25 October 2022

UNOFFICIAL TRANSLATION of Joseph-Christopher Luamba (Plaintiff) v Attorney General of Québec and Attorney General of Canada (Defendants) and Canadian Civil Liberties Association and Canadian Association of Black Lawyers (Intervenors)

1. BY WAY OF INTRODUCTION

[1] As a general rule, the mere fact that a person is behind the wheel is not sufficient to cause the police to stop the person without cause or suspicion and demand identification. However, the evidence shows that this is not the case for some people, particularly Black men. For many, merely driving a motor vehicle is sufficient. The expression *Driving while Black* reflects this reality.

[2] This is the contention of the appealant, a student of Haitian origin in his early twenties living in Montreal and holder of a driver's license since 2019.

[3] On three occasions in the span of just over a year, the vehicle he was driving was stopped by a police officer who, without cause, asked him for identification and who, after verification, released him without issuing a ticket.

[4] Several other people added their testimony at trial after being stopped in similar circumstances while driving a vehicle.

[5] All these people have in common that they are Black.

[6] As trivial as it may seem, these traffic stops are intolerable to those concerned because they are based on appearances and more or less conscious prejudice associated with the color of their skin, rather than on a road safety objective.

[7] This phenomenon is now known, documented and named for what it is: racial profiling. Experienced as a stigma by Black communities, it mars both the hearts and spirits of their members who perceive early in life that the law is not applied to them as it is to others and that freedom is not guaranteed in the same way depending on whether one is Black or white.

[8] The plaintiff in his appeal therefore contests the constitutional validity of the common law rule and the validity of the legislative provision on which these road stops are based in Quebec. He does so on the basis of Sections 7 and 9 and Subsection 15(1) of the *Canadian Charter of Rights and Freedoms*[1] (*"Canadian Charter"* or *"Charter").*

[1] *Constitution Act, 1982,* Part I, S.C., 1982

[9] At the end of a 21-day trial, the Court finds, for the following reasons, that the appealant's case is well founded and must be granted.

2. THE CASE IN LAYMEN'S TERMS

[10] This case, as will be seen, raises several complex questions of law and fact. But at its core, the problem is relatively simple. Addressing it in laymen's terms is important to allow readers to start on the same footing.

[11] Black people, the vast majority of whom are men, contend being repeatedly stopped while driving without any real reason for the officers ordering them to stop.

[12] This form of traffic stop, even if brief, is at the complete discretion of the police and is therefore arbitrary.

In 1988, the Supreme Court ruled[2] that a random stop of this type constitutes an arbitrary *detention.*[3] This case involved a traffic stop at a fixed checkpoint. The Court concluded that, although arbitrary under Section 9 of the *Charter,* such a traffic stop could be justified under Section 1 of the Charter given the statistics presented on impaired driving in relation to the number of motor vehicle accidents.

Two years later, in *R. v. Ladouceur*[4] ("*Ladouceur ruling*" or "*Ladouceur*"), a similar problem arises. But this time it was a random vehicle stop not at a spot check but from a patrol car. Strongly divided, five justices to four, the Supreme Court came to the same conclusion, as we will see more closely in Section 8.

[13] The police have thus been given the right to proceed to this form of detention without real reason. Often, when the driver of the vehicle asks for the reason for the stop, he receives from the police officer only the answer that the law allows it. In short, the argument quickly becomes circular: the police officer stops a vehicle just because he has the right to do so, without any real reason or suspicion, anywhere and anytime, and answers the driver who asks him the reason for the stop precisely that: he has the right to do so, without real reason or suspicion.

[14] The plaintiff, supported by the participants, argues that the common law rule established by the Supreme Court in *Ladouceur* and the legislative provisions derived from it, in this case on Sections 320.27, Subsection 2 of the *Criminal Code*[5] and 636 of the *Highway Safety Code ("HSC")*[6], have been gradually perverted and diverted from their primary purpose, i.e., road safety.

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[2] *R. v. Hufsky,* [1988] 1 S.C.R. 621.

[3] The Court will use this word throughout the judgment in reference to *R. v. Therens,* [1985] 1 S.C.R. 613, para. 53.

[4] [1990] 1 S.C.R. 1257.

[5] R.S.C. (1985), ch. C-46. Initially, the plaintiff challenged the constitutional validity of this section of the *Criminal Code* but abandoned this conclusion at the time of the oral arguments. The present judgment therefore does not address the validity of this provision of the *Criminal Code.*

[6] CQLR, ch. 24.2

[15] According to the plaintiff, the "random" nature of the traffic stops made by patrol officers has the concrete result of selecting Black drivers in proportions that bear no relation to the demographic weight of Black communities in Quebec nor to the representation of Black people in annual crime reports.

