**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**GENERAL DIVISION**

**Citation**: *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125
**Date**: September 17, 2020
**Docket**: 202001G2342

BETWEEN:

**KIMBERLEY TAYLOR**

FIRST APPLICANT

AND:

**CANADIAN CIVIL LIBERTIES ASSOCIATION**

SECOND APPLICANT

AND:

**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR**

FIRST RESPONDENT

AND:

**JANICE FITZGERALD**

SECOND RESPONDENT

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**Before:** Justice Donald H. Burrage

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**Place of Hearing:** St. John's, Newfoundland and Labrador

**Dates of Hearing:** August 4, 5, 6, 7, 11 and 12, 2020

**Summary:**

On 4-5 May 2020, in an effort to curtail the spread of COVID-19, the Chief Medical Officer of Health (CMOH) for Newfoundland and Labrador issued two orders pursuant to s. 28(1)(h) of the *Public Health Protection and Promotion Act* (the "*PHPPA*") restricting those permitted to enter the province. On 8 May 2020, the CMOH denied Kimberley Taylor entry from Nova Scotia to attend her mother's funeral.

Ms. Taylor challenges s. 28(1)(h) of the *PHPPA* as outside the legislative authority of the province, and the decision to refuse her entry pursuant to the travel restriction as contrary to her ss.6 and 7 *Charter* rights to mobility and liberty, respectively.

The CCLA seeks to join with Ms. Taylor in her challenge and, in addition, to bring its own challenge to ss. 28.1 and 50(1) (the enforcement and investigative provisions) of the *PHPPA*.

**Held:** The CCLA is granted public interest standing in support of Ms. Taylor. It is denied public interest standing to bring its own challenge to ss. 28.1 and 50(1) of the *PHPPA*, as the challenge is non-justiciable on the record before the Court.

Section 28(1)(h) of the *PHPPA* is a valid law, as falling within the legislative competence of the province over matters of public health, under s. 92(16) (matters of a local and private nature) or, alternatively s. 92(13) (property and civil rights) of the *Constitution Act, 1867*.

Ms. Taylor's s. 6(1) *Charter* right to mobility was infringed, albeit fleetingly, when she was denied entry into the province. Ms. Taylor's s. 7 right to liberty was not engaged.

The infringement of Ms. Taylor's right to mobility was demonstrably justified under s. 1 of the *Charter* in response to the COVID-19 pandemic.

In the result, the application is dismissed.

In light of the importance of the issues raised, each party is ordered to bear their own costs.

**Appearances:**

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|---|---|
| John F.E. Drover | Appearing on behalf of the First Applicant |
| Rosellen Sullivan | Appearing on behalf of the Second Applicant |
| Justin S. C. Mellor<br>Donald E. Anthony, Q.C.<br>Mark P. Sheppard | Appearing on behalf of the Respondents |

**Authorities Cited:**

**CASES CONSIDERED:** *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45; *Canadian Council of Churches v. R.*, (1992) 1 S.C.R. 236; *Shiell v. Amok* (1987), 27 Admin. L.R.1, 1987 CarswellSask 56 (Q.B.); *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Bedford v. Canada (Attorney General)*, 2013 SCC 72; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243; *R. v. Nur*, 2015 SCC 15; *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Marakah*, 2017 SCC 59; *R. v. Mann*, 2004 SCC 52; *R. v. Grant*, 2009 SCC 32; *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 1998 CarswellOnt 2808, 111 O.A.C. 51; *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *R. v. Blais*, 2008 BCCA 389; *Reference re Firearms Act (Canada)*, 2000 SCC 31; *Ward v. Canada (Attorney General*), 2002 SCC 17; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture*), 2002 SCC 31; *Quebec (Attorney General) v. Canada* (*Attorney General*), 2015 SCC 14; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53; *Canadian Western Bank v. Alberta*, 2007 SCC 22; *R. v. Comeau*, 2018 SCC 15; *Ontario (Attorney General) v. Winner*, 1954 CarswellNB 40, [1954] 2 W.L.R. 418 (P.C.); *Union Colliery Co. of British Columbia v. Bryden*, 1899 CarswellBC13, [1899] A.C. 580 (P.C.); *Schneider v. British Columbia*, [1982] 2 S.C.R. 112; *Fawcett v. Attorney General of Canada*, [1964] S.C.R. 625; *Reference Re Intoxicated Persons Detention Act*, 1980 CarswellMan 144, [1981] 1 W.W.R. 333(C.A.); *Rinfret v. Pope*, (1886) 10 L.N. 74, 12 Q.L.R. 303 (Que. C.A.); *Labatt Breweries v. Canada (Attorney General)*, [1980] 1 S.C.R. 914; *Reference re Canada Temperance Act*, [1946]

A.C. 193, 1946 CarswellOnt 100 (P.C.); *Toronto Elec. Commrs. v. Snider*, [1925] 1 W.W.R. 785, 1925 CarswellOnt 80 (P.C.); *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357; *Ontario (Attorney General) v. Winner*, [1951] S.C.R. 887; *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591; *Malartic Hygrade Gold Mines Quebec Ltd. c. Quebec*, [1982] C.S. 1146, 1982 CarswellQue 298 (Sup. Ct.); *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626; *Manitoba (Attorney General) v. Manitoba Egg & Poultry Assn.*, [1971] S.C.R. 689; *Toomer v. Witsell*, 334 U.S. 385 (1948); *Shapro, Commissioner of Welfare of Connecticut v. Thompson*, 394 U.S. 618 (1969); *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *United States of America v. Sriskandarajah*, 2012 SCC 70; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177; *R. v. Lloyd*, 2016 SCC 13; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; *Carter v. Canada (Attorney General*), 2015 SCC 5; *R. v. Malmo-Levine*, 2003 SCC 74; *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Smith*, 2015 SCC 34; *Godbout v. Longueuil (Ville)*, [1997] 3 S.C.R. 844; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Thompson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12; *Harper v. Canada (Attorney General)*, 2004 SCC 33; *M. v. H.*, [1999] 2 S.C.R. 3; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37; *Newfoundland (Treasury Board) v. N.A.P.E*, 2004 SCC 66; *South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.*, No. 19A1044 (USSC); *Henning Jacobson, Plff. In Err. V. Commonwealth of Massachusetts*, 197 U.S. 11(1905)

**STATUTES CONSIDERED:** *Public Health Protection and Promotion Act*, S.N.L. 2018, c. P-37.3; *Canadian Charter of Rights and Freedoms* (the *Charter*), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1; *Elections Finances Act*, S.M. 1982-83-84, c. 45; *Criminal Code*, R.S.C. 1985, c. C-46; *Corrections and Conditional Release Act*, S.C. 1992, c. 20; *Immigration Act 1976*, S.C. 1976-77, c.52, as am. by S.C. 1988, c. 35; *Canadian Security Intelligence Services Act*, R.S.C. 1985, c. C-23;

*Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.); *New Brunswick Liquor Control Act*, R.S.W.B. 1973, c. L-10; *Mental Hospitals Act*, R.S.O. 1960, c. 236; *Heroin Treatment Act*, R.S.B.C. 1979, c. 166; *Quarantine Act*, S.C. 2004, c. 20; *Law Society Act*, R.S.O. 1980, c. 233; *Extradition Act*, R.S.C. 1970, c. E-21; *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12; *Canada Elections Act*, S.C. 2000, c. 9

**OTHER:** *Commission of Inquiry on the Blood System in Canada*: Final Report. (Ottawa: Canadian Government Publishing 1997); *Extradition Treaty between Canada and the United States*, CTS 1976; *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47

## PREFACE

This case engages the novel question of the Province of Newfoundland and Labrador's ability to restrict domestic travel across its border in response to the COVID-19 pandemic.

## REASONS FOR JUDGMENT

**BURRAGE, J.:**

## INTRODUCTION

[1] It is difficult to overstate the global impact of the SARS-CoV-2 virus, known more commonly by the infectious and potentially fatal disease it causes, COVID-19. Since first identified in Wuhan, China[1], it has claimed the lives of close to one million people worldwide, almost ten thousand in Canada alone, hospitalized many

[1] Affidavit of Dr. Janice Fitzgerald, 9 July 2002, at para. 17. On 31 December 2019 the World Health Organization (WHO) was alerted to cases of pneumonia in Wuhan, China. On 7 January 2020 China confirmed that a new coronavirus was the cause.

times that number, and left entire economies shaken.[2] To date, there is no known cure, no effective treatment and no vaccine. The impact of COVID-19 continues to be felt on international, national and regional levels, as governments implement public health measures in an effort to control the spread of the virus.

[2] In 2018, long before the world heard of COVID-19, the legislature of this province was busy enacting the *Public Health Protection and Promotion Act*[3] (the "*PHPPA*"). This legislation would prove to be timely, for as the Minister of Health and Community Services stated during its introduction in the legislature:

> We are living in a world with SARS and Ebola. You are one plane flight away from a significant public health problem, and we need legislation that can adapt and deal with that.[4]

[3] During times of a public health emergency s. 28(1)(h) of the *PHPPA* authorizes the Chief Medical Officer of Health (the "CMOH") to restrict travel to the province. In responding to the COVID-19 pandemic, the CMOH did just that.

[4] On 29 April 2020 the CMOH issued Special Measures Order (Amendment No. 11), to take effect on 4 May 2020, limiting entry to residents of Newfoundland and Labrador, asymptomatic workers and those in extenuating circumstances. On 5 May 2020 the CMOH issued Special Measures Order (Travel Exemption Order), expanding those circumstances when entry into the province would be permitted. As neither Order served as an outright ban on all travel, I will henceforth collectively refer to these two special measures as the "travel restriction".

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[2] Fitzgerald Affidavit, at para. 45. As of 4 July 2020, 8,684 deaths were recorded in Canada and 528,204 worldwide. The numbers continue to grow. At the time of writing the deaths worldwide have exceeded 930,000 and in Canada have exceeded 9,000.

[3] S.N.L. 2018, c. P-37.3.

[4] House of Assembly Proceedings, November 20, 2018, Vol. XLVIII No. 44, p. 2616, Second Applicant's Brief, Volume 1, Tab 1.

[5] On 5 May 2020 Kimberley Taylor's mother passed away suddenly at her home in Kilbride, St. John's, NL. Ms. Taylor, who was born in this province, but now lives in Halifax, Nova Scotia, sought an exemption from the travel restriction in order to attend her mother's funeral. On 8 May 2020 Ms. Taylor's request was denied.

[6] Ms. Taylor now challenges s. 28(1)(h) of the *PHPPA* as beyond the legislative authority of the province. In the alternative, Ms. Taylor argues that the travel restriction violated her right to mobility and right to liberty as guaranteed by ss. 6 and 7 of the *Charter*[5], respectively.

[7] On 5 August 2020, following a hearing, the Canadian Civil Liberties Association ("CCLA") was granted standing as a public interest litigant in support of Ms. Taylor. On that same date it was denied public interest standing to challenge two provisions of the *PHPPA*, namely ss. 28.1 and 50(1), relating to enforcement and investigation, as contrary to ss. 7, 8 and/or 9 of the *Charter*.[6] These provisions are not challenged by Ms. Taylor.

[8] While recognizing that *Charter* rights are not absolute, both the CCLA and Ms. Taylor argue that the violation of her right to mobility and/or liberty cannot be justified on the facts of this case.[7] They seek a Declaration that s. 28(1)(h) of the *PHPPA* and the travel restriction are of no force and effect.

[9] At this point I would pause to observe that this is not an administrative law case. The Applicants do not seek review of the decision of the CMOH based upon procedural fairness, natural justice or reasonableness, for example. Nor do the

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[5] *Canadian Charter of Rights and Freedoms* (the *Charter*), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] The reasons for the grant and denial of public interest standing are set forth herein.

[7] Section 1 of the *Charter* states that "The *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."

Applicants challenge the power vested in the CMOH as an improper delegation of authority. The manner in which the CMOH made the decision regarding Ms. Taylor is not in play. The Applicants have bigger fish to fry.

**THE QUESTIONS**

[10] The questions to be addressed by the Court are, as follows:

1) Should the CCLA be granted public interest standing?

2) Is s. 28(1)(h) of the *PHPPA* within the legislative competence of the province?

3) Did the travel restriction violate Ms. Taylor's right to mobility as guaranteed by s. 6 of the *Charter*?

4) Did the travel restriction violate Ms. Taylor's right to liberty as guaranteed by s. 7 of the *Charter*?

5) If Ms. Taylor's *Charter* rights were infringed, is the infringement justified under s.1 of the *Charter*, in response to the COVID-19 pandemic?

6) If s. 28(1)(h) of the *PHPPA* is beyond the legislative competence of the province, or there is a violation of Ms. Taylor's *Charter* rights that cannot be justified by s. 1, should any declaration of invalidity be temporarily suspended?

## THE LEGISLATION

[11] The title of our legislation, "Public Health Protection and Promotion", lends a clue to what lies within. Section 5 of the *PHPPA* identifies its purpose:

> 5. The purpose of this Act is to
>
> (a) promote the health and well-being of individuals and communities;
>
> (b) protect individuals and communities from risks to the health of the population;
>
> (c) prevent disease, injury and disability;
>
> (d) provide a healthy environment for individuals and communities;
>
> (e) provide measures for the early detection and management of risks to the health of the population, including monitoring of a disease or health condition of significance;
>
> (f) improve the health of the population and of vulnerable groups; and
>
> (g) promote health equity within the population by addressing the social determinants of health.

[12] The CMOH is appointed by the Minister of Health and Community Services (the "Minister") pursuant to s. 9 of the *PHPPA*. Section 9(1) provides that the CMOH must be a medical practitioner and a Fellow of the Royal College of Physicians and Surgeons of Canada in Public Health and Preventative Medicine, or have equivalent experience and training.[8]

[8] Section 9(1)(c) also provides that the CMOH have the qualifications prescribed in the Regulations. To date there are no Regulations.

[13] Section 9(2) of the *PHPPA* provides that the CMOH shall "exercise his or her powers and perform his or her duties independently and impartially in order to best protect and promote the health of the people in the province."

[14] To this end, s. 9(3) provides that the CMOH shall:

> (a) monitor the health of the people in the province, including the impact of zoonotic disease on human health;
>
> (b) establish measures to identify, investigate and manage communicable diseases and outbreaks in the province;
>
> (c) monitor the implementation of core public health programs and services prescribed in the regulations;
>
> (d) monitor regional medical officers of health in the exercise of their powers and duties under this Act and the regulations;
>
> (e) be responsible for those aspects of the province's emergency planning, preparedness, response and recovery that relate to health;
>
> (f) increase public awareness of health issues and changing health needs;
>
> (g) provide advice to the minister on public health and health issues;
>
> (h) develop, in consultation with the regional health authorities, standards related to core public health programs and services as prescribed in the regulations;
>
> (i) implement the provincial public health plan developed under subsection 7(1);
>
> (j) prepare and publish an annual report within 6 months of the end of each year respecting the reportable events, outbreaks, public health emergencies and number and results of inspections conducted under this Act and the regulations during that year; and
>
> (k) prepare a report to the Lieutenant-Governor in Council every 5 years regarding the health status of people in the province.

[15] Finally, s. 9(4) provides that the CMOH may:

> (a) exercise the powers and perform the duties of a regional medical officer of health as set out in this Act and the regulations;
>
> (b) issue directions to regional medical officers of health regarding the exercise of their powers and duties under this Act and the regulations;
>
> (c) make recommendations and engage in planning in respect of public health; and
>
> (d) approve or issue standards and guidelines for controlling a communicable disease.

[16] The *PHPPA* is divided into nine Parts. Part VI is entitled "Public Health Emergencies". Such emergencies are defined in s. 2(y):

> 2. (y) "public health emergency" means an occurrence or imminent threat of one of the following that presents a serious risk to the health of the population
>
> (i) a communicable disease,
>
> (ii) a health condition,
>
> (iii) a novel or highly infectious agent or biological substance, or
>
> (iv) the presence of a chemical agent or radioactive material;

[17] Section 27(1) of the *PHPPA* gives the Minister the power, on the advice of the CMOH, to declare a public health emergency in all or a part of the province, where one exists, and such emergency cannot be "sufficiently mitigated or remedied without the implementation of the special measures available under s. 28."

[18] Pursuant to s. 27(2) a declaration of a public health emergency expires no more than 14 days after it is made. However, the Minister may, on the advice of the CMOH, extend the public health emergency for consecutive periods of 14 days,

where the public health emergency continues to exist and the extension is required to protect the health of the population.

[19] In the event of a public health emergency, the declaration must identify the nature of the emergency, specify the area of the province to which it relates and specify the dates when the declaration takes effect and when it expires (*PHPPA*, s. 27(4)).

[20] While a declaration of a public health emergency exists, s. 28 of the *PHPPA* gives the CMOH the power to implement a number of special measures, "for the purpose of protecting the health of the population and preventing, remedying or mitigating the effects of the public health emergency."

[21] Section 28(1) reads:

> 28.(1) While a declaration of a public health emergency is in effect, the Chief Medical Officer of Health may do one or more of the following for the purpose of protecting the health of the population and preventing, remedying or mitigating the effects of the public health emergency:
>
> (a) authorize qualified persons to give aid of a specified type;
>
> (b) provide directions to environmental health officers and public health personnel in the province;
>
> (c) establish a voluntary immunization program in the province;
>
> (d) establish a list of individuals or classes of individuals who shall be given priority for immunizing agents, drugs, medical supplies or equipment;
>
> (e) enter into an agreement for services with an agency of the Government of Canada or another province and provide directions regarding the deployment of those services when operating in the province;
>
> (f) procure and provide for the distribution of medical supplies, aid and equipment in the province;

> (g) acquire or use real or personal property, whether private or public, other than a dwelling house;
>
> **(h) make orders restricting travel to or from the province or an area within the province;** [emphasis added]
>
> (i) order the closure of any educational setting or place of assembly;
>
> (j) enter or authorize any person acting under the direction of the Chief Medical Officer of Health to enter any premises without a warrant; and
>
> (k) take any other measure the Chief Medical Officer of Health reasonably believes is necessary for the protection of the health of the population during the public health emergency.

[22] In the within action the impugned provision is s. 28(1)(h), which authorizes the CMOH to "make orders restricting travel to or from the province or an area within the province."

[23] Section 13 of the *PHPPA* is cautionary. It reads:

> 13. Where an individual's rights or freedoms are restricted as a result of the exercise of a power or the performance of a duty under this Act, the regulations or an order made under this Act or the regulations, the restriction shall be no greater than is reasonably required in the circumstances to respond to a communicable disease, health hazard, public health emergency or contravention of this Act, the regulations or an order made under this Act or the regulations.

[24] The next two sections of the *PHPPA* are included here for the sake of completeness. They are not considered in this decision other than in the context of the CCLA's request for standing.

[25] Section 28.1 of the *PHPPA* reads:

> 28.1 (1) While a measure taken by the Chief Medical Officer of Health under subsection 28(1) is in effect, the Minister of Justice and Public Safety may, upon the request of and following consultation with the minister, authorize a peace officer to do one or more of the following:
>
> (a) locate an individual who is in contravention of the measure;
>
> (b) detain an individual who is in contravention of the measure;
>
> (c) convey an individual who is in contravention of the measure to a specified location, including a point of entry to the province; and
>
> (d) provide the necessary assistance to ensure compliance with the measure.
>
> (2) A peace officer who detains or conveys an individual under subsection (1) shall promptly inform the individual of
>
> (a) the reasons for the detention or conveyance;
>
> (b) the individual's right to retain and instruct counsel without delay; and
>
> (c) the location to which the individual is being taken.

[26] Section 28.1 is new. It was added to the *PHPPA* on 5 May 2020, primarily to give force to the special measures under s. 28(1)(h).

[27] Section 50(1) of the *PHPPA* reads:

> 50.**(**1) An inspector may, at all reasonable times and without a warrant, for the purpose of administering or determining compliance with this Act or the regulations, a code of practice or a **measure** taken or an order made under this Act or the regulations or to investigate a communicable disease or health hazard, do one or more of the following:

> (a) inspect or examine premises, processes, books and records the inspector may consider relevant;
>
> (b) enter any premises;
>
> (c) take samples, conduct tests and make copies, extracts, photographs or videos the inspector considers necessary; or
>
> (d) require a person to
>
> (i) give the inspector all reasonable assistance, including the production of books and records as requested by the inspector and to answer all questions relating to the administration or enforcement of this Act or the regulations, a code of practice or a measure taken or an order made under this Act or the regulations and, for that purpose, require a person to stop a motor vehicle or attend at a premises with the inspector, and
>
> (ii) make available the means to generate and manipulate books and records that are in machine readable or electronic form and any other means or information necessary for the inspector to assess the books and records.
>
> [emphasis added]

[28] Section 50(1) is not new, but the word "measure" was added on 5 May 2020 making it clear that the powers of inspectors could operate to determine compliance with special measures.

## THE PUBLIC HEALTH EMERGENCY

[29] At the end of 2019 the World Health Organization (WHO) was alerted to several cases of pneumonia in Wuhan, China, caused by an unknown virus. On 7

January 2020 China advised the world that a new coronavirus was the cause, later labelled SARS-CoV-2. It causes the disease known as COVID-19.[9]

[30] In mid-January 2020 the Public Health Agency of Canada activated the Emergency Operation Centre in support of Canada's response to COVID-19. On 22 January 2020 Canada implemented COVID-19 screening requirements for travelers returning from China.[10]

[31] On 25 January 2020 Canada confirmed its first case of COVID-19 related to travel from Wuhan, China. On 9 March 2020 Canada recorded its first death related to COVID-19.[11]

[32] On 11 March 2020 the WHO declared the global outbreak of COVID-19 to be a pandemic.[12]

[33] Three days later Newfoundland and Labrador recorded its first presumptive positive case of COVID-19.[13]

[34] In response to the COVID-19 pandemic, on 18 March 2020, the Minister, on the advice of the CMOH, declared a public health emergency for all of Newfoundland and Labrador, pursuant to s. 27 of the *PHPPA*. Since that date the Minister has extended the public health emergency declaration, such that at the time of writing it remains in effect. Quite rightly, the status of the COVID-19 pandemic

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[9] Fitzgerald Affidavit, at para. 17.

[10] *Ibid*, at para.18.

[11] *Ibid*, at para. 19.

[12] *Ibid*, at para. 20.

[13] *Ibid*, at para. 21.

as a public health emergency within the meaning of the *PHPPA* is not challenged by the Applicants.

[35] Pursuant to s. 28 of the *PHPPA*, commencing on 18 March 2020 the CMOH issued a number of special measures for the purpose of protecting the health of those in Newfoundland and Labrador and preventing, remedying or mitigating the effects of the COVID-19 pandemic. Up to the date of Ms. Taylor's request to travel these included, but are not limited to the following:[14]

- On 18 March 2020 the CMOH ordered certain businesses in the province to close; fitness facilities, dance studios, cinemas, performance spaces, arenas, bingo halls, liquor stores and restaurants for in person dining (unless the restaurant could operate at 50% capacity and maintain social distancing). Gatherings of more than 50 people were prohibited and those returning from outside Canada (including the U.S.) were required to self-isolate for 14 days.

- On 23 March 2020 the list of business closures was expanded to include personal service establishments, all retail stores other than those providing services essential to the life, health or personal safety of individuals and animals, and all in person eating in restaurants. Gatherings were reduced to no more than 10 people and visitation to personal care homes prohibited except in exceptional circumstances.

- The following day all private health care clinics were ordered to close, with the exception of physician and nurse practitioner clinics, and urgent and emergent services. Virtual care was encouraged.

- The sale of scratch and break open lottery tickets was prohibited on 30 March 2020. Gatherings were restricted to five people and those required to self-

[14] *Ibid*, at Tab 16. The special measures orders referenced may all be found at this Tab.

isolate were ordered to remain on their property and not go for a drive unless to seek medical attention.

- The following day all campsites in municipal and privately owned parks that were not already closed were ordered to do so. Some weeks later, on 17 April 2020, an exemption was made for those individuals who are a permanent resident of a campsite, with no other residence.

- On 20 March 2020 the requirement to self-isolate was expanded to include all individuals arriving from other provinces and territories. An exception was made for certain asymptomatic workers in the air transportation sector.

