The Constitutional Stopping of Motor Vehicles in Canada and the United States:

A Comparative Analysis

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When can the police constitutionally stop a motor vehicle in the United States of America and Canada? In this column, I intend to examine this question through a comparative analysis that considers the law in both countries. As will be seen, the power of the police to stop a motor vehicle in Canada is significantly greater than the power of the police to do so in the United States.

I intend to illustrate this proposition by considering the most recent decision of the Supreme Court of the United States on this issue (***Kanas v. Glover***, 140 S.Ct. 1183 (2020)), and then the law in Canada. I will also consider how ***Glover*** would likely have been decided in Canada. Finally, I will end by considering how the issue of "racial profiling" has affected the stopping of motorists by the police in Canada. Let us start with the facts in ***Glover***.

KANAS V. GLOVER

In ***Kanas v. Glover***, a police officer (Deputy Mehrer) stopped a motor vehicle after checking the vehicle's plate. The check indicated that the driver's license of the owner of the vehicle had been revoked. Before stopping the vehicle, Deputy Mehrer did not know that Mr. Glover was the driver. The agreed facts at trial indicated as follows (see page 1187):

> Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.

When the vehicle was stopped, it was found that the accused was the driver of the vehicle. He was charged with driving as a habitual violator (*Kan. Stat. Ann.* §8–285(a)(3) (2001)).

THE TRIAL

At his trial, the accused sought to have the evidence obtained as a result of the stopping of his vehicle excluded. He argued that Deputy Mehrer lacked reasonable suspicion to have stopped his vehicle.

The trial court granted the motion, holding that the officer violated the Fourth Amendment of the United States Constitution by stopping the vehicle Mr. Glover was driving without reasonable suspicion of criminal activity.[1]

The Kansas Court of Appeals set aside the trial court's ruling. It held that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion" (see page 1187).

On appeal to the Kansas Supreme Court, the trial court's decision was reinstated. That Court held that "Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to 'only a hunch' that Glover was engaging in criminal activity" (see page 1187).

THE APPEAL

An appeal was taken to the Supreme Court of the United States. The Court described the issue raised in the following manner (at page 1186):

> This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license.

The appeal was allowed and the decision of the Court of Appeals affirmed. The Supreme Court held that "when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable" (at page 1187).

THE DECISION OF THE SUPREME COURT OF THE UNITED STATES

The Supreme Court noted that the "Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" The Court also indicated that although "a mere 'hunch' does not create reasonable

Footnotes

1. The Fourth Amendment states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause" (at page 1187).

The Court held that Deputy Mehrer "did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity—driving with a revoked license. Traffic stops of this nature do not delegate to officers 'broad and unlimited discretion' to stop drivers at random. . . . Nor do they allow officers to stop drivers whose conduct is no different from any other driver's. . . . Accordingly, combining database information and common sense judgments in this context is fully consonant with this Court's Fourth Amendment precedents" (at page 1190).

The Court also indicated, however, that "the presence of additional facts might dispel reasonable suspicion. . . . For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.' . . . Here, Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified" (at page 1191).

THE CONCURRING OPINION

In a concurring opinion, two justices (Justices Kagan and Ginsberg), indicated that they agreed that the officer had reasonable suspicion because he knew the accused had a "proclivity for breaking driving laws" (at page 1192). The justices indicated that but for this additional fact, they would have concluded that a reasonable suspicion did not exist (at page 1192):

> . . . I would find this a different case if Kansas had barred Glover from driving on a ground that provided no similar evidence of his penchant for ignoring driving laws. Consider, for example, if Kansas had suspended rather than revoked Glover's license. Along with many other States, Kansas suspends licenses for matters having nothing to do with road safety, such as failing to pay parking tickets, court fees, or child support. . . . So the good reason the Court gives for thinking that someone with a revoked license will keep driving—that he has a history of disregarding driving rules—would no longer apply. And without that, the case for assuming that an unlicensed driver is at the wheel is hardly self-evident. It would have to rest on an idea about the frequency with which even those who had previously complied with driving laws would defy a State's penalty-backed command to stay off the roads. But where would that idea come from? As discussed above, I doubt whether our collective common sense could do the necessary work. See supra, at 1. Or otherwise said, I suspect that any common sense invoked in this altered context would not much differ from a "mere 'hunch"—and so "not create reasonable suspicion."