[16] In sum, the rule established by the *Ladouceur* ruling has become a safe harbor for police officers to engage in a form of racial profiling of Black motor vehicle drivers. The fundamental rights of Black people guaranteed by the *Charter* would thus be trampled day after day without this police practice being justified under the first article of the *Charter*.

[17] In contrast, the Crown argues that racial profiling is a problem known to both political leaders and law enforcement authorities who have taken steps to combat it. Police officers are now trained to disregard racial or social considerations in the exercise of their discretionary powers when making stops or questioning. Intercepting people from a patrol vehicle because they are Black deviates from the power granted by the rule of law, and must be condemned, the Attorneys General argue.

[18] Does this now-documented disproportionality of so-called blind traffic stops to the detriment of Black drivers stem from the common law rule established by the nation's highest court and codified in the *Highway Safety Code* or is it the result of police officers' deviation from it? These are the central issues of the case. Depending on one's perspective, the answer clinches the issue.

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14. ACKNOWLEDGEMENTS

[826] Before concluding, the Court wishes to express its thanks to the litigators, lawyers, articling students and researchers who have worked tirelessly to bring this case to a successful conclusion. The complexity of the case and the short period of time between the filing of the application and the commencement of the trial in a case of this nature required them not only to work diligently, but more importantly, to focus on the essentials and work together to overcome many difficulties. The quality of their inquiries as well as their arguments, their high level of preparation, their courtesy and their willingness to put their talent at the service of justice must be emphasized loud and clear.

[827] But as he signs what is his last judgment before his mandatory retirement, the undersigned will be forgiven for adding this comment. Trials of the magnitude of this case, the number and complexity of the issues involved, and the sensitivity with which racial profiling must be approached, require lawyers who are aware of their responsibilities not only to their clients but to society at large. To complete this work

in harmony is an act of civilization. Without quality lawyers on both sides, such a trial would be impossible, simply impossible. The Court is grateful to all of them for representing so well those whose views they were mandated to represent.

15. CONCLUSIONS

[828] We cannot as a society wait for a part of the population to continue to suffer in silence in the hope that a rule of law will finally be applied by the police services in a way that respects the fundamental rights guaranteed by the *Canadian Charter.* Racial profiling does exist. It is not a laboratory-constructed abstraction or a figment of the imagination. It is a reality that weighs heavily on Black communities. It manifests itself in particular with Black drivers of motor vehicles. *Charter* rights can no longer be left in thrall to an unlikely moment of epiphany by the police. Ethics and justice must go hand in hand to turn this page.

[829] The preponderant evidence shows that over time, the arbitrary power granted to the police to carry out roadside stops without cause has become for some of them a vector, even a safe harbor, for racial profiling against the Black community. The rule of law thus becomes, quietly, a breach through which this insidious form of racism rushes in.

[830] The time has come for the judiciary to recognize this and to declare that this unlawful power violates some of the constitutional guarantees of the members of this community without this violation being justified within the meaning of Section 1 of the *Charter.* It must be concluded that the common law rule formulated by the Supreme Court of Canada in *Ladouceur* has become obsolete and inoperative, as has Section 636 of the *Highway Safety Code* as amended in 1990.

[831] However, we must not delude ourselves. Declaring inoperative under Section 52 of the Constitution the rule of law that permits *roadside stops without real cause* will not magically end racial profiling overnight. The latter must be escorted out one step at a time, this being one of them. In time, society will be better off. In the meantime, it is to be hoped that this judgment will make the basis of police power clearer and, above all, more understandable to the civil society over which it is exercised.

[832] At the same time, forcing change too quickly would not be in the interest of society, which could suffer from the disaffection of those patrol officers who seek only to fulfill the duties of their office to the best of their ability. Hence the six (6) month delay that the Court sees fit to grant for the reasons already explained.

WHEREFORE, THE COURT:

[833] **GRANTS** the Amended Statement of Claim;

[834] **DECLARES** that the conditions are met to review the common law rule established by *R. v. Ladouceur,* [1990] 1 S.C.R. 1257;

[835] **DECLARES** that the rule of law authorizing *roadside stops without probable cause,* within the meaning of this judgment, violates the rights guaranteed by Sections 7 and 9 and Subsection 15(1) of the *Canadian Charter of Rights and Freedoms* without being justifiable in a free and democratic society and is therefore invalid;

[836] **DECLARES** inoperative the common law rule established by *R. v. Ladouceur,* 1990] 1 S.C.R. 1257 and Section 636 of the *Highway Safety Code;*

[837] **SUSPENDS** for six months from the date of service of the notice of judgment the declaration of inoperability taking effect, except for any court case in which the same rule of law has been challenged and the proceedings are still pending;

[838] **THE WHOLE** with legal costs including expert fees.