- The following day, 21 March 2020, the exemption for asymptomatic workers was expanded for those deemed essential to the movement of goods and people, while travelling to and from their home and place of work in the province. When not working and while in the province these workers were required to self-isolate. Such workers included those essential to the critical maintenance of the province's infrastructure in the trade, transportation, fishing, mining and oil and gas sectors.

- The exemption from self-isolation was expanded on 25 March 2020 to include asymptomatic workers essential to critical health care in the province, including air ambulance, and organ donor retrieval teams, while travelling to and from their home and place of work.

- Almost a month later, on 22 April 2020, a further exception was made, due to the level of social and economic integration between towns and communities on the Newfoundland and Labrador-Quebec border. Asymptomatic individuals crossing the border for work or health reasons were exempt from the requirement to self-isolate.

- As of 24 April 2020 all individuals arriving from outside the province were required to complete a declaration form and be available for contact by public health officials during their 14 day self-isolation period. As of noon on 27 April 2020 those arriving from outside the province were required to provide specifics of their plan to self-isolate. Employers of those arriving from a point of origin outside Canada were similarly required to submit the specifics of their plan for the employees' self-isolation. Those arriving by motor vehicle from Quebec were required to stop at their point of entry for the purpose of the declaration.

- Other measures leading up to the travel restriction related to operators, staff and residents of personal care homes and assisted living facilities, members and staff at the House of Assembly, those who attended Caul's Funeral Home from 15-17 March 2020, and those returning from Kearl Lake, Alberta. The latter were required to self-isolate if arriving after 29 March 2020 and to contact 811 for follow up.

[36] Special Measures Order (Amendment No. 11) came into effect on 4 May 2020. It prohibited all individuals from entering Newfoundland and Labrador, except for the following:

> a. Residents of Newfoundland and Labrador;
>
> b. Asymptomatic workers and individuals who are subject to the Exemption Order for the 14-day self-isolation; and
>
> c. Individuals who are permitted entry to the province in extenuating circumstances, as approved in advance by the Chief Medical Officer of Health.

[37] "Resident" is defined in the Order as an individual who:

> a. is lawfully entitled to be or to remain in Canada;
>
> b. makes his or her home in the province; and

c. is ordinarily present in the province.

but does not include a tourist, transient or visitor to the province.

[38] Special Measures Order (Travel Exemption Order) came into effect on 5 May 2020, exempting those individuals who enter the province:

a. who have a significant injury, condition or illness and require the support of family members resident in Newfoundland and Labrador;

b. who are visiting a family member In Newfoundland and Labrador who is critically or terminally ill;

c. to provide care for a family member who is elderly or has a disability;

d. to permanently relocate to the province;

e. who are recently unemployed and who will be living with family members;

f. to fulfill a short term contract, education internship or placement;

g. who are returning to the province after completion of a school term out of province; and

h. to comply with a custody, access, or adoption order or agreement. (This includes a child/children arriving in the province, as well as individuals who are accompanying the child/children.)

[39] As already noted, for ease of reference these two special measures are referred to throughout this decision as the "travel restriction." Both were in play when Ms. Taylor sought permission to travel to this province.

**THE EVIDENCE**

[40] The within matter proceeded by way of Originating Application with affidavit evidence and cross-examination. Specifically, the Applicants provided an affidavit from Ms. Taylor, dated 20 May 2020, detailing her efforts to come to this province.

The facts contained therein are not contested by the Respondents and Ms. Taylor was not cross-examined. The CCLA provided an affidavit from Cara Faith Zwibel, Director of the Association's Fundamental Freedoms Program, dated 20 May 2020. Ms. Zwibel's affidavit related to the standing of the CCLA as a public interest litigant. She was not cross-examined.

[41] The Respondents provided affidavit evidence from Dr. Brenda Wilson, Full Professor and Associate Dean of the Faculty of Medicine at Memorial University; Dr. Patrick Parfey, Professor of the Faculty of Medicine at Memorial University and clinical epidemiologist; Dr. Proton Rahman, University Research Professor and Clinical Scientist with the Faculty of Medicine at Memorial University and Eastern Health; Dr. Janice Fitzgerald, CMOH, for the Province of Newfoundland and Labrador; and Katie Norman, Assistant Deputy Minister of Enforcement and Resource Services with the Department of Fisheries and Land Resources. All affiants were cross-examined by the Applicants with the exception of Ms. Norman.

[42] The following is a summary of the evidence provided by each witness.

**Kimberley Taylor**

[43] Kimberley Taylor, is a Canadian citizen, born and raised in Kilbride, a community within the City of St. John's, Newfoundland and Labrador. Ms. Taylor moved to Halifax, Nova Scotia, in 1996 and resides there with her spouse and two children. Since moving to Halifax, Ms. Taylor and her family would regularly return to this province to visit her parents and other family members.

[44] On 5 May 2020 Ms. Taylor's mother passed way suddenly at her home in Kilbride. After learning of the travel restriction, on 6 May 2020 Ms. Taylor followed the instructions on the province's website and requested an exemption by email, so that she might attend her mother's funeral.

[45] In her email Ms. Taylor writes:

> Please contact me ASAP.
> My mother in St. John's has just passed away from natural causes (not COVID-19)
>
> I live in Halifax, NS and need to be with my family in NL
> What do I have to do to be permitted to travel to NL so that I can grieve with my family?
>
> Thank you,

[46] While waiting for a response Ms. Taylor researched available flights and made arrangements to self-isolate for a period of 14 days upon her anticipated arrival in this province. With the agreement of her family and cooperation of the funeral director she planned a burial service for her mother to take place after her period of self-isolation. Ms. Taylor was to attend the service with her father and younger sister.

[47] Having not received a response, later that same day Ms. Taylor repeated her request, noting that she had not received an acknowledgement, nor did she have a phone number to call for information.

[48] Eventually, late in the day on 8 May 2020, Ms. Taylor received a reply from the office of the CMOH, denying her request to travel. The response reads, as follows:

> Dear Ms. Taylor,
>
> Your request for an exemption of the Special Measures Order (Travel Exemption Order) of May 5, 2020 to enter Newfoundland and Labrador has been reviewed based on the Information you provided. While I would like to offer my deepest condolences to you and your family, unfortunately, your request has been denied, meaning you are not permitted to enter Newfoundland and Labrador at this time. Please continue to check https://www.gov.nl.ca/covid-19/ website for updates on NL Alert levels and travel guidance.

> A person may request that the Chief Medical Officer of Health reconsider this decision by filing a written request for reconsideration within 7 days of the date on this letter. A written request for reconsideration of this decision shall include:
>
> (i) the reasons for the request;
>
> (ii) a summary of the facts relevant to the request;
>
> (iii) whether the decision should be revoked or how it should be varied; and
>
> (iv) the contact information of the person making the request; and shall be sent to the following address: exemptionrequests@gov.nl.ca
>
> Once again, my deepest condolences. If you have any further questions, please visit www.gov.nl.ca/COVID-19.

[49] On 14 May 2020 Ms. Taylor submitted a reconsideration request.[15] On 16 May 2020, Ms. Taylor was granted an exemption, permitting her entry into the province.[16]

**Cara Faith Zwibel (for the CCLA)**

[50] Ms. Zwibel is the Director of the CCLA's Fundamental Freedoms Program. The CCLA was founded in 1964 as a national, non-profit, independent, non-governmental organization dedicated to promoting respect for and observance of fundamental human rights and civil liberties in Canada.[17] Its work includes research, advocacy, public education and engagement. The CCLA seeks to hold government accountable by actively defending and promoting the recognition of fundamental human rights through the media, courts, provincial legislatures and Parliament, as well as through training in schools and universities.

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[15] Fitzgerald Affidavit, at para. 105.

[16] *Ibid*, at para. 106.

[17] Affidavit of Cara Faith Zwibel, dated 20 May 2020, at para. 5.

[51] The CCLA is no stranger to constitutional litigation, having either intervened or been granted standing in no less than 30 cases involving the *Charter* and constitutional rights generally.[18]

[52] With respect to the COVID-19 pandemic the CCLA has actively monitored and advocated for a rights based response by governments and agencies, both in terms of protecting vulnerable populations and preventing what it perceives as unjustified infringements of civil liberties under the guise of public safety. To this end, the CCLA has written to numerous public authorities expressing concerns and making recommendations on a variety of measures relating to COVID-19.[19] This correspondence includes a letter to the Attorney General of this province, dated 11 May 2020, expressing concerns regarding the travel restriction and ss. 28.1 and 50(1) of the *PHPPA* (the enforcement and inspection provisions).

[53] The CCLA has also initiated litigation as a public interest litigant in two matters directly related to the COVID-19 pandemic. On 24 April 2020 the CCLA and others commenced an application in the Ontario Superior Court of Justice against the City of Toronto and Province of Ontario, challenging the constitutionality of the Toronto Shelter Standards and the Toronto 24 Hour Respite Standards. On 12 May 2020 the CCLA and others brought a challenge in the Federal Court regarding the government's handling of the COVID-19 pandemic in federal correctional institutes.[20]

**Katie Norman**

[54] Katie Norman is the Assistant Deputy Minister of Enforcement and Resource Services with the province's Department of Fisheries and Land Resources, and serves as the operational lead for points of entry during the COVID-19 pandemic.

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[18] *Ibid*, at paras. 7, 8, 17, 18 and 20.

[19] For a more detailed account of this correspondence, see Zwibel Affidavit, at para. 13.

[20] Zwibel Affidavit, at paras. 15-16.

Ms. Norman, who was not questioned by the Applicants, tells us that as of 9 July 2020 neither the Royal Newfoundland Constabulary, nor the Royal Canadian Mounted Police have undertaken enforcement measures under s. 28.1 of the *PHPPA*. Rather, those who have been asked to leave the province have done so voluntarily. In some instances the province has paid for accommodation, or return transportation, for persons unable to reasonably assume this cost themselves.[21]

**Dr. Brenda Wilson**

[55] Dr. Brenda Wilson is a Full Professor, and Associate Dean of Community Health and Humanities in the Faculty of Medicine at Memorial University of Newfoundland and Labrador. Following cross-examination by the Applicants, Dr. Wilson was qualified by the Court as an expert in the field of public health decision making. Dr. Wilson did not offer advice to the CMOH with regard to the travel restriction. Rather, her evidence and report focused more broadly on the practice and culture of public health decision making.[22]

[56] Dr. Wilson explained that while public health interventions aim to prevent disease or improve health in individuals, they are typically applied to groups, populations, or systems as a whole:

> For example, legislation to require the removal of lead from gasoline is an intervention applied at a population/system level: no individual consent is sought and no individual may seek an exemption. While all children may, in principle, be biologically susceptible to the negative health effects of lead (brain damage and intellectual impairment), in reality only a small proportion would have been destined to experience this. This is the essence of the population-based approach.[23]

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[21] Affidavit of Katie Norman, dated 9 July 2020, at paras. 7-10.

[22] Dr. Wilson's Report "The Practice and Culture of Public Health Decision Making", dated 2 July 2020, is attached as Tab 2 to her 9 July 2020 Affidavit.

[23] Wilson Affidavit, Tab 2, at p. 2.

[57] Exposure to disease causing risks is not distributed equally across all groups in society, nor is the ability to access the means to mitigate these risks, whether through individual preventative behaviors, or access to the health services needed to treat the resulting medical conditions. As such, applying a preventative measure across the entire population is often a more effective means than targeting smaller at risk sub-groups[24]. In addition, such an approach is often a better use of constrained resources.

[58] Dr. Wilson observed that:

> Public health goals are rarely achieved through single actions or simple tools. A range of mechanisms may be employed, depending on the health problem and context.[25]

[59] The central objective of a public health practice is to intervene early and effectively to mitigate or prevent the effects of harmful agents. To the lay observer, when the desired outcome is achieved (e.g. lower level of disease), these public health interventions often appear to have been unnecessary or overdone[26].

[60] In the context of a public health emergency with emergent and rapidly evolving situations, the time available for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow: "The more urgent the situation, and the less evidence or precedent, the more that 'best judgment' must be exercised."[27] This approach is illustrative of the "precautionary principle", the case for action to prevent anticipated harm before confirmatory evidence is available.[28] To illustrate the point Dr. Wilson referred to

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[24] *Ibid*.

[25] *Ibid*, at p. 3.

[26] *Ibid*, at p. 2.

[27] *Ibid*, at p. 3.

[28] *Ibid*.

Canada's 'tainted blood' tragedy, where decision makers delayed measures to protect the supply of donated blood from HIV while awaiting evidence, prompting the *Krever Commission* to conclude that the "action to reduce risk should not await scientific certainty."[29]

[61] Long before the WHO officially declared COVID-19 a pandemic, public health officials across the world were preparing their responses, extrapolating as best they could from influenza and other recent outbreaks relating to coronavirus[30].

[62] In the case of COVID-19, Dr. Wilson explained that there were two characteristics which served to increase the complexity of public health decision making:

> The first is that this is a <u>novel</u> virus: never before encountered in the world, therefore its biology unclear, no possibility of immunity in any country's population, no vaccine, and no treatments confirmed to be effective. The second is that this has produced a much more severe, complicated, and protracted clinical condition than seen in influenza, with an approximately ten times higher death rate.[31]
>
> [emphasis in original]

[63] The early messages communicated by the WHO and national public health agencies was that COVID-19 seemed more complex than influenza or a respiratory infection, as it affected the cardiovascular system and kidneys and caused severe blood clots, such that a much higher proportion of diagnosed patients needed ICU support and mechanical ventilation than expected. The risk of critical illness in the

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[29] *Ibid*, quoting from Krever, H. The blood supply system in Canada: systemic problems in the 1980s. Commission of Inquiry on the Blood System in Canada. Final Report. Ottawa: Canadian Government Publishing 1997 (Part W, at p. 989].

[30] *Ibid*, at p. 4. Sudden Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS).

[31] *Ibid*.

elderly was also higher than expected, as was the overall rate of death in diagnosed patients.

[64] With asymptomatic spread (spread without symptoms) a reality, a community could see a doubling of cases every few days, known as exponential spread. It was estimated that on average one infected person could pass the virus to 2-3 others. Over the course of 30 days one infected person could therefore infect 400 others, with each of these infecting 400 more, and so forth.[32]

[65] Cutting down person to person transmission would thereby slow the rate of new cases, "flattening the curve", thereby giving the health systems time to increase their available beds, ICU places, and ventilators, and provide front line health care workers time to react while protecting themselves.[33] Flattening the curve would also give time to develop a vaccine, effective treatments and give societies time to adjust to life with COVID-19.

[66] From a public health perspective the speed with which control interventions are implemented is crucial. The idea of exponential spread is that the speed of the increase in transmission gets greater day by day. One early calculation, based in China, estimated that a single day's delay in implementing effective control measures could lead to a 40% increase in total cases in a population[34]. According to Dr. Wilson, the feeling of urgency for "immediate, decisive, heavy action" was probably best captured in the following remarks of Dr. Michael Ryan of the WHO at a media briefing in early March:

> Be fast, have no regrets, you must be the first mover. … If you need to be right before you move, you will never win. Perfection is the enemy of the good when it comes to emergency management. Speed trumps perfection. And the problem in society at the moment is everyone is afraid of making a mistake, everyone is afraid

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[32] *Ibid*, at p. 4.

[33] *Ibid*.

[34] *Ibid*.

> of the consequences of error. But the greatest error is not to move, the greatest error is to be paralysed by the fear of failure.[35]

[67] Dr. Wilson concludes her report:

> Public health practitioners are expected to be able to offer advice and make decisions based on best available scientific evidence, but often under conditions of uncertainty. Intervening at a population level to address an important public health problem is rarely a simple prospect, usually requires multiple approaches, and may simultaneously be perceived as too much or too little by different sections of society. However, the more serious the consequences of under-reaction, the more that decision-making is likely to be driven by the precautionary principle: in the absence of clear evidence, use best judgement to prevent potential harm.
>
> Despite pandemic preparation being a core activity for public health agencies, it was evident that extraordinary measures would be necessary as the true impact of the COVID-19 pandemic became apparent. For the province of Newfoundland and Labrador, as for every other jurisdiction, judgements about the necessity of specific public health decisions during the pandemic's first few months will be discernable only in hindsight.[36]

## Dr. Patrick Parfrey

[68] Dr. Patrick Parfrey is a Professor at the Faculty of Medicine at Memorial University and a clinical epidemiologist. He is the lead member of a group entitled "Quality of Care NL" at Memorial University. Quality of Care NL is funded by the Canadian Institute of Health Research. It examines and makes recommendations concerning the performance of the health system in Newfoundland and Labrador, as well as interventions in health care undertaken in hospitals, long term care facilities and the community.

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[35] *Ibid*.

[36] *Ibid*, at p. 5.

[69] Under Dr. Parfrey's direction Quality of Care NL prepared two reports for this litigation. The first, entitled "Coronavirus Disease (COVID-19): Border Control and Travel Restrictions" is a review of border controls to prevent the spread of COVID-19 in comparable island populations and other provinces, as of 19 June 2020.[37]

[70] After the WHO declared COVID-19 a pandemic on 11 March 2020, many governments implemented travel restrictions, or closed their borders to non-citizens and non-residents in an effort to arrest the spread of the virus. As case numbers decrease and countries begin to loosen their public health restrictions, many continue to maintain strict control over their borders while allowing more domestic and regional travel.

[71] While there is no clear consensus on how borders are to be managed, small populations with fewer cases of COVID-19 are more likely to have stricter border control.[38]

[72] The second report of Quality of Care NL, dated 25 June 2020, is entitled "NL Population Health Implications for COVID-19 Risk". It compares the risk factors for severe illness from COVID-19 in this province with the rest of Canada.

[73] Risk factors for severe illness or death from COVID-19 include asthma, chronic kidney disease, chronic lung disease, diabetes, chronic liver disease, serious heart conditions, obesity, cancer and age over 65.[39]

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[37] Affidavit of Patrick Parfrey dated 6 July 2020, Tab 2. The Report notes that measures to prevent the spread of COVID-19 are in a constant state of flux. Hence, the information provided is accurate for that date only.

[38] e.g. New Brunswick, Prince Edward Island, Yukon and Nunavut. Parfrey Affidavit, Tab 2.

[39] Parfrey Affidavit, Tab 3. The risk factors were obtained from the Centers for Disease Control and Prevention. They are not challenged by the Applicants. Nor do the Applicants question the ranking of this province against the rest of Canada.

[74] This report concludes that "Newfoundland and Labrador has the lowest life expectancy and health status in Canada."[40] Further, Newfoundland and Labrador has the dubious distinction of ranking, the highest, or next to highest in the country for many of the risk factors for adverse outcomes from COVID-19.[41] With an aging population, the province ranks 9th in Canada, with 20.5% of its residents being 65 years of age or older.

**Dr. Proton Rahman**

[75] Dr. Proton Rahman is a University Research Professor and Clinical Scientist with the Faculty of Medicine at Memorial University and Eastern Health. Following cross-examination, Dr. Rahman was qualified by the Court as an expert in the field of epidemiology.

[76] The Newfoundland and Labrador Centre for Health Information (NLCHI) is a Crown Agency of the government of Newfoundland and Labrador with a legislative mandate which includes enhancing the health and well-being of Newfoundland and Labrador residents through, amongst other measures, the preparation of health reports, conducting research and evaluation and providing analytics and decision support services.[42]

[77] In early March 2020 the NLCHI was asked by the Department of Health and Community Services to "co-ordinate an expert group which would use predictive modelling to help inform public health decision-making with respect to the COVID-19 pandemic."[43] The end result was the Predictive Analytics Technical Team, with Dr. Rahman as its lead. The team, assisted by NLCHI, was asked by the Government

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[40] Parfrey Affidavit, at para.6.

[41] The province was variously ranked 9th or 10th within 10 representing the worst/unhealthiest. Parfrey Affidavit, Tab 3.

[42] Affidavit of Proton Rahman, dated 9 July 2020, Tab 2, at p. 4.

[43] *Ibid*.

of Newfoundland and Labrador to model the impact of the travel restriction subsequent to 4 May 2020 on the spread of COVID-19. Following an examination of the relevant peer reviewed literature, two separate modelling approaches were undertaken, in order to take into account the province's "spatial, biological, social and environmental elements"[44]. The models chosen were designed to best represent the COVID-19 case trajectory with, and without the travel restriction.

[78] The team concluded that:

> The results from our simulation modelling demonstrates that travel restrictions significantly reduced the COVID-19 spread in the NL population.[45]

[79] The two models used by the team are referred to as the "NL Branching Process Model" (NL-BP) and the "NL Agent Based Simulation Model" (ABS-NL). Dr. Rahman explained that both approaches were undertaken as the peer reviewed literature is replete with examples of each. In the scientific community there is no consensus as to the "best" approach, as each model has its unique strengths and weaknesses. Dr. Rahman explained that by utilizing both models the team endeavored to generate a balanced inference, free of any pre-existing bias towards a particular approach.[46]

[80] During cross-examination Dr. Rahman confirmed that both models were chosen as they are generally accepted within the epidemiological community. The Applicants offered no evidence to the contrary.

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[44] *Ibid*, at p. 3.

[45] *Ibid*.

[46] *Ibid*, at p. 9.

NL Branching Process Model (NL-BP)

[81] This model has been used to inform New Zealand's approach to COVID-19 management. The assumptions and methodology were provided in the Technical Report as an attachment to Dr. Rahman's Affidavit. The aim of the model was to predict COVID-19 cases in the nine weeks subsequent to 4 May 2020, under two scenarios: 1) when the travel restriction is implemented and 2) with no travel restriction in place.[47]

[82] Dr. Rahman explained the methodology of the NL-BP model, as follows:

> In the NL-BP model, infection is spread to susceptible NL residents when they come into contact with an infected person, who may be either another NL resident or a traveler (Appendix A – Technical Report 1). The NL-BP model distinguishes between infected individuals that are pre-clinical, clinical, and asymptomatic, considers infectivity depending on the number of days since the infection onset, assumes that individuals with clinical infections self-isolate, and allows for individual differences and chance events (e.g. a few infected individuals who would generate many more new infections than the average infected person).
>
> Prior to May 4th, the model is fit to data describing the number of active COVID-19 cases in NL, where the model fitting considers the number of daily contacts between NL residents before and after the declaration of the public health emergency on March 18th (Appendix A – Technical Report 1: Figure 1). After May 4th, the analysis considers future scenarios where no travel restriction is implemented. The number of infected travelers that fail to self-isolate per month is assumed to be 3 (no travel restriction) and 0.24 (travel restriction). The value of 3 infected travelers failing to self-isolate per month when there is no travel restriction is likely an underestimate, given the large number of travelers that enter NL during this time period and recent data documenting the poor compliance rates with lockdowns (Smith et al, 2020). The effect of the travel restriction also depends on the level of physical distancing in place at the time, as reflected by daily contact rates.[48]

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[47] *Ibid*.

[48] *Ibid*, at pp. 9-10.

[83] The conclusion reached using the NL-BP model was that over the nine weeks subsequent to 4 May 2020, failing to implement the travel restriction resulted in ten times more cases of COVID-19 in Newfoundland and Labrador residents than what actually occurred, where these residents are part of an infection chain that began with an infected traveler.[49] If a period longer than nine weeks were considered, the predicted effect of the travel restriction would be greater than a tenfold decrease, as the number of cases increases exponentially. As a result, the difference between the two scenarios, travel restriction versus no restriction widens over time. The model also determined that if 15 infected travelers failed to self-isolate each month, with no travel restriction in place, an estimated 50-fold increase in the total number of cases would occur over the nine weeks subsequent to 4 May 2020.[50]

NL Agent Based Simulation Model (ABS-NL)

[84] Like the NL-BP model, the details of the methodology, assumptions, risks, strengths and biases of the ABS-NL model were described in a Technical Report appended to Dr. Rahman's affidavit.

[85] The ABS-NL model tested three scenarios:

1) Travel restrictions in place with 1,000 exempted travelers entering the province per week (current base scenario);

2) Travel restrictions lifted and non-resident travel to NL resumes at typical levels; and

3) Travel restrictions lifted and non-resident travel to NL resumes at 50% of current levels.[51]

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[49] *Ibid.*

[50] *Ibid,* at p. 11.

[51] *Ibid,* at p. 12.