THE DISSENT

In a dissenting opinion, Justice Sotomayor indicated that "[c]ontrary to the majority's claims . . . the reasonable-suspicion inquiry does not accommodate the average person's intuition. Rather, it permits reliance on a particular type of common sense—that of the reasonable officer, developed through her experiences in law enforcement" (at page 1196). Justice Sotomayor concluded (at page 1198):

"[P]rovinces can enact legislation that allows for the random stopping of motor vehicles . . ."

> Vehicle stops "interfere with freedom of movement, are inconvenient, and consume time." *Prouse*, 440 U.S., at 657. Worse still, they "may create substantial anxiety" through an "unsettling show of authority." *Ibid*. Before subjecting motorists to this type of investigation, the State must possess articulable facts and officer inferences to form suspicion. The State below left unexplained key components of the reasonable-suspicion inquiry. In an effort to uphold the conviction, the Court destroys Fourth Amendment jurisprudence that requires individualized suspicion. I respectfully dissent.

A SUMMARY

In summary, the majority found no constitutional violation because the police officer had "a particularized and objective basis for suspecting the particular person stopped of criminal activity." It was significant to them that the traffic stop did not allow for "officers to stop drivers whose conduct is no different from any other driver's."

Of interest, from a Canadian perspective, is the latter comment and the majority's noting that if the driver had been a female is in her mid-twenties, this could have caused the stop to be unconstitutional. I will come back to these points, but at this point let us look at the law in Canada.

CANADA

In Canada, criminal law is exclusively a federal jurisdiction (see section 91(27) of the *Constitution Act, 1867*). However, the provinces have legislative authority to enact highway traffic legislation (see section 92(13) of the *Constitution Act, 1867*). As a result, the provinces can enact legislation that allows for the random stopping of motor vehicles within the province. The provinces have done so. For instance, the legislation enacted in Ontario is typical of provincial legislation enacted throughout Canada by individual provinces. Section 216(1) of the *Highway Traffic Act*, R.S.O. 1990 states:

> A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such shall immediately come to a stop.

In ***R. v. Mayor***, 2019 ONCA 578, in considering this legislation, the Ontario Court of Appeal noted that the "Ontario

" . . . a random stop pursuant to provincial highway enforcement legislation will generally be constitutionally valid."

Legislature has given the police broad powers to stop motor vehicles for highway regulation and safety purposes, and, in some circumstances, to arrest drivers of motor vehicles. Section 216(1) of the *Highway Traffic Act* gives an officer the power to stop a vehicle, even if the stop is random and the officer lacks reasonable and probable grounds or even reasonable suspicion" (at paragraph 6).

THE SUPREME COURT OF CANADA

In a series of judgments, the Supreme Court of Canada has affirmed the constitutionality of the police conducting random stops of motorists at common law and pursuant to highway traffic legislation.

In ***R. v. Dedman***, [1985] 2 S.C.R. 2, for instance, the Supreme Court had held that the police have a common law authority to conduct organized "spot checks," which involve stopping all vehicles at a designated spot. The Court held that "having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not, therefore, an unjustifiable use of a power associated with the police duty, within the *Waterfield* test. I would accordingly hold that there was common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. ["Reduce Impaired Driving in Etobicoke"] program" (at paragraph 69).

Five years later, in ***R. v. Ladouceur***, [1990] 1 S.C.R. 1257, the Court expanded police powers to randomly stop motorists beyond spot checks like the R.I.D.E. program. In ***Ladouceur***, the police had stopped a motor vehicle though they did not suspect the driver had breached any highway traffic provision. They simply wanted to check his driver's licence. It turned out his licence was suspended. He was convicted at trial, but the conviction was overturned by the Ontario Court of Appeal on the basis that the random stop was not authorized by law. On appeal to the Supreme Court of Canada, the conviction was restored.

The Supreme Court, in very broad language, held that "routine checks are a justifiable infringement on the rights conferred by s. 9" of the *Charter* in "order to provide the proper control [of the use of motor vehicles], society must be able to require that random stops be made without articulable cause and outside of any formal programs" (at page 1283).

