

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

[10]

**LORNE BROWN, DONALD PETERSON,
and TERO RAMPANEN**

Appellants
(Appellants in the Court of Appeal)

- and -

REGIONAL MUNICIPALITY OF DURHAM POLICE SERVICES BOARD

[20]

Respondent
(Respondent in the Court of Appeal)

- and -

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH
COLUMBIA and CANADIAN ASSOCIATION OF CHIEFS OF POLICE**

[30]

Interveners

RESPONDENT'S FACTUM

PART I — FACTS

[40] **A. Introduction**

1. The Respondent obtained information that many hundreds of members, friends and associates of a known outlaw motorcycle gang, the Paradise Riders, were to gather on four weekends

on a small property in the middle of the quiet rural hamlet of Caesarea, population 700. The Respondent had ample information about this outlaw motorcycle gang, its tendency to engage in serious crime and its connections with other outlaw motorcycle gangs, including the Hell's Angels. In addition to the public safety and public order concerns posed by this, the Respondent had legitimate highway safety concerns such as vehicle fitness, licencing and insurance.

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2. Therefore, the Respondent established road checks near Caesarea. At these road checks, the Respondent stopped members, friends and associates of this outlaw motorcycle gang. The stops lasted only 3 to 20 minutes and entailed investigation of licence and insurance, a CPIC check and a visual vehicle inspection. The trial judge found that the stops, based in part as they were on highway safety concerns, were authorized by the *Highway Traffic Act*. There were no interrogations or broader investigations.

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3. Three members of this outlaw motorcycle gang now complain that they were improperly singled out and that these limited stops were detentions in a "temporary, but very real 'police state'", under practices which are "institutionalized in authoritarian and totalitarian states", in order to be "identified and subjected to police dominance". They submit that the detentions infringed their rights under s. 9 of the Charter.

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4. This Court has already upheld vehicle stops, verifications of licence and insurance, vehicle inspections and CPIC checks under the Charter. It has upheld such activities even when conducted on a random basis. In this case, however, the stops were not random: the Respondent effected the stops of the Paradise Riders for good, verifiable reasons. The trial judge found as a fact that the Respondent had rationally-based, substantial concerns about highway safety and potential breaches of the peace associated with the arrival of the Paradise Riders which had "a very significant potential for violence and disruption". Accordingly, the Respondent took reasonable steps, authorized by statute and common law, in order to achieve those important purposes without unnecessarily or unreasonably interfering with civil liberties. There is no s. 9 Charter breach.

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B. The nature of the Appellants

5. The appellants are individual members of the Paradise Riders Motorcycle Club. During all material times, the Appellants, Lorne Brown and Donald Peterson, were President and Vice-President respectively in the Paradise Riders. The Appellant, Tero Rampanen, also was a member of the Paradise Riders.

Statement of Claim, para. 4; Appellants' Record, vol. I, p. 24

C. The nature of the Paradise Riders and their members

- [20] 6. While the Paradise Riders' principal clubhouse is on Eastern Ave. in Toronto, it operates throughout Southern Ontario, primarily in the Greater Toronto area.

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, pp. 87-88

7. The trial judge found that the Paradise Riders are in lifestyle an outlaw motorcycle gang. The term "outlaw motorcycle gang":
- [30] ... has a much wider and more sinister meaning. [It] is a term now commonly used to described motorcycle clubs around the world which have adopted a fairly stereotyped lifestyle which the members themselves consider that of a "righteous outlaw". The term "outlaw" is intended to differentiate such bikers from those who are law-abiding.

Trial Judgment, pp. 10, 21; Appellants' Record, vol. II, pp. 229, 240

8. The trial judge noted that the Paradise Riders "are not on trial here" and that it was not necessary to find that the Paradise Riders were an organized crime organization (although he was satisfied that the Paradise Riders do have "a number of the characteristics of organized crime") or that the members' criminal activities are part of the Paradise Riders' activities (although many of the members "had long-standing criminal records and some for very serious offences"). Nevertheless, he held that there were "strong grounds" supporting the police view that the Paradise

Riders are a "criminal organization and not just a club some of whose members are involved in crime".

Trial Judgment, pp. 20-21; Appellants' Record, vol. II, pp. 239-240

Exhibit 42: Exhibit C of J. Bruce Towale's Affidavit, dated July 9, 1992 (list of known Paradise Rider members and their convictions)

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9. Some of those "strong grounds" supporting the police view which were accepted by the trial judge include:

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- information contained in a study prepared by a joint task force of the Metropolitan Toronto Police and the Ontario Provincial Police ("Project Ronterrio") which showed that the Paradise Riders were an outlaw gang and an organized crime entity. This information showed that:

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- the Paradise Riders' members had numerous Criminal Code convictions, 41 driving suspensions and 172 highway traffic violations;
- the Paradise Riders often communicate with outlaw motorcycle gangs across Canada and the United States;
- members engaged in criminal activity with members of seven other gangs; wiretaps on 49 members disclosed involvement of members in drug trafficking, dealing in stolen property, prostitution, extortion and other crimes;

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- a search of the Toronto clubhouse revealed a heavily fortified structure with rifles, baseball bats and steel pipes mounted on the wall;
- numerous intelligence reports of illegal activity by members involving use of weapons and assaults on police;

- intelligence reports of numerous meetings and contacts between members of the Paradise Riders and the Hell's Angels in various provinces during 1989 and 1990;

Project Ronterrio, Exhibit 12; Respondent's Record, vol. VII, Tab 11, pp. 1421-1542

Trial Judgment, pp. 17-18; Appellants' Record, vol. II, pp. 236-237

[10]

- statistics showing that 62 men were identified by the police as being members of the Paradise Riders, of whom 40 had convictions for a total of 370 convictions for offences, including 67 convictions involving violence, 31 involving weapons and one murder;

Trial Judgment, pp. 18, 20; Appellants' Record, vol. II, pp. 237, 239

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Evidence of Mercier; Respondent's Record, vol. VI, pp. 1153-1160 (conviction of member, Elkins, for a murder of a stranger); see also Evidence of Peterson; Respondent's Record, vol. I, p. 157 (Paradise Riders held a fundraiser for Elkins after he was charged)

- in May 1991 one member of the Paradise Riders had been charged with shooting two people and killing one of them;

Trial Judgment, pp. 18, 20; Appellants' Record, vol. II, pp. 237, 239

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- specific testimony of numerous police officers regarding conduct of members of the Paradise Riders, including rapes, hotel fights, assaults, intimidation, disruption to resort towns, drug crimes and organized crime.

Trial Judgment, pp. 18-20; Appellants' Record, vol. II, pp. 237-239

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- other specific testimony about various investigations of the Paradise Riders, including one road check of members which resulted in 6 Criminal Code charges, 1 narcotics charge, 50 highway traffic charges and the discovery of a weapon and ammunition in a truck following the motorcycles which intelligence suggested was carried for use in an anticipated conflict with another gang;

Trial Judgment, pp. 18-20; Appellants' Record, vol. II, pp. 237-239

- the testimony of a former member of the Paradise Riders who boastfully testified that he had used hundreds of aliases in the past to take out drivers' licences to avoid accumulating demerit points;

Trial Judgment, pp. 18-20; Appellants' Record, vol. II, pp. 237-239

[10]

- information that the Paradise Riders invite large numbers of guests from other outlaw motorcycle clubs to major functions; some of these clubs had held functions which had given rise to violence and public safety problems, including shootings and injuries.