[86] The ABS-NL model is described by Dr. Rahman, as follows:

> The ABS NL travel model is based on the total number of annual non-resident travelers to the province from May 1st and simulates importation of infected cases over the next 100 days. As the exact percentage of travelers infected with SARS-CoV-2 is not known, the model assessed two plausible infection rates (0.03%, 0.1%). We assumed that 75% of travelers follow the stated requirement of a 14-day self-isolation upon arrival in NL, and that 50% of those who did not self-isolate will choose to self-isolate if they became symptomatic. During the travel restrictions, approximately 1000 individuals per week were granted travel exemptions and able to enter the province. The importation impact from these travelers were incorporated in the ABS modelling.
>
> The scenarios start on May 1, and simulate 100 days. An initial undetected five cases are assumed to be present in the community at the start of the simulation. Households are engaged in a "double bubble", in accordance with NL's current de-escalation protocol. Non-resident travelers that arrived via air and car were assigned to 'workplace' if they travel for business or assigned to 'households' if they are in NL to visit relatives and friends. The non-resident travelers are also matched to economic zones based on the site of tourist attractions. At each location visited by a traveler, there is interaction with other individuals at the same location (household members, fellow students, fellow employees, etc.), and an individual's chance of becoming infected is determined by contact with infected individuals in each location and the nature of that contact. Exempted travelers are assumed to only be visiting family or business.
>
> The daily SARS-CoV-2 infections significantly increase as the percentage of infected travelers rises from 0.03% to 0.1% for both 100% and 50% travel volume scenarios (Figure 2). At 100% travel volume, when comparing 0.03% of incoming travelers being infected to 0.1% of exempted travelers infected (this is the most conservative case for SARS-Co-V-2 infections in the 100% scenario), there was a 5x greater peak for infections when no travel restrictions were in place. And when 0.1% of incoming travelers were infected there was 20x more infections when compared to 0.1% infections for exempted travelers, during the travel restrictions. Similar results are observed for the 50% travel volume scenarios, though at smaller magnitudes: The lifted travel restrictions scenarios are three-and six-fold worse than the travel restrictions for 0.03% and 0.1% of travelers infected, respectively.[52]

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[52] *Ibid*, at p. 12.

[87] The conclusion reached through the application of this model is that the travel restriction provides significant protection to the province's population:

> The ABS NL model provides insight when comparing multiple "what if scenarios". This model informs us that the lifted travel restriction scenarios pose a much greater risk of new infections. The strength of the model is that incorporates granular NL data, allowing for individual behavioral, demographic, health, spatial and environmental characteristics to be represented. As contact tracing has not been incorporated into the ABS-NL model, it overestimates the number of daily cases, however given the large difference between the scenarios, inclusion of contact tracing is highly unlikely to erase the magnitude of the difference. Thus, our ABS model indicates that the travel restrictions provides significant protection to the NL population.[53] [emphasis added]

[88] The overall conclusion reached by Dr. Rahman's team is summarized, as follows:

> In summary, SARS-CoV-2 is a novel coronavirus that continues to exhibit a very unpredictable course. NL has done well in managing the first wave of the pandemic, but over 99% of the population lacks immunity to the virus. Swift deployment of public health measures, including implementation of travel restrictions, has been key in controlling SARS-CoV-2 infections in NL to date. Similar island jurisdictions with low infection rates have opted for implementing strict border controls, thus allowing the loosening of other public health measures, while keeping infection rates low. Given the older population, high prevalence of chronic conditions, and the population dispersed over a vast geography, controlling the border is a prudent strategy to manage this pandemic in NL. The NL Branching process Model and Agent Based Simulation NL models are two independent mathematical simulation models that provide clear evidence in support of the travel restriction in NL on May 4th, 2020. Significant reduction in imported cases in NL will lead to lower rates of community transmission. It is important to minimize community transmission as the epidemic increases quickly due to the positive feedback between the number of infected people, and the number of new infections they generate leading to exponential grown of SARS-CoV-2 during the early phase of the epidemic. The travel restriction in NL is not an isolated intervention, but is part of a comprehensive public health action plan that aims to reduce the impact of COVID-19 in the province. Low rates of community transmission combined with

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[53] *Ibid*, at pp. 12-13.

> limited the number of imported cases will support the safe de-escalation of public health measures.[54] [emphasis added]

[89] The upshot of the modelling conducted by the Predictive Analytics Team, headed by Dr. Rahman, is that the travel restriction is an effective measure at reducing the spread of COVID-19 in Newfoundland and Labrador.

**Dr. Janice Fitzgerald**

[90] Dr. Janice Fitzgerald is the CMOH for Newfoundland and Labrador. Her qualifications for this position are not challenged by the Applicants. Dr. Fitzgerald explained that while she works within the structure of the Government of Newfoundland and Labrador and reports to the senior executive within the Department of Health and Community Services, the advice she provides is both independent and impartial.

[91] In addition to her own expertise, Dr. Fitzgerald tells us that in providing this advice she relies on expertise from outside the office, including but not limited to expertise from:

a. other employees within the Department of Health and Community Services;
b. Federal and Provincial Government departments and agencies;
c. regional health authorities;
d. the Newfoundland and Labrador Centre for Health information;
e. the Newfoundland and Labrador Centre for Applied Health Research;
f. university-affiliated research teams;
g. the Canadian Institute for Health Information;
h. the Canadian Agency for Drugs and Health Technology; and
i. national and provincial public health and health professional associations.[55]

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[54] *Ibid*, at p. 14.

[55] Fitzgerald Affidavit, at para. 13.

[92] COVID-19 is a new disease not previously identified in humans, caused by the SARS-CoV-2 virus. This virus is one of a large family of viruses known as coronaviruses, which may cause illness in people and animals. Typically, human coronaviruses are associated with such mild illnesses as the common cold. Rarely, however, these viruses can spread from animals to humans, as was the case with the severe acute respiratory syndrome coronavirus (SARS CoV) and Middle East respiratory syndrome coronavirus (MERS CoV), and now the SARS-CoV-2 virus.[56]

[93] COVID-19 is spread mainly from close person to person contact, (within approximately 6 feet) particularly through respiratory droplets when an infected person coughs, sneezes, talks or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose or mouth.[57]

[94] Recent evidence has shown that the virus can be transmitted by those who have not yet developed symptoms (pre-symptomatic) and people who never develop symptoms (asymptomatic), although it does not appear that these groups are the major drivers of the disease.[58]

[95] COVID-19 disproportionally affects those with pre-existing medical conditions, as underlying chronic disease tends to weaken the body's defence mechanism to viral infections. In addition, those over 65 years of age are more likely to be hospitalized and more likely to be admitted to ICU, even without a pre-existing medical condition. As COVID-19 is a new disease, its long term effects are unknown. Some of those infected have short hospital stays while others are

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[56] *Ibid*, at paras. 23-25.

[57] *Ibid*, at para. 26.

[58] *Ibid*, at para. 28.

extended. Elderly patients often do not recover to their pre-illness baseline, thus increasing the need for future care.[59]

[96] Newfoundland and Labrador has an aging population with Indigenous communities on the island and in Labrador. The rural nature of the province is such that any unnecessary importation of the virus, and the resulting strain on the health care system in rural communities, must be considered in public health decision making. There are a total of 1,376 hospital beds in the province and 92 ICU beds. Despite the reduction in health care services in anticipation of COVID-19, ICU occupancy rates consistently hover between 50-60%. Modelling prepared for the NL Center for Health Information on 8 April 2020 shows that ICU bed capacity would be quickly overwhelmed if the province were to experience significant infection rates.[60]

[97] The medical community has generally accepted that the incubation period for COVID-19 is up to 14 days with the median estimate at 5-6 days between infection and the onset of clinical symptoms.[61]

[98] At this time there is no therapy to treat or prevent COVID-19. There is no vaccine and no drug therapies approved by Health Canada.[62] In such a circumstance the first goal of pandemic planning is to minimize serious illness and death, while the second goal is to minimize societal disruptions.[63]

[99] In the absence of a vaccine or treatment, health officials must rely on public health measures, (i.e. non-medical actions to reduce the spread of COVID-19) both

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[59] *Ibid*, at paras. 47-50.

[60] *Ibid*, at para. 43, Exhibit 6.

[61] *Ibid*, at para. 31.

[62] *Ibid*, at paras. 32-34.

[63] *Ibid*, at para. 74.

community and personal. The goal is to identify and isolate all cases and contacts so that the virus is not spread throughout the community. There is no one size fits all solution, as the epidemiology of the disease is different in different areas of the country. For example, Ontario and Quebec have had large outbreaks with widespread community transmission, while the Atlantic provinces have had smaller outbreaks and less community spread.[64]

[100] Community spread refers to the spreading of a disease from person to person in the community. There are two general types: 1) where the source is known; 2) where the source is not known. The latter is worrisome as it makes contact tracing more difficult and generally is an indicator of a more widespread transmission of the disease in the community. As of 9 July 2020 (the date of Dr. Fitzgerald's Affidavit) Newfoundland and Labrador had not experienced widespread community transmission of COVID-19. 97% of cases have come from a known source.[65]

[101] The Caul's Funeral Home outbreak served as a poignant reminder of the impact infected travelers can have on the spread of the virus. The Caul's outbreak lasted almost a month, from 16 March to 13 April 2020, during which time 93 of the 350 persons who attended the funeral home over a three day period developed COVID-19, an attack rate of 26.6%. Four generations of transmission occurred from the attendees of the funeral home and their contacts, affecting households and several workplace settings, including healthcare, Canada Post, an IT company and a municipal para-transit facility. There were 12 hospitalizations, including 5 ICU admissions and 2 deaths associated with the "Caul's cluster." Some people recovered within 10 days, while others were ill over two months [66].

[102] At the time of the travel restriction the Caul's cluster had resolved. However, Dr. Fitzgerald explained that with a low prevalence rate of COVID-19, the biggest risk to Newfoundland and Labrador is the introduction of the disease from other

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[64] *Ibid*, at para. 78.

[65] *Ibid*, at para. 62.

[66] *Ibid*, at paras. 66-67.

jurisdictions. At the time of the travel restriction other provinces were seeing an increase in cases of COVID-19 while this province was having success at controlling the outbreak.

[103] As of 5 May 2020 seven provinces had more active COVID-19 cases than Newfoundland and Labrador, with only New Brunswick, Prince Edward Island and the territories having less. On 5 May 2020 Nova Scotia had 991 cases of COVID-19 and was reporting new cases daily. It was then in the midst of an outbreak in a long-term care facility in the Halifax metro area, as well as community outbreaks.[67]

[104] Due to the sudden onset of COVID-19 there is currently a sparsity of peer-reviewed scientific literature and medical publications which specifically address the effectiveness of travel restrictions in curtailing this disease[68]. There are several studies which suggest that the exportation of the disease from China was curtailed by travel restrictions, giving health systems time to prepare and respond. A study out of Europe showed a faster spread across Europe with unconstrained travel.[69]

[105] Both the WHO and Public Health Agency of Canada have recognized that the control of importation risk is a readiness criteria for lifting public health measures in place.[70]

[106] Self-isolation can serve as on effective means of curtailing the spread of COVID-19, when people actually self-isolate. However, at the time of the travel restriction concerns had been raised by some municipalities regarding non-compliance with self-isolation orders. There was also a concern that as cases continued to rise in other parts of the country, people would travel to this province

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[67] *Ibid*, at paras. 71-73.

[68] *Ibid*, at para. 82. The work of Dr. Rahman and the predictive analytics team stands as an exception in this jurisdiction.

[69] *Ibid*, at para. 83.

[70] *Ibid*, at para. 84.

to avoid COVID-19, thereby increasing the importation risk. In the case of the Caul's Funeral Home cluster the province had witnessed firsthand how a single case could easily spread from person to person.[71]

[107] Around 22 March 2020 a public reporting form was introduced, with the result that between that date and 5 May 2020 there were 3,453 reports and e-mails. As a result, public health officials were made aware of 989 complaints that individuals were not complying with self-isolation requirements[72]. Complaints were also received from members of the House of Assembly.

[108] Information received from Marine Atlantic confirmed that a number of travelers were booked with a return sail time within the 14 day self-isolation period. This gave rise to a concern that tourists, in particular, were less inclined to follow this requirement. In addition, travel by itself is a high risk activity for the spread of COVID-19.[73]

[109] Contact tracing is the process of identifying, assessing and managing individuals who have been exposed to a disease to prevent transmission to others.[74]

[110] Dr. Fitzgerald explained that the follow up for self-isolation involves a phone call from a regional health authority to educate the traveler about self-isolation and to confirm that the traveler is self-isolating. As a practical matter there are human resource challenges in fulfilling this mandate, leading to an "honour system."[75] Restricting the number of persons entering the province thus allows public health officials to better monitor and track new arrivals, as well facilitating a more rapid

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[71] *Ibid*, at para. 89.

[72] *Ibid*, at para. 69, Tab 18, para. 13.

[73] *Ibid*, at para. 95.

[74] *Ibid*, at para. 37.

[75] *Ibid*, at para. 96.

response to an outbreak. With the travel restriction in place, public health officials can conduct contact tracing with greater ease.

[111] The diagnostic test used in this province is the nucleic acid test. It involves taking a sample from the patient's nasopharynx, or lungs, in search for genetic material from the virus. The test is less than perfect, with a false negative between 20 and 30 percent.[76] A false negative can lead to a heightened sense of security, resulting in an inadvertent spread of the virus.

[112] Testing alone is therefore not an effective means to combat the spread of COVID-19 and cannot be relied upon to reduce importation risk. It is a point in time test result and can lead to a negative test in a pre-symptomatic person.[77]

[113] According to Dr. Fitzgerald an effective public health approach to controlling the spread of COVID-19 is multipronged and includes measures such as physical distancing, quarantining those who may have been exposed, isolation of those infected, testing, the rapid identification of cases and contact tracing, prohibiting mass gatherings, the closure of businesses and schools, limiting contact to those outside of your household, and travel restrictions. Private measures include handwashing, not touching your face, cleaning and disinfecting high contact surfaces, physical distancing, staying home if unwell and practicing proper cough and sneeze etiquette.[78]

[114] Dr. Fitzgerald explained that the public health management of COVID-19 presents as a moving target as new information regarding this virus comes to light. Measures taken to control the spread of COVID-19, including the travel restriction, are regularly reassessed and adjusted as necessary. Indeed, on 3 July 2020 Newfoundland and Labrador joined an "Atlantic bubble" allowing for unrestricted

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[76] *Ibid*, at paras. 57-60.

[77] *Ibid*, at para. 103.

[78] Fitzgerald Affidavit, at Tab 18, para. 3(c)(d).

travel without the need to self-isolate for asymptomatic travelers in Atlantic Canada.[79]

[115] Requests for exemption from the travel restriction are reviewed by a Travel Request Exemption Team, consisting of employees from the Department of Health and Community Services. The final decision is made by Dr. Fitzgerald.[80]

## SHOULD THE CCLA BE GRANTED PUBLIC INTEREST STANDING?

### Introduction

[116] On 5 August 2020, following argument, I granted the CCLA public interest standing to join with Ms. Taylor in challenging s. 28(1)(h) of the *PHPPA*, as outside the legislative competence of the provincial Legislature, and the travel restriction as contrary to the *Charter*. At the same time I denied the CCLA public interest standing to challenge the enforcement and investigative provisions, ss. 28.1 and 50(1) of the *PHPPA*, as contrary to the *Charter*. These provisions are not challenged by Ms. Taylor. My ruling with regard to standing was with written reasons to follow. These are those reasons.

### The Test for Standing

[117] The grant of public interest standing is a discretionary decision in which the Court is required to weigh three considerations: whether the case raises a serious and justiciable issue; whether the party bringing the action has a real stake or a genuine interest in its outcome; and whether the proposed suit is a reasonable and effective means to bring the case to court (*Downtown Eastside Sex Workers United Against*

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[79] *Ibid*, paras. 38-39. Special Measures Order (Atlantic Travel Amendments), at Tab 16.

[80] Fitzgerald Affidavit, at Tab 18, para. 3(c)(d).

*Violence Society v. Canada (Attorney General)*, 2012 SCC 45). The three factors do not amount to a checklist, but should be seen as interrelated considerations to be weighed cumulatively, rather than individually, in a purposive, flexible and generous manner. (*Downtown Eastside*, at para. 53). The onus is on the party seeking standing, the CCLA in this instance, to establish that the three factors, applied in this manner, favour the grant of standing.

[118] Limitations on standing are necessary to "ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government" (*Downtown Eastside*, at para. 1).

[119] At the root of the law on standing is a need to strike a balance "between ensuring access to the courts and preserving judicial resources" (*Downtown Eastside*, at para. 23, quoting with approval from *Canadian Council of Churches v. R.* (1992), 1 S.C.R. 236, at p. 252).

**Section 28(1)(h) of the *PHPPA* and the Travel Restriction**

Does the Challenge Raise a Serious and Justiciable Issue?

[120] To constitute a serious issue the question must be a substantial constitutional issue, or an important one. The claim must be far from frivolous (*Downtown Eastside*, at para. 42).

[121] As it relates to s. 28(1)(h) of the *PHPPA* and travel restriction, the Respondents accept that this proceeding raises issues that are both serious and justiciable. I agree. There is the question of whether s. 28(1)(h) of the *PHPPA* is within the legislative competence of the province. In addition, Ms. Taylor was directly affected by the application of this provision, as well as the travel restriction issued pursuant to it, and has stepped forward claiming that her *Charter* rights were

infringed when she was denied entry into this province on 8 May 2020. The facts underpinning Ms. Taylor's request to travel are detailed in her affidavit and are not contested.

Does the CCLA Have a Real Stake or Genuine Interest in the Outcome?

[122] The CCLA points to its long history of interventions and litigation before Canadian courts in all manner of civil liberties cases, as well as its ongoing work during the COVID-19 pandemic, as demonstrating its genuine interest in the issues before the Court. Its history of involvement in such matters is detailed in the affidavit of Cara Faith Zwibel summarized, above.

[123] The Respondents argue that to have a "genuine interest" the CCLA must show that it is directly impacted by the outcome of the proceeding. According to the Respondents, it is not enough to say that the public interest litigant is "truly concerned" about the matters raised. If this were the standard the CCLA would have the right to commence an action anywhere in Canada, at any time, as long as it involved civil liberties and *Charter* rights.

[124] To illustrate this point, the Respondents observe that the CCLA is distinguishable from the organization granted standing in *Downtown Eastside*. That organization was run "by and for" current and former sex trade workers living in the Vancouver Downtown Eastside, and its objective included improving working conditions for female sex workers who lived and/or worked in the neighbourhood. Presumably, those running the organization would have had the right to bring the action themselves, as persons directly affected. The Respondents argue that the CCLA, on the other hand, has no such direct connection, nor for that matter even a connection to this province.

[125] In support of their position the Respondents also refer to the decision of the Saskatchewan Court of Queen's Bench in *Shiell v. Amok* (1987), 27 Admin. L.R. 1, 1987 CarswellSask 56 (Q.B.), in which it was alleged that the Minister of Environment was in breach of the *Environmental Assessment Act*, S.S. 1979-80, c.

E-10.1. The Respondents rely, in particular, on the following statement by Justice Barclay (at para. 22):

> 22. I am satisfied that the plaintiff does not have a direct, personal interest in the alleged improper granting of the ministerial approval under s. 16 of the *Environmental Assessment Act*. If it were sufficient for the plaintiff to be interested in the sense that she is concerned about the environment and environmental issues then it is difficult to conceive of cases where this criteria would not be met. In my respectful view, to be afforded standing the plaintiff must be affected in the sense that the issue has some direct impact on her. This is clearly distinguishable from the *Finlay* case in which the respondent had a direct personal interest in the issue as deductions were being made from his cheques.
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> [emphasis added]

[126] Like the plaintiff in *Shiell*, the Respondents argue that while the CCLA may be concerned about the issues raised, this concern is not such as to amount to a direct interest.

[127] The CCLA responds by characterizing the Respondents' approach as "outdated", "rigid and stingy".[81] The CCLA observes that *Shiell* is a 1987 decision of the Saskatchewan Court of Queen's Bench, predating the Supreme Court of Canada's decision in *Downtown Eastside* and other precedents of that Court. [82]

[128] I do not interpret *Shiell* to mean that where a constitutional challenge is pursued the protagonist must have a direct personal interest in the outcome. Such a proposition is to cast the net too narrowly. First of all, *Shiell* was not a constitutional case but in reality a public nuisance action by a private individual against a mining company. Justice Barclay observed that "[p]ublic interest standing should not be conferred to enable a party to sue a private individual or corporation" (at para. 19). Second, in *Downtown Eastside* the Court reiterated the need to screen out the "mere busybody" and determine whether "the plaintiff has a real state in the proceedings

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[81] Second Applicants Reply Brief, at para. 3.

[82] See for e.g. *Canadian Council of Churches v. Canada*.

or is engaged with the issues they raise" [emphasis added] (*Downtown Eastside*, at para. 43).

[129] In *Canadian Council of Churches* the Court held it was clear that the applicant had a genuine interest as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of refugees and immigrants" (at para. 39).

[130] Based upon the evidence of Ms. Zwiel, I am satisfied that the CCLA does not seek to enter the fray as a "mere busybody". Its interest in the *Charter*, and in the measures taken by governments in response to COVID-19, is enough to convince me that it has a real and continuing interest in the issues raised by Ms. Taylor in this proceeding.

Is the Action by the CCLA a Reasonable and Effective Way to Bring the Matter Before the Court?

[131] The third consideration is also to be applied purposively in light of the need to ensure a full and complete adversarial presentation and to conserve judicial resources (*Downtown Eastside*, at para. 49). It is not to be applied rigidly, but rather from a practical and pragmatic point of view and in light of the particular nature of the proposed challenge.

[132] As to whether the proposed suit is a reasonable and effective means to bring the case to Court, the following considerations are relevant: the plaintiff's capacity to bring forward a claim; whether the case is of public interest in that it transcends the interests of those most directly affected by the challenged law; whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources; and the potential impact of the proceedings on the rights of others who are equally or more directly affected (*Downtown Eastside*, at para. 51).

[133] With regard to these considerations the Respondents argue that insofar as Ms. Taylor has standing as of right, and has retained counsel to challenge the travel restriction, it would not be appropriate to grant the CCLA standing with respect to this issue. According to the Respondents, the CCLA brings nothing new to the table and its appearance therefore amounts to a duplication of effort.

[134] The Respondents further point to *Canadian Council of Churches*, wherein the court found that individual claimants for refugee status who had a right to challenge the legislation had, in fact, done so. As such, the legislation was not immunized from challenge and the very rationale for the public interest litigation disappeared (*Canadian Council of Churches*, at para. 42). The Respondents observe that in *Downtown Eastside* the Court stated the "[a]all of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred" (at para. 37).

[135] The submission of the Respondents thus focuses sharply on one of the considerations in deciding whether the participation of the CCLA is a reasonable and effective way to bring the matter before the court, that of judicial economy. The Respondents suggest that by denying the CCLA standing there will be a saving of judicial resources.

[136] In response, the CCLA argues that as a result of its expertise, special knowledge and perspective regarding constitutional rights, it is uniquely positioned to supplement, rather than duplicate the efforts of Ms. Taylor. Both counsel for the CCLA and Ms. Taylor offered that they had agreed to share cross-examination of the Respondents' witnesses, so that there would be no duplication of that effort, at least.

[137] Furthermore, the CCLA maintains that it has the resources and capacity to bring the claim forward. Indeed, during submissions counsel for the CCLA frankly acknowledged that it was financially supporting Ms. Taylor's claim.

[138] Finally, it is accepted by all parties that the issues at play transcend the personal interests of Ms. Taylor.

### Conclusion Regarding Section 28(1)(h) of the *PHPPA* and the Travel Restriction

[139] I do not regard the fact that Ms. Taylor has initiated an action on her own as dispositive of the grant of public interest standing to the CCLA. Unlike *Canadian Council of Churches*, the CCLA does not seek to go it alone in challenging s. 28(1)(h) of the *PHPPA* and the travel restriction, but rather to join forces with Ms. Taylor in the effort. There is a robust factual record upon which to do so.

[140] After cumulatively considering the three factors in light of the guidance provided in *Downtown Eastside*, I am of the view that the CCLA ought to be granted public interest standing with regard to the issues raised by Ms. Taylor. The questions asked with respect to s. 28(1)(h) of the *PHPPA* and the travel restriction are both serious and justiciable. The CCLA does not present to the Court as a mere busybody, but rather as an organization with considerable expertise and experience in constitutional matters. This expertise is not transitory, but rooted in the CCLA's creation 25 years ago. As a public interest litigant the CCLA has the ability to bring this experience to bear on the issues raised in this application.