Ten years after ***Dedman***, in ***R. v. Nolet***, [2010] 1 S.C.R. 851, the Supreme Court of Canada noted that it "has ruled on a number of occasions that pursuant to statutory authority, police officers can randomly stop persons for 'reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle'" (at paragraph 25).

Thus, the random stops of motor vehicles are lawful in Canada. As pointed out in ***R. v. Suteau***, 2019 SKCA 115, "the police do not need to hold a reasonable suspicion that a crime or traffic safety infraction has been committed to randomly stop and detain a motorist" (at paragraph 24).

THE CHARTER

However, police actions pursuant to this type of legislation are not immune from constitutional scrutiny in Canada. The *Canadian Charter of Rights and Freedoms, Constitution Act, 1982* (the *Charter*), prohibits the "arbitrary detention" of anyone in Canada. It states as follows:

> Everyone has the right not to be arbitrarily detained or imprisoned.

In ***Nolet***, the Supreme Court of Canada indicated that a "random vehicle stop on the highway is, by definition, an arbitrary detention" but the detention can "be justified under s. 1 of the *Charter* . . . if the police act within the limited highway-related purposes for which the powers were conferred" (at paragraph 22).[2]

Thus, a random stop pursuant to provincial highway enforcement legislation will generally be constitutionally valid. Because of the broad scope of such legislation, this provides the police with significant power to stop motor vehicles in Canada. Though the stopping of a motor vehicle must generally be related to highway traffic enforcement, it does not require proof of an offence having been committed or a suspicion that one was committed. In other words, it allows for the random stopping of a motor vehicle with little restriction except that it be related to highway traffic enforcement.

A SUMMARY

The state of Canadian law on this issue was succinctly set out by the Supreme Court of Canada in ***R. v. Orbanski***, [2005] 2 S.C.R. 3, in which the Court noted that the "legality and constitutionality of random vehicle stops pursuant to general statutory vehicle stop powers was confirmed in *Ladouceur*. . . . It is also settled law that the police have the authority to check the sobriety of drivers. This authority was found to exist at common law in *Dedman*. More pertinently, it was also found in statute in *Ladouceur*, where this Court held that checking the sobriety of drivers was one of the purposes underlying the general statutory vehicle stop powers" (at paragraphs 40 and 41). Thus, a broad power to stop motorists.

An example of the broad scope provided to the police by these decisions is illustrated by what is often referred to in Canada as the "dual purpose doctrine."

THE DUAL PURPOSE DOCTRINE

Under this doctrine, the police may constitutionally stop a motor vehicle in Canada, even if it is for the purpose of investigating a criminal offence, if the stop also has a basis in

2. Section 1 of the *Charter* states:

> 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.

highway traffic enforcement. Thus, in ***R. v. Upright***, 2020 ABCA 227, the Alberta Court of Appeal noted that it "is entirely permissible for police to have dual purposes in conducting a traffic stop, that of investigating traffic safety violations and criminal offences" (at paragraph 9).

A dual purpose stop is lawful and will not violate section 9 of the *Charter* as long as one of the purposes for the stop is related to a traffic regulation purpose. This is so even if the traffic regulation purpose is a secondary purpose or a small part of the reasons for stop (see ***Nolet***, at paragraphs 35 to 41). In other words, an officer may simultaneously have a highway traffic regulation purpose and a criminal law purpose in mind. In Canada, these dual police pursuits can exist simultaneously and still be constitutional, even if the latter purpose is the primary reasons for the stop (see ***R. v. Sandhu***, 2011 ONCA 124, at paragraph 62).

The broad scope of the authority to stop motor vehicles provided by this doctrine is illustrated by the facts in ***Upright***. In that case, the criminal charges laid against the accused arose out of a motor vehicle stop. The police suspected that the passenger in Ms. Upright's vehicle (Mr. Hanton) was involved in the sale of illegal drugs. As a result, it was decided to the initiate a traffic stop "if the opportunity arose." A police officer testified that he "was hoping for a reason to stop the vehicle to allow a further investigation into his suspicion that Hanton was involved in drug-related activities" (see paragraph 3). The officer noticed that Ms. Upright made a turn without signaling. Her vehicle was stopped. A search of her purse resulted in the police finding cash and drugs. She was charged with possession of illegal drugs for the purpose of trafficking.