Trial Judgment, p. 20; Appellants' Record, vol. II, p. 239

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D. Findings and evidence at trial regarding outlaw motorcycle gangs

(a) The purpose of this evidence

10. At trial, the Respondent adduced much evidence concerning outlaw motorcycle gangs: a total of 68 books, articles, studies, reports and other publications. The trial judge held that this evidence was adduced for the purpose of demonstrating "reasonable grounds for [the police] to believe that certain conduct is committed by bikers and that appropriate police action is warranted in response."

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Trial Judgment, p. 7; Appellants' Record, vol. II, p. 226

Exhibits in Vols. X to XIV

(b) Structure, organization and activities of outlaw motorcycle gangs

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11. Outlaw motorcycle gangs are an American phenomenon which arose after World War II. Over the years, outlaw motorcycle gangs have evolved from their rebellious, hard-living antisocial roots and are now an integral part of organized crime throughout the world. The Hell's

Angels are the largest and most notorious of all outlaw motorcycle gangs, but virtually all outlaw motorcycle gangs, including the Paradise Riders, are modelled on the Hell's Angels. The trial judge found that outlaw motorcycle gangs:

- [10] • are "close-knit fraternal organizations for which loyalty is paramount and disloyalty may be punishable by death";
- are "para-military in terms of organization with fortified clubhouses and heavy security measures", precautions which "are intended to be defences against the police, the public and rival gangs";
- [20] • enforce "internal discipline, including an iron-clad code of silence which ensures that information about the club operations never goes beyond the walls of the clubhouse";
- engage in exclusive and anti-social activity which is "marked by abuse of alcohol and drugs, violence and aggressive behaviour and language";
- [30] • are "more and more involved in criminal activity" and "crime as a source of livelihood", with "drug trafficking" as a "principal interest"; with the trend toward crime have "come affiliations on provincial, state, national and international levels, sophisticated business practices and wars over territory"; they act as a "brokerage of criminals";
- [40] • are "pre-adapted as vehicles of organized crime" and "some are apparently quite simply organized crime organizations"; many police specialists believe that most outlaw gangs "are involved in major organized crime";

- are often distinguishable by distinctive dress and appearance, including long hair and beards and black leather clothes decorated with symbols and colours of their club and motorcycle lore; increasingly, however, some are adopting business dress and vehicles which reflects the "trend toward becoming sophisticated organizations"; and
- [10]
- are virtually impossible for police to infiltrate; the police have limited means by which they can deal with the gangs.

Trial Judgment, pp. 11-15, 21; Appellants' Record, vol. II, pp. 230-234, 240

1987 RCMP Gazette, Exhibit 10; Respondent's Record, vol. VII, Tab 9: see especially pp. 1341-1344 (history of outlaw motorcycle gangs), pp. 1345-1347 (characteristics), pp. 1348-1350 (organization and structure), pp. 1350-1354 (visible indicia), pp. 1354-1360 (biker runs and police stops), pp. 1360-1362 (clubhouses), pp. 1363-1264 (weapons), pp. 1367-1369 (inter-gang relations), pp. 1370-1373 (analysis of gangs, province by province)

- [20]
- 1994 RCMP Gazette, Exhibit 11; Respondent's Record, vol. VII, Tab 10; see especially pp. 1385-1387 (history of outlaw motorcycle gangs), pp. 1388-1389 (visible indicia), pp. 1390-1393 (organization and structure), pp. 1394-1395 (biker runs and police stops), pp. 1409-1415 (analysis of gangs, province by province)

12. Violence and intimidation are the stock-in-trade of the modern outlaw motorcycle gang. Outlaw motorcycle gang members are deeply involved in the trafficking and distribution of drugs although, being opportunistic by nature, they are involved in many forms of criminal activity.

- [30]
- Trial Judgment, p. 9; Appellants' Record, vol. II, pp. 228
 Evidence of Lieutenant Louis Barbaria; Respondent's Record, vol. III, Tab 1, pp. 501-556
 Evidence of Sgt. Jean Pierre Levesque; Respondent's Record, vol. V, Tab 1, pp. 1091-1115

13. Outlaw motorcycle gangs are territorial and highly protective in nature resorting to murder, bombings, and arson, as evidenced by the ongoing war in Quebec between the Hell's Angels and the rival gang, Rock Machine, which at the time of trial had claimed many lives including the

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bombing death of an eleven year old child in 1995. In Quebec, there were many deaths, attempted murders, bombings, missing persons and cases of arson concerning biker-affiliated businesses and hangouts.

Evidence of Sgt. Guy Ouellette; Respondent's Record, vol. III, Tab 1, pp. 626-731

Evidence of Sgt. Jean Pierre Levesque; Respondent's Record, vol. V, Tab 1, pp. 1091-1115

1994 RCMP Gazette, Exhibit 11; Respondent's Record, vol. VII, Tab 10, pp. 1379-1420

14. Gang members congregate not only for social purposes but to advance their criminal purposes and as a defence against the police, the public and rival gangs. With outlaw motorcycle gang members, the possibility of violence and even death is never far away.

Trial Judgment, p. 11; Appellants' Record, vol. II, p. 230

Exhibit 50; Respondent's Record, vol. IX, Tab 32, pp. 1888-1890

15. Every outlaw motorcycle gang attracts a group of prospects, associates and other hangers-on who do not hold full membership but are part of the motorcycle gang network and engage in criminal activities. Motorcycle gangs are generally organized into cells with individual members engaging in criminal activities. The cell structure insulates gang members and the gang itself from criminal prosecution. This structure means that the conviction and imprisonment of one or more gang members does not result in the destruction of the motorcycle gang itself as a criminal organization. The cell structure, coupled with gang secrecy, loyalty and the ever-present reality of violence and intimidation, has made effective law enforcement against outlaw motorcycle gangs uniquely difficult.

Evidence of Lieutenant Louis Barbaria; Respondent's Record, vol. III, Tab 1, pp. 501-556

Evidence of Sgt. Jean Pierre Levesque; Respondent's Record, vol. V, Tab 1, pp. 1091-1115

Evidence of Anthony Tait; Respondent's Record, vol. IV, Tab 1, pp. 732-821

16. The trial judge found that "the police witnesses were unanimous in their opinions that outlaw motorcycle gangs were major threats to public safety and their personal experience and accumulated expertise justifies that view." Police have been acting on these concerns for years, regarding them as a "major threat" and have created "special local, provincial and national

organizations to combat them". Recent reports by the U.S. President's Commission on Organized Crime and the United Nations' Commission on Crime Prevention and Criminal Justice underscore these concerns and illustrate that the problem is one of international dimension.

Trial Judgment, pp. 15-16; Appellants' Record, vol. II, pp. 234-235

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Exhibit 44: Report for United Nations Commission on Crime Prevention; Respondent's Record, Tab 27, pp. 1834-1849

Exhibit 45: President's Commission on Organized Crime, Report to the President and Attorney General; Respondent's Record, Tab 28, pp. 1850-1867

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17. A significant concern in Ontario is that the Hell's Angels, the most powerful biker gang in the world, may now be trying to gain control in Ontario. It already controls the outlaw biker community in Quebec and British Columbia. Significant contacts between the Hell's Angels and the Paradise Riders have been detected. The police are "continually trying to monitor the movements and meetings of gangs in an effort to combat their illegal activities and to prevent their influence from spreading."