[141] While some duplication is inevitable, the issues raised in relation to the travel restriction and the implications of this Court's ruling extend beyond Ms. Taylor. The Court will benefit from the perspective and input of the CCLA and I would not be prepared to sacrifice its participation on the altar of judicial economy. A "full and complete adversarial presentation" is more likely to be the result (*Downtown Eastside*, at para. 49).

[142] The CCLA also is therefore granted public interest standing to join with Ms. Taylor in challenging s. 28(1)(h) of the *PHPPA* and the travel restriction.

**Sections 28.1 and 50(1) of the *PHPPA***

[143] The CCLA also seeks public interest standing to challenge s. 28.1 of the *PHPPA* as contrary to ss. 7 and 9 of the *Charter*, and to challenge s. 50(1) of the *PHPPA* as contrary to s. 8 of the *Charter*. With respect to this challenge the CCLA is on its own, as Ms. Taylor was not directly impacted by either of these provisions and, as such, does not challenge their constitutionality.

Does the Challenge Raise a Serious and Justiciable Issue?

[144] In constitutional litigation there is a distinction between "adjudicative facts" and "legislative facts". Adjudicative facts are those which concern the immediate parties and must be proven by admissible evidence. Legislative facts are of a more general nature and are those which establish the background of legislation, including its "social, economic and cultural context" (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at paras. 27-28). Such facts are subject to less stringent admissibility requirements.

[145] Simply stated, the CCLA is denied public interest standing to challenge ss. 28.1 and 50(1) of the *PHPPA* as the challenge is <u>not</u> <u>justiciable</u> on the record before the Court. Except in rare circumstances adjudicative facts matter and here there are no facts.

[146] To date the enforcement measures provided for in s. 28.1 of the *PHPPA* have not been utilized. Rather, those who have been asked to leave the province have done so voluntarily. Indeed, in some instances the province has paid for accommodations, or return transportation[83]. In addition, there is no evidence of the use of the investigative powers in s. 50(1) of the *PHPPA.*

[83] Norman Affidavit, at paras. 9-10.

[147] As such, there are no adjudicative facts upon which to ground a *Charter* challenge to the effect of these provisions. The best we have are hypothetical scenarios of how these powers might, or might not be utilized in the future, and in this case hypotheticals are not helpful.

[148] In the instant case, as with most *Charter* cases, the effect of the legislation upon *Charter* rights is not self-evident. Without a factual basis there is no yardstick against which to measure government conduct in the exercise of the authority granted to the police or inspectors. It follows that there is also no means by which to assess a s. 1 *Charter* response by the Respondents.[84]

[149] The following cases are illustrative of the need for adjudicative facts.

[150] In *Mackay et al. v. Manitoba et al*, [1989] 2 S.C.R. 357, the appellants challenged the constitutionality of certain provisions of the *Elections Finances Act*, S.M. 1982-83-84, c. 45, which provided for payment out of the Consolidated Fund of the province of Manitoba. The payment was to cover a portion of the campaign expenses for those parties and candidates who received more than 10 percent of the votes cast in an electoral division.

[151] The appellants argued that the provision of funding for political parties with taxpayers' dollars constituted a violation of their right to freedom of expression, as guaranteed by s. 2(b) of the *Charter*. The trial judge held there was no infringement and the majority of the Court of Appeal was of the same view. The minority agreed that there was an infringement of s. 2(b) of the *Charter*, which was not saved under s.1.

[152] The appellants expressed two particular concerns. First, that splinter groups such as the Neo-Nazis might qualify for public funding, even though they espoused

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[84] *Charter* rights are not absolute, such that their infringement may on occasion be justified providing the criteria in s. 1 of the *Charter* is met.

values inimical to a democratic society. Second, that the system of funding favoured the three established political parties to the detriment of all others.

[153] Justice Cory, for a unanimous Court, observed that "not one particle" of evidence was put before the Court in support of the appellants' submissions, just unsubstantiated submissions without a factual foundation (at para.12).

[154] With regard to *Charter* decisions generally, Justice Cory stated (at para. 9):

> 9. Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
>
> [emphasis added]

[155] And (at para 20):

> 20. A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the Charter but its effects. If the deleterious effects are not established there can be no Charter violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.
>
> [emphasis added]

[156] Justice Cory lamented that the respondents did not question the status of the appellants to bring the action, and "as a result, this important issue was not considered by the court and for the purpose of this appeal it is assumed that the appellants had the requisite status to bring the action" [emphasis added] (at para. 6).

[157] Nor did the respondent government criticize the complete lack of any evidentiary basis for the appellant's claim. Rather, the respondent took the position that it preferred to "have the case decided on the merits" and not defeated on the "technical" basis that there was no factual foundation for the claim (at para. 6). Justice Cory refused to have any part in the plan, irrespective of the respondent's desire to do so, concluding that the necessity for adjudicative facts is not something that the parties can circumvent by agreement.

[158] In *Danson*, decided a year following *Mackay*, the Supreme Court of Canada again addressed the question of "the appropriateness of seeking constitutional declarations by way of application without alleging facts in support of the relief claimed." (*Danson*, at para. 1). An application was brought by Danson, a barrister and solicitor and member of the Law Society of Upper Canada, challenging a rule which provided for an assessment of costs against solicitors personally, on the grounds that it was outside the authority of the provincial Legislature and violated ss. 7 and 15 of the *Charter*. The application contained no supporting affidavit and no facts were alleged. The question of standing was not an issue, as Danson, a barrister and solicitor, was directly impacted (at least potentially) by the new costs rule.

[159] Justice Sopinka observed, nevertheless, that the Court "has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provision of the *Charter*, particularly where the effects of the impugned legislation are the subject of the attack" (*Danson*, at para. 26). The Justice concluded that it would be impossible for a motions judge to assess the merits of Danson's application without evidence of those effects, by way of adjudicative facts (i.e. actual instances of the use or threatened use of the impugned rules).

[160] In *Bedford v. Canada (Attorney General)*, 2013 SCC 72 three applicants, all current or former prostitutes, brought an application seeking declarations that certain provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 purporting to govern how prostitution is carried out are unconstitutional. The provisions concerned bawdry houses, living off the avails of another's prostitution and communicating for the purpose of prostitution. In concluding that the impugned laws deprived prostitutes of security of the person, the Supreme Court paid due deference to the trial judge's

finding on not only the adjudicative facts, but the social and legislative facts as well. The evidence called in that case was substantial. As the Supreme Court observed (at para. 54):

> 54. The application judge arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records.

[161] In *Downtown Eastside* the respondents provided a "concrete factual background", which included affidavits from "more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver" (at para. 74). The respondents were further supported by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside, which "conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees" (*Downtown Eastside*, at para. 74).

[162] In support of its advocacy as a public interest litigant the CCLA proffered the recent decision of the Ontario Court of Appeal in *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243. The CCLA successfully challenged those provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 which authorized administrative segregation, as infringing the *Charter* prohibition against cruel and unusual punishment. Further, it did so as the sole public interest litigant. However, in that case the challenge was supported by a robust evidentiary record; which included photographic evidence of the small prison cell in question, affidavit evidence regarding the horrific effects of administrative segregation, expert testimony from a professor of human rights law, and evidence from a professor of sociology and a psychologist.

[163] By way of contrast, in the case before me there is not a scintilla of evidence in support of the assertion that the deleterious effects of ss. 28.1 and 50(1) of the *PHPPA* are such as to violate the *Charter*.

[164] In response, the CCLA relies upon the comments of Chief Justice McLachlin, in *R. v. Nur*, 2015 SCC 15 as conclusive of its position. *Nur* involved the question of whether mandatory minimum sentences for various firearms offences violated s. 12 of the *Charter*. Nur accepted that his rights were not infringed, but argued that it was reasonably foreseeable that the application of the law on other hypothetical offenders might violate the s. 12 *Charter* prohibition against "cruel and unusual punishment."

[165] Chief Justice McLachlin agreed, concluding that to limit consideration to the offender runs contrary to the jurisprudence of the Court relating to *Charter* review generally and to s. 12 of the *Charter* in particular.

[166] The Chief Justice wrote (at para. 51):

> 51. … If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M.* at p. 313. This reflects the principle that the constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.

[167] With regard to mandatory minimum sentences Chief Justice McLachlin stated (at para. 63):

> 63. Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable — it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

[168] *Nur* concerned the constitutionality of mandatory minimum sentences for, in that case, certain firearms offences. Upon satisfying the elements of the offence the minimum penalty was prescribed. So as to avoid a piecemeal approach to the *Charter* and prevent the sword of Damocles from hanging over the head of those facing charges in the future, the Court devised the test of reasonably foreseeable applications of the law.

[169] I do not regard the remarks of the Chief Justice as standing for the proposition that in *Charter* cases adjudicative facts no longer matter and such cases may henceforth be decided based on a series of hypotheticals. *Nur* considered the test for the constitutionality of a mandatory minimum sentence and must be considered in that context. In that circumstance the deleterious effect of the statutory language is known, namely the minimum sentence to be imposed. What remained for the Court was a consideration of those circumstances where it might be called into service.

[170] That said, I accept that there are occasions like that in *Nur*, when the effect of the legislation is known and adjudicative facts are not necessary. However, such cases are exceptional.

[171] In *Danson*, Justice Sopinka acknowledged that there may be rare cases where the question of constitutionality will present as a simple question of law alone. In so doing, Justice Sopinka referred to the hypothetical example offered by Beetz, J. in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, of a law purporting to impose the beliefs of a state religion. Justice Sopinka observed that the constitutional purpose of this hypothetical law would be obvious on its face and would require no extrinsic evidence to flesh it out (at para. 32).

> 32. The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred. …

[172] As a further example, consider a hypothetical law in which a person receives a mandatory life sentence for spitting on the sidewalk (see *Bedford*, at para. 120). Such a law would undoubtedly attract *Charter* scrutiny without the necessity of adjudicative facts, as the unconstitutional effect (i.e. life sentence) of the law is apparent from its face. Such cases are rare, however, and this is not one of that character.

[173] The CCLA also argues that the immediate question is whether it should be granted standing. We are not here addressing an adjudication on the merits, and standing should therefore be decided prior to and separate from a consideration of whether a factual foundation is lacking.

[174] In responding to this argument I am mindful that the Court should not take a deep dive into the merits. As Justice Cromwell stated in *Downtown Eastside*, in deciding the question of standing "courts should not examine the merits of the case in other than a preliminary manner" (at para. 42). In the present case, however, a deep dive is not necessary, as we clearly find ourselves swimming in the shallow end of the pool. The Court is not engaged in the weighing of evidence, simply because there is no evidence. A preliminary examination is all that is called for.

[175] Consider, for example, the proposed challenge to s. 50(1) of the *PHPPA* on the ground that it violates the s. 8 *Charter* prohibition against "unreasonable search or seizure."

[176] In order to invoke s. 8 the CCLA must first establish on the balance of probabilities a reasonable expectation to privacy in the thing that was searched. Whether the state action has interfered with a reasonable expectation of privacy is to be determined based on the totality of the circumstances (*R. v. Edwards*, [1996] 1 S.C.R. 128). Factors which merit consideration may include "the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation" (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 31).

[177] The CCLA acknowledges that whether or not a person has a right to privacy in the premises, as defined, "may well be debatable depending on the circumstances"[85]. However, this requirement is dwarfed by the "obvious conclusion" that there was a privacy interest in the subject matter of the search. Section 50(1) of the *PHPPA* includes materials fitting with "the biographical core of personal information" as referenced by Chief Justice McLachlin in *R. v. Marakah*, 2017 SCC 59.

[178] With respect, this conclusion is anything but "obvious", depending on the circumstances. Even accepting as a starting point that some of the type of testing contemplated in s. 50(1) engages the privacy of the person, there remains the question of whether the search is reasonable. The onus is on the Crown, but without a factual matrix how does it do so effectively. What search? What seizure?

[179] Section 50(1) gives inspectors the power to search, but what are the factual circumstances against which this power is to be measured in this case? The question is rhetorical, for there are none. Without such, the Court is left to shoot at a moving target, limited only by the imagination of counsel. Furthermore, the party accused of the *Charter* infringing conduct, the Respondents in this instance, are entitled to know the case they must meet in both responding to the challenge and in deciding whether or not to invoke the *Charter* s. 1 saving provision.

[180] Turning briefly to the CCLA's proposed challenge to s. 28.1 of the *PHPPA*, as contrary to s. 7 of the *Charter*.

[181] The onus is on the CCLA to establish that s. 28.1 operates to deprive liberty and security of the person guaranteed by s.7 of the *Charter* and that such deprivation is not consistent with the principles of fundamental justice.

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[85] Second Applicant's Brief, at p. 35.

[182] The approach to this question is individualistic, and the analysis is qualitative, not quantitative, such that the question under s. 7 is whether "*anyone's* life, liberty or security of the person has been denied by a law that is inherently bad". A grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7 (*Bedford*, at para. 123).

[183] Therefore, the threshold question is whether the impugned provision deprives an individual of liberty and/or security of the person. If it does, the remaining question is whether the deprivation is in accordance with the principles of fundamental justice. There is no evidence before the Court, however, of the unconstitutional effect on a single person, just possibilities.

[184] Turning next to the CCLA's proposed challenge to s. 28.1 of the *PHPPA* on the grounds of arbitrary detention or imprisonment, contrary to s. 9 of the *Charter*.

[185] Detention is a term that covers a broad range of encounters between the police and citizens, but *Charter* rights are not engaged by delays that involve no "significant physical or psychological restraint"(*R. v. Mann*, 2004 SCC 52, at para. 19).

[186] We start with a recognition that an investigative detention is not such as to engage the *Charter* in the first place. However, accepting that s. 28.1 of the *PHPPA* authorizes the police to detain persons, within the meaning of detention in s. 9 of the *Charter* (see *Mann*), to date there is no evidence of a detention ever having occurred.

[187] Furthermore, a violation of s. 9 requires more than a detention. The detention must be authorized by law and be neither unreasonable nor arbitrary (*R. v Grant*, 2009 SCC 32). That a detention is authorized by law is apparent from a reading of s. 28.1, but in the absence of a factual foundation how is it to be determined that a given exercise of that authority is either unreasonable or arbitrary. Again, the Court is left to speculate on events that may, or may not, come to pass.

[188] Section 28.1 of the *PHPPA* is an empowering provision and the police in the exercise of that power may or may not run afoul of the *Charter*. The devil in the details, depending on the factual matrix in each case.

[189] In *Canadian Council of Churches* the Council sought the validity of the amended *Immigration Act 1976*, S.C. 1976-77, c.52, as am. by S.C. 1988, c. 35 and 36 as contrary to the *Charter*. Justice Cory observed that the "issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge" (at para. 38). While some aspects of the Statement of Claim raised a serious issue as to the validity of the legislation, some allegations were so hypothetical in nature "that it would be impossible for any court to make a determination with regard to them" (at para. 38). In contrast, refugee claimants were bringing forward claims akin to those bought by the Council on a daily basis, where "each case presented a clear concrete factual background upon which the decision of the court could be based" (at para. 40).

[190] The case *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 1998 CarswellOnt 2808, 111 O.A.C. 51 is instructive and in keeping with the caution of Justice Cromwell, to the effect that a preliminary examination of the merits is all that is called for in deciding whether or not to grant standing (*Downtown Eastside*, at para. 42).

[191] In *Canadian Civil Liberties* the Association brought an application for a declaration that certain provisions of the *Canadian Security Intelligence Services Act*, R.S.C. 1985, c. C-23 (CSIS) were contrary to ss. 2(b) to 2(d), 7 and 8 of the *Charter*. The motions judge granted public interest standing on the basis that the challenge was a serious issue to advocacy groups and citizens at large and there was no better way for the issues to be litigated. The trial judge then proceeded to dismiss the challenge on its merits. The Association appealed and the Attorney General cross-appealed on the issue of the Association's standing.

[192] At issue was the adequacy of the factual record (the adjudicative facts) grounding the Association's challenge and whether this was relevant to a

consideration of standing, or was a matter left to be decided after standing had been adjudicated.

[193] A majority of the Court quoted with approval from the Supreme Court of Canada's decisions in *Mackay*, *Danson* and *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, in support of the proposition that *Charter* decisions should not and must not be made in a factual vacuum. In *Hy & Zel's Inc.*, Justice Major, writing for the majority, observed that the applicants "presented almost no original evidence in support of that claim" (at 692).

[194] Justice Charron observed that the issue of public interest standing was not in issue in either *Mackay* or *Danson*, as in both cases the claimants alleged that their own rights were violated.

[195] However, when it comes to public interest litigants Justice Charron concluded (at paras. 28-29):

> 28. I would agree with L'Heureux-Dubé J. that the issue of sufficiency of the evidence is entirely separate from the question of standing for those litigants who have a cause of action under the traditional rules, a situation which she was of the view existed in *Hy & Zel's*. These litigants have standing as of right. They do not depend on a discretionary grant of standing to pursue their claim. Any screening of unmeritorious claims which may be made under the rules of procedure on the ground of a lack of a proper evidentiary basis will not likely be related to any issue of standing.
>
> 29. However, where a litigant does not have a cause of action under the traditional rules and requires a discretionary grant of public interest standing to pursue its claim, the concerns identified above have to be addressed and these concerns, as held by the majority in *Hy & Zel's*, include a consideration of the sufficiency of the evidence. More will be said later on what constitutes a sufficient evidentiary basis for this purpose.

[196] While there was an evidentiary record in *Canadian Civil Liberties*, Justice Charron concluded that it was not such as to raise a justiciable issue, and that the standing of the Association ought to have been denied.

[197] In her dissent, Justice Abella would have granted the Association standing, as in her view the information contained in its supporting affidavits raised "serious questions" about the constitutionality of the impugned provisions of the *CSIS Act*.

[198] For Justice Abella the issue was not whether a factual context was necessary, but the adequacy of that context based on the evidence presented. She stated (at para. 98):

> 98. It would be a significant diminution of access to public interest standing to so merge the question of standing and the merits, that a preliminary conclusion about the merits determines whether the case should be heard at all. There must certainly be enough evidence to justify the conclusion that the issue is an arguable one and serious enough to warrant judicial scrutiny (*Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (Ont. C.A.)). But I would resist an approach that appears to require that there should be enough evidence to demonstrate the likelihood of success.
>
> [emphasis added]

[199] Both the majority and dissenting judgments in *Canadian Civil Liberties* thus support the position adopted in this case, to the effect that the absence of a factual record is relevant and potentially fatal to the question of standing.

Does the CCLA Have a Real Stake or Genuine Interest in the Outcome?

[200] My findings, above, with respect to the CCLA apply with equal force to its proposed challenge to ss. 28.1 and 50(1) of the *PHPPA*, and I would not deny it standing on the grounds of not having a genuine interest in the issues raised.

Is the Action by the CCLA a Reasonable and Effective way to bring the Matter before the Court?

[201] I observe that the necessity for a factual foundation is a common theme in whether the action is a reasonable and effective way of bringing the matter before the Court.

[202] In assessing whether a particular means of bringing a matter to court is "reasonable and effective" the Court is to take a purposive and flexible approach in determining whether the proposed action is an economical use of judicial resources, whether permitting the action to proceed will uphold the principle of legality and "whether the issues are presented in a context suitable for judicial determination in an adversarial setting" (*Downtown Eastside*, at para. 50).

[203] In assessing the CCLA's capacity to bring forward the claim the Court should examine, amongst other things, the CCLA's resources, expertise "and whether the issue will be presented in a sufficient concrete and well developed factual setting" (*Downtown Eastside*, at para. 51).

[204] The CCLA argues that it is an economical use of judicial resources to challenge the enforcement provisions without waiting for individual rights to be impacted. According to the CCLA it is "unrealistic" to expect a single individual to mount a challenge of this nature on their own.

[205] This is essentially a rehash of its argument on whether the challenge is serious and justiciable. Further, it is not clear to me why such a challenge is "unrealistic". The *Charter* jurisprudence is replete with examples of individuals who have sought recourse to the Courts for a breach of their *Charter* rights, real or perceived. The within proceeding by Ms. Taylor is a case in point.

[206] In assessing the potential impact on the proceedings on the rights of others not before the court, Justice Cromwell quoted with approval from the court's earlier

ruling in *Danson*, for the proposition that the court should consider whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints" [emphasis added] (*Downtown Eastside*, at para. 51).

[207] Furthermore, Justice Cromwell observed that while an accused in a criminal case will always be able to raise a constitutional argument, this does not necessarily mean that such a challenge is a more reasonable and effective way to bring the issue to court. "The case of *R.* v. *Blais*, 2008 BCCA 389 illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support" (*Downtown Eastside*, at para. 69). In the result the court dismissed the constitutional claim without examining it in detail.

[208] In considering whether there was another more effective means of bringing the mater before the Court, Justice Charron in *Canadian Civil Liberties* stated (at para. 91):

> 91. Further, the scant evidentiary basis in this case raises other concerns referred to by L'Heureux-Dubé J. in *Hy & Zel's*. A comparison of the factual basis in *Atwal* with the scant adjudicative facts alleged in this case confirms that better use can usually be made of the judicial process to decide live issues between parties as opposed to hypothetical ones. In *Atwal*, CSIS involvement was clearly established. An actual warrant had been obtained and executed pursuant to the Act. Clearly, the impugned provisions of the Act were engaged. In this case, a mere suspicion was raised that CSIS was involved. Many facts would have to be presumed before an intelligible debate on the constitutionality of the section could be engaged in. The scant evidentiary basis does not allow the issues to be fully canvassed.
>
> [emphasis added]

Conclusion Regarding Sections 28.1 and 50(1) of the *PHPPA*

[209] The fact the challenge to the enforcement and investigative provisions is not justiciable on the record before me is fatal to the CCLA's request for standing.

[210] That said, were I incorrect in this conclusion, I would nevertheless conclude, weighing the factors in *Downtown Eastside*, that the challenge does not present as a reasonable and effective way of bringing the matter to court.

## Is SECTION 28(1)(h) OF THE *PHPPA* WITHIN THE LEGISLATIVE COMPETENCE OF THE PROVINCE?

### Introduction

[211] As s. 28(1)(h) of the *PHPPA* empowered the CMOH to impose the travel restriction, the Applicants challenge starts at this point. The question is whether this provision falls within the legislative authority of the province to enact.

[212] The answer lies in the Canadian *Constitution*[86]. The Applicants argue that s. 28(1)(h) of the *PHPPA* is not valid as it intrudes into federal jurisdiction over interprovincial works and undertakings (s. 92(10)). Alternatively, they say that it falls under federal authority over naturalization and aliens (s. 91(25)), or the federal emergency power to make laws for the peace, order and good government of Canada (s. 91). The Respondents maintain that it is a valid law falling under either provincial authority over property and civil rights (s. 92(13)), or matters of a local and private nature (s. 92(16)).

[213] There is a presumption of constitutionality, such that the Applicants, as the parties challenging s. 28(1)(h), must establish that it does not fall within the legislative authority of the province.

[214] This dispute is resolved by asking two questions. What is s. 28(1)(h) of the *PHPPA* really about, its pith and substance? Having answered this question, into

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[86] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

what head or heads of power under the *Constitution Act, 1867* does it most naturally fall (*Reference re Firearms Act (Canada),* 2000 SCC 31).

[215] For the reasons that follow, I conclude that the purpose of s. 28(1)(h), its pith and substance, is the protection and promotion of the health of those in Newfoundland and Labrador. It is a valid public health measure falling under the province's authority over matters of a local and private nature (s. 92(16)). Alternatively, it is a valid measure falling under the province's authority over property and civil rights (s. 92(13)). Section 28(1)(h) of the *PHPPA* is thus a valid law as falling within the legislative competence of the province.

**The Essential Character of the Law**

[216] We begin our inquiry with an examination of the true meaning, or essential character of s. 28(1)(h). In other words, its core. To answer this question two aspects of the law must be examined: the purpose of the provincial Legislature in enacting s. 28(1)(h) and the legal effect of the law.

[217] The pith and substance analysis is not technical or formalistic (*Ward v. Canada (Attorney General),* 2002 SCC 17, at para. 18). Rather, the approach is more one of interpretation, as the Court considers not only the words used in the impugned legislation, but also the background and circumstances surrounding its enactment (*Ward*, at para. 18).