Ms. Upright argued that the traffic stop was conducted "on a false pretext, or as a ruse to disguise the true intention or motivation of the police, which were to stop the vehicle for drug trafficking." She argued that "the presence of an unlawful aim to the roadside stop (ie—to investigate a suspicion of drugs) renders the stop unlawful regardless of whether the police also had a lawful traffic safety reason for the stop. If the traffic stop was unlawful, she argues, then the cascading sequence of subsequent searches must also be unlawful and the evidence obtained as a result excluded" (see paragraph 8).

The Alberta Court of Appeal found this argument to "without merit" (at paragraphs 9 and 10):

> This argument is without merit. It is entirely permissible for police to have dual purposes in conducting a traffic stop, that of investigating traffic safety violations and criminal offences: ***Nolet*** at para 37. As this Court noted in ***R v Zolmer***, 2019 ABCA 93 at para 36, 373 CCC (3d) 162, "for at least two hundred years it has been accepted that police might extend their investigations opportunistically while exercising an initial lawful authority provided the extension is reasonable."

"[T]he Supreme Court of Canada has indicated that '[r]andom roadside stops must be limited to their intended purposes.'"

The fact that S/Sgt Smithman suspected Hanton to be involved in drug activities and therefore wanted the appellant's vehicle stopped for traffic violations does not make the traffic stop illegal and therefore an infringement of s 9 of the *Charter*. The trial judge found as a fact that the appellant and Hanton committed infractions under the *Traffic Safety Act*, RSA 2000, c. T-6 ("*TSA*") based on the police testimony and the audio-recorded communications between officers. Section 166 of the *TSA* authorizes police to stop vehicles and request identification to issue tickets for traffic violations.

These comments suggest a very broad police power to stop motor vehicles without cause. However, the Supreme Court of Canada has indicated that "[r]andom roadside stops must be limited to their intended purposes" (see ***Nolet***, at paragraph 23).

NOT AN UNLIMITED POWER

Though broad, the power of the police to stop motor vehicles in Canada is not unlimited.[3] In ***Orbanski***, for instance, the Supreme Court of Canada considered provincial legislation allowing for the stopping of motor vehicles and indicated that "police officers can stop persons under such statutory power only for. . . reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle" (at paragraph 41).[4]

Similarly, in ***R. v. Mellenthin***, [1992] 3 S.C.R. 615, it was indicated that "[r]andom stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search" (at paragraph 15). In ***Brown v. Durham (Regional Municipality) Police Force***, [1998] O.J. No. 5274, the Ontario Court of Appeal indicated, at paragraph 37, that though the type of legislation referred to earlier provides the police with "broad powers to stop motorists" the potential abuse of that power requires the "limiting [of the] the statutory power to situations in which the police had both legitimate highway safety concerns and did not have a coexisting improper purpose." Finally, in ***R. v. Houben***, [2006] S.J. No. 715 (C.A.), it was pointed out that highway traffic legislation "cannot be used to create a general power of detention for investigative purposes" (at paragraph 65).

3. It would not, for instance, allow for a stop based upon the race of the driver. More on this later, but see David Tanovich, *Applying the Racial Profiling Correspondence Test*, 64 CRIM. L.Q. 359 (2017), in which the author under the heading "Driving While Black" lists a number of examples in which Canadian courts have found racial profiling to have been the basis for the stopping of a motorist.
4. However, the Court also held in ***Orbanski*** that the police may question the driver of the vehicle they stopped "about their prior alcohol consumption" and "request the performance of sobriety tests at the roadside" without first informing the driver of his right to contact counsel under section 10(b) of the *Charter* because "these screening measures, used in each case for assessing the sobriety of the driver, were authorized by law and incompatible with the exercise of the right to counsel by the detained motorist at the roadside" (at paragraph 3).