Trial Judgment, pp. 16-17; Appellants' Record, vol. II, pp. 235-236

Exhibit 46: Analysis of Contacts between members of Paradise Riders and Hell's Angels; Respondent's Record, vol. IX, Tab 46, pp. 1868-1873

1987 RCMP Gazette, Exhibit 10; Respondent's Record, vol. VII, Tab 9, pp. 1337-1378

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1994 RCMP Gazette, Exhibit 11; Respondent's Record, vol. VII, Tab 10, pp. 1397-1416 (characteristics of Hell's Angels)

(c) Activities of motorcycle gangs in small rural communities

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18. Historically, motorcycle gang members have congregated in large numbers in small rural communities, effectively taking them over and intimidating and terrorizing law-abiding citizens. Occasionally riots have ensued, the most infamous of which was the 1947 riot in Hollister, California where approximately 500 gang members disrupted an American Motorcycle Association sponsored tour and competition for about 2500 of its members. A member of the Association later said that the rioters represented one percent of motorcyclists and, in response, members of

motorcycle gangs later adopted the designation "one percenter" as a badge of honour. Today, as is well understood by our courts, the term "one percenter" symbolizes that the gang and members who are permitted to wear the symbol operate outside the law. The Paradise Riders are a "one percenter" club and the Appellants all bear "one percenter" tattoos.

[10] Trial Judgment, p. 9 (including reference to jurisprudence on the subject); Appellants' Record, vol. II, pp. 228

1987 RCMP Gazette, Exhibit 10; Respondent's Record, vol. VII, Tab 9, pp. 1337-1378

1994 RCMP Gazette, Exhibit 11; Respondent's Record, vol. VII, Tab 10, pp. 1379-1420

[20] 19. On summer weekends throughout the 1960's and 1970's, outlaw motorcycle gangs took over and controlled Sauble Beach and Wasaga Beach in Ontario. They did so with impunity until the Ontario Provincial Police were able to regain control primarily through the use of road check programs directed at motorcycle gang members, their friends and associates. Operationally, the road check programs pursued by the Respondent in this case are virtually identical to the early road checks first used by the OPP to regain control of Sauble Beach and Wasaga Beach.

Evidence of Inspector Terry Hall; Respondent's Record, vol. V, Tab 1, pp. 909-964

(d) The use of road stops

[30] 20. Road checks directed at motorcycle gangs are used throughout Canada and the United States. Police throughout North America consider the road check an effective and important tool in law enforcement in their continuing battle against outlaw motorcycle gangs. The police community fears that if its use of road checks directed at outlaw motorcycle gang members is declared unconstitutional, motorcycle gang members will travel in groups with utter impunity, and thereby continue to transport narcotics, weapons, and otherwise further their criminal objectives.

[40] Trial Judgment, pp. 5, 23; Appellants' Record, vol. II, pp. 224, 242 (use of road checks throughout North America)

Evidence of Lieutenant Louis Barbaria; Respondent's Record, vol. III, Tab 1, pp. 501-556

Evidence of Sgt. Jean Pierre Levesque; Respondent's Record, vol. V, Tab 1, pp. 1091-1115

Evidence of Sgt. Guy Ouellette; Respondent's Record, vol. III, Tab 1, pp. 626-731

Evidence of Inspector Terry Hall; Respondent's Record, vol. V, Tab 1, pp. 909-964

Evidence of Sgt. Robert Lines; Respondent's Record, vol. VI, Tab 1, p. 1274-1310

(c) **Highway traffic concerns**

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21. Motorcycle gang members favour Harley Davidson motorcycles, many of which have been modified, or in biker vernacular "chopped" or constructed from stolen motorcycles from which identifying marks have been obliterated. The trial judge found that "[s]ince many bikers are not licenced mechanics and the changes they make may be fundamental, this tradition raises significant highway safety concerns." As a result, "it is reasonable to believe that outlaws' bikes are potentially unsafe."

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Trial Judgment, pp. 10-11; Appellants' Record, vol. II, pp. 229-230

22. The trial judge found that it is part of gang culture to "steal motorcycles and parts and to change or erase identification numbers and to use false identification" or aliases "to avoid laws including those relating to highway traffic". Paul Braybrook, one of the Appellants' important witnesses at trial, openly boasted in the witness box that he used "hundreds of aliases" to mislead the police and avoid the loss of his license through demerit points. The Appellant, Rampanen, also admitted the use of aliases.

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Trial Judgment, p. 11; Appellants' Record, vol. II, p. 230

Evidence of Paul Braybrook; Respondent's Record, vol. II, Tab 1, pp. 212-324

Evidence of Tero Rampanen; Respondent's Record, vol. I, Tab 1, pp. 165-211

1987 RCMP Gazette, Exhibit 10; Respondent's Record, vol. VII, Tab 9, pp. 1337-1378

1994 RCMP Gazette, Exhibit 11; Respondent's Record, vol. VII, Tab 10, pp. 1379-1420

[40]

E. The events giving rise to this appeal

(a) Events leading up to the road stops in this case

- [10] 23. In 1990, a corporation beneficially owned by members of the Paradise Riders, Sovereign Property Corporation, purchased a former marina (the "Riders' property") in the heart of Caesarea, a town of 700 people, located on the shores of Lake Scugog. Access to Caesarea is restricted to one highway, Regional Road No. 57.

Trial Judgment, pp. 4-5; Appellants' Record, vol. II, pp. 223-224

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, p. 88

- [20] 24. Since 1990, members, associates and friends of the Paradise Riders have used the Riders' property primarily as a summer clubhouse. The Riders' property is not large: there is one single large building and a storage shed on 0.83 acres of land. It is surrounded by a security fence and is protected by security cameras.

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, p. 88

- [30] 25. On three or four weekends in the summer, the Paradise Riders hold major events on their property. Upwards of three to four hundred outlaw motorcycle gang members, their associates and friends converge on Caesarea and attend these events. During these events, consistent with the desire of outlaw motorcycle gangs assiduously to maintain security and secrecy, up to four Paradise Rider members continuously patrol the perimeter of the Riders' property.

Trial Judgment, pp. 5; Appellants' Record, vol. II, p. 224

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, pp. 88-89

- [40] 26. Through informants, the Respondent, the police agency with jurisdiction over Caesarea, often learns about these events. The events are a source of concern: in the words of the trial judge, they are a "frequent source of trouble" and are always perceived "as presenting a significant risk of violence and rival gang conflict" and "a very significant potential for... public

disruption". In order to deal with the events, the Respondent developed an operational plan for road stops at Caesarea.

Trial Judgment, pp. 19, 21; Appellants' Record, vol. II, p. 238, 240

Exhibit 16: Road Check Operational Plans and Reports; Respondent's Record, vol. VII, pp. 1544-1763

[10]

27. The Respondent set up road stops for major events on the Riders' property on the weekends of May 19-20, July 6-7 and September 7, 1991 and June 12-13, 1992. These are the road stops which are at issue in this appeal. In addition to the information and experience possessed by the Respondent which is set out above concerning outlaw motorcycle gangs and, in particular, the Paradise Riders, the Respondent also had information that large numbers of members of other outlaw motorcycle clubs had been invited to these events. The Respondent also had previous experiences with various outlaw club functions which had given rise to shootings and injuries and other public safety problems and some of these clubs were invited to the major events on the Riders' property on the four weekends at issue in this appeal.

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Trial Judgment, p. 20; Appellants' Record, vol. II, p. 239

Exhibit 16: Operational Plans; Appellants' Record, vol. I, p. 97

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, p. 92

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28. The trial judge found that the Respondent conducted the road stops in this case for the following purposes:

(a) to investigate for contraventions of the *Highway Traffic Act* and the *Compulsory Automobile Insurance Act*;

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(b) to investigate criminal or drug violations and to check the sobriety of drivers (A.L.E.R.T. machines were present);

(c) to control traffic entering Caesarea;

- (d) to establish a police presence in the hamlet of Caesarea to reassure local residents who were concerned about the large number of motorcycles;
- (e) to let the Paradise Riders and the residents of Caesarea know that peace would be maintained;
- (f) to check for outstanding warrants for arrest;
- (g) to check for possible breaches of bail and parole conditions;
- (h) to identify all motorcycle gangs, members, friends and associates and persons known to be engaged in criminal activity in attendance at the event; and
- (i) to identify stolen motorcycle parts.