[218] Therefore, in ascertaining the law's true purpose, resort may be had to both intrinsic evidence, such as the legislation's preamble and purpose clauses, as well as extrinsic evidence, such as the legislative history, parliamentary debates and the like. However, such extrinsic evidence must be relevant and reliable and not assigned undue weight (*Reference re Firearms Act*, at para. 17). Purpose may also be ascertained by identifying the "mischief" of the legislation, the problem the enacting body sought to remedy.

[219] In this case the challenge concerns a particular provision, s. 28(1)(h), which forms part of a larger scheme. While the pith and substance analysis begins with the impugned provision, the subject matter of the provision must be considered in the context of the legislative scheme as a whole *(Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31). Its relationship to that scheme, the *PHPPA* in this instance, may be an important consideration in ascertaining its pith and substance (see *Quebec (Attorney General) v. Canada* (*Attorney General*), 2015 SCC 14).

[220] Determining the legal effects of the law involves considering how it will operate and how it will affect (impact the legal rights of) Canadians (*Reference re Firearms Act*, para. 18). Whether or not the law will achieve its intended purpose, its efficaciousness, is not relevant to the division of powers analysis. Legislation cannot be challenged by proposing an alternate, allegedly better way of achieving its objective (*Ward*, at para. 276). Rather, how the law sets out to achieve its purpose enables the Court to better understand its "total meaning" (*Reference re Firearms* Act, at para. 18).

[221] The effect of the law can be of assistance in revealing whether the law is "colourable". In other words, whether facially it appears to address something within the legislature's jurisdiction, but in substance reaches beyond that jurisdiction (*Ward*, at para. 17).

The Purpose of Section 28(1)(h) of the *PHPPA*

[222] The *PHPPA* provides a mechanism for the declaration of a "public health emergency", defined as "an occurrence or imminent threat" that presents a "serious risk to the health of the population" from, amongst other things, "a communicable disease" (*PHPPA*, s. 2(y).)

[223] Two requirements must be met before the Minister may, upon the advice of the CMOH, declare a public health emergency. The Minister must be satisfied that the emergency meets the definition of a public health emergency, and the emergency

must be such that it cannot be sufficiently mitigated or remedied without the implementation of the special measures available under s. 28 of the *PHPPA*.

[224] It is beyond question that the COVID-19 pandemic qualifies as a public health emergency. It is a novel communicable disease with no known cure, effective treatment or vaccine, that can, and often does, cause severe illness or death.

[225] In responding to such an emergency the CMOH has been given a pivotal role, without the requirement for further legislative oversight. This role is in keeping with the independence, impartiality and qualifications of the CMOH and the powers and duties of that office.

[226] By its very nature a public health emergency calls for a swift response by those entrusted and qualified to react, in an independent and impartial manner without political intervention. As the member for Conception Bay East-Bell Island explained during the legislative debate on the *PHPPA*:

> Again, we're talking on a global issue and a global perspective in Newfoundland and Labrador to be able to react in a very expedient manner to protect our society before it gets to a point where there's an outbreak of something that's devastating, and we've known we've had it.[87]

[227] The declaration of a public health emergency sets the stage for such a response and the powers vested in the CMOH to impose special measures are thereby unleashed. Such measures are "for the purpose of protecting the health of the population and preventing, remedying or mitigating the effects of the public health emergency" (*PHPPA*, s. 28(1)). The powers are broad, too broad the Applicants argue in the case of s. 28(1)(h), but the purpose is clear, the protection and promotion of the health of the population.

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[87] House of Assembly Proceedings, November 20, 2018, Vol. XLVIII No. 44 at p. 2624, Second Applicant's Brief, Volume 1, Tab 1.

[228] These powers, which are to be exercised only in the case of a public health emergency, are in alignment with the overall purpose of the *PHPPA*. Section 5 bears repeating. It reads:

> 5. The purpose of this Act is to
>
> (a) promote the health and well-being of individuals and communities;
>
> (b) protect individuals and communities from risks to the health of the population;
>
> (c) prevent disease, injury and disability;
>
> (d) provide a healthy environment for individuals and communities;
>
> (e) provide measures for the early detection and management of risks to the health of the population, including monitoring of a disease or health condition of significance;
>
> (f) improve the health of the population and of vulnerable groups; and
>
> (g) promote health equity within the population by addressing the social determinants of health.

[229] During the introduction of the *PHPPA* in the legislature the Minister had the following to say with regard to this legislation and s. 28(1)(h) in particular:

> I think we recently remembered in this House, during the commemoration and honouring of those who served in the First World War, what gets forgotten is in the immediate aftermath of all those soldiers coming home, the Spanish Flu of 1918 and ’19 infected half a billion people worldwide; 500 million people. At the time, the population of the planet was maybe a fifth of what it is today. It had an appalling effect on our population, and it wiped out Indigenous communities in Okak and Hebron, up in the Big Land.
>
> So large-scale, public pandemics, health emergencies still need to be recognized, and Part VI of the bill does this. It talks about public health emergencies, and these are situations where extraordinary or unusual measures are required. It’s time limited, it’s subject to legislative mandatory review. There is an extension period possible, and these powers really give the chief medical officer of health considerable scope in acting promptly to protect populations.

> We can, under this legislation, under the regulations, we could authorize voluntary mass immunization programs as a priority. We can divert resources to do that. We could establish lists of individuals, or classes of individuals, to be given priority for immunization. For example, health care providers, or for drugs or medical supplies and equipment. We could make orders restricting travel. We can do some of this already under older legislation, but, again, it's not done in a way that's constitutionally sound.[88]

[230] Communicable diseases such as COVID-19 are precisely that, communicable. They do not respect borders, provincial or otherwise. Unlike a local health emergency such as that posed by a tainted water supply, for example, the threat posed by COVID-19 is global in scope.

[231] In the words of the Minister, "We are living in a world with SARS and Ebola" where you are "one plane flight away from a significant health problem and we need legislation that can adapt and deal with that."[89]

[232] It is in recognition of this reality that the CMOH has the authority to restrict travel. The purpose of this provision is the protection of the health of those in Newfoundland and Labrador. It is one of a number of tools in the arsenal of the CMOH directed to this end.

The Legal Effect of Section 28(1)(h) of the *PHPPA*

[233] What of the effect of s. 28(1)(h), its impact on the legal rights of those wishing to travel to the province? In the case of Ms. Taylor the immediate impact is clear.

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[88] House of Assembly Proceedings, 20 November 2018, Vol. XLVIII No. 44, at p. 2620, Second Applicant's Brief, Vol. 1, Tab 1.

[89] *Ibid*, at p. 2,616.

The travel restriction issued under the authority of s. 28(1)(h) had the effect of denying Ms. Taylor access to the province (at least initially) for her mother's funeral.

[234] Facially, the effect of s. 28(1)(h) appears obvious, as merely a restatement of the language used. It gives the CMOH the authority to restrict or deny entirely the ability of persons to enter Newfoundland and Labrador.

[235] Scratch just below the surface, however, and it is apparent that the roots of s. 28(1)(h) run deeper. Its broader effect includes a reduction in the spread of communicable diseases, in this case COVID-19. Viewed from this perspective, the effect of s. 28(1)(h) reaches well beyond those immediately impacted, such as Ms. Taylor, to include all others in the province who might otherwise run afoul of the virus.

[236] The Supreme Court of Canada decision in *Ward* provides a useful comparator. In *Ward*, the Court addressed whether a federal regulation prohibiting the sale of young hooded and harp seals fell under the federal authority to legislate in relation to the sea coast and inland fisheries (or criminal law), or whether it fell under provincial power over property and civil rights.

[237] On its face a regulation prohibiting sale is suggestive of a provincial head of power over property. However, the analysis did not end at that point. The Court sought out the purpose of the regulation, its effect and how it fit within the regulatory scheme as a whole. The question being not whether the regulations prohibit the sale, but why it is prohibited (*Ward*, at para. 19). Following a review of the regulations as a whole, and the legislative history, the Court concluded that the "mischief" Parliament sought to remedy was the large scale commercial hunting of whitecoats and bluebacks, in order to preserve the economic viability of the fishery in general. Parliament's objective in the prohibition on sale was the elimination of the commercial hunting of these mammals (*Ward*, at para. 24.)

[238] With regard to the effect of the regulation in *Ward*, to argue that because it prohibited sale it must in pith and substance be concerned with the regulation of sale,

was to confuse the purpose of the regulation with the means used to carry out that purpose (*Ward*, at para. 25).

[239] On its surface, s. 28(1)(h) of the *PHPPA* empowers the CMOH to restrict interprovincial travel, just as in *Ward* the impugned regulation might be seen as a prohibition on sale. The question, however, is not whether s. 28(1)(h) restricts travel, but why does it do so?

[240] As was the case in *Ward*, to say that because s. 28(1)(h) restricts travel it must be pith and substance concerned with the regulation of travel, is to confuse the purpose of s. 28(1)(h) with the means to carry out that purpose. At its core, s. 28(1)(h) is directed toward the health of those in the province. The "mischief" the legislature sought to address by empowering the CMOH to restrict travel included the spread of a communicable disease. In this sense the effect of s. 28(1)(h) is felt well beyond those directly impacted by the travel restriction, such as Ms. Taylor.

[241] For the foregoing reasons, I thus conclude that the purpose of s. 28(1)(h) of the *PHPPA*, its pith and substance, is the protection and promotion of the health of those in Newfoundland and Labrador. At its core it is a public health measure.

**The Applicant's Submission**

*Interprovincial Undertakings*

[242] It follows that the Applicants' argument that the purpose of s. 28(1)(h) is to restrict interprovincial travel, thus intruding into federal authority over interprovincial works and undertakings must be rejected.

[243] Federal authority in this area is grounded in the exclusion of interprovincial works and undertakings from provincial power over works and undertakings within the province under s. 92(10) of the *Constitution Act, 1867*.[90]

[244] "Works" are the physical infrastructure in support of transport; ships, railways, and in a more modern context, planes. An "undertaking" is not a physical thing, but an arrangement under which physical things are used. "It is the business *performing* the interprovincial operations (i.e. the interprovincial transportation) that is subject to federal jurisdiction" (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, at para. 80).

[245] Section 28(1)(h) empowers the CMOH to restrict the entry of individuals into the province. It does not purport to govern the physical infrastructure in support of interprovincial travel. Nor does s. 28(1)(h) empower the CMOH to regulate the business of interprovincial travel activities. The CMOH cannot prohibit a ferry from docking, or a plane from landing.

[246] However, it does not follow that the operation of s. 28(1)(h) cannot have some effect on the business of interprovincial transportation. It is true that the CMOH cannot stop a plane from landing, but an empty passenger jet is unlikely to take off in the first place. I would therefore conclude that there is at least the potential for an impact on federal undertakings, in the limited sense that less travel may translate into a reduced demand for the service.

[247] However, any such effect is incidental to the purpose of s. 28(1)(h), which is directed to public health, not interprovincial travel. Such an effect does not change the essential character of s. 28(1)(h).

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[90] The exceptions from provincial authority fall within federal power by virtue of s. 91(29), which includes under federal power those classes of subjects expressly exempt from provincial authority.

[248] That laws mainly in relation to the jurisdiction of one level of government may overflow into, or have 'incidental effects' upon the jurisdiction of the other level of government, is clear (*Reference re Firearms Act*, at para. 26). An incidental effect is one that may be of significant practical importance, but is collateral and secondary to the purpose of the law (see *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 28).

[249] The recent Supreme Court of Canada decision in *R. v. Comeau*, 2018 SCC 15 is illustrative of this point.

[250] In *Comeau*, the Court addressed s. 121 of the *Constitution Act*, *1867* in the context of a New Brunswick law restricting the quantity of liquor that could be brought into the province from another province. Section 121 provides that:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

[251] Mr. Comeau was arrested after returning to New Brunswick from Quebec with a quantity of alcohol in excess of that permitted by s. 134(b) of the *New Brunswick Liquor Control Act*, R.S.W.B. 1973, c. L-10. He argued that by virtue of s. 121, the restriction was outside the authority of the New Brunswick legislature.

[252] After applying a purposive approach to s. 121, the Court concluded that it served to prohibit laws that in essence and purpose restrict trade across provincial boundaries. On the other hand, laws that are part of a broader scheme not aimed at impeding trade, and as a result have only an incidental effect of restricting trade across provincial boundaries, do not offend s. 121. This is because the purpose of such laws is to support the relevant scheme and not to restrict interprovincial trade (*Comeau*, at para. 106).

[253] The Court held that (at para. 112):

> Stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, but some other purpose. Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121.
>
> [emphasis added]

[254] We are obviously not here concerned with the importation of liquor. However, like the New Brunswick legislation, s. 28(1)(h) of the *PHPPA* is a law restricting travel for the "primary purpose of protecting the health and welfare of the people of the province" (*Comeau*, at para. 112).

[255] The within case may also be distinguished from the decision of the Judicial Committee of the Privy Council in *Ontario (Attorney General) v. Winner*, 1954 CarswellNB 40, [1954] 2 W.L.R. 418 (P.C.), as relied upon by the Applicants.

[256] Mr. Winner, who resided in the United States, was in the business of operating motor buses for the carriage of passengers and goods from Boston, through the State of Maine and New Brunswick, to Glace Bay in Nova Scotia. He was granted a license for this purpose by the New Brunswick Motor Carrier Board, but in accordance with its terms was prohibited from taking up or setting down passengers within New Brunswick while on route to Nova Scotia. Mr. Winner challenged this restriction as being outside the authority of the province of New Brunswick.

[257] In striking down the law the Privy Council observed that the restriction did not apply to all persons, but was a "particular provision aimed at preventing Mr. Winner from competing with local transport companies in New Brunswick" (at para. 43). The impact of the law on Mr. Winner's interprovincial undertaking was therefore not incidental to its purpose. Rather, the pith and substance of the *Regulation* amounted to an interference with an undertaking connecting province and province, and, as such, was outside the authority of the province of New Brunswick (at para. 47).

[258] Nor does s. 28(1)(h) of the *PHPPA* intrude on federal authority over citizenship, as found the federal head of power over naturalization and aliens[91].

[259] In *Union Colliery Co. of British Columbia v. Bryden*, 1899 CarswellBC13, [1899] A.C. 580 (P.C.), the Judicial Committee of the Privy Council addressed the validity of a British Columbia regulation which prohibited those of Chinese descent from being employed in mines. The pith and substance of the regulation consisted in establishing a statutory prohibition which affected aliens or naturalized subjects and therefore entrenched on federal jurisdiction in that area.

[260] Unlike the circumstance in *Bryden*, s. 28(1)(h) of the *PHPPA* does not single out a class of persons, whether they be Canadian citizens, permanent residents or otherwise. It is a restriction on travel without regard to status and does not in its pith and substance purport to regulate that status, or for that matter any rights inherent in that status.

**Does Section 28(1)(h) Relate to an Enumerated Head of Power Granted to the Province by the *Constitution Act, 1867***

[261] Having determined that the pith and substance of s. 28(1)(h) is public health, the next step is to determine whether it most naturally falls within the legislature of the province, or the federal Parliament. At this point an examination of the heads of power under ss. 91 and 92 of the *Constitution Act, 1867* is required.

[262] The division of powers in the *Constitution Act, 1867* has been described as the "bedrock" of our federal system. Local diversity is preserved within a federal nation by conferring broad powers on provincial legislatures, while at the same time reserving for Parliament powers best exercised for the benefit of the country as a

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[91] s. 91(25) of the *Constitution Act, 1867*.

whole. This balance of power is such as to foster cooperation among governments and legislatures for the common good (*Consolidated Fastfrate Inc.*, at para. 29).

[263] In comparing the scope of federal and provincial powers, the *Constitution* must be interpreted flexibly over time to meet new social, political and historical realities (*Ward*, at para. 30). In addition, the principle of federalism must be respected, wherein power is shared between two orders of government. "A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government …" (*Reference re Firearms Act*, at para. 48). At the same time one level of government cannot usurp the functions of the other.

[264] The Canadian *Constitution* assigns some matters exclusively to the federal Parliament and others exclusively to the provincial legislatures. Then there are matters where both levels of government have a role to play, depending on the circumstance. Public health is a case in point.

[265] In express terms the matter of public health is neither attributed exclusively to Parliament, or the provinces. The absence of a specific head of power dealing with health is reflective of the fact that in 1867 the administration of public health was still in a very primitive stage (*Schneider v. British Columbia,* [1982] 2 S.C.R. 112). It is perhaps not surprising, then, that legislation dealing with health matters can be found emanating from both levels of government. Justice Estey, (concurring in the result) observed in *Schneider*, that health is "an amorphous topic, which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question" (*Schneider*, at para. 75).

[266] Rather, the closest we come to an express reference to health in the *Constitution Act, 1867* is ss. 92(7) and 91(11), neither of which captures s. 28(1)(h) of the *PHPPA*.

[267] Section 92(7) supports the physical infrastructure for provincial health care. The province is given jurisdiction over "The Establishment, Maintenance and Management of Hospitals, Asylums, Charities and Eleemosynary Institutes in and for the Province, other than Marine Hospitals."

[268] The Supreme Court of Canada decision in *Fawcett v. Attorney General of Canada*, [1964] S.C.R. 625 is illustrative of the operation of s. 92(7). Provisions of the *Mental Hospitals Act*, R.S.O. 1960, c. 236 which provided for the admission and detention of mentally ill persons were in pith and substance matters falling within the subject matter of s. 92(7), and not in relation to criminal power (at para. 16).

[269] Similarly, in *Reference Re Intoxicated Persons Detention Act*, 1980 CarswellMan 144, [1981] 1 W.W.R. 333, legislation which provided "sanctuary for an intoxicated person until he can care for himself" (at para. 29) fell within Manitoba's s. 92(7) power.

[270] While not the majority view in *Schneider*, Justice Estey would have placed British Columbia's *Heroin Treatment Act*, R.S.B.C. 1979, c. 166 under s. 92(7), as it provided for facilities and other means to treat a patient's addiction (at para. 73).[92]

[271] There is an argument that the management of the COVID-19 pandemic is related to the management of hospitals insofar as "flattening the curve" is directed towards ensuring that hospitals, and intensive care beds, in particular, are not overwhelmed. However, s. 28(1)(h) is not directed towards the physical facilities of health care, as was the case in *Fawcett* and *Reference Re Intoxicated Persons Detention Act*. Further, such an interpretation is to stretch the term "management" beyond its intended scope, when considered in relation to its cohorts "establishment and maintenance."

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[92] Justice Estey would have also grounded the *Heroin Treatment Act* in provincial authority under ss. 92(13) and 92(16) of the *Constitution Act, 1867* (at para. 74).

[272] Section 91(11) gives the federal government exclusive authority in relation to "Quarantine and the Establishment and Maintenance of Marine Hospitals."

[273] The establishment and maintenance of marine hospitals clearly does not encompass s. 28(1)(h) of the *PHPPA*. However, s. 91(11) also gives the federal government exclusive jurisdiction over quarantine. To this end the federal government has passed the *Quarantine Act*, S.C. 2004, c. 20.

[274] The *Quarantine Act* bears the long title "An Act to prevent the introduction and spread of communicable diseases." Pursuant to s. 4 its purpose is "to protect public health by taking comprehensive measures to prevent the introduction and spread of communicable diseases." A communicable disease means "a human disease that is caused by an infectious agent … and poses a risk of significant harm to public health, or a disease listed in the schedule …" (s. 2). COVID-19 coronavirus disease (Maladie à coronavirus COVID-19) is one such disease listed in the Schedule.

[275] The *Quarantine Act* applies to a "traveler", defined as a person, or the operator of a means of transportation (e.g. watercraft, aircraft, train, motor vehicle, trailer, cargo carrier, etc.) who arrives in Canada, or is in the process of departing from Canada (s. 2). In other words, international travel. As it relates to travel across Canada's national border, the *Quarantine Act* contains broad measures to control the spread of communicable disease, including the ability to close the border entirely. I am prepared to take judicial notice of the fact that the federal government has used the emergency power in s. 58 of the *Quarantine Act* in response to the COVID-19 pandemic.

[276] Those entering Newfoundland and Labrador may do so from elsewhere in Canada, or from outside Canada by sea or air. Section 28(1)(h) of the *PHPPA* does not specify the point(s) of origin, but Ms. Taylor sought to travel within Canada across provincial boundaries. As such the *Quarantine Act* is not engaged on the facts before me.

[277] The question of paramountcy therefore does not arise in connection with the federal power over quarantine. The *Quarantine Act* and s. 28(1)(h) of the *PHPPA* can live together and operate concurrently, at least with regard to the regulation of domestic travel, and it is with domestic travel that we are here concerned. On the facts of this case, the two are not operationally incompatible in the sense that compliance with one necessitates a breach of the other. It may well be the case that the *Quarantine Act* displaces s. 28(1)(h) of the *PHPPA* where international travel is concerned, but that is not an issue for me to decide.

[278] Having eliminated provincial control over health care infrastructure, and federal control over quarantine as possible contenders, as it relates to public health the heads of power left competing for attention are the provincial heads of power over property and civil rights, s. 92(13), and matters of a local and private nature, s. 92(16). On the federal side is the emergency power of the federal government to make laws for the peace, order and good government of Canada, in relation to those matters not assigned exclusively to the provinces (s. 91).

[279] As noted, the *Constitution Act, 1867* does not expressly assign public health to either level of government. That said, over 100 years ago, in 1886, the Quebec Court of Appeal in the case of *Rinfret v. Pope*, (1886) 10 L.N. 74, 12 Q.L.R. 303 (Que. C.A.) held that with the exception of federal jurisdiction over quarantine and marine hospitals, all matters of public health fall within the control of the provinces. The constitutional question raised in that case was "whether the legislation respecting the health of the people of Canada, generally, is a subject for local or for federal legislation (*Rinfret*, at p. 74).

[280] In *Rinfret*, the majority of the Court held that the federal *Quarantine and Public Health Act* was outside the authority of the federal government, insofar as it purported to repeal a Quebec law regarding public health.

[281] More recently, in *Schneider* Justice Dickson observed that the absence of a specific head of power for public health was the subject of comment by the Rowell-Sirois Commission (at para. 59):

> 59. The Report of the Royal Commission on Dominion-Provincial Relations (the "Rowell-Sirois Commission") Book II, "Recommendations", in 1940 commented on this absence of a specific head of power dealing with the administration of public health [pp. 32-33]:
>
> > In 1867 the administration of public health was still in a very primitive stage, the assumption being that health was a private matter and state assistance to protect or improve the health of the citizen was highly exceptional and tolerable only in emergencies such as epidemics, or for purposes of ensuring elementary sanitation in urban communities. Such public health activities as the state did undertake were almost wholly a function of local and municipal governments. It is not strange, therefore, that the British North America Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the Dominion, while the province was given jurisdiction over other hospitals, asylums, charities and eleemosynary institutions. But the province was assigned jurisdiction over "generally all matters of a merely local or private nature in the Province", and it is probable that this power was deemed to cover health matters, while the power over "municipal institutions" provided a convenient means for dealing with such matters.
>
> …

[282] Justice Dickson, J. proceeded to conclude (at para. 60):

> 60. This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned: see *Rinfret v. Pope* (1886), 12 Q.L.R. 303, 10 L.N. 74 (Que. C.A.); *Re Bowack,* supra; and *Labatt Breweries of Can. Ltd. v. A.G. Can.*, [1980] 1 S.C.R. 914, 9 B.L.R. 181, 52 C.C.C. (2d) 433, 110 D.L.R. (3d) 594, 30 N.R. 496, per Estey J.

[283] At issue in *Schneider* was British Columbia's *Heroin Treatment Act*. That *Act*, which provided a comprehensive program for the evaluation, treatment and rehabilitation of narcotic dependent persons, including detention and compulsory treatment, was held by the Court to fall within general provincial competence over health matters under s. 92(16). The compulsory aspects of the *Act* were incidental

to its dominant characteristic, being the treatment of narcotic addiction. The legislature was endeavouring to cure a medical condition, not punish a criminal activity (*Schneider*, at para. 63).

[284] The decisions in *Rinfret* and *Schneider* thus lend strong support for the inclusion of s. 28(1)(h) of the *PHPPA* under the province's authority to legislate with respect to matters of a local and private nature (s. 92(16)).

[285] In response, the CCLA accepts that the *PHPPA* is valid provincial legislation aimed at public health, but argues that a travel ban during a pandemic is of national concern. As such, any restriction on interprovincial mobility, even in the context of public health protection, is a matter falling within the "federal heads of power set out in s. 91 of the *Constitution Act, 1867*"[93]. While the CCLA does not specify the federal head of power engaged under s. 91, I interpret this as a suggestion that the federal government might restrict interprovincial travel in the name of public health (subject to the *Charter*), but the province may not do so.

[286] The CCLA points out that in *Schneider* Justice Dickson allowed for a limited federal jurisdiction over health, either ancillary to the express heads of power in s. 91, or the emergency power under peace, order and good government (at para. 60).

[287] I agree that under the right circumstances Parliament may indeed make laws in relation to health for the peace, order and good government of Canada (see *Labatt Breweries v. Canada (Attorney General),* [1980] 1 S.C.R. 914). Such laws may arise where the subject matter of the legislation transcends local or provincial concern or interests and from its inherent nature be of concern to the country as a whole (*Reference re Canada Temperance Act*, [1946] A.C. 193, 1946 CarswellOnt 100 (P.C.). By way of example, an "epidemic of pestilence" may qualify as such a

[93] Brief of the Second Applicant, at para. 58.

menace to the national life of Canada (*Toronto Elec. Commrs. v. Snider,* [1925] 1 W.W.R. 785, 1925 CarswellOnt 80 (P.C.) at p. 795).

[288] Accepting that under the right conditions the federal emergency power under s. 91 might be used in response to a pandemic (an "epidemic of pestilence"), when it comes to COVID-19 there are two problems with the Applicants' argument.

[289] First, the Applicant's position underestimates the complexity of the challenge posed by this disease. At present there is no one size fits all solution for the prevention and control of COVID-19. There is no magic bullet for its eradication.

[290] In the public health response to COVID-19 there is plenty of room for both levels of government. Indeed, for the sake of the common good an effective public health response demands the cooperative participation of each.

[291] To this end, amongst other measures, the federal government has used its emergency quarantine power to limit international travel across Canada's border and to impose restrictions on those who enter.

[292] At the same time, the epidemiology of the disease is different in different areas of the country. Local variations in geography[94], population vulnerability, health care capacity, resources (human and monetary) and COVID-19 prevalence in the jurisdiction, as compared to other jurisdictions, have necessitated localized responses to the control of the virus. The decision of this province to do so by restricting the domestic travel of persons across its border is quintessentially a local response to a local situation. Put another way, the challenge posed by COVID-19 has both a national and local dimension, and the localized dimension does not admit

[94] Point of entry screening is feasible in provinces such as Newfoundland and Labrador where there are limited points of entry. Less so in larger provinces with long borders and multiple access points.

of a national response. In responding to the pandemic the federal government cannot be all things to all people.

[293] The second difficulty with the Applicants' position stems from the fact that the federal government has not attempted to regulate domestic travel. In *Schneider* the conclusion that heroin treatment fell within the authority of the province came with a qualification. The Chief Justice stated (at para. 1):

> 1. … This conclusion must not be taken as excluding the Parliament of Canada from legislating in relation to public health, viewed as directed to protection of the national welfare. …

[294] However, as there was no preclusive or superseding federal legislation, the Chief Justice found it unnecessary to come to a determination whether on the proclamation of a federal law the *Heroin Treatment Act* would become inoperable.

[295] Similarly, in this case whether or not the federal government could exercise its peace, order and good government powers to regulate interprovincial travel of persons in the name of public health, and whether such powers could override the provincial authority to do so, is not for me to decide. The federal government has not attempted to enter the field, leaving it to the provinces and territories to devise their own solutions, in response to local conditions and on the advice of their respective health experts.

Conclusion with Respect to Section 28(1) of the *PHPPA*

[296] For the foregoing reasons, I conclude that s. 28(1)(h) of the *PHPPA* is within the legislative competence of the province. In pith and substance it is a public health measure which falls under provincial authority over matters of a local or private nature under s. 92(16) of the *Constitution Act, 1867*. Any impact on interprovincial undertakings or citizenship is incidental to its main purpose, namely protecting and

promoting the health of the province's population, in this case from the spread of a communicable disease. Section 28(1)(h) of the *PHPPA* is a valid law.

[297] Were I wrong in placing s. 28(1)(h) under the province's s. 92(16) power, I would make room for it under the province's authority over property and civil rights (s. 92(13).

## DID THE TRAVEL RESTRICTION VIOLATE MS. TAYLOR'S RIGHT OF MOBILITY AS GUARANTEED BY SECTION 6 OF THE *CHARTER*?

### Introduction

[298] Section 6 of the *Charter* provides:

> Mobility Rights
>
> 6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in

> that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

[299] Ms. Taylor maintains that by denying her entry into the province her mobility right as guaranteed by s. 6 of the *Charter* was infringed. She further argues that this infringement cannot be justified under s. 1 of the *Charter* as a reasonable limitation of her right. The CCLA picks up the cudgels in support of Ms. Taylor.

[300] The asserted right in question is not the right to earn a livelihood, or take up residence in Newfoundland and Labrador. Ms. Taylor did not seek to travel to this province for either of these reasons. Rather, her request was to attend her mother's funeral. The right thus claimed might be characterized as a simple right of mobility, (a right simpliciter) to travel within Canada.

[301] For the reasons that follow, I conclude that the right to "remain in" Canada, as embodied in s. 6(1) of the *Charter*, includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries.

[302] It follows that Ms. Taylor's s. 6(1) *Charter* right to mobility was infringed when she was denied entry to this province on 8 May 2020, in accordance with the travel restriction. The infringement was fleeting, as eight days later Ms. Taylor was granted an exemption, permitting her to travel.

**Prior Court Decisions Addressing Mobility**

[303] I begin with a review of some of the court decisions to date as it relates to section 6 of the *Charter*.[95] In doing so, I observe at the outset that I am unaware of any decision which squarely addresses the nature of the mobility right claimed by

[95] The list does not purport to be exhaustive, but rather inclusive of those decisions I have found to be of the greatest assistance.

Ms. Taylor. As Justice Estey astutely observed some 36 years ago: "Mobility Rights has a common meaning until one attempts to seek its outer limits" (*Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357, at page 13).

[304] The pre-*Charter* decisions which touch on mobility do so in the context of a division of powers struggle between the federal and provincial levels of government. With this caveat, I consider the decision of the Supreme Court of Canada in *Ontario (Attorney General) v. Winner* 1951 CarswellNB 31, [1951] S.C.R. 887 of relevance, insofar as the commentary of Justice Rand subsequently found favour with the Supreme Court of Canada in its post *Charter* discussion of mobility rights.

[305] Of interest to the right of mobility Justice Rand stated: (at paras. 118-119):

> 118. … a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that attribute of citizenship lies outside of those civil rights committed to the province, and is analogous to the capacity of a Dominion corporation which the province cannot sterilize.
>
> 119. It follows, *a fortiori*, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original provinces sought and obtained disrupted. In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen.

[306] The Judicial Committee of the Privy Council did not subsequently see fit to wade in on Justice Rand's commentary regarding citizenship (*Ontario (Attorney General) v. Winner*, 1954 CarswellNB 40, [1954] 2 W.L.R. 418). As we shall see, however, his words received new life some 38 years later in *Black v. Law Society Alberta*, [1989] 1 S.C.R. 591.

[307] In *Malartic Hygrade Gold Mines Quebec Ltd. c. Quebec*, [1982] C.S. 1146, 1982 CarswellQue 298 (Sup. Ct.) the issue was whether s. 6(2)(b) of the *Charter* guaranteed the right of a member of the bar of Ontario to participate in judicial proceedings in Quebec, without the requisite permit or license from the Quebec bar. With reference to s. 6(2)(b) Chief Justice Deschênes wrote (at paras. 40 and 52):

> 40. The purpose of this provision is undoubtedly to give Canadian citizenship its true meaning and to prevent artificial barriers from being erected between the provinces. …
>
> and
>
> 52. In principle the *Charter* thus intends to ensure interprovincial mobility.

[308] The foregoing passage from *Malartic* found favour with Justice Estey in *Skapinker*, who found it to be "instructive" (at p. 15). The same passage was subsequently quoted with approval by Justice LaForest in *Black* (at para. 51).

[309] At stake in *Skapinker* was the validity of s. 28(c) of the *Law Society Act*, R.S.O. 1980, c. 233, which required that all members of the Ontario bar be Canadian citizens. Mr. Skapinker met all the preconditions of membership except that of citizenship.[96] The case did not engage residency, as Mr. Skapinker was already a resident of Ontario.

[310] At issue was the interrelationship between the *Charter* mobility right to residency in s. 6(2)(a) and the right to earn a livelihood in any province, in s. 6(2)(b). Justice Estey (for a unanimous court) concluded that both provisions relate to the movement into another province and s. 6(2)(b) did not create a "separate and distinct right to work divorced from the mobility provision in which it is found" (at page 16).

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[96] Mr. Skapinker became a Canadian citizen and was admitted to the Ontario bar during the course of the proceedings. The Court nevertheless permitted the matter to proceed as it raised novel and important issues under the *Charter*.

[311] With regard to the heading "Mobility Rights", Justice Estey concluded that as "one step" in the process of constitutional interpretation, at a "minimum" some attempt should be made to discern the intent of the drafters of the document from the language of the heading (at p. 13). While it is difficult to conceive of the heading as of controlling importance, at the same time it is difficult to contemplate a situation where the heading can be summarily rejected. The heading must have a "taint" of relevancy (at p. 14), and "[p]erhaps its relevance is limited to an elimination of a meaning which, in a range of two possible interpretations is out of sympathy with the clear meaning of the heading itself" (at p. 14). Justice Estey stated (at p. 13):

> In a constitutional document relating to personal rights and freedoms, the expression "Mobility Rights" must mean rights of the persons to move about, within and outside the national boundaries. Subsection (1), for example, refers to a citizen's right to leave and return to Canada.

[312] Some five years later s. 6 of the *Charter* again found its way to the Supreme Court of Canada, this time in the case of *Black*. At issue in *Black* were two rules of the Law Society of Alberta. The first rule (Rule 154) prohibited residents of Alberta from entering into a law partnership with non-residents and the second (Rule 75B) prohibited members of the Law Society from participating in dual or multiple partnerships. The mobility question at issue was whether these rules violated the right to pursue the gaining of a livelihood in any province, as guaranteed by s. 6(2)(b) of the *Charter*.[97]

[313] Writing for the majority (Justice McIntyre, dissenting in part) Justice LaForest concluded that both rules violated s. 6(2)(b) of the *Charter*, as their combined effect was to seriously impair the ability of the respondents to maintain a viable association for the purpose of earning a livelihood (at para. 58).

[314] Justice LaForest began his analysis of the scope and effect of s. 6(2)(b) with a brief review of the "protection of interprovincial mobility in Canada" (at para. 33).

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[97] The case also raised, but did not decide, whether freedom of association as guaranteed by s. 2(d) of the *Charter* was violated.

After referencing the central importance of economic integration in what became the *Constitution Act, 1867* and the pre-*Charter* division of powers cases of *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626 and *Manitoba (Attorney General) v. Manitoba Egg & Poultry Assn.*, [1971] S.C.R. 689, the Justice stated (at para. 38):

> 38. Before the enactment of the *Charter*, however, there was no specific constitutional provision guaranteeing personal mobility, but it is fundamental to nationhood and even in the early years of Confederation there is some, if limited, evidence that the courts would, in a proper case, be prepared to characterize certain rights as being fundamental to, and flowing naturally from, a person's status as a Canadian citizen. …
>
> [emphasis added]

[315] Justice LaForest then refers with approval to the passage (referenced above) from Justice Rand in *Winner*, concluding that (at para. 39):

> Rand, J. makes it clear that Canadian citizenship carries with it certain inherent rights, including some form of mobility right. The essential attributes of citizenship including the right to enter and the right to work in a province, he asserted, cannot be denied by provincial legislatures.
>
> [emphasis added]

[316] Justice LaForest next refers to extrinsic evidence in support of the "wave of political and economic" concern regarding barriers to interprovincial economic activity during the drafting of the *Charter*. That the "federal government, in particular, was concerned about the growing fragmentation of the Canadian economic union" (at para. 40), leading the Justice to conclude (at para. 41):

> 41. These economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights under s. 6(2) of the *Charter*. But citizenship and the rights and duties that inhere in it are relevant not only to state concerns for the proper structuring of the economy. It defines the relationship of citizens to their country and the rights that accrue to the citizen in that regard, a factor not lost on Rand J., as is evident from the passage already quoted. This approach is reflected in the language of s. 6 of the *Charter*, which is not expressed in terms of the structural elements of federalism, but in terms of the rights of the citizen and permanent residents of Canada. Citizenship and nationhood are correlatives. Inhering in

> citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries. Under *Charter* disposition, that right is expressly made applicable to citizens and permanent residents alike. Like other individual rights guaranteed by the *Charter*, it must be interpreted generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country.
>
> [emphasis added]

[317] Justice LaForest tells us that a "purposive approach to the *Charter*" dictates a "comprehensive approach to mobility", before concluding that the language of s. 6(2)(b) is clear enough, as permitting a person to pursue a livelihood in a province without being there personally (at para. 62).

[318] Justice LaForest observed that it is "not without interest", given the broad similarities in the federal structure of the two countries, that mobility rights exist under the *United States Constitution* (at para. 43). The American *Constitution* does not have a specific clause dedicated to "mobility rights", yet some of its provisions have been interpreted as protecting those rights. Notably, Art. IV, s. 2(1) of the *United States Constitution*, which provides that "The citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States" (at para. 44). The United States Supreme Court in *Toomer v. Witsell*, 334 U.S. 385 (1948) stated that the purpose of privileges and immunities clause was "to help to fuse into one Nation a collection of independent, sovereign states" (at para. 44). Justice LaForest found it "noteworthy that this aim, as in the case of the *Charter*, was achieved by according rights to the citizen" (at para. 44).

[319] In a similar vein, while not referenced in *Black*, we have the United States Supreme Court ruling in *Shapro, Commissioner of Welfare of Connecticut v. Thompson*, 394 U.S. 618 (1969). At issue were statutory provisions which denied welfare assistance to those who had not lived in the jurisdiction for at least one year before applying. In declaring the impugned provisions unconstitutional, Justice Brennan, for a majority of the Court, observed that while mobility finds no explicit mention in the *United States Constitution*, the Court long ago recognized that as one people with one common country, all citizens of the United States "must have the right to pass and repass through every part of it without interruption" (at page 17).

[320] Next, we have a line of authority emanating from the Supreme Court of Canada which addresses the s. 6(1) right to "remain in" Canada in the context of extradition. The seminal case is that of *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469. Mr. Cotroni, a Canadian citizen, was arrested in Canada under the authority of the *Extradition Act*, R.S.C. 1970, c. E-21 and the Extradition Treaty between Canada and the United States, CTS 1976, on the charge of conspiracy to possess and distribute heroin.

[321] Justice LaForest, for the majority[98], concluded that extradition *prima facie* infringes upon the right to remain in Canada guaranteed by s. 6(1) of the *Charter*. However, extradition "lies at the outer edges of the core values sought to be protected by that provision". The "central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community", rather than extradition (at para. 19).

[322] Justice LaForest proceeded to conclude that the "intimate relation between a citizen and his country" invites a generous interpretation of the *Charter* right, such that "the right to remain in one's country is of such a character that if it is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose" (at para. 16).

[323] In *Cotroni*, Justice Wilson (dissenting, but not on this issue) had the following to say regarding s. 6(1) (at para. 73):

> 73. Applying these guidelines [*Big M Drug Mart*], it is my view that s. 6(1) of the *Charter* was designed to protect a Canadian citizen's freedom of movement in and out of the country according to his own choice. He may come and go as he pleases. He may elect to remain. Although only Canadian citizens can take advantage of s. 6(1) the right protected is not that of Canadian citizenship. Rather, the right protected focuses on the liberty of a Canadian citizen to choose of his own volition whether he would like to enter, remain in or leave Canada. Support for this interpretation is found in

[98] Wilson, J. dissented on whether the violation was saved by s. 1.

> the language of the other subsections of s. 6 and in the heading of s. 6 "Mobility Rights".
>
> [emphasis added]

[324] In the more recent decision of *United States of America v. Sriskandarajah*, 2012 SCC 70, the Supreme Court of Canada reaffirmed its line of cases starting with *Cotroni*, to the effect that extradition constitutes a "marginal limitation" of the s. 6(1) right to remain in Canada and lies at the outer edges of its core values (at para. 9). Flowing from this conclusion, extradition is generally warranted as a reasonable limit of the right to remain in Canada under s. 1 of the *Charter* (at para. 10).

[325] In *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 the Supreme Court of Canada addressed the interrelationship between s. 6(2)(b), the right to pursue a livelihood, and the limitation on that right in s. 6(3)(a). The Court quoted from its previous decisions in *Skapinker* and *Black*, in concluding that the two sections must be read together as defining a single right, rather than one right which is externally "saved" by the other. The discrimination provision in s. 6(3) should be fully integrated into an understanding of the mobility right in s. 6(2)(b)( at para. 54).

[326] In *Canadian Egg Marketing Agency* the Court quoted with approval from its previous ruling in *Black*, followed by this passage (at para. 60):

> 60. Situated in the *Charter*, and closely mirroring the language of international human rights treaties, it seems clear then that s. 6 responds to a concern to ensure one of the conditions for the preservation of the basic dignity of the person. The specific guarantee described in s. 6(2)(*b*) and s. 6(3)(*a*) is mobility in the gaining of a livelihood subject to those laws which do not discriminate on the basis of residence. The mobility guarantee is defined and supported by the notion of equality of treatment, and absence of discrimination on the ground normally related to mobility in the pursuit of a livelihood (i.e. residence). …
>
> …
>
> The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(*b*) and 6(3)(*a*) advance this purpose by

> guaranteeing a measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their livelihood.
>
> [emphasis added]

[327] The Court concluded that s. 6 responds to a concern to ensure "one of the conditions" for preserving the basic dignity of the person. Sections 6(2)(b) and 6(3)(a) of the *Charter* do so by addressing the basic human right to participate in the economy.

[328] The role of Canada's international obligations was to figure prominently a quarter of a century later, when the Supreme Court of Canada again addressed s. 6 of the *Charter*. This time, in the case of *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47. The tone is set in the opening paragraph of *Divitio*, wherein Justice Abella describes the mobility rights protected by section 6 of the *Charter* as "among the most cherished rights of citizenship" (at para. 1).

[329] Divito, a Canadian citizen, was sentenced to 7-1/2 years in prison in the United States for serious drug offences. He applied to serve his sentence in Canada. When the Canadian government refused, he argued an infringement of his mobility rights as guaranteed by s. 6(1) of the *Charter*.

[330] Justice Abella observed that the protection for citizens in s. 6(1), like most modern human rights protections, had its origins in the cataclysmic violations of WW II. Without the ability to enter one's country of citizenship the "right to have rights" is illusionary. "The right of a Canadian citizen to enter and to remain in Canada is therefore a fundamental right associated with citizenship" (*Divito*, at para. 21).

[331] With regard to the interpretive scope of s. 6 Justice Abella wrote (at paras. 22-23):

> 22. Canada's international obligations and the relevant principles of international law are thus instructive in defining the right … In *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 323 Dickson, C.J., dissenting, as describing the template for considering the international legal context as follows:
>
> > The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter's* protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. [p. 349]
>
> 23. More recently, in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 (S.C.C.), McLachlin C.J. and LeBel J. confirmed that, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" (para. 70). This helps frame the interpretive scope of s. 6(1).

[332] The international law inspiration for s. 6(1) of the *Charter* was considered by Justice Abella to be Article 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), as ratified by 167 states, including Canada (*Divito,* at para. 24).

[333] Article 12 of the ICCPR reads:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and

> freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.[99]

[334] As a treaty to which Canada is signatory, the ICCPR provides the minimum level of protection in interpreting mobility rights under the *Charter* (*Divito*, at para. 25).

[335] While not referenced in *Divito*, in a similar vein Article 13 of the *Universal Declaration of Human Rights*, as adopted by the U.N. General Assembly, provides that:

> 1. Everyone has the right to freedom of movement and residence within the borders of each State.
>
> 2. Everyone has the right to leave any country, including his own, and to return to his country.[100]

[336] While the Court in *Divito* was divided on whether Divito's s. 6(1) *Charter* right was violated (the minority concluding that the violation was justified under section 1 of the *Charter*), it was unanimous in the generous interpretation of s. 6(1) in a manner consistent with the broad protection of mobility rights under international law (at para. 55).

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[99] Brief of the Second Applicant, Tab 5, and as quoted by the Court in *Divito*.

[100] Brief of the Second Applicant, Tab 6.

**Analysis of Mobility Rights**

Section 6(1) of the *Charter*

[337] I start from what the Supreme Court of Canada has described as its "primordial direction" that rights under the *Charter* are to be defined generously in light of the interests the *Charter* was designed to protect (*Divito*, at para. 19). In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Justice Dickson summarized the requisite approach, as follows (at paras. 117-118):

> 117. This court has already in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc*, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> 118. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question*, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

[338] In pursuit of the purpose of the mobility right in question reference may thus be had to the character and larger objects of the *Charter*, the language chosen to articulate the right, the historical origins of the right and the purpose of other specific rights and freedoms with which it is associated within the text of the *Charter*. The

interpretation should be generous, rather than legalistic, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it should not overshoot the right or freedom in question.

[339] At this point my conclusion with respect to s. 6(1) of the *Charter* bears repeating. Namely, that the right to remain in Canada as embodied in this provision includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries.

[340] My reasons for interpreting s. 6(1) of the *Charter* in this manner are, as follows.

[341] First, I start with a consideration of the language of s. 6 and the purpose and meaning of the other rights with which the right to "remain in" is associated.

[342] It will be observed that s. 6 provides for two sets of rights. The first, as found in section 6(1), is the right of Canadian citizens to enter, remain in and leave Canada. The second, as found in s. 6(2), is the right of Canadian citizens and permanent residents to move to, live in, and work in any province (*Divito*, at para. 17). Unlike the rights in s. 6(1), the rights in s. 6(2) are subject to the qualifications in ss. 6(3) and 6(4) (*Canadian Egg Marketing Agency*).

[343] The s. 6(1) right is thus comprised of three distinct rights; the right to <u>enter</u> Canada, the right to <u>remain in</u> Canada (the subject of our inquiry) and the right to <u>leave</u> Canada. The right to enter Canada is a right of pure mobility. So too, is the right to leave Canada.

[344] The remaining rights in s. 6(2) have likewise been interpreted as rights of mobility. In *Skapinker*, Justice Estey concluded that both ss. 6(2)(a) and (b) relate to movement into another province and that s. 6(2)(b) did not create a "separate and distinct right to work divorced from the mobility provision in which it is found"(at p. 16). In *Black*, Justice LaForest concluded that the right to earn a livelihood in any

province is not a static right to employment, but rather to travel throughout the country for this purpose.

[345] The rights protected in s. 6 are thus positive rights of mobility. By a positive right, I mean a right of action. The right to choose. The right to travel for livelihood or residence (*Skapinker*, *Black*). The right to come and go from Canada as one pleases (*Cotroni*, at para. 73, *Divito*).

[346] Thus, an interpretation of the right to remain in Canada as embodying a positive right of mobility is consistent with the purpose and meaning of the other rights with which it is associated. Furthermore, such an interpretation is not "out of sympathy" with the heading of s. 6, "Mobility Rights". As Justice Estey stated in *Skapinker* (at para. 28):

> 28. … In a constitutional document relating to personal rights and freedoms, the expression "Mobility Rights" must mean rights of the person to move about, within and outside the national boundaries….
>
> [emphasis added]

[347] Second, if the right to remain in Canada includes a positive right of mobility, what is the nature of that right? How might it be exercised while in Canada? The extradition cases were not called upon to address this question.

[348] If we accept, as we must, that s. 6(1) protects the citizen's choice to remain in Canada (*Controni, Sriskandarajah,*), we must also recognize that such choices are not made in a factual vacuum. The right to remain in Canada must, of necessity, include the right to choose where in Canada one wishes to be from time to time. By the express language of s. 6 our citizens' options are not limited to a part of Canada, or to the province of one's immediate residence, but to all of Canada. We may ask rhetorically, how is the citizen to exercise this right without the ability to traverse provincial and territorial boundaries?