" . . . the crucial issue is whether the police 'had a road safety purpose in mind or . . . was using the Highway Safety Act as a ruse . . . '"

AS LONG AS THE STOP IS NOT A RUSE

It has been held that if a police officer conducting a motor vehicle stop does "not have a legitimate road safety purpose in mind and is using the highway traffic act authority as a mere ruse or pretext to stop a vehicle in order to investigate a crime, then the detention will be unlawful" (***Mayor***, at paragraph 9). In ***Brown***, the Ontario Court of Appeal held that the powers provided by highway enforcement legislation will not authorize police stops if the police use these powers as a "ruse" to justify a stop for another purpose (at page 234). Thus, the "actions of the police in stopping a vehicle under their authority at common law or by statute only constitutes an unconstitutional stop if the reason for the stop is unconnected to a highway safety purpose" (see ***R. v. Gardner***, 2018 ONCA 584, at paragraph 21).

An example of how this can arise is found in the Ontario Court of Appeal's decision in ***Major***. In that case, the police received an anonymous tip that the accused was dealing drugs from his car. Through their own initiative, they learned that his driver's licence had been suspended. The accused's car was stopped by the police and he was arrested for driving with a suspended licence. A subsequent search discovered cocaine and drug-related paraphernalia. The accused was charged with possession of a controlled substance for the purpose of trafficking.

At his trial, the accused argued that the stop and arrest were illegal. He sought exclusion of the items discovered during the search. The trial judge dismissed the application and the accused was convicted.

The Ontario Court of Appeal indicated that the existence of highway traffic legislation "does not automatically make motor vehicle stops lawful because the police are not free to use these powers for some other purpose, including to further a criminal investigation. . . . The court must ensure that the police use these powers in a manner consistent with this purpose." The Court of Appeal held that as a result, "if the police do not have road safety purposes subjectively in mind, they cannot rely on the *Highway Traffic Act* powers to authorize the stop. . . . If the police cannot point to any other legal authority for the stop, the stop will not be authorized by law and so will violate s. 9 of the *Charter*. . . . The court must thus determine whether the officer actually formed a 'legitimate intention' to make the detention or arrest for road safety purposes" (at paragraph 7).

The Ontario Court of Appeal held that the crucial issue is whether the police "had a road safety purpose in mind or whether the officer was using the *Highway Traffic Act* power as a ruse to conduct a criminal investigation" (at paragraph 10). The Court of Appeal concluded that a new trial was warranted because the trial judge failed to "resolve the central issue on the application, which was whether the police used powers that the Legislature granted for a road safety purpose as a ruse to search the appellant's vehicle as part of a drug investigation" (at paragraph 13).[5]

In summary, when a dual purpose is alleged, a Canadian trial judge must determine if the purported highway enforcement goal was real or a ruse.

HOW IS THIS TO BE DETERMINED?

In ***Major***, the Ontario Court of Appeal indicated that a trial judge "must make a factual determination as to whether the officer had a road safety purpose in mind or whether the officer was using the *Highway Traffic Act* power as a ruse to conduct a criminal investigation. In determining the police purpose, the court must consider all the circumstances, including the evidence of the officers, the evidence of the detained person, the circumstances of the stop, and the police conduct during the stop" (at paragraph 10).

If the stop is found not to have been pursuant to highway traffic legislation, then the stop will violate section 9 of the *Charter* unless the police had "articulable cause" for the stop (see ***R. v. Simpson*** (1993), 12 O.R. (3d) 182 (C.A.)).

THE ARTICULABLE CAUSE TEST IN CANADA

In ***R. v. Decker*** (2004), 50 M.V.R. (4th) 53 (N.L.C.A.), the Court of Appeal considered the application of section 9 of the *Charter* to the stopping of motor vehicles and concluded that the "relevant legal principles are well established" (at paragraph 9):

> Articulable cause has been described by this Court as "a demonstrable rationale . . . which is sufficiently reasonable to have justified the detention" *R. v. Burke (A.)*, *supra*, at paragraph 29). Cory J., speaking for the majority in *R. v. Wilson*, *supra*, referred to stopping a vehicle on the basis of reasonable grounds that can be clearly expressed.