Trial Judgment, pp. 19, 29-32; Appellants' Record, vol. II, pp. 238, 248-251

- (b) **The set up of the road check points and the carrying out of the road checks: brief detention and minimal intrusion**

29. The Respondent set up two road check points. The primary check point was at a fire station on Regional Road No. 57 south of Caesarea. Most of the Paradise Riders attending the major event approached Caesarea from the south. A secondary checkpoint was just east of Caesarea on Regional Road No. 57 but it was on a smaller scale because fewer motorcycles approached from the east.

Trial Judgment, pp. 23-24; Appellants' Record, vol. II, pp. 242-243

Exhibit 1: Agreed Statement of Facts; Appellants' Record, vol. I, p. 89

- [10] 30. The Respondent organized the road checks well in advance in response to intelligence reports and conducted them for pre-set purposes. Officers participating in the road checks were briefed in advance regarding who to stop and were instructed to lay charges where evidence warranted it. Senior officers of the Respondent approved the road checks in advance. The trial judge noted that the existence of a plan approved by senior officers and briefings of officers concerning those plans resulted in "fairly consistent practice" at the various road checks.

Trial Judgment, pp. 25, 28, 32; Appellants' Record, vol. II, pp. 244-247, 251

Exhibit 16: Road Check Operational Plans and Reports; Respondent's Record, vol. VII, pp. 1544-1763

- [20] 31. The Respondent conducted the road checks in essentially the same manner on all four occasions. It deployed approximately 50 police officers at the southern checkpoint and 15 officers at the eastern checkpoint. Uniformed police officers conducted the checks and were assisted by motorcycle gang intelligence officers and members of the canine unit. Members of the Respondent's tactical unit with their usual equipment were deployed as backup for officer safety reasons. Members of the tactical unit were not engaged in the stops themselves.

Trial Judgment, pp. 24-25; Appellants' Record, vol. II, pp. 243-244

Agreed Statement of Facts; Appellants' Record, vol. I, pp. 89-90

- [30] 32. The police selected persons to stop by looking for the visible indicia of outlaw bikers. Other traffic was slowed and sometimes stopped for a quick look at the occupants, but then was waved through without being directed into the parking lot.

Trial Judgment, p. 25; Appellants' Record, vol. II, pp. 244

Trial Judgment, pp. 12-13; Appellants' Record, vol. II, pp. 231-232 (bikers "create and advertise" a particular appearance, which includes such things as symbols, logos and names of their club)

- [40] 33. When persons thought to be going to the Riders' property approached on the highway, they were directed by uniformed officers to pull into a parking lot and were required to produce their driver's license, ownership and insurance documentation. They were detained until their documentation was checked through the Canadian Police Information Centre (CPIC) computer for

outstanding charges or warrants, bail or parole conditions and identification information including aliases. The uniformed officer might also ask the driver to activate equipment on the motorcycle to see, for instance, if the brake lights worked.

Trial Judgment, pp. 25-26; Appellants' Record, vol. II, pp. 244-245

- [10] 34. To minimize the duration of the stop, the motorcycle gang intelligence officers assigned to the road check had pre-printed CPIC records for those motorcycle gang members expected to attend the function and the records were arranged in alphabetical order. The stop for each individual lasted approximately 3 minutes but could last as long as 20 minutes when larger groups arrived at Caesarea together. While waiting for CPIC results the motorcycles were visually inspected for mechanical fitness and compliance with the *Highway Traffic Act*. The police engaged
- [20] in conversations with those stopped; often the officers knew the persons by name and conversations of a social nature ensued. Participants were "fairly cordial and casual" for the most part, with only occasional tension, coarse language and bickering. Apart from one incident involving one individual who was arrested for disturbing the peace, the stops were orderly and peaceful. Both the Respondent and members of the Paradise Riders videotaped the stops.

Trial Judgment, pp. 26-28; Appellants' Record, vol. II, pp. 245-247

Evidence of Sgt. Tom Hart; Respondent's Record, vol. III, pp. 557-594

- [30] 35. Intelligence officers were present in the background at the road checks in order to assist in identifying bikers from other gangs especially for the purpose of enabling the police to ascertain if there were outstanding warrants or relevant terms of bail or parole. Identification was particularly important because of the frequent use of aliases. Many persons stopped in the road checks were indeed members of other outlaw gangs. The information regarding who went through the road check and what gang they were associated with was circulated to other police intelligence
- [40] agencies.

Trial Judgment, pp. 24-26, 28-29; Appellants' Record, vol. II, pp. 243-245, 247-248

- [10] 36. As a result of the road checks which are the subject of this proceeding, various charges were laid for offences relating to vehicle condition, improper helmets, lack of licence, lack of insurance, obstructed plates, improper mufflers, improper tires, handle bars too high, unsafe vehicles, unnecessary noise and no speedometers. In addition, the police served suspension notices and laid a number of other charges including obstruct police, trespassing, failure to surrender licence, careless driving, causing a disturbance and speeding. Three persons were arrested on outstanding warrants. The police had generally conducted road checks with respect to all of the Paradise Riders' major social functions and so the road checks in issue in this case were anticipated by the Paradise Riders; nevertheless, these road checks resulted in numerous charges.

Trial Judgment, pp. 22, 27-28; Appellants' Record, vol. II, pp. 241-247

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PART II — POINTS IN ISSUE

37. Were the detentions of the Appellants, in the circumstances of this case, arbitrary and thus contrary to s. 9 of the Charter?

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PART III — ARGUMENT

A. The Appellants' Submissions

- [40] 38. The Appellants submit that the Respondent's road stops infringed s. 9 of the Charter because they were not authorized by any legislative provision or any common law power. They assert that this case involves persons, "deemed of lesser worth by the police", who were detained in a "temporary, but very real 'police state'", under practices which are "institutionalized in authoritarian and totalitarian states", in order to be "identified and subjected to police dominance". Those persons are said to have been singled out based upon "nefarious 'profiling'" based on "suspected group

stereotypes", "guilt by association" and "disreputable reputation". The detentions "raise the spectre of unrestrained police conduct", conduct which is "such as would be seen in a police state", based on "police stereotypes based on race or method of dress", leading to unspecified "nefarious consequences". They warn the Court that if it dismisses the appeal, it will "embark down a path that could easily descend into greater and greater abuses", such as targeting on the basis of race, and the distinction between "a totalitarian society and a state subject to the rule of law" will be ignored. The Appellants, referring to a dictionary and not the jurisprudence of this Court, define "arbitrary" in s. 9 of the Charter as meaning "despotic", the synonyms of which are said to be "totalitarian, tyrannical and dictatorial".

39. The Appellants rarely refer to the actual evidence in the record. Instead, as is seen above, they prefer to adopt characterizations which are not based on the evidence and to present dark and ominous scenarios, both with some measure of overstatement. The Appellants' analysis of s. 9 of the Charter does not go much beyond taking the characterizations and scenarios which they have fashioned and then comparing them with supposed practices in totalitarian, tyrannical and dictatorial regimes and police states. As far as the legal analysis is concerned, the Appellants dismiss in just one single sentence the possibility that the Respondent's actions were authorized by the *Police Services Act* and the common law. As far as s. 9 of the Charter is concerned, the Appellants fleetingly refer to only two decisions of this Court concerning s. 9 of the Charter and three pre-1991 decisions of this Court concerning s. 8 of the Charter. Except for attempting to distinguish two lower court s. 9 authorities which are hostile to their position and which were relied upon by the Court below, they fail to mention any s. 9 authorities. Finally, the Appellants fail to address how this Court should balance the important needs of public safety, public order, peacekeeping and highway safety on the one hand with the vital constitutional rights of individuals on the other hand — perhaps because they only deal with the latter and never acknowledge the existence of the former.

