2020 01G 2342
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

KIMBERLEY TAYLOR

FIRST APPLICANT

AND:

CANADIAN CIVIL LIBERTIES ASSOCIATION

SECOND APPLICANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

FIRST RESPONDENT

AND:

JANICE FITZGERALD, CHIEF MEDICAL OFFICER OF HEALTH

SECOND RESPONDENT

BRIEF OF THE FIRST AND SECOND RESPONDENTS

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PART I – OVERVIEW

1. In 1775, the American revolutionary Patrick Henry declared "Give me liberty or give me death." In this case, if the Applicants' remedy is granted it will result in both.

2. We are the in the midst of a global pandemic. COVID-19 is a highly infectious virus that has killed over half a million people. All too frequently, it is fatal for the elderly and those with pre-existing medical conditions. The impugned measures taken by the Chief Medical Officer of Health ("CMOH") and the Legislature are designed to protect the public, in particular, the most vulnerable members of society. At its core, this case is not simply about alleged infringements of the rights of non-resident travelers, it is also about protecting other *Charter* rights such as life and security of the person as guaranteed by s.7. This case should not be mistaken for one in which the state is the singular antagonist of an individual. This is a case where the state is mediating between the competing rights of different groups.

3. The Canadian Civil Liberties Association ("CCLA") seeks public interest standing in this matter. Granting standing is a discretionary decision of the court. It should not be granted when there is an actual plaintiff actively prosecuting a case. The very existence of the First Applicant ("Ms. Taylor"), as a person directly impacted by Special Measures Order 11 ("SMO 11") eliminates the need for the CCLA. Its submissions are simply duplicative. The CCLA has not proven a "genuine interest" in these matters. Being "interested in a matter" is the not the same as having a "genuine interest" in the legal sense.

4. The Applicants are attacking the statutory authority of the CMOH to manage the pandemic. They claim that Her Majesty in Right of

Newfoundland and Labrador (the "Province") has no constitutional authority to prevent temporary visitors from entering Newfoundland and Labrador. The Province asserts that the purpose of s. 28(1)(h) of the *Public Health Protection and Promotion Act* ("*PHPPA*") and SMO 11 is to protect the health of the population by preventing, remedying and mitigating the effects of a pandemic. This falls within the Province's broad jurisdiction over health found in ss.92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a local or private nature) of the *Constitution Act, 1867*.

5. The Applicants also claim that SMO 11 violates s.6 of the *Charter* because it prohibits visitors from traveling to the province. The Province's submission will demonstrate that s.6 does not create a constitutional right to tourism or to visit family. Section 6 is an economic right. It guarantees that Canadians may move within Canada to earn a livelihood. SMO 11 creates an express exemption for these very purposes, as such, there is no *prima facie* violation of s.6(2) of the *Charter*.

6. In addition to the s.6 violation, Ms. Taylor and the CCLA claim that SMO 11 violates s.7 of the *Charter* by infringing on Ms. Taylor's liberty interest. In its submission, the Province demonstrates that non-essential travel for personal reasons does not engage a s.7 liberty interest. It is simply not a "fundamental personal choice" that is central to one's personal autonomy. It is not equivalent to a decision to terminate a pregnancy or end one's own life. Even if tourism and personal travel is protected by s.7's liberty interest, neither Ms. Taylor nor the CCLA have discharged the onus of establishing that SMO 11 is arbitrary, overbroad or grossly disproportionate.

7. Should this Court determine that SMO 11 violates ss.6 and/or 7 of the *Charter*, the Province maintains that the infringement is reasonable and demonstrably justified under s.1. The pandemic is a pressing and substantial objective and the Province's mathematical modelling evidence

proves that travel restrictions do in fact work. The evidence demonstrates that 14-day self-isolation is not, in and of itself, sufficient to protect the resident population from the importation and spread of COVID-19. A small number of non-compliant infected travelers can produce community spread with fatal consequences. Even if this court has doubts about the modelling or scientific evidence, deference should be shown to the expertise of the CMOH. When the CMOH acts in areas fraught with medical uncertainty, public health measures must be broad, and courts should be cautious in rewriting them, even if one assumes that a court will make a wiser choice.

8. In addition to the challenges to SMO 11, the CCLA claims that s.28.1 of the *PHPPA* violates s.7 of the *Charter*. S.28.1 of the *PHPPA* provides authority for the enforcement of measures taken by the CMOH. The Province's submission will demonstrate that the CCLA has produced no factual matrix which the Court can use to determine whether s.28.1 infringes s.7 of the *Charter*. Further, the Province will show that the CCLA has not established that s.28.1 violates the norms against arbitrariness, overbreadth or gross disproportionality.

9. The CCLA also asserts that s. 28.1 of the *PHPPA* violates s.9 of the *Charter*. Again, the CCLA is asking the Court to make a *Charter* determination of great import in a factual vacuum. There is no evidentiary or factual basis provided to establish that s.28.1 of the *PHPPA* infringes s.9 of the *Charter*. On the contrary, the Province illustrates that the effect of s.28.1 of the *PHPPA* is analogous to random or routine traffic stops which have been found to be *Charter* compliant on numerous occasions.

10. Finally, the CCLA argues that s.50(1) of the *PHPPA* violates s. 8 of the *Charter*. Section 50(1) of the *PHPPA* delineates the powers of inspectors under the *PHPPA*. The continued factual vacuum in the CCLA's submissions means it is unable to establish a reasonable expectation of

privacy in the subject matter of the search. This absence of facts also hampers the Province's ability to argue the lawfulness of "the search". Notwithstanding the lack of an example to defend, the Province will establish that the powers provided in s.50(1) do not offend the *Charter*.

11. If this Court finds that s.28.1 violates ss. 7 and/or 9 of the *Charter* and/or s.50(1) violates s.9, then the Province asserts that these sections are saved by s.1. A constant in the s.1 analysis across both sections of the *PHPPA*, is lack of any evidence of deleterious effects and a wealth of information speaking to the salutary effects of both sections 28.1 and 50(1). The abstract nature of the argument offered by the CCLA provides no actual qualitative or quantitative measure of the effect of any infringement against which the Province can establish proportionality. However, the Province has advanced a panoply of evidence that makes clear the salutary effects of the of travel restrictions and, by direct correlation, their enforcement. The Province will demonstrate that any constitutional violation found in either of the challenged sections is justified as both address a pressing and substantial problem and the means chosen to address that problem are proportionate.

PART II – CONCISE STATEMENT OF FACTS

A. The Virus and the Public Health Emergency

12. On 31 December 2019, the World Health Organization ("WHO") was alerted to several cases of pneumonia in Wuhan, China. The virus did not match any other known virus.[1] On 7 January 2020, China confirmed a new coronavirus was the cause.[2]

13. Coronaviruses may cause illness in people or animals. Human coronaviruses are common, and typically associated with mild illnesses similar to the common cold. Rarely, animal coronaviruses can infect people, and more rarely, these infections can then spread from person to person through close contact.[3]

14. The virus identified in Wuhan was subsequently named SARS-CoV-2.[4] It causes a potentially fatal and infectious disease known as COVID-19.[5]

15. COVID-19 is spread mainly from close (within approximately six feet) person-to-person contact, particularly through respiratory droplets when a person infected with the disease coughs, sneezes, talks, or sings. It may also be possible to contract the virus by touching a surface or object that has the virus on it and then touching one's eyes, nose, or mouth.[6]

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[1] Affidavit of Dr. Janice Fitzgerald ("Fitzgerald Affidavit"), para. 17

[2] Fitzgerald Affidavit, para. 17

[3] Fitzgerald Affidavit, para. 24

[4] Fitzgerald Affidavit, para. 17

[5] Fitzgerald Affidavit, para. 17

[6] Fitzgerald Affidavit, para. 26

16. Evidence indicates that the virus can be transmitted by someone who is infected but not showing symptoms. This includes people who have not yet developed symptoms (pre-symptomatic) and people who never develop symptoms (asymptomatic).[7]

17. Without strict public health measures, COVID-19 has the potential for exponential growth. Each new person can generate 2 to 3 new infections who in turn infect a similar number of people resulting in rapid spread of the disease.[8]

18. In Canada, 8.3% of people with COVID-19 have died. The Canadian mortality rate is 23.1 deaths per 100,000 population (8,684 deaths/37,589,262 total population).[9]

19. On 11 March 2020, the WHO declared the global outbreak of COVID-19 a pandemic.[10] The first presumptive case of COVID-19 occurred in Newfoundland and Labrador on 14 March 2020.[11]

20. On 18 March 2020, the Minister of Health and Community Services, on the advice of CMOH, declared a public health emergency pursuant to s. 27 of the *Act*.[12]

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[7] Fitzgerald Affidavit, para. 28

[8] Affidavit of Dr. Proton Rahman ("Rahman Affidavit"), Tab 2, p.11 of 84; Affidavit of Dr. Brenda Wilson ("Wilson Affidavit"), Tab 2, p. 4

[9] Fitzgerald Affidavit, para. 44

[10] Fitzgerald Affidavit, para. 20

[11] Fitzgerald Affidavit, para. 21

[12] Fitzgerald Affidavit, para. 22

B. Public Health Measures- No Drug Therapies & No Vaccine

21. There are currently no drug therapies approved by Health Canada for the treatment of COVID-19.[13] Also, no vaccine exists to prevent infection.[14] The WHO anticipates it will be 2021 before a vaccine is widely available.[15]

22. Absent a vaccine, the most effective public health measures to reduce the spread of COVID-19 are physical distancing, quarantining those who may have been exposed (travelers and close contacts of cases), isolation of those infected, testing, rapid identification of cases, prohibiting mass gatherings, business and school closures, and travel restrictions.[16]

23. Testing, while helpful, is not a full answer to controlling the spread of COVID-19. The diagnostic test used in Newfoundland and Labrador is a nucleic acid test.[17] The test looks for the genetic material from the virus. It relies on a sample from the patient's nasopharynx or lungs.[18] It produces a false negative rate of between 20 to 30 percent.[19]

24. A false negative test result can be wrongly reassuring to a person. The concern is that someone could be less vigilant with isolation measures when they have a negative test. If they do not yet have symptoms, it could

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[13] Fitzgerald Affidavit, para. 34

[14] Fitzgerald Affidavit, para. 32

[15] Fitzgerald Affidavit, para. 33

[16] Fitzgerald Affidavit, para. 38

[17] Fitzgerald Affidavit, para. 57

[18] Fitzgerald Affidavit, para. 57

[19] Fitzgerald Affidavit, para. 59

heighten that sense of security and result in inadvertent spread of the virus.[20]

25. The efficacy of 14-day self-isolation is largely contingent on an honour system.[21] In a normal year, Newfoundland and Labrador receives over 500,000 visitors.[22] Public health officials have a limited capacity to monitor and enforce this measure.[23] Even assuming a 90% decrease in visitors to the province, public health officers would have to monitor the compliance of over 45,000 visitors annually. A recent study in the UK has demonstrated that adherence to self-isolation and lockdown measures is poor. The study found that three quarters of those with COVID-19 symptoms or living in a household with someone with symptoms, left their home in direct contravention of government regulations.[24]

C. Vulnerability of Newfoundland and Labrador

26. Compared to other provinces, Newfoundland and Labrador is particularly vulnerable to a COVID-19 outbreak because of the higher levels of co-morbidity.[25] The province has a high prevalence of metabolic disease, cancer and increased prevalence of many autoimmune diseases.[26] Advanced age is the strongest risk factor for complications arising from COVID-19.[27] The mean age in the province is 47.1 years compared to a national average of

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[20] Fitzgerald Affidavit, para. 60

[21] Fitzgerald Affidavit, para. 96

[22] Rahman Affidavit, Tab 2, p. 36 of 84

[23] Fitzgerald Affidavit, para. 96

[24] Rahman Affidavit, Tab 25

[25] Affidavit of Dr. Patrick Parfrey ("Parfrey Affidavit"), para. 6

[26] Rahman Affidavit, Tab 2, pp. 6-7 of 84

[27] Rahman Affidavit, Tab 2, p. 7 of 84

40.8 years.[28] Those over the age of 65 comprise 21.5 % of the population as opposed to 17% nationally.[29]

27. The capacity of Newfoundland and Labrador's healthcare system to deal with a COVID-19 outbreak is limited. There are only 1376 hospital beds in the province and 92 ICU beds.[30] Despite a reallocation of health care services to increase the system's ability to cope with a surge in COVID-19 cases, ICU occupancy rates consistently hover between 50-60%. Modeling shows that ICU bed capacity would be quickly overwhelmed if this province experience's significant number of infections.[31] A large number of non-residents and tourists in the province would compound this problem.

D. Public Health Decision Making During the Pandemic

28. During the early stages of a pandemic, especially one involving a new virus such as COVID-19, evidenced based decision making is not always possible because of the lack of data and the evolving event.[32] The time available for seeking and analyzing evidence shrinks.[33] Measures to reduce risk simply cannot await scientific certainty, and a precautionary approach must be employed. [34]

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[28] Rahman Affidavit, Tab 2, p. 7 of 84

[29] Rahman Affidavit, Tab 2, p. 7 of 84; Rahman Affidavit, Tab 2, p. 38 of 84; Parfrey Affidavit, Tab 3, p. 4

[30] Fitzgerald Affidavit, para 43

[31] Fitzgerald Affidavit, para 43

[32] Fitzgerald Affidavit, para.76

[33] Fitzgerald Affidavit, para. 76; Wilson Affidavit, Tab 2, p. 3

[34] Wilson Affidavit, Tab 2, p. 3

29. In relation to COVID-19, the need for rapid action in the absence of scientific certainty was best expressed by Dr. Michael Ryan, Executive Director, WHO Health Emergencies Programme when he stated:

> 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 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]

30. COVID-19 has two characteristics that increase the complexity of public health decision making. The first is that this is a novel virus: never before encountered in the world. Therefore its biology is unclear, with 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.[36]

31. Much of the decision making in early weeks of the pandemic was based on extrapolation from influenza, SARS and Middle East Respiratory Syndrome (MERS), the second two also being coronaviruses but behaving very differently from each other and COVID-19); and on the experiences of countries experiencing the earliest outbreaks, most notably China and Italy.[37]

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[35] Wilson Affidavit, Tab 10, p. 10

[36] Wilson Affidavit, Tab 2, p. 3

[37] Wilson Affidavit, Tab 2, p. 4

32. While lessons can be drawn from early outbreaks, public health decisions, such as introducing travel restrictions, must consider facts that are specific to this province, including:

(a) the aging population;

(b) the indigenous communities;

(c) the rural nature of the province; and

(d) the strain on the existing healthcare resources that may come from tourists with COVID-19[38]

E. Travel Restrictions

33. On 29 April 2020, the CMOH announced that travel restrictions would be implemented on 4 May 2020. SMO 11 was issued prohibiting 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.[39]

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[38] Fitzgerald Affidavit, para. 92

[39] Fitzgerald Affidavit, Tab 16, p. 37-39

34. On 5 May 2020, Special Measures Order (Travel Exemption Order) was issued exempting those individuals:

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.)

provided they make a formal request to the CMOH and comply with all other public health orders.[40]

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[40] Fitzgerald Affidavit, Tab 16, p. 88-90

35. Travel is a significant factor in the spread of COVID-19. Even a small number of infected travelers has the potential to dramatically worsen the pandemic.[41] The mere act of travel, especially by air (which comprises 84% of Newfoundland and Labrador's non-resident travel) necessitates significant exposure to COVID-19, and travelers may therefore have a higher risk of infection than the general population of their province or country of origin.[42].

36. The Caul's Funeral Home outbreak is an example of the impact that infected travelers can have on rapid spread of the virus in close gathering events. A total of 178 cases are linked to this particular outbreak, which is 68% of the provincial case count to date. This cluster is an example of local transmission where the case can be traced back to a travel related source.[43]

37. The Caul's outbreak lasted almost a month. Approximately 350 people attended the funeral home over a three day period in mid-March. Of those, 93 developed COVID-19 – an attack rate of 26.6%. Four generations of transmission occurred from attendees of the funeral home and their contacts. In addition to households, several workplace settings were sources of onward transmission, including healthcare, Canada Post, an IT company and a municipal para-transit facility. [44]

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

[42] Rahman Affidavit, Tab 2, p. 33-34 of 84

[43] Fitzgerald Affidavit, para. 64

[44] Fitzgerald Affidavit, para. 66

38. There were 12 hospitalizations associated with the Caul's outbreak, including 5 ICU admissions and 2 deaths. Some people recovered within 10 days, but others were ill for over two months. [45]

39. SMO 11 was introduced to protect residents of the province from the importation, and spread of COVID-19. At the time of introduction, many other provinces were seeing increasing cases of disease and this province was having success at controlling COVID-19 here. There were concerns raised regarding compliance with self-isolation orders from municipalities and there was concern that as cases continue 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.[46]

F. Efficacy of Travel Restrictions

40. The only effective method to determine the efficacy of the travel restrictions is to model it. No modelling was done prior to introducing the restrictions. The CMOH took a precautionary approach and implemented them without complete certainty as to their efficacy. The CMOH's action was in accordance with Justice Krever's instructions from the tainted blood inquiry that in public health decision making "action to reduce risk should not await scientific certainty".[47]

41. Subsequent to the introduction of SMO 11, two models were employed by the Predictive Analytics Group to test the efficacy of the travel restrictions- a Newfoundland and Labrador Branching Process model (NL-BP) and an

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[45] Fitzgerald Affidavit, para. 67

[46] Fitzgerald Affidavit, para. 89

[47] Wilson Affidavit, Tab 8, p. 989

Agent Based Simulation (ABS) model. The NL-BP model was used to predict COVID-19 cases in the 9 weeks subsequent to May 4th under two scenarios: 1) when the travel restriction is implemented, and 2) with no travel restriction in place. The number of infected travelers that fail to self-isolate per month was assumed to be 3 (no travel restriction) and 0.24 (travel restriction). The model showed that in "the 9 weeks subsequent to May 4th, failing to implement the travel restriction results in ten times more COVID-19 cases in NL residents than what actually occurred".[48]

42. The ABS model simulated the importation of infected cases over a 100 day period commencing 1 May 2020. The simulation ran three scenarios:

1) Travel restrictions in place, with 1000 exempted travelers entering the province per week

2) No travel restrictions and non-resident travel to NL at typical levels

3) No travel restrictions and non-resident travel to NL at 50% of typical levels

43. The ABS assessed two plausible infection rates (0.03%, 0.1%). It assumed that 75% