor): The majority found the impact of the breach to be "significant" because the protected interest included liberty, and the police questioned the respondent and obtained evidence against him. The majority also considered that the breach occurred on the respondent's private property.[68]

53. *First*, every s. 9 breach engages the person's liberty interest.[69] And in the vast majority of s. 24(2) applications, the police would have questioned the person or attempted to elicit evidence from them during the detention (otherwise there would be no evidence to exclude). These factors add little to making the breach significant, lest every s. 9 breach be considered "significant".

54. *Second*, while the majority was correct that a detention on the respondent's private property sharpened its impact, the majority failed to consider relevant context:

- The indicia of impairment observed by police were not entirely connected to the respondent's detention. Police did not "stop" the respondent in the ordinary sense of a roadside stop; the respondent stopped on his own accord upon arriving at his destination. And police did not do anything to elicit the initial indicia – they immediately saw how the respondent struggled to maintain his balance when exiting and walking around his vehicle.
- While a person's private property undoubtedly carries heightened privacy interests, the analysis must consider the exact nature of the private property. There is a difference

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[66] See the chart that follows paragraph 34 of this Memorandum of Argument. Also see: *Reasons of the ONCA*, 2021 ONCA 382 at paras. 170-178 (Application Record, Tab 8 at pp. 117-120).

[67] Contrast this case to other situations of legal uncertainty, where police have the option to get advice and seek a warrant to obtain evidence, even if one *may* not be required; see: *R. v. Yogeswaran*, 2021 ONSC 1242 at paras. 149-154.

[68] *Reasons of the ONCA*, 2021 ONCA 382 at para. 86 (Application Record, Tab 8 at p. 80).

[69] *R. v. Suberu*, 2009 SCC 33 at para. 28: the core purpose of s. 9 is to protect "liberty of choice".

between the inside of someone's home or a delineated backyard, versus a driveway that connects to the public street, serves adjoining commercial properties, and allows some measure of public access.[70] It is unlikely that most people, regardless of their socio-economic status or access to life in a privileged community, would be "utterly shocked and appalled" by a police officer pulling onto their driveway and proceeding no further.[71]

- If police had stopped the respondent seconds earlier on the public street, the detention would not have offended the *Charter*. The respondent was wrapping up a licensed and regulated activity where police could randomly check his sobriety at any time. Finding that a continuous investigation can shift from *Charter*-compliant to a *significant breach* within a matter of seconds and metres parses the encounter into unrealistic segments.

This Court must emphasize the thorough analysis demanded by s. 24(2)

55. The dissenting decision at the Ontario Court of Appeal outlines the need for this Court to emphasize the thorough analysis demanded by s. 24(2).[72] In every case, the court deciding a s. 24(2) application must conduct a contextual analysis of each *Grant* factor to assess the impact of admitting the evidence on the long-term repute of the administration of justice.

56. The dissenting decision highlights the emerging pattern of cursory s. 24(2) analyses and points to the one conducted at the SCAC in this case as a prime example.[73] This is not the first time in recent memory that a Justice of the Ontario Court of Appeal felt obligated to comment on an eroding approach to the multifaceted s. 24(2) analysis.[74] The time is ripe for this Court to correct

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[70] See: *R. v. Le*, 2019 SCC 34 at paras. 51-61.
[71] See: *R. v. Le*, 2019 SCC 34 at paras. 59, 61.
[72] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 100, 152-164 (Application Record, Tab 8 at pp. 85-86, 110-115).
[73] *Reasons of the ONCA*, 2021 ONCA 382 at paras. 152-153 (Application Record, Tab 8 at p. 110); *Reasons of the SCAC*, 2019 ONSC 5359 at para. 49 (Application Record, Tab 5 at p. 38).
[74] *R. v. Omar*, 2018 ONCA 975 at paras. 109-121.

course on s. 24(2)'s descent into a simplistic, formulaic afterthought.[75]

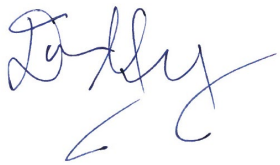
PART IV: COSTS

57. The applicant asks that no costs be awarded.

PART V: ORDER REQUESTED

58. The applicant requests that the application for leave to appeal be granted.

ALL OF WHICH is respectfully submitted by,



Davin Michael Kumar Garg
Counsel for the Applicant

DATED at Toronto this 2nd day of September 2021.

[75] The following decisions reference a cursory s. 24(2) analysis conducted in the court below them: *R. v. Aselford*, 2009 ONCA 28 at para. 5; *R. v. Rehill*, 2015 ONSC 6025 at paras. 18-24; *R. v. McGuffie*, 2016 ONCA 365 at para. 72; *R. v. Harflett*, 2016 ONCA 248 at para. 55; *R. c. Archambault*, 2012 QCCA 20 at paras. 68-70; *R. v. Cullen*, 2015 SKCA 142 at paras. 49, 55.

PART VI: TABLE OF AUTHORITIES

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