B. The Respondent's submissions: an introduction

[10] 40. The Respondent submits that the road stops in this case did not infringe s. 9 of the Charter. The road stops were authorized by s. 216(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, were conducted for good reason, and were limited in scope and duration. As such, they were not "arbitrary" within the meaning of this Court's jurisprudence under s. 9 of the Charter.

41. Further, the Respondent submits that the road stops were authorized by the common law powers or ancillary powers of police to keep the peace and preserve public safety. These powers have been codified in s. 42 of the *Police Services Act*, R.S.O. 1990, c. P.15.

[20] 42. In this case, the road stops were based on a rationally-based concern, founded upon a wealth of evidence and experience, that there was a risk of material harm to public safety and public order posed by the gathering of hundreds of members, friends and associates of the Paradise Riders, an outlaw motorcycle gang, in the small rural town of Caesarea. The Respondent was also concerned about highway safety, prevention of crime and intelligence gathering. The road stops took place in two particular locations of concern on four particular weekends. The road stops were brief and businesslike and succeeded in their objectives with a minimum of interference with civil liberties.

[30]

43. The Respondent's conduct in this case is even more defensible than the police conduct unanimously upheld by this Court in *R. v. Wilson*, [1990] 1 S.C.R. 1291. In that case, a police officer acting under the authority of the *Highway Traffic Act*, stopped an individual who was driving from a hotel shortly after bar closing time. The police officer had no reason to believe the driver was doing anything wrong other than his general experience that those driving from hotels shortly after bar closing time sometimes are impaired. The stop was not part of a comprehensive program, but rather was a random stop made on the spot by a single officer. This Court unanimously upheld the stop. There was sufficient articulable cause — i.e., sufficient reason, based on evidence and

[40]

experience — to take proactive measures under the authority of the *Highway Traffic Act* in the interests of public safety and public order, to stop the driver.

- [10] 44. In the case at bar, statutory authority for the roadcheck stops exists under the *Highway Traffic Act*. Further, as mentioned in paragraphs 6-22 and 26-27, above, the Record of this case contains much more than the sort of general experience which gave rise to the apprehension of risk to public harm and public safety in *Wilson*. The Record of the case at bar is comprised of voluminous evidence, expert analysis and specific experience supporting an apprehension of significant risk and this was recognized by the trial judge, whose findings of fact are binding. Further, in *Wilson*, there were no specific circumstances such as erratic driving of the automobile which would give rise to a specific apprehension of harm. However, in the case at bar, the [20] Respondent knew in advance that hundreds of members, friends and associates of the Paradise Riders, a known outlaw motorcycle gang, were going to converge upon tiny Caesarea, giving rise to a very specific apprehension of harm. The case at bar is even stronger than *Wilson*.

C. What this case is not about

- [30] 45. The Appellants address issues which are not raised by the facts of this case.
46. This case is not about discrimination or the classification of people according to group characteristics and stereotypes. Indeed, the Appellants specifically abandoned all arguments based on ss. 7, 8 and 15 of the Charter in the courts below and constitutional questions have not been stated concerning those sections. Further, the Record reveals no targeting of individuals on the basis [40] of an enumerated or analogous ground under s. 15.

Statement of Agreed Facts; Respondent's Record, vol. XIV, p. 2865

47. In addition, this is not a case about police selecting persons for stops based on "stereotyping". Instead, this is a case about the police engaging in limited, well-considered, protective action based on a rational and well-founded apprehension of risk to public harm and public safety.

[10]

48. Finally, one-third of the cases cited by the Appellants are cases arising under s. 8 of the Charter which do not deal with s. 9 of the Charter. The Appellants abandoned all arguments concerning s. 8 of the Charter. Other than s. 9 of the Charter, no other constitutional rights or torts are engaged in this Appeal.

Trial Judgment, p. 33; Appellants' Record, vol. II, p. 252
Statement of Agreed Facts; Respondent's Record, vol. XIV, p. 2865

[20]

D. Assessing the Respondent's conduct in this case and determining the limits of police powers: general considerations

49. The Respondent submits that the Court should have regard to certain general considerations when evaluating the Respondent's conduct and determining the extent to which police may engage in proactive, protective measures to preserve public safety and public order.

[30]

(a) Police do not have the benefit of hindsight but instead must act as circumstances present themselves

50. Police facing circumstances compelling them to take proactive, protective measures to protect public safety and public order do not have the benefit of hindsight. They must make an assessment, often on short notice, concerning the measures which may be necessary in order to deal with a potential but apparently material risk to public safety and public order in circumstances where the precise extent and nature of that risk is impossible to know. Their actions must not be evaluated with the benefit of hindsight. The fact no harm eventuated in Caesarea in this particular case does

[40]

not mean that the road stops were unnecessary or excessive and thus improper; to the contrary, it may mean that they were effective in preventing harm. Police, like any other specialized administrative agency, should be afforded some margin of appreciation when they exercise an expert judgment as the circumstances present themselves regarding what proactive, protective measures are necessary in order to address the interests of public safety and public order.

R. v. Coleman, [1999] O.J. No. 2007 (Sup. Ct.) at para. 25 (warning against using hindsight in evaluating police actions under s. 9 of the Charter)

(b) The police are subject to conflicting obligations and pressures

51. Police are obliged by statute to preserve public safety and public order (s. 42 of the *Police Services Act*) and failure to take proactive, protective measures in the face of a real concern, based on evidence and experience, about public safety and public order would violate this provision. While this case shows that police can be sued for violating Charter rights if they do act to protect public safety and public order, police can also be exposed to negligence claims by those injured or whose property is destroyed if they do not act. There are many competing interests and many competing considerations which must be weighed and balanced. This context informs the interpretation of s. 9 of the Charter and its application in this case.

(c) The importance of proactive, protective policing

52. Much of law enforcement, particularly criminal investigation and prosecutions, can be characterized as reactive policing. However, police often must act as peacekeepers; in this regard, they are engaged in proactive policing. Reactive and proactive policing are designed for different purposes and have quite different implications for individual liberty. With reactive policing, the police are engaged in criminal investigation in the expectation that a crime, already committed, will be solved and the perpetrators will be successfully apprehended and prosecuted. The civil liberties

of those who are subject to investigation are engaged during an investigation or prosecution. For that reason, comprehensive protections are extended under both the Charter and the *Criminal Code*.

See generally Court of Appeal Judgment, pp. 36-38; Appellants' Record, vol. II, pp. 323-325

- [10] 53. On the other hand, proactive policing is aimed at addressing rationally-based, substantial concerns about material risk of harm to persons or property, not furthering a specific criminal investigation or prosecution. The conduct here is regulatory in nature — *i.e.*, conduct designed to protect persons who may be vulnerable to harm or to further another proper purpose. In such contexts, this Court has confirmed that Charter standards are attenuated: *R. v. McKinlay Transport Inc.*, [1990] 1 S.C.R. 627 and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154. As Doherty J.A. pointed out in the court below, while it is true that much proactive policing occurs without
- [20] comprising individual liberties, from time to time individual liberties and the Charter may be engaged, but only minimally. A few examples of proactive policing include RIDE program vehicle stops, monitoring / visual inspection / inspection of bags carried by youths entering certain rock concerts and searches of persons and their possessions at departure areas of airports. The Courts have repeatedly upheld such forms of proactive policing based on the need to address potential risk and the fact that the techniques employed are tailored to address those risks while minimizing any infringement of individual liberties. Canadians accept these minor interferences on civil liberties
- [30] as a small price to pay to live in a safe, free and democratic society.