[349] Viewed in this manner the citizen's choice to remain in Canada (i.e., to be in Canada) emerges, like the other rights in s. 6, as a positive right of mobility. The right to travel within Canada.

[350] It is not an answer for this province to say to Ms. Taylor, you still have the right to remain in Canada, just not this part of Canada. If Newfoundland and Labrador is entitled to close its border to Ms. Taylor without attracting *Charter* scrutiny, might other provinces and territories not do the same?

[351] In the context of s. 6(2)(b) LaForest, J. in *Black* stated (at para. 68):

> 68. Denying non-residents access to some fields cannot be condoned, for the purposes of s. 6(2)(b), by the fact that some job positions are still left open to non-residents. The right to pursue this livelihood of choice must remain a viable right and cannot be rendered practically ineffective and essentially illusory by the provinces….
>
> [emphasis added]

[352] We might by analogy apply this logic to Ms. Taylor's right to remain in Canada. The provinces may not render the right "practically ineffective and essentially illusory" by closing their borders.

[353] At the risk of sounding pedantic, if I may be forgiven for proposing this simple analogy. In common parlance, we would regard the right to come and go from one's home, and to remain in it, as surely including the right to wander freely from room to room.

[354] That is not to suggest that the right to remain and the right to travel are synonymous, such that we may substitute "travel" with "remain" in s. 6(1). They are not. Rather, the mobility right, the right to travel across provincial and territorial boundaries, flows from and is a logical consequence of the citizen's choice to remain in Canada.

[355] Third, the foregoing approach to s. 6(1) finds support in the judicial commentary to date regarding mobility and the rights inherent in citizenship.

[356] Canada is a unified federation, not a series of republics. We are one people with one common country. The right to traverse Canada thus gives Canadian citizenship its true meaning and prevents artificial barriers from being erected between the provinces (*Malartic*, at para. 40). In this manner the country may not be "converted into a number of enclaves and the 'union' which the original provinces sought and obtained disrupted." (Rand, J. in *Winner*, at para. 119, as quoted with approval in *Black*).

[357] It is an interpretation of s. 6(1) that recognizes and respects "the intimate relation between a citizen and his country" (*Cotroni*, at para. 16) and recognizes personal mobility as fundamental to nationhood (Black, at para. 38). It recognizes the s. 6(1) right as among the "most cherished rights of citizenship" (*Divito*, at para. 1).

[358] It is an interpretation that defines the relationship of citizens to their country (*Black*, at para. 41) and "embodies a concern for the dignity of the individual" (*Canadian Egg Marketing Agency*, at para. 60).

[359] Fourth, the citizen's freedom of movement across provincial and territorial boundaries is consistent with Canada's international human rights obligations. Such obligations are an important indicia of the full benefits of *Charter* protection (*Divito*).

[360] The *Charter* is presumed to provide protection at least as great as that afforded by the various international human rights documents Canada has ratified. In this regard, the international law aspiration for s. 6(1) of the *Charter* is considered to be Article 12 of the ICCPR (*Divito*, at para. 24).

[361] Article 12(1) of the ICCPR provides:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> [emphasis added]

[362] Article 12(3) of the ICCPR provides that the foregoing right shall not be subject to any restrictions except those which are provided by law and necessary to protect, amongst other things, public health. In the context of the *Charter* this qualifying language finds its expression in the s. 1 limitation on *Charter* rights, a topic which is addressed later in this decision. The possibility that public health measures might be necessary to restrict the liberty of others does not alter the essential character of the "right to liberty of movement" enshrined in Article 12(1).

[363] The foregoing interpretation of s. 6(1) is also consistent with Article 13(1) of the *Universal Declaration of Human Rights* which provides that "everyone has the right to freedom of movement and residence within the borders of each state."

[364] Fifth, and by no means the least important. This is not a circumstance of reading language into s. 6(1), but rather of giving full breadth and scope to the language that exists. A purposive approach to the *Charter* dictates a comprehensive and generous approach to mobility (*Black*, at para. 62). The foregoing interpretation of s. 6(1) is such as to fulfill for Canadian citizens, such as Ms. Taylor, the full benefit of the *Charter's* protection (*Big M Drug Mart*, at para. 118).

[365] The right to "remain in" Canada in s. 6(1) of the *Charter* thus includes the right of Canadian citizens to travel in Canada for lawful purposes across provincial and territorial boundaries. The right is not one of residence or livelihood. As we shall see, these are governed by s. 6(2). But rather the right simpliciter to travel within Canada.

[366] Ms. Taylor was denied this right when her application for an exemption was refused on 8 May 2020. Her right to mobility as guaranteed by s. 6(1) was thereby infringed by the travel restriction.

Section 6(2) of the *Charter*

[367] Turning now to s. 6(2) of the *Charter*. It reads:

> 6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (*a*) to move to and take up residence in any province; and
>
> (*b*) to pursue the gaining of a livelihood in any province.

[368] We have already observed that Ms. Taylor did not wish to travel to this province to take up residence, or pursue a livelihood. However, I am nevertheless urged by the Applicants to interpret s. 6(2)(a) disjunctively so that it embodies not one, but two distinct rights. The first being the right "to move to" any province, which the Applicants would interpret as synonymous with "to travel to" any province, and the second being the right to "take up residence" in any province. Viewed in this manner, Ms. Taylor argues that her s. 6(2)(a) *Charter* right "to move to" this province was infringed when she was denied entry.

[369] With the greatest respect to the Applicants, I am unable to interpret s. 6(2)(a) in this manner, for to do so is to strain its language beyond what even a generous and liberal interpretation of the *Charter* can bear. Accepting that a legalistic approach is to be shunned, at the same time it is important not to overshoot the purpose of the freedom and right in question (*Big M Drug Mart*, at para. 118).

[370] Rather, I interpret the language "to move to" as conjunctive with the taking up residence in any province, such that the right as defined is singular, the right to move to and take up residence.

[371] Does such an interpretation mean that the language "to move to" is superfluous, such that s. 6(2)(a) might simply read as the right to "take up residence" in any province?

[372] I do not think so, for the right is a mobility right, not a static right of residence. I am prepared to take judicial notice of the fact that from time to time Canadians change their place of residence in Canada. That said, this case does not concern what is meant by "residence", as by any reasonable interpretation Ms. Taylor did not wish to come to Newfoundland and Labrador for that purpose.

[373] I would thus interpret the right to move to and take up residence as the right to live anywhere in Canada and to move freely about the country for that purpose, subject to the limitations in s. 6(3).

[374] Viewed from this perspective s. 6(2) does not encompass the right simpliciter of Canadian citizens and permanent residents to travel across provincial and territorial boundaries. As we have seen, that right is reserved for Canadian citizens under s. 6(1) of the *Charter*. Rather, subject to the qualifications in s. 6(3) the mobility rights guaranteed by s. 6(2) are those of residency and employment. The right to move to and live anywhere in Canada and the right to earn a livelihood in any province. Such an interpretation is in keeping with the historical purpose of s. 6(2) which had as its concern the economic integration of the country (*Black*, at paras. 40 and 41).

[375] As Ms. Taylor did not seek to travel to this province to earn a livelihood or take up residence, her right to mobility under s. 6(2) of the *Charter* was not engaged by the travel restriction.

**DID THE TRAVEL RESTRICTION VIOLATE MS. TAYLOR'S RIGHTS UNDER SECTION 7 OF THE *CHARTER*?**

[376] The Applicants argue that by denying Ms. Taylor entry into the province to attend her mother's funeral, her right to liberty as guaranteed by s. 7 of the *Charter* was also infringed, and that the infringement was not in accordance with the principles of fundamental justice. For the reasons that follow, and without wishing to trivialize the importance to Ms. Taylor of the reason for her visit, I conclude that in this case s. 7 of the *Charter* was not engaged by the travel restriction.

[377] Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[378] The Respondents make the argument, convincingly in my view, that s. 7 is not an amalgam of expressed rights under the *Charter*, and where an expressed right exists the Court should reject s. 7 claims as creating parallel rights with different tests and standards.

[379] In this case the expressed right is the right to mobility. Section 6(1) rights, apply to citizens of Canada and s. 6(2) rights to citizens of Canada and permanent residents. Section 7 on the other hand applies to "everyone", interpreted as "every human being who is physically present in Canada and by virtue of such presence amenable to Canadian Law" (*Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, at p. 202).

[380] Furthermore, s. 6 mobility rights are subject to the application of s. 1 of the *Charter* and may be infringed where the infringement can be demonstrably justified in a free and democratic society. Section 7 is subject to the principles of fundamental justice. These principles demand that the law not be arbitrary, overbroad or grossly disproportionate to its object. The inclusion of mobility rights in s. 7 under the guise of a "liberty" right would thus give rise to a new constitutional standard for mobility.

[381] In *R. v. Lloyd*, 2016 SCC 13 the Supreme Court of Canada struck down the one year mandatory minimum jail sentence for certain drug offences as being "grossly disproportionate" and thus in violation of the prohibition against cruel and unusual punishment in s. 12 of the *Charter*.

[382] In response to Lloyd's argument that his *Charter* right to liberty under s. 7 of the *Charter* was also violated, Chief Justice McLachlin observed that the "principles of fundamental justice in s. 7 must be defined in a way that promotes coherence within the *Charter* and conformity to the respective roles of Parliament and the courts" (*Lloyd*, at para. 40).

[383] The present circumstance is not unlike that in *Lloyd*, where the Chief Justice concluded that to invoke the s. 7 right to liberty would give rise to a new constitutional standard lower than s. 12, leading to incoherence in the *Charter*.

[384] Were I wrong in concluding that s. 7 does not apply where mobility rights are expressly provided for in the *Charter*, I would conclude in any event that Ms. Taylor's liberty interest was not engaged on the facts of this case. With the greatest respect to Ms. Taylor, and while not discounting the importance to her of attending her mother's funeral, her decision to do so does not rise to the level of a "fundamental personal choice", as defined in the case law, so as to attract constitutional protection.

[385] Underlying both liberty and security of the person is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference" (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 54), as quoted with approval in *Carter v. Canada (Attorney General*), 2015 SCC 5, at para. 64.

[386] On this point I find myself again in agreement with the Respondents. The fundamental personal choices that have to date attracted *Charter* protection are qualitatively different than Ms. Taylor's decision in this case. While the Supreme Court of Canada has yet to define a test for what constitutes a "fundamental personal choice", the test cannot be a subjective one. Were it otherwise, all personal choices

would be protected under the *Charter*. This interpretation was expressly rejected by the Supreme Court of Canada in *R. v. Malmo-Levine*, 2003 SCC 74. In that case the appellant argued that smoking marijuana was integral to his lifestyle, such that criminalization violated his right to liberty under s. 7.

[387] While accepting that marijuana use was integral to the appellant's lifestyle, Justices Gonthier and Binnie stated " … the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle" (*Malmo-Levine*, at para. 86).

[388] In *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 the Respondent argued that the statutory obligation to close his business on Sunday deprived him of "liberty". Chief Justice Dickson concluded that "whatever the precise contours of liberty within the meaning of s. 7, I cannot accept that it extends to an unconstrained freedom to transact business whenever one wishes" (at para. 154).

[389] I appreciate that we are not here dealing with a lifestyle choice, or a business transaction. However, examples to date of what amount to a fundamental personal choice such as to engage the s. 7 liberty interest include the following:

- In *Carter* a majority of the Court concluded that an individual's response to a grievous and irremediable medical condition is a matter critical to one's dignity and autonomy. As such, a law which interferes with the ability to make decisions concerning medical care and bodily integrity trenches on liberty under s. 7.

- In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 the appellants argued that their right to choose (refuse) medical treatment for their child was a liberty interest protected by s. 7. The treatment in question being a blood transfusion. Justice LaForest, for the majority, agreed, but concluded on the facts that there had been no violation of the principles of fundamental justice.

- In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 Justice Wilson concluded that a woman's liberty interest was engaged in deciding whether or not to have an abortion, as the "decision is one that will have profound psychological, economic and social consequences for the pregnant woman" (at para. 300).

- In *R. v. Smith*, 2015 SCC 34 restrictions on the manner medical marijuana could be ingested was held to violate the liberty interest of the appellant, by exposing him to a threat of imprisonment for violation and by foreclosing reasonable medical choices through the threat of criminal prosecution. By forcing a person to choose between a legal, but inadequate treatment (smoking dry marijuana), and an illegal but more effective choice (ingestion), the law also infringed security of the person.

[390] Fundamental personal choices sufficient to engage s. 7 thus far include deciding whether one's child should receive a blood transfusion (*B. (R.)*), abortion (*Morgentaler*, per Justice Wilson), the decision to end one's life when facing a chronic incurable disease (*Carter*), and a restriction on the use of medical marijuana (*Smith*). Without discounting the importance to Ms. Taylor of attending her mother's funeral this decision is qualitatively different than the fundamental personal choices engaged by s. 7.

[391] In response, the Applicants refer to *Godbout v. Longueuil (Ville)*, [1997] 3 S.C.R. 844, wherein all nine judges struck down a law which imposed a residency requirement as a condition of employment, as contrary to s. 5 of the *Quebec Charter of Human Rights and Freedoms,* R.S.Q., c. C-12. Section 5 provided that "Every person has a right to respect for his private life."

[392] Three of the nine Justices (La Forest, L'Heureux-Dubé and McLachlin, J.J.) would have also concluded that the law violated the right to liberty enshrined in s. 7 of the *Charter*. Justice La Forest wrote that "choosing where to establish one's home is a quintessentially private decision going to the very heart of personal autonomy…" (*Godbout*, at para. 66).

[393] The remaining six judges gave s. 7 a pass, however, concluding that it was "unnecessary and perhaps imprudent" to consider whether s. 7 was infringed in the absence of submissions from other interested parties (*Godbout*, at para. 1).

[394] In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 the Court noted the absence of a majority in *Godbout*, stating that:

> 93. It is not clear that place of residence is a protected liberty interest under s. 7 of the *Charter*. … [T]he issue remains unsettled.

[395] *Godbout* was not a s. 7 decision and I do not regard it as an expansion of the liberty interests engaged by this provision. In any event, the facts in *Godbout* are distinguishable. Ms. Godbout was forced to live in a place against her wishes in order to maintain employment. We are not here concerned with residency or employment.

[396] As I have concluded that Ms. Taylor's liberty interests were not engaged by the travel restriction within the meaning of s. 7, I decline to proceed further to consider whether there was a violation of the principles of fundamental justice.

## IF MS. TAYLOR'S *CHARTER* RIGHTS WERE INFRINGED, IS THE INFRINGEMENT JUSTIFIED UNDER SECTION 1 OF THE *CHARTER* IN RESPONSE TO THE COVID-19 PANDEMIC?

### Introduction

[397] Ms. Taylor's right to mobility under the *Charter* is not absolute. However, if government is to infringe a *Charter* right, if it is going to tell a citizen such as Ms. Taylor that she cannot travel to Newfoundland and Labrador, it had better have a very good reason. In legal terms that "very good reason" finds its expression in s. 1 of the *Charter*.

[398] Section 1 provides:

> 1. 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.

[399] The yardstick by which the travel restriction is to be measured are the values and principles essential to a free and democratic society. As the Supreme Court of Canada observed in *R. v. Oakes*, [1986] 1 S.C.R. 103, the rights and freedoms guaranteed by the *Charter* are not absolute and there may be "circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance" (at para. 68).

[400] The Respondents argue that in this case there are "collective goals of fundamental importance" which must prevail over Ms. Taylor's mobility right, namely the protection of others from the spread of COVID-19.

[401] On the other hand, the Applicants argue that the travel restriction was an unnecessary measure to control COVID-19, such that the infringement of Ms. Taylor's right to mobility cannot be justified under s. 1 of the *Charter*. The Applicants also argue that the travel restriction is in violation of s. 13 of the *PHPPA*.

[402] For the reasons that follow, I conclude that the infringement of Ms. Taylor's mobility right by the travel restriction was justified on the evidentiary record in this case, as a reasonable measure to reduce the spread of COVID-19 in Newfoundland and Labrador. There was no violation of s. 13 of the *PHPPA*.

**Context**

[403] I begin with a consideration of the context of the travel restriction, the nature of the problem it sought to address. Context has been described as the "indispensable handmaiden" to the s. 1 analysis. As Justice Gonthier stated for the majority in

*Thompson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (at para. 87):

> 87. The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

[404] Contextual factors are directed towards determining whether or not, given the nature of the case, evidence will consist of "approximations and extrapolations" and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case (*R. v. Bryan*, 2007 SCC 12, at para. 29).

[405] In *Harper v. Canada (Attorney General)*, 2004 SCC 33 Justice Bastarache observed that the "legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case" (*Harper*, at para. 77). In the absence of determinative scientific evidence the Court is entitled to rely on logic, reason and the application of common sense to what is known (*Harper*, at para. 78).

[406] At issue in *Harper* was whether the spending limits in s. 350 of the *Canada Elections Act*, S.C. 2000, c. 9 infringed the right to free expression in s. 2(b) of the *Charter*. The majority, led by Justice Bastarache, concluded that the infringement was demonstrably justified under s. 1 of the *Charter*. For the majority the "central issue" in the s. 1 analysis was the nature and sufficiency of the evidence required by the Attorney General to justify the infringement (at para. 75).

[407] After observing that this was not the first time the Court was faced with conflicting social science evidence Justice Bastarache stated (at para. 76):

> The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*, at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.
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> [emphasis added]

[408] The Justice then proceeded to consider the applicable contextual factors under four categories: (i) the nature of the harm and the inability to measure it; (ii) vulnerability of the group; (iii) subjective fears and apprehension of harm; and (iv) nature of the infringed activity.

[409] To these contextual considerations the Respondents seek to add deference to the CMOH and the institutional capacity of the Courts.

(i) The Nature of the Harm and the Inability to Measure it

[410] The nature of the harm caused by COVID-19 is unfortunately all too real. It is a severe acute respiratory illness that has killed close to a million persons globally and almost 10,000 in Canada alone, and the number continues to rise.[101] Dr. Wilson explained, as did Dr. Fitzgerald, that there are characteristics which increase the complexity of public health decision making in the case of COVID-19. It is a novel virus with no known cure, effective treatment or vaccine, and the illness caused by it is far more severe than seen in influenza. Infected, but asymptomatic persons, may unwittingly infect others.

[411] I found the evidence of Dr. Wilson and Dr. Fitzgerald to be most informative in explaining the challenges faced by those with the responsibility for public health

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[101] Fitzgerald Affidavit, at para. 45.

decision making in the context of a pandemic such as COVID-19. In the context of such a public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow. In such a circumstance, the response does not admit of surgical precision. Rather, in public health decision making the "precautionary principle" supports the case for action before confirmatory evidence is available.

(ii) Vulnerability of the Group

[412] Dr. Parfrey explained that as compared to the other provinces and territories, the Newfoundland and Labrador population is particularly vulnerable to severe illness from COVID-19. This province ranks the highest, or near the highest, for many of the risk factors for severe illness or death from this disease: asthma; chronic kidney, lung and liver diseases; diabetes; serious heart conditions; obesity and cancer.

[413] In addition, the province has an aging population with almost one quarter of its residents being age 65, or older. Those in that age bracket are more likely to be hospitalized and admitted to ICU even without other co-morbidities. At the time of implementing the travel restriction COVID-19 was on the rise in Nova Scotia and that province was in the midst of a large outbreak in a long term care facility in the Halifax metro area.[102]

(iii) Subjective Fears and Apprehension of Harm

[414] It is a statement of the obvious to say that given the potential for serious illness or death from COVID-19, there is a heightened fear of contracting this illness.

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[102] Fitzgerald Affidavit, at para. 73.

(iv) Nature of the Infringed Activity – Mobility

[415] In this case the activity infringed was Ms. Taylor's travel to this province to attend her mother's funeral. The right of Canadian citizens to move freely throughout their country across provincial and territorial boundaries, for lawful purposes, is not a right to be taken lightly. The fact that s. 6 is not subject to the s. 33 notwithstanding clause underscores the importance of this right.[103] That said, as already observed, the infringement of Ms. Taylor's mobility right in this case was fleeting.

(v) Role of the CMOH and the Institutional Capacity of the Court

[416] An examination of context is essential in deciding whether or not deference is appropriate. However, deference itself is not to be determined at the outset of the s. 1 inquiry, but rather, where appropriate, under the various steps in the s. 1 analysis (*M. v. H.*, [1999] 2 S.C.R. 3 at paras. 80-81). I thus decline to comment on the role of the CMOH and the Court at this stage of our inquiry.

**The Section 1 Test for Infringement**

[417] I turn now to the specific requirements which must be met in order to justify the infringement of a *Charter* right.

[418] The onus of proving that a limit or freedom guaranteed by the *Charter* meets the criteria of s. 1 rests upon the party seeking to uphold the limitation, the

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[103] Section 33 of the *Charter* permits a Parliament or the legislature of a province to expressly declare (opt out) that legislation operates notwithstanding s. 2 or ss. 7-15 of the *Charter*. Governments cannot opt out of the s. 6 mobility right.

Respondents in this case. The standard of proof is the civil standard, namely proof by a preponderance of probability. A tipping of the scales.

[419] Two central requirements must be met in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society.

[420] First, the objective which the measures responsible for a limit on a *Charter* right or freedom are designed to serve must be of sufficient importance to warrant overriding the right or freedom.

[421] Second, if a sufficiently important objective is identified, the party invoking s. 1 must establish that the means chosen are reasonable and demonstrably justified (see *Oakes*, paras. 73 – 74).

[422] This second requirement involves a form of proportionality test, where in each case the court is required to "balance the interests of society with those of individuals and groups" (*Oakes*, at para. 74). There are three components to this inquiry. First, the measures adopted must be rationally connected to the objective.

[423] Second, the means chosen must impair as little as possible the right or freedom in question. Sometimes referred to as the least drastic means, or minimum impairment, the law should impair the right no more than is necessary to accomplish the desired objective.

[424] Third, there must be proportionality between the effects of the measures and the objective. With regard to this third criteria, in order to be reasonable and demonstrably justified, the more severe the deleterious effects of a measure the more important must be the objective (*Oakes*, at para. 74-75). As such, even if the objective is of sufficient importance, the measures rationally connected and the impairment a minimum, it remains possible that the severity of the deleterious effects will not be justified by the purposes it is intended to serve (*Oakes*, at para. 75).

[425] Turning now to an application of these criteria to the case at hand.

Does the Travel Restriction Relate to a Pressing and Substantial Objective?

[426] The first step in the s. 1 analysis is to determine whether the objectives of the law are of sufficient importance to warrant the limitation of the constitutional right, the right to mobility in this instance. Is the objective of the law, the travel restriction in this context, pressing and substantial?

[427] The CCLA acknowledges that the express purpose of the travel restriction is "to prevent the spread of COVID-19 in the province".[104]

[428] The First Applicant agrees that the travel restriction was "ostensibly" to protect the health of residents of Newfoundland and Labrador by limiting the spread of COVID-19 so as to not overwhelm the medical resources available in the province.[105]

[429] However, the Applicants argue that the measures in place prior to the travel restriction were already successful at controlling the spread of COVID-19, at "flattening the curve", such that the real pressing and substantial objective was to prevent non-residents, such as Ms. Taylor, from entering the province in violation of their *Charter* rights.

[430] With the greatest respect to the Applicants, this argument misapprehends the objective of the travel restriction. I agree that when the travel restriction was

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[104] CCLA Brief, at p. 24.

[105] First Applicant's Brief, at para. 68.

imposed there were a low number of infections in this province. However, the objective of the travel restriction was not to "flatten the curve".

[431] The low prevalence of COVID-19 here did not make the travel restriction unnecessary. Quite the opposite. Dr. Proton Rahman, who was qualified by the Court as an expert in the field of epidemiology, explained:

> Local infection levels are a consideration for COVID-19 management. When there are hundreds of active cases, then a few imported cases does not appreciably alter the management of the outbreak; however, when there are only a small number of active cases, just a few imported cases may double the number of active transmission chains, changing local infection prevalence quite substantially.[106]

[432] Further, in populations with low infection levels and thus little immunity, the growth rate of COVID-19 is exponential. Again Dr. Rahman explained:

> In the early phase of an epidemic, the number of cases increases exponentially, as epidemic susceptible individuals are plentiful, and if each infected person generates two new infections, then from one infected individual, the second, third, fourth, and fifth generations of infection spread will yield 2, 4, 8, and 16 infected individuals, respectively.[107]

[433] In a similar vein, the rationale for the travel ban was explained by the CMOH, Dr. Janice Fitzgerald:

> The travel restrictions were introduced to protect Newfoundland and Labrador from the importation, and ultimate spread of COVID-19. Newfoundland and Labrador witnessed firsthand how a single case of COVID-19 could easily spread from person to person, some even spreading without knowing they have the disease or presenting with any symptoms. Much of this spread can be traced back to out-of-province travel. At the time of introduction, many other provinces were seeing increasing cases of disease and we were having success at controlling the outbreak

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[106] Rahman Affidavit, Tab 2, at p. 6.

[107] Rahman Affidavit, Tab 2, at p. 11.

> here. There were concerns raised regarding compliance with self-isolation orders from municipalities and there was concern that as cases continues to rise in other parts of the country, people would attempt to come to Newfoundland and Labrador to avoid COVID-19, potentially increasing the importation risk.[108]
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> [emphasis added]

[434] While this province had a low infection rate at the time of the travel restriction, it was Dr. Fitzgerald's evidence that "the biggest risk is an introduction of the disease from importation from other jurisdictions[109]."

[435] I accept this reasoning. It seems entirely logical to put measures in place to control the spread of COVID-19 from an area of high infection to an area of low infection.

[436] The objective of the travel restriction was not to interfere with Ms. Taylor's rights, but to protect those in Newfoundland and Labrador from illness and death arising from the importation and spread of COVID-19 by travelers. While pressing and substantial objectives are not limited to emergencies (*P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424) the existence of COVID-19 as a public health emergency is beyond question.

[437] There can be no doubt that the goal of the travel restriction in reducing the importation of COVID-19 into Newfoundland and Labrador is a pressing and substantial objective.

> Is there a Rational Connection between the Objective and Infringement of the Right?

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[108] Fitzgerald Affidavit, at para. 89.

[109] Fitzgerald Affidavit, at para. 90.

[438] This requirement calls for an assessment of how well the travel restriction is tailored to suit its purpose. A rational connection prevents limits from being imposed on rights arbitrarily. The Respondents must establish that it is reasonable to suppose that the travel restriction will further the goal (of reducing the importation of COVID-19), not that it is guaranteed to do so (*Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, at para. 48).

[439] The Applicants argue that the Respondents have failed to show why the requirement for self-isolation was deemed insufficient to arrest the spread of COVID-19. The Applicants note that by the time the province introduced the travel restriction, it had already been successful at flattening the curve. This argument is essentially a repeat of that advanced with respect to whether the travel restriction amounted to a pressing and substantial objective, but now advanced with respect to the rational connection part of the s.1 test.

[440] The Applicants argue that it defies logic to assert that the travel restriction is effective in containing COVID-19 when people are still entering the province with exemptions from other parts of Canada, including provinces with some of the highest rates of infection. According to the Applicants, it is the 14 day self-isolation period and other legitimate orders of the CMOH, such as social distancing, that has resulted in success in the fight against the virus.

[441] I accept that there are other measures which have proven successful in the fight against COVID-19, but I do not agree that these measures render the travel restriction unnecessary, such that it is no longer rationally connected to combating the spread of the disease.

[442] While empirical evidence is not necessary to establish a rational connection, the Respondents provided convincing evidence of the effectiveness of the travel restriction. Dr. Rahman and the predictive analytics group modelled the effects of the travel restriction using two independent simulations: the NL Branching Process Model (NL-BP) and the Agent Based Simulation (ABS-NL) model. Dr. Rahman testified during cross-examination that both models are accepted within the epidemiology community.

[443] The NL-BP model assumed three infected travelers per month who failed to isolate, yielding results that showed:

> Over the 9 weeks subsequent to May 4th, failing to implement the travel ban results in ten times more COVID-19 cases in NL residents, where these residents are part of an infection chain that began with an infected traveler …. In the early phase of an epidemic, the number of cases increases exponentially. If a period of longer than 9 weeks were considered, the predicted effect of the travel ban would be even greater than a ten-fold decrease, since the number of cases increases exponentially, thus widening the difference between the travel ban and the no travel ban scenario over time.[110]

[444] The methodology employed by the ABS-NL was different. It compared the following three scenarios:

1. Travel ban in place, with 1000 exempted travelers per week entering NL (baseline)
2. Travel ban lifted and non-resident travel to NL resumes at typical levels (100% travel volume)
3. Travel ban lifted and non-resident travel to NL resumes at 50% of typical levels

[445] This simulation considered two possible infection rates for travelers: 0.03% and 0.1%. It further assumed that 75% of travelers would abide by the requirement of a 14-day self-isolation upon arrival in the province and that one half of those who initially did not self-isolate would choose to self-isolate when they became symptomatic.

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[110] Rahman Affidavit, Tab 2, at p. 20.

[446] The ABS-NL model found that:

> At 100% travel volume, the best case (0.03% infected travelers) has 5x more peak infections than the worst case of the travel ban (0.1% infected); the worst case (0.1% infected travelers) yields 20x more infections than either scenario of the travel ban. Similar results are observed for the half travel volume scenarios, though at smaller magnitudes: The lifted travel ban scenarios are three- and six-fold worse than the travel ban for 0.03% and 0.1% of travelers infected, respectively.[111]

[447] Dr. Rahman concludes that "[t]he results from our simulation modelling demonstrates that travel restrictions significantly reduced the COVID-19 spread in the population".[112]

[448] While the Respondents bear the onus, no evidence has been adduced to counter this conclusion, nor to impugn the methodology of Dr. Rahman and the predicative analytics group. The Applicants simply point to the number of exemptions in support of the argument that there is no rational connection between the travel restriction and spread of COVID-19. This argument is speculative and contrary to the modelling evidence.

[449] In any event, the baseline adopted in the ABS-NL simulation is 1,000 exemptions per week. I am satisfied that even with such a large number of exemptions the simulation still demonstrates that the travel restriction significantly reduces the spread of COVID-19.

[450] Furthermore, the number of exemptions remains small when compared to the well over 500,000 visitors received by the province annually[113]. Between 4 May and

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[111] Rahman Affidavit, Tab 2, at p. 33 of 84.

[112] Rahman Affidavit, Tab 2, at p. 3.

[113] Rahman Affidavit, Tab 2, at p. 36.

2 June 2020, 4,537 exemptions were granted.[114] If this rate were to continue for the entire year, there would still be a reduction in the number of visitors in excess of 90%.

[451] Based on the evidentiary record, and the uncontradicted evidence of Dr. Rahman, in particular, it is beyond argument that travel restriction is an effective means for reducing the spread of COVID-19 in Newfoundland and Labrador. The travel restriction is rationally connected to its objective.

That the Means Chosen Interfere as Little as Possible with the Protected Right

[452] This component of the *Oakes* test requires that the law not impair the right any more than is necessary to achieve its desired objective.

[453] The fact that the travel restriction is rationally connected to reducing the spread of COVID-19 in this province does not necessarily mean that it is the least drastic means for doing so. Here, as throughout the s. 1 analysis, the onus is on the Respondents to establish that the other measures taken are not an effective substitute for the travel restriction, or that the travel restriction itself cannot be tweaked to accommodate a less intrusive infringement on mobility.

[454] The Court is required to inquire into whether there are reasonably feasible and less impairing alternatives to achieve the same objective. At the same time the CMOH must be afforded a degree of flexibility in crafting a solution to the spread of COVID-19. As Justice LaForest explained in *Videoflicks Ltd*. (at para. 214):

> Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be

[114] Fitzgerald Affidavit, Tab 18, at para. 4.

> regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan, supra,* at p. 524 calls "the practical living facts" to which a legislature must respond. That is especially so in a field of so many competing pressures as the one here in question.[115]
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> [emphasis added]

[455] The Court must tread carefully when conducting this analysis as, with the benefit of hindsight, it is always possible for imaginative counsel to posit alternatives. As Justice Binnie observed in *Newfoundland (Treasury Board) v. N.A.P.E*, 2004 SCC 66 "resourceful counsel, with the benefit of hindsight, can multiply the alternatives" (at para. 96). This is particularly true when it comes to the management of a public health emergency such as COVID-19.

[456] It is at this point that I digress briefly to consider the role of deference to the CMOH and the institutional capacity of the Court.

[457] I am mindful of the fact that while travel restriction has legal force, it is in essence a medical decision directed towards protecting the health of those in this province. The qualifications of the CMOH to make this decision are not challenged. Furthermore, in the exercise of her authority the CMOH draws upon specialized resources at her disposal. This team approach is conducive to informed decision making based on the best medical evidence available.

[458] To this I would add that the courts do not have the specialized expertise to second guess the decisions of public health officials.

[459] In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference and the role of the judiciary (*South Bay United Pentecostal*

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[115] *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R.713, at para. 214.

*Church et al v. Gavin Newsom, Governor of California, et al.,* No. 19A1044 (USSC) at p. 2):

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those official "undertake [ ] to act in area fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).

[460] The Applicants acknowledge that while some measure of deference to the decision of the CMOH is appropriate, the court must not abdicate its responsibility as guardian of the *Constitution* and rule of law. I agree.

[461] The Applicants also argue that while the case law supports deference to the provincial legislature, in this case the travel restriction was implemented by a "single, unelected individual", and that special measures, (the travel restriction in this context) are neither debated nor approved by the legislative assembly.

[462] With respect, this argument ignores two key considerations; first, it was the legislature that saw fit to bestow the special measures powers on the CMOH in the first place; second, these powers are only activated in times of a declared public health emergency. On such occasions there may be little time for legislative debate, assuming of course that the emergency was such that the legislature could convene to do so in the first place.

[463] I accept the Applicant's argument that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.

[464] However, it is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.

[465] The Applicants argue that while a least drastic measure is often left to be imagined by the Court, in this case a less drastic measure was in place prior to the travel restriction. Namely, the requirement in the special measures order of 20 March 2020 that those entering the province self-isolate for a period of 14 days. Other less drastic means could include tailoring the travel restriction to target individuals who are "exposed to enhanced risks based on their means of travel into the province" or to individuals who have "not been engaged in a prolonged period of self-isolation in their home province or territory".[116]

[466] In considering whether or not the travel restriction could have been less intrusive, the Court must exercise caution in recognition of the fact that the public health response to COVID-19 is ever evolving. The implementation of the travel restriction must be gauged from the circumstances as they existed at the end of April 2020 and what was known about COVID-19 at the time.

[467] I am reminded at this juncture of the evidence of Dr. Wilson and the precautionary principle in public health decision making. In the context of the COVID-19 pandemic, with the prospect of serious illness or death, the margin for error is small. In such a circumstance, the public health response is to err on the side of caution until further confirmatory evidence becomes available; the precautionary principle. Applying public health measures across the population is often a more effective means than trying to target smaller at risk sub groups. "Public health goals

[116] Brief of the Second Applicant, page 26.

are rarely achieved through single actions or simple tools. A range of mechanism may be employed, depending on the health problem and context."[117]

[468] Dr. Wilson concluded her report:

> Intervening at a population level to address an important public health problem is rarely a simple prospect, usually requires multiple approaches, and may simultaneously be perceived as too much or too little by different sections of society. However, the more serious the consequences of under-reaction, the more that decision-making is likely to be driven by the precautionary principle: in the absence of clear evidence, use best judgement to prevent potential harm.[118]

[469] There is no simple one size fits all solution to the effective management of a pandemic such as COVID-19. A variety of public health measures are required in combination. Dr. Rahman explained the challenge facing public health officials:

> A multi-pronged provincial approach that will address control of importation of COVID-19, enhanced testing, rapid case identification and contact tracing along with strategies to maintain physical distancing will undoubtedly lead to the best health outcomes. However, the relative prioritization of each of these measures will differ across provinces, due to regional differences in infection levels and disease spread, vulnerability of the provincial populations, and regional characteristics that influence the effectiveness of public health measures.[119]

[470] By the end of April 2020 the travel restriction was one of a number of special measures implemented by the CMOH in an effort to arrest the spread of COVID-19. The province was, at that time, in a virtual state of lockdown with the closure of institutions, and non-essential business. With few exceptions individuals entering the province were required to self-isolate for 14 days. Enhanced testing for COVID-19 was available to those with symptoms of the disease. Social distancing of six feet

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[117] Wilson Affidavit, at p. 3.

[118] *Ibid*, at p. 5.

[119] Rahman Affidavit, Tab 2, at p. 5-6.

was, and remains the rule. Public health officials employed contact tracing as a means of tracking the infection in the population.

[471] In short, the public health approach to COVID-19 was (and remains) multipronged. While other measures are being taken to combat the spread of COVID-19, I am satisfied on the evidence presented that none of these, taken together or in isolation, is an effective substitute for the travel restriction. Let me explain.

[472] Self-isolation is relied upon heavily by the Applicants as obviating the need for the travel restriction. Indeed, self-isolation is shown to be effective when those required to do so actually self-isolate. However, in reality not all those required to self-isolate actually comply.

[473] By the time the travel restriction was implemented the CMOH had received complaints of non-compliance from individuals and businesses. Marine Atlantic had confirmed the arrival of travelers with a return date inside the required 14 day self-isolation period. Between 22 March 2020 and 5 May 2020 some 3,453 public reports and emails were received. While no charges were laid, public health officials became aware of 989 complaints that individuals were not complying with self-isolation requirements.[120]

[474] Studies in the UK have shown that 75.1% of those with COVID-19 symptoms, or with a household member with symptoms, failed to self-isolate as required. That said, the ABS-NL study assumed a much higher rate of self-isolation than that found in the UK. Yet, there was a considerable increase in COVID-19 if the travel restriction was lifted. The rationale for non-compliance was explained by Dr. Rahman:

> We assume that 75% of travelers follow the stated requirement of a 14-day self-isolation upon arrival in NL, and that 50% of those who did not self-isolate will

[120] Fitzgerald Affidavit, at para. 69, Tab 18, para. 13.

> choose to self-isolate when they become symptomatic. The reason for these seemingly low behavior probabilities is that once a person has committed the time to travel to NL and likely have a fixed date of return, they are less incentivized to spend their time in NL in isolation. Similarly, exempted travelers ostensibly have urgent matters to attend to in NL, and will likely not be dissuaded from pursuing their original agendas by non-severe symptoms.[121]

[475] Monitoring for self-isolation is complicated by the fact that with a diverse population over a vast geographical area, it is impossible to monitor compliance on a large scale. This is true even with the travel restriction in place. I am satisfied that removing the restriction and opening the province to an influx of visitors, most of whom arrive in the summer, would render effective monitoring for compliance impossible.

[476] Once again, it is worth remembering that when the travel restriction was put in place our nearest neighbor, Nova Scotia, was seeing new cases daily and was in the midst of an outbreak at a long term care facility in the Halifax metro region.

[477] Self-isolation can be effective, but I am satisfied that it is not a viable substitute for the travel restriction.

[478] A further alternative is to test all incoming travelers. However, the false negative rate for COVID-19 can be as high as 30%. As Dr. Fitzgerald explained, testing cannot be relied upon:

> Testing alone would not be sufficient to combat the spread of COVID-19. We cannot rely on testing to reduce importation risk. Testing is a point in time result. It can take time for an infected person to develop enough virus in their system to produce a positive result and could result in a negative test in a pre-symptomatic person. This can lead to a false reassurance and the unintentional spread of disease. The course of the disease can also affect the test result as early in the disease course the virus tends to be in the nasopharynx (nasal passages) and can be more prominent

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[121] Rahman Affidavit, Tab 2, at p. 32 of 84.

> in the lungs later in the disease course. A nasopharyngeal swab (one done through the nose) may not pick up the virus if the person now has mainly lower respiratory tract (lungs) symptoms. Additionally, the quality of the sample is user dependent and, if not taken properly, can produce in a false negative test result.[122]

[479] I accept that testing is not an effective substitute for the travel restriction.

[480] A further tool in the arsenal of public health officials is contact tracing. Dr. Fitzgerald explains contact tracing as:

> … the process of identifying, assessing, and managing people who have been exposed to a disease to prevent onward transmission. When systematically applied, contact tracing will break the chains of transmission of COVID-19 and is an essential public health tool for controlling the virus".[123]

[481] The utility of contact tracing lies in its ability to contain infection by preventing onward spread. Contact tracing does not prevent the importation of COVID-19. However, it can be a very effective tool when used in conjunction with the travel restriction, which:

> …not only reduce the risk of COVID-19 entering the province, but they also reduce the number of people entering the province, which allows public health to better monitor and follow new arrivals as well as act more rapidly in the event of an outbreak. <u>With travel restrictions in place, public health can conduct contact tracing with better ease and track people coming in to the province to ensure they are following an approved self-isolation plan</u>.[124]
>
> [emphasis added]

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[122] Fitzgerald Affidavit, at para. 103.

[123] *Ibid*, at para. 37.

[124] Fitzgerald Affidavit, at para. 93

[482] When it comes to reducing the risk of COVID-19 through importation, I am satisfied that self-isolation, testing and contact tracing, either together, or in isolation, are not a reasonable substitute for the travel restriction.

[483] In continuing the least drastic means analysis I observe that the travel restriction did not impose a blanket ban on all travel, but admitted of exemptions. These included residents of Newfoundland and Labrador, certain asymptomatic workers, those requiring the support of family or to care for family members, those permanently relocating to the province, completing a contract or education, and complying with custody, access or adoption, for example.[125]

[484] Dr. Fitzgerald explains that the travel restrictions are aimed at non-essential travel:

> The intent of the travel restrictions was not to prevent people from returning to the province if they were unemployed, intending to work in Newfoundland and Labrador, or returning to take care of a loved one. The intent is to prevent those that do not need to travel to Newfoundland and Labrador during the pandemic. The travel ban will help prevent the unnecessary spread of the disease by tourist or seasonal vacationers that may be carrying the virus from entering the province by controlling importation. Furthermore, travel itself is a high-risk activity for the transmission of COVID-19. Non-essential travel places Newfoundland and Labrador at greater risk of those unknowingly carrying the virus to the province as well as those unknowingly catching the virus while travelling to the province.[126]
>
> [emphasis added]

[485] The COVID-19 pandemic presents as a moving target and as a consequence the necessity of the travel restriction is regularly reassessed[127]. Further, the travel restriction provides for an exemption process for considering those with extenuating circumstances, not previously contemplated. The travel request exemption team

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[125] See SMO Amendment No. 11 and Travel Exemption Order dated 5 May 2020.

[126] Fitzgerald Affidavit, at para. 102.

[127] At the time of writing, for example, the province has opened travel to those in Atlantic Canada. The "Atlantic Bubble" as it is commonly known.

consults with the public health team and the CMOH to determine the disposition. Non-residents who are denied an exemption also have recourse to an appeal process, and within seven days may apply for a reconsideration by the CMOH. Ms. Taylor in fact did so, after which she was granted an exemption to travel to the province.

[486] Based on the foregoing evidence I am satisfied that an enemy as resilient as COVID-19 will not be kept in check through the approach advocated by the Applicants. The task of wrestling this disease into submission is no easy feat and is one that requires a dynamic and multipronged approach. The travel restriction is integral to that approach. I am thus satisfied that the least drastic means component of the *Oakes* test has been satisfied.

[487] For the foregoing reasons I am also satisfied that there has been no violation of s. 13 of the *PHPPA.*

Do the Statutory Effects of the Measure outweigh its Deleterious Effects?

[488] This stage involves balancing the objective sought by the travel restriction with the infringement on mobility. Arguably, this has already been done in determining whether the impugned objective is sufficiently pressing to warrant overriding the *Charter* right.

[489] The application of s. 1 in this instance involves a balancing of mobility rights with protection of the health of the population. The Respondents reference the U.S. Supreme Court decision in *Henning Jacobson, Plff. In Err. v. Commonwealth of Massachusetts,* 197 U.S. 11(1905) as illustrative of a circumstance where individual rights were found to give way to the common good. At issue was a constitutional challenge to a law passed by Cambridge, Massachusetts, imposing compulsory smallpox vaccinations in response to an increase in that disease in the city.

[490] In response to the argument that compulsory vaccination is "hostile to the inherent right of every freeman to care for his own body and health in such a way as

to him seems best", the court observed that real liberty could not exist in a circumstance where each individual operates regardless of the injury that may be done to others, and "there are manifold restraints to which each person is necessarily subject for the common good" (at p. 6).

[491] This step in the proportionality analysis asks whether the harm done by restricting travel to the province outweighs the benefit to the public gained through the prevention, or at least reduction of COVID-19 in the province. To ask the question, is to answer it.

[492] While restrictions on personal travel may cause mental anguish to some, and certainly did so in the case of Ms. Taylor, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case Ms. Taylor's *Charter* right to mobility must give way to the common good.

Conclusion with Respect to Section 1 of the *Charter*

[493] In conclusion, I am satisfied based on the evidence presented that the travel restriction represents a reasonable limit on Ms. Taylor's right to mobility, as demonstrably justified in a free and democratic society.[128]

[128] This conclusion is also sufficient to meet the requirement of s. 13 of the *PHPPA*.

**IF SECTION 28(1) OF THE *PHPPA* IS BEYOND THE LEGISLATIVE COMPETENCE OF THE PROVINCE, OR THERE IS A VIOLATION OF MS. TAYLOR'S *CHARTER* RIGHTS THAT CANNOT BE JUSTIFIED BY SECTION 1, SHOULD ANY DECLARATION OF INVALIDITY BE TEMPORARILY SUSPENDED?**

[494] It is not necessary to answer this question in light of my conclusion that s. 28(1)(h) of the *PHPPA* is a valid law, and that the infringement of Ms. Taylor's right to mobility was justified under s. 1 of the *Charter* in response to the COVID-19 pandemic.

**CONCLUSION**

[495] The CCLA is granted public interest standing to challenge s. 28(1)(h) of the *PHPPA* and travel restriction as contrary to the *Charter*. The intended challenge to ss. 28.1 and 50(1) of the *PHPPA* is non-justiciable on the record before the Court and the CCLA is denied standing to bring this portion of its claim.

[496] Section 28(1)(h) of the *PHPPA* is within the legislative competence of the province as a public health measure falling under the province's authority over matters of a local or private nature in the province under s. 92(16) of the *Constitution Act, 1867*. In the alternative, s. 28(1)(h) of the *PHPPA* falls within the province's authority over property and civil rights under s. 92(13).

[497] The decision to deny Ms. Taylor entry into the province in accordance with the travel restriction served to violate Ms. Taylor's right to mobility as guaranteed by s. 6(1) of the *Charter*.

[498] Ms. Taylor's right to liberty as guaranteed by s. 7 of the *Charter* was not engaged.

[499] The infringement of Ms. Taylor's *Charter* right to mobility was justified under s.1 of the *Charter* in response to the COVID-19 pandemic.

[500] I would thus answer the questions raised in this case, as follows:

1. ***Question***:

   Should the CCLA be granted public interest standing?

   ***Answer***:

   Yes, with respect to the challenge to s. 28(1)(h) of the *PHPPA* and the travel restriction. No, with respect to the challenge to ss. 28.1 and 50(1) of the *PHPPA*.

2. ***Question***:

   Is s. 28(1)(h) of the *PHPPA* within the legislative competence of the province?

   ***Answer***:

   Yes.

3. ***Question***:

   Did the travel restriction violate Ms. Taylor's right to mobility as guaranteed by s. 6 of the *Charter*?

   ***Answer***:

   Yes.

4. ***Question***:

Did the travel restriction violate Ms. Taylor's right to liberty as guaranteed by s. 7 of the *Charter*?

***Answer***:

No.

5. ***Question***:

If Ms. Taylor's *Charter* rights were infringed, is the infringement justified under s. 1 of the *Charter*, in response to the COVID-19 pandemic?

***Answer***:

Yes.

6. ***Question***:

If s.28(1)(h) of the *PHPPA* is beyond the legislative competence of the province, or there is a violation of Ms. Taylor's *Charter* rights that cannot be justified by s. 1, should any declaration of invalidity be temporarily suspended?

***Answer***:

No answer is required.

[501] The Application is dismissed and the Applicants' request for declaratory relief denied.

**COSTS**

[502] The within matter has brought to the fore several novel and important constitutional questions. Under the circumstances, while the Respondents were ultimately successful, each party will be responsible for their own costs.

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**DONALD H. BURRAGE**
Justice