In ***R. v. Wilson***, [1990] 1 S.C.R. 1291, the accused was charged with a drinking-and-driving offence. The police officer had stopped the accused's vehicle because it "was a block away from one of the hotels; the bars at the hotels had just closed; there were three men in the front seat of the vehicle; the vehicle had out-of-province licence plates; and he recognized neither the vehicle nor its occupants" (see paragraph 6).

The Supreme Court of Canada concluded that the police had "articulable cause" to have made the stop (at paragraph 13):

> . . . the stopping of the appellant was not random, but was based on the fact that the appellant was driving away from a hotel shortly after the closing time for the bar and that the vehicle and its occupants were unknown to the police officer. While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community. In a case such as this, where the police offer grounds

5. Interestingly, the Ontario Court of Appeal seemed willing to accept that if the stop had been based upon a suspended driver's license, it would have been constitutional, even if the stop was also to investigate the anonymous tip. Compare this latter point with the commentary on police stops based upon anonymous tips found in Navarette v. California, 572 U.S. 393 (2014).

for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the *Charter*.

Though articulable cause is no longer a significant issue in Canada because of the prevalence of provincial highway enforcement legislation, the test put forward in ***Wilson*** suggests a very low threshold. However, this is consistent with the general acceptance by the Supreme Court of Canada that there are significant societal benefits in allowing the police to stop motorists with little if any cause.[6]

Having considered ***Glover*** and compared it to the law in Canada, how would ***Glover*** have been decided here?

HOW WOULD GLOVER HAVE BEEN DECIDED IN CANADA?

This is an easy question to answer. The police in Canada would have been acting constitutionally if they stopped a motor vehicle based upon the facts revealed in ***Glover***.

The officer was acting upon information he received after checking the vehicle's licence plate. Once he determined that the driver's licence of the registered owner of the vehicle had been suspended, he would have had lawful authority to stop it. He had such authority because the stop was based upon highway traffic regulation.

If the officer had observed that the driver of the vehicle did not match the description of the owner (the mid-twenties female referred to by the majority in ***Glover***) this would not have altered his authority in Canada to stop the vehicle unless it was for an improper purpose or as a ruse to investigate criminal activity. Otherwise, the stop would still be related to highway traffic enforcement and thus constitutional. For the same reasons, it would be irrelevant in Canada that the registered owner's driver's licence had been suspended rather than revoked.

One final area: what if the stopping of the motorist is based upon racial profiling?

RACIAL PROFILING

It is beyond the scope of this column to consider the issue of how race in Canada has impacted the administration of justice, but I do wish to connect the issue of "racial profiling" to the stopping of motorists by the police in Canada. In ***R. v. Le***, 2019 SCC 34, the Supreme Court indicated that racial profiling "occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment" (at paragraph 76). In ***R. v. Brown*** (2003), 173 C.C.C. (3d) 23 (Ont. C.A.), it was pointed out that 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" (at paragraph 44).[7]

"The Commission concluded that these 'disproportionate numbers raise concerns of systemic racism or anti-Black bias.'"

The impact of race on police action in Canada has been recently considered by the Ontario Human Rights Commission in its report, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service*, August 2020. The Commission found that "Black people are more likely to be arrested by the Toronto police. . . . Toronto Police Service data ranging from 2013 to 2017, collected and analyzed by a team of experts, reflects the many ways Black communities are over-charged and over-policed, ranging from laying low-quality discretionary charges to police use of force, with all of its negative and detrimental physical and emotional consequences" (at page 2).

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The Commission also found that "Black people represented 35.2% of people involved in 'out-of-sight' driving charges (such as driving without valid insurance), which are charges that only arise after a stop has already taken place, suggesting other motives for the stop. . . . Although they represent only 8.8% of Toronto's population, Black people represented 35.2% of people involved in these charges. They were four times more likely to be charged with an 'out-of-sight' driving offence than their representation in the general population would predict, while both White people and people from other racialized groups were under-represented in these charges" (at pages 2 and 6).

The Commission concluded that these "disproportionate numbers raise concerns of systemic racism or anti-Black racial

6. Subsequently, in R. v. Mann, [2004] 3 S.C.R. 59, the Supreme Court indicated that it preferred "to use the term 'reasonable grounds to detain' rather than the U.S. phrase 'articulable cause' since Canadian jurisprudence has employed reasonable grounds in analogous circumstances and has provided useful guidance to decide the issues in question. As I discuss below, the reasonable grounds are related to the police action involved, namely, detention, search or arrest" (at paragraph 33).
7. An illustration of the training provided to Canadian judges on this issue can be found in the upcoming program "Building Cultural Competence," offered by the Canadian National Judicial Institute. The web page for the NJI describes the course as follows:

   Participants will learn about, and then practice, the skills associated with effective judicial cultural competence.

   Day 1 will focus on the key principles that underlie cultural competence for judges and explore how training in this area has evolved to incorporate science and empirical research about risks and best practices. Judges will gain an understanding of how cultural competence is relevant to the legal system and to their role. Experts—including judges, academics, and members of the community—will address issues such as implicit bias, privilege and marginalization, systemic racism and discrimination, and cultural homophily. They will also explore a range of strategies and tools—which participants will have the opportunity to apply—to address the risks of implicit bias.

"Where race or racial stereotypes are used to any degree . . . there will be no reasonable suspicion . . ."

bias. Out-of-sight driving offences, by their very nature, are typically the result of proactive policing practices, where an officer uses their discretion to check a vehicle's licence plate or stop a driver before they are aware that the driver may be implicated in an offence. In many of these situations, an officer will have observed the race of the driver before making the decision to pull them over" (at pages 6 and 7).

In ***R. v. Odle***, 2020 ONSC 3991, a vehicle the accused, a Black man, was driving was stopped by a police officer (Cst. Dunfield). The officer relied upon section 216(1) of the *Highway Traffic Act* as support for the stop being constitutionally valid. The accused argued that the stop was constitutionally invalid on the basis that the police used "racial profiling as the basis for the traffic stop."

The trial judge indicated that "Canadian jurisprudence continues to evolve in its efforts to identify and acknowledge instances of systemic racism and to develop well-informed jurisprudence aimed at ensuring an effective, equal, fair and just application of the law for all" (at paragraph 59). The trial judge also indicated that "where race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling" (at paragraph 63). However, the trial judge rejected the argument that race played a part in the stopping of the motor vehicle because "Cst. Dunfield did not know that Mr. Odle was a Black man before he made the decision to stop his vehicle. He stopped the vehicle primarily because it was a rental car. I therefore find that race played no role in the decision to conduct the traffic stop. Applying the Dudhi test, I conclude that there is no evidentiary basis to support the claim of racial profiling in this case" (at paragraph 64).

In ***R. v. Thompson***, 2020 ONCA 264, the police surrounded a parked motor vehicle being driven by a Black man. A search of the vehicle led to drug-trafficking charges.

An appeal to the Ontario Court of Appeal concentrated on whether the accused had been "detained" in an arbitrary fashion, contrary to section 9 of the *Charter* and, if so, whether this should have led to the evidence obtained during the search of the vehicle being excluded. In addressing these issues, the Ontario Court of Appeal indicated that though it was "not suggesting that the police engaged in racial profiling—to the contrary, they could not determine the race of the occupants because the windows were tinted . . . the appellant's status as a racialized Canadian in Brampton, one of the largest majority-racialized cities in Canada, is relevant to the perception of a reasonable person in his shoes" (at paragraph 63).

The importance of assessing whether racial profiling played a role in police action can be found in ***R. v. Dudhi***, 2019 ONCA 665. In this case, the police stopped a motor vehicle being driven by the accused. A subsequent search led to evidence supporting a charge of drug trafficking. The Ontario Court of Appeal noted that "[d]uring the arrest of Rusheed Dudhi, a man of colour, the arresting officer made a comment over the radio to his police colleagues about 'brown drug dealers.'" The accused argued that the stopping of his motor vehicle was based on racial profiling.

The Ontario Court of Appeal held that "a decision need not be motivated solely or even mainly on race or racial stereotypes to nevertheless be 'based on' race or racial stereotypes. If illegitimate thinking about race or racial stereotypes factors into suspect selection or subject treatment, any pretence that the decision was reasonable is defeated. The decision will be contaminated by improper thinking and cannot satisfy the legal standards in place for suspect selection or subject treatment. . . . Where race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling" (at paragraphs 62 and 63).

In referring the matter back to the trial judge to determine if the evidence should be excluded pursuant to section 24(2) of the *Charter*, the Court of Appeal indicated that "[i]f racial profiling did occur, this is an aggravating factor that elevates the seriousness of the breach: *R. v. Li*, at para. 78. It may be, as Mr. Dudhi urged before us, that even absent racial profiling, racially inappropriate conduct by an officer falling short of racial profiling that occurs in the course of effecting an arbitrary detention makes the breach more serious, but I will leave that proposition unresolved given that it was not argued before the trial judge. The immediate point is that it cannot be determined whether the admission of the evidence would bring the administration of justice into disrepute until a new trial has settled all of the relevant circumstances that inform a proper s. 24(2) decision" (at paragraph 88).[8]

CONCLUSION

In ***R. v. Ahmad***, 2020 SCC 11, in the context of considering the defence of entrapment, the Supreme Court of Canada noted that "an investigation that is pursued in bad faith will not be one that is motivated by genuine law enforcement purposes. . . . Examples of bad faith in this context include pursuing an investigation that is motivated by racial profiling or based on information from a source that they know or have reason to believe is unreliable" (at paragraph 157). Thus, the "reasonable suspicion standard is necessary where there is the fundamental need to balance society's interest in the detection and punishment of crime with its interest in maintaining individual freedoms. Courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon 'intuition' or 'hunches' that easily disguise unconscious racism and stereotyping" (at paragraph 25).

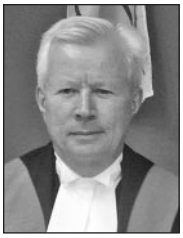
In contrast, in the context of the stopping of motorists, the

8. Section 24(2) of the *Charter* states:

> 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.

Supreme Court of Canada has rejected the requirement for reasonable suspicion or any succession. As we have seen, in Canada the stopping of a motor vehicle does not require individualized suspicion. Just the opposite, it requires no specific suspicion of an offence having been committed. The stop can occur for the purpose of checking licence, sobriety, and other matters, but not on the basis of racial profiling. Though this is a broad power, it is not unlimited and some of the decisions referred to have been willing to go behind the stated reason for the stop to determine if it actually involved regulation of traffic upon the highway.

This lack of a requirement for suspicion creates the possibility of motorists being stopped based upon racial grounds. However, proving that this was the basis for the stop is very difficult, particularly when random stops have been declared to be free of constitutional taint.[9]



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9. As a result of *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, SC 2018 c 21, Parliament added section 320.27(2) to the *Criminal Code of Canada*. This new provision allows the police to demand that the driver of a motor vehicle to "immediately" provide a sample of their breath for analysis. It does not require that the officer have grounds to believe or suspect that a drinking and driving offence has been committed. It states as follows:

> 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.

This new provision was considered in R. v. Labillois [2020] A.J. No. 376, 2020 ABQB 200. In this case, it was held that the police now have the power to randomly stop a vehicle and then demand a breath sample without any suspicion that the motorists has committed a drinking-and-driving offence (at paragraph 35):

> In summary, Cst. Debow was acting in the course of the lawful exercise of his powers under *ATSA* s 166(2), an Act of the Alberta legislature, or arising at common law pursuant to ***Dedman***, in conducting the stop of Mr. Labillois's vehicle. Thereafter, *Criminal Code* s 320.27(2), allows Cst. Debow to make the Demand. Of course, Cst. Debow had to have an approved screening device, which he did, and Mr. Labillois had to have been operating a motor vehicle, which he was. Cst. Debow was not limited to asking questions "related to driving offences": ***Ladouceur*** at 1287. *Criminal Code* s 320.27(2) authorizes him to make a Demand, even if he did not have reasonable and probable grounds, or a reasonable suspicion.

In R. v. Morrison, 2020 SKPC 28, in upholding the constitutionality of section 320.27(2), it was suggested that "the public utility of police officers having the ability to detect alcohol in drivers who otherwise do not display any observable signs of alcohol consumption is very high" (at paragraph 136).

Answers to Crossword

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