Court of Appeal Judgment, pp. 37-38; Appellants' Record, vol. II, pp. 324-325: "Proactive policing is in many ways more efficient and effective than reactive policing. Where proactive steps do not collide with individual rights, that increased efficiency and effectiveness comes at no constitutional cost. Even where there is interference with individual rights, the societal gains are sometimes worth the interference. This is most often the case where the proactive measures are taken in the context of a regulatory scheme such as the *Highway Traffic Act*."

- [40] E. Section 9 is not infringed in this case

54. It is common ground that the Appellants were "detained" within the meaning of s. 9 of the Charter. The central question is whether the detentions were "arbitrary". In this case, the

detentions were not "arbitrary" because the Respondent had statutory authority under the *Highway Traffic Act* and had the common law authority or ancillary power (as codified by s. 42 of the *Police Services Act*) to detain the Appellants. There are no facts suggesting an arbitrary exercise of discretion on the part of the Respondent.

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

(a) Statutory authority for the road stops

55. The road stops were authorized by s. 216(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. Under this provision, the Respondent has the power to stop vehicles at any time for highway safety reasons.

56. The Appellants, however, submit that the road stops in this case were not conducted for highway traffic purposes but for other purposes. They suggest, in effect, that the Respondent's reliance upon s. 216(1) of the *Highway Traffic Act* for the stops is a pretext or a sham.

57. The Appellants' submission has no merit:

Neither the trial judge nor the Court of Appeal found that the road stops for highway concerns were pretexts or "shams". The question of whether highway safety concerns motivated any given stop is solely one of fact to be determined by the trier-of-fact in each case. The trial judge's findings of fact in this regard — that such concerns motivated the stops — are well-supported by evidence and cannot be displaced on appeal.

Stein v. Kathy K (The), [1976] 2 S.C.R. 802 at 808

Trial Judgment, p. 51; Appellants' Record, vol. II, pp. 270: "I have... found as a fact that the police did act in part for highway traffic reasons and therefore there is no issue of bad faith or pretext."

Court of Appeal Judgment, para. 27; Appellants' Record, vol. II, p. 302: "The trial judge's finding that highway safety concerns was one of the purposes behind the stops is a finding of fact. Unless it can

be said to be unreasonable or based on a material misapprehension of the evidence, it must be accepted in this court. The totality of the evidence provides a reasonable basis for the trial judge's conclusion that highway safety concerns were one of the purposes for the stops."

- [10] ● The Respondent has always acknowledged that there were purposes for the road stops other than highway safety. But there is no authority for the proposition that the existence of other purposes, short of pretext or "sham", vitiates a road stop. Indeed, there is authority to the contrary.

R. v. Storrey, [1990] 1 S.C.R. 241 (reasonable and probable grounds existed to arrest Storrey but another purpose behind the arrest was to assist an ongoing investigation; the Court held this to be satisfactory)

R. v. Daigle, [1994] B.C.J. No. 2118 (B.C.C.A.) (search and seizure)

R. v. Annett (1984), 17 C.C.C. (3d) 332 (Ont. C.A.) (search and seizure)

- [20] ● *R. v. Duncanson* (1991), 12 C.R. (4th) 86 (Sask. C.A.), *aff'd* on other grounds, [1992] 1 S.C.R. 836

R. v. Simpson (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at pp. 492-493

Judgment of the Court of Appeal, para. 31; Appellant's Record, vol. II, p. 305: "as long as the additional police purpose is not improper and does not entail an infringement on the liberty or security of the detained person beyond that contemplated by the purpose animating s. 216(1) of the HTA, I see no reason for declaring that a legitimate police interest beyond highway safety concerns should taint the lawfulness of the stop and detention."

- [30] ● If the Appellant's submissions were accepted, then every time a police officer validly stops a vehicle under the *Highway Traffic Act* for highway safety reasons and there is another purpose, no matter how insignificant, the detention would be invalid. No authority supports that result.

Trial Judgment, p. 50; Appellants' Record, vol. II, pp. 269

- [40] ● It is only where the purpose of the stop has absolutely nothing to do with motor vehicle considerations that the stop can be said to be unauthorized by highway traffic legislation.

For example, *Dedman v. The Queen*, [1985] 2 S.C.R. 2 (in *Dedman*, the court held that the only purpose of the stop was to determine whether there were grounds for a reasonable suspicion that the accused had alcohol in his blood and not to determine whether the accused possessed a licence or other highway concerns)

- Even if the Appellants' submission of "sham" were accepted, this would not affect the Respondent's submissions, below, that the road stops were authorized by s. 42 of the *Police Services Act* and the Respondent's common law or ancillary powers.

- [10] 58. Therefore, the stops in the case at bar, conducted for the purposes of highway traffic regulation, were authorized by the *Highway Traffic Act*. There are no other facts suggesting that the stops were arbitrary. The stops in this case were not random interceptions — the trial judge found that the stops were conducted on the basis of a well-founded apprehension that members of outlaw motorcycle gangs often perform inexpert modifications to their vehicles and frequently use aliases to avoid demerit points: such an apprehension is not even necessary, as provisions of the *Highway Traffic Act* authorize even random stops and they have been upheld under the Charter: see *R. v. Ladouceur*, [1990] 1 S.C.R. 1257. Further, brief stops at which licences, vehicles and CPIC are checked are not arbitrary or otherwise contrary to the Charter.

R. v. Murray, [1999] J.Q. no. 1037 (Que. C.A.) at para. 24 (like here, the stops were not random, and so the case is distinguishable from the cases, below)

R. v. Hufsky, [1988] 1 S.C.R. 621 at pp. 636-637 (production of licence, ownership and proof of insurance)

- [30] *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at p. 1277 (production of licence, ownership and proof of insurance), at p. 1288 (asking questions regarding these documents and mechanical fitness of vehicle), at p. 1281 (look at vehicle and examine parts to verify mechanical fitness of vehicle), at p. 1287 (check driver's sobriety), at p. 1289 (do CPIC check)

R. v. Mellenthin, [1992] 3 S.C.R. 615 at pp. 622, 624 (production of licence, ownership and proof of insurance)

(b) Common law authority

- [40] 59. The police have ancillary or common law powers to protect public order and public safety in certain circumstances.

R. v. Godoy, [1999] 1 S.C.R. 311 at para. 12, citing *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.), *R. v. Stenning*, [1970] S.C.R. 631, *Knowlton v. The Queen*, [1974] S.C.R. 443 and *R. v. Dedman*, [1985] 2 S.C.R. 2

R. v. Murray, [1999] J.Q. no. 1037 (Que. C.A.)

60. If police conduct constitutes a *prima facie* interference with a person's liberty or property, such as in this case, the Court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty?

[10]

R. v. Godoy, [1999] 1 S.C.R. 311 at para. 12

61. In the Court below, Justice Doherty, writing without the benefit of this Court's decision in *Godoy*, formulated a different test. He held that in order for the police to engage in proactive measures to maintain the public peace, the requisite necessity arises only when there is a "real risk of imminent harm". In his view, before that point is reached, proactive policing must be limited to steps which do not interfere with individual freedoms. He conceded that "[i]n some situations, the requirement that there must be a *real risk of imminent harm* before the police can interfere with individual rights will leave the police powerless to prevent crime." It is submitted that Justice Doherty's test of "*real risk of imminent harm*" is an inflexible, pre-formulated bright-line rule which unduly restricts the ability of police to protect public safety and public order. In any event, Justice Doherty's test is *not* the test prescribed by this Court in *Godoy* and thus it is not an accurate statement of the law.

[30]

Court of Appeal Judgment, p. 45; Appellant's Record, vol. II, p. 332 ("*real risk of imminent harm*" test)

Ironically, Doherty J.A.'s "*real risk of imminent harm*" test is the very sort of pre-formulated bright-line rule he criticized earlier in his judgment. See Court of Appeal Judgment, at p. 34-35 (Appellant's Record, vol. II, pp.321-322): "The infinite variety of situations in which the police and individuals interact and the need to carefully balance important but competing interests in each of those situations make it difficult, if not impossible, to provide pre-formulated bright-line rules which appropriately maintain the balance between police powers and individual liberties."

[40]

(i) The Respondent's conduct fell within the general scope of any duty imposed by statute or recognized at common law

62. The Respondent's conduct fell within the general scope of the duties imposed on it by statute and by common law:

- [10] • Section 42 of the *Police Services Act* (the Act) imposes a duty on the Respondent's officers to preserve the peace (s. 42(1)(a)), prevent crimes and other offences (s. 42(1)(b)), apprehend criminals and other offenders and others who may lawfully be taken into custody (s. 42(1)(d)) and lay charges (s. 42(1)(e)). In addition to this, s. 1 of the Act provides that police services shall be provided in accordance with the "need to ensure the safety and security of all persons and property in Ontario". Municipalities are obligated under s. 4 of the Act to provide adequate and effective police services and these services must include "crime prevention", "law enforcement", "public order maintenance" and "emergency response". Subsection 42(3) of the Act also vests officers with the powers and duties given to constables at common law. Finally the *Interpretation Act*, R.S.O. 1990, s. 28 provides that where a statute gives a person a power to act, all powers necessary to enable the person to do the act are deemed to be given.
- [20]

- The common law imposes a duty on the Respondent's officers to preserve the peace, prevent crime, and protect life and property.

R. v. Godoy, [1999] 1 S.C.R. 311 at para. 15

R. v. Dedman, [1985] 2 S.C.R. 1 at pp. 11-12

R. v. Murray, [1999] J.Q. no. 1037 (Que. C.A.) at para. 24

R. v. Waterfield, [1963] 3 All E.R. 659 (C.C.A.)

Rice v. Connolly, [1966] 2 Q.B. 414 at p. 419

Johnson v. Phillips, [1975] 3 All E.R. 682 at p. 685

[40] 63. Given the evidence and information available to the Respondent in advance of the check stops, the check stops were within the general scope of these duties imposed by statute or recognized at common law. In addition to addressing highway traffic concerns, the check stops were limited, well-considered, protective action based on a rational and well founded apprehension of risk to public harm and public safety, matters which fall well within the Respondent's statutory and common law duties.

(ii) **The Respondent's conduct did not involve an unjustifiable use of powers associated with the duty**

64. In *Godoy*, this Court held that certain factors should form the basis of analyzing whether police used their powers justifiably. These factors are:

[10]

(1) the duty being performed;

(2) the importance of the duty;

(3) the liberty interfered with;

[20]

(4) the nature and extent of the interference;

(5) the extent to which some interference with individual liberty is necessary in order to perform that duty.

R. v. Godoy, [1999] 1 S.C.R. 311 at para. 15

[30]

65. The Respondent submits that the *Godoy* test in these circumstances means that where the police have rationally-based, substantial concerns about material risk of harm to persons or property, the police may take reasonable steps in order to address those concerns as long as there is no unnecessary or unreasonable interference with civil liberties. Whether that balance has been achieved in a particular case must be evaluated using the *Godoy* factors and any other relevant factors. In accordance with the contextual factors set out in paragraphs 49-53 above, this evaluation should proceed without the benefit of hindsight, with an understanding of the inherent limitations associated with proactive policing and with an appropriate margin of appreciation for the experience and expertise of the police in making judgments concerning such matters.

[40]

(1) The duties being performed

[10] 66. The duties being performed by the Respondent in this case are the maintenance of public safety and public order, prevention of crime and highway safety. The first two duties are duties at common law and enshrined in the *Police Services Act*; the third is specifically authorized by statute.

[20] 67. These duties were clearly triggered in the circumstances of this case. The concerns giving rise to them were not fanciful, vague, speculative or remote. Instead, the Respondent had available to it reliable information and experience regarding the nature, magnitude and immediacy of the concerns. As found by the trial judge, and affirmed by the Court of Appeal, "there were legitimate factual reasons for the police" to pursue the road checks. The Respondent "had reasonable grounds to believe that large social functions sponsored by the Club had a very significant potential for violence and public disruption".

Trial Judgment, pp. 21-22; Appellants' Record, vol. II, pp. 240-241.

- [30] 68. In this case, as noted in paragraphs 6-22, 25-27 and 35, above,
- There was a sufficient basis, in the form of studies, reports, published articles, evidence and general experience, permitting the Respondent to reasonably believe that outlaw motorcycle gangs are engaged in conduct contrary to law and threatening to public order, public safety and highway safety;
 - There was a sufficient basis permitting the Respondent to reasonably believe that the Paradise Riders are an outlaw motorcycle gang engaged in conduct contrary to law and threatening to public order, public safety and highway safety;
- [40]

- In fact, the Respondent (either first hand or through other police sources) had specific information concerning the risks posed by outlaw motorcycle gangs and, in particular, the Paradise Riders, including risks of violence, the commission of offences and threats to public safety and property;

[10]

- The Respondent had reliable information alerting it to the fact that a large number of Paradise Riders and others, including other members of outlaw motorcycle gangs, would travel on Regional Road No. 57 to Caesarea on the weekends in question;
- The Respondent knew that upwards of 300-400 of these individuals would gather at the small property in the middle of Caesarea on the weekends in question.

[20]

- There was also specific evidence available to the Respondent suggesting that actions by members of outlaw motorcycle gangs and the Paradise Riders were of particular concern from a highway traffic standpoint — i.e., frequent use of aliases, inexpert modification of vehicles and use of stolen parts.

69. The bases for the triggering of the duties to protect public safety, public order, prevent crime and preserve highway safety in the case at bar are much stronger than that which triggered the police officer's conduct in *Wilson*. In *Wilson*, the officer had no specific information about the driver and merely had a suspicion that an individual driving from a bar at closing time might be impaired. In the case at bar, the Respondent had a duty to protect public safety, public order, prevent crime and preserve highway safety and sufficient facts existed to trigger that duty.

[30]

Trial Judgment, p. 44; Appellants' Record, vol. II, p. 263: "the facts before me are stronger evidence of articulable cause than those in *Wilson*."

[40]

In *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at p. 501, Doherty J.A. held that police may detain an individual where there is "articulable cause", a "constellation of objectively-discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation". *Simpson* is a "reactive policing" case, not a proactive policing case. It concerns what police officers may do when investigating a crime that has been committed. It has no application to proactive policing situations, which is a different context raising different

Charter considerations. See paragraphs 52-53, above. The applicable test is that set out in this Court's decision in *Godoy*, not *Simpson*. Further, the test of "articulable cause" in *Simpson* appears to be contrary to this Court's decision in *Wilson* where the officer had no "constellation of objectively-discernable facts".

[10] (2) The importance of the duty

70. The duties on police officers to preserve public safety and public order are the most important of their duties. This Court has held that prompt police reaction to a 911 call is very important for the public good (*R. v. Godoy*, [1999] 1 S.C.R. 311), sufficient even to permit unauthorized entry into a private residence. Similarly, in this case, the brief, limited highway traffic stops, done for the very serious reasons disclosed in the evidence, are very important actions.

[20] Among other things, 300 to 400 members of an outlaw motorcycle gang were converging on Caesarea and the residents of Caesarea needed protection and security.

See also *R. v. Murray*, [1999] J.Q. no. 1037 (Que. C.A.) (roadblock set up, stopping all traffic immediately after an armed robbery, to catch criminals in flight)

(3) The liberty alleged to be interfered with

[30] 71. The liberties interfered with are the rights of members of outlaw motorcycle gangs not to be detained arbitrarily. As mentioned above, the stops were not done on a random, unprincipled basis and so they were not arbitrary. The case at bar is even a stronger case than *Godoy*, where the police entered a private home unannounced, without any authority, statutory or otherwise; in the case at bar, there was statutory and common law authority for the stops.

[40]

(4) The nature and extent of the interference

72. The interference with the liberties of those stopped, if any, was very limited in extent:

- [10] ● The stops were only 3-20 minutes in duration and involved only suspected members and associates of the Paradise Riders who were driving motorcycles.
- [20] ● The primary activities during the stops were licence and identification checks, vehicle inspection and CPIC checks. These are not unusual activities: most drivers expect to be stopped by police at some time in their driving career and drivers commonly encounter these activities when stopped. Those stopped in this case encountered the sort of interference which no doubt hundreds of other motorists across Canada experienced on those very same days: a brief stop, a check of the driver's licence and identity and a CPIC check. These minimally intrusive activities are not unlike income tax audits or inspections of records to check compliance which have been upheld by this Court for important public purposes (see e.g. *R. v. McKinlay Transport Inc.*, [1990] 1 S.C.R. 627 and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154).
- [30] ● The limited purpose stops in this case are to be distinguished from lengthy detentions conducted for the purpose of adversarial interrogation. In the latter, the intrusion is significant and a stronger justification for the detention may be required in order for it to be justified.
R. v. Simpson (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at p. 503: there is a spectrum of detentions, ranging from "a brief detention, perhaps to ask the person detained for identification (to) a more intrusive detention complete with physical restraint and a more extensive interrogation."
- [40] ● *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.)
- The stops were well planned and were tailored to address the specific purposes set out in paragraphs 26-30, above. More intrusive measures were not undertaken. Although the

police in the case at bar may have had good reason, based on their experience and the general information about outlaw motorcycle gangs, to suspect that members were carrying weapons and illicit drugs, they refrained from searches of individuals and their vehicles. Frisk searches during detentions in circumstances similar to this have been upheld, yet the Respondent did not even engage in frisk searches.

[10] Terry v. Ohio 392 U.S. 1, 88 S. Ct. 1868: "where a police officer observes unusual conduct that leads the officer reasonably to conclude ... that criminal activity may be afoot, the police officer may approach and briefly detain the suspect to make reasonable inquires aimed at confirming or dispelling the officer's suspicions." In this case, "pat down" searches were upheld.

- The road checks were not *ad hoc*, random actions. Rather, as mentioned in paragraphs 26-30, they were organized well in advance and approved by senior officers, for purposes clearly articulated, and were carried out by officers who were briefed.

- [20]
- This case does not involve roving, random stops of individuals simply to ask questions with the intention of running the information provided through an immediate computer check: see, e.g. *R. v. Powell*, [2000] O.J. No. 2229 (Sup. Ct.) and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, per Sopinka J. at pp. 1266, 1267. Nor were these stops based on whim, without any selection criteria. The trial judge found, "... the criteria applied in Caesarea were objective and rationally connected to the purposes of the stops. The officers here did not exercise any significant discretion as to whom to stop. The criteria were established by their superior officers."

[30] Trial Judgment, p. 40; Appellants' Record, vol. II, p. 259

- The Respondent specifically attempted to minimize intrusion and inconvenience to those stopped. For example, CPIC checks were done in advance on those expected to arrive.

[40]

(5) The extent to which some interference with individual liberty is necessary in order to perform that duty

73. The evidence in this case is uncontested: highway stops of outlaw motorcycle gangs who are gathering at a certain place are an important tool in preserving public safety and public order. Many police forces across North America engage in this technique and all indications are that it has worked.

74. In addition, without stops, precise identification of those attending a major event of an outlaw motorcycle gang cannot be accomplished. Many members of outlaw motorcycle gangs use aliases and stops are necessary in order to establish identity. If the stops did not take place and identity of attendees was not established, persons at the gathering may engage in criminal activity and acts of violence without fear of being under later investigation. It must be recalled that this property was surrounded by fencing and was patrolled by up to four gang members; monitoring of in these circumstances was impossible. Experience has shown that "reactive" law enforcement after an incident takes place involving outlaw motorcycle gangs is extremely difficult, if not impossible due to impossibility of identification, codes of silence within the gang and terrified civilian witnesses.

75. Finally, without the stops, the highway safety concerns could not be addressed. Licences would not be produced and checked and vehicle safety and insurance could not be ascertained.

76. In the court below, Justice Doherty stated that "there is much to be said for the appellants' submissions that the large police presence in the vicinity of the Scugog property would have maintained the public peace without interfering with the appellants' ability to travel to and from the parties." This comment is incorrect:

(a) The comment is, in reality, a factual conclusion which only the trial judge could make. The trial judge declined to so conclude;

[10] (b) There is no evidence in the record to support it; in fact, it conflicts with the trial judge's findings regarding the "significant potential for violence and public disruption";

Trial Judgment, pp. 21-22; Appellants' Record, vol. II, pp. 240-241.

[20] (c) It must be remembered that there was safety and order in Caesarea on the weekends in question. The road stops accomplished their purposes and a mere police presence may well have failed, with serious consequences. The Paradise Riders had advance knowledge of the stops. As a result, some who might have wanted to cause trouble at the event may have decided not to come to Caesarea and others may have chosen not to bring illicit drugs or weapons to the gathering. Finally, a mere police presence would not have accomplished any of the important highway safety purposes;

[30] (d) Finally, it is submitted that Doherty J.A., by suggesting that a mere presence would have ensured order, is incorrectly viewing the situation with the benefit of hindsight and is engaged in the sort of second-guessing of the experience and expert judgments of the police which were brought to bear as circumstances presented themselves. Had the police merely been present, watching the outlaw motorcycle gang members drive by without any interference or standing outside the Appellants' fenced, guarded property, and serious violence or property damage resulted, the residents of Caesarea may well have had good reason to complain that the police were negligent and failed to discharge their obligations under the *Police Services Act*.

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77. In summary, the Respondent had rationally-based, substantial concerns about material risk of harm to persons or property. It took reasonable steps in order to address those concerns,

avoiding unnecessary or unreasonable interference with civil liberties. Accordingly, the Respondent's conduct did not violate s. 9 of the Charter.

F. Justification

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78. Assuming that a violation of s. 9 of the Charter is established, the Respondent submits that any violations are saved under s. 1 of the Charter. On numerous occasions, this Court has justified random check stops for the purposes of dealing with the serious problem of impaired driving. In this case, for the reasons discussed above, the check stops were conducted in response to a rationally-based, substantial concern about material risks of harm to persons or property and highway safety concerns, and the Respondent took reasonable steps in order to address those concerns, avoiding any unnecessary or unreasonable interference with civil liberties.

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

R. v. Ladouceur, [1990] 1 S.C.R. 1257

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PART IV — ORDER SOUGHT

79. The Respondent respectfully requests an order dismissing the appeal with costs in this Court and in the Courts below.

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Dated this 14th day of July, 2000, at Whitby, Ontario.

All of which is respectfully submitted,

David J.D. Sims, Q.C.

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David Stratas

David R. Neill

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The Regional Municipality of Durham
Police Services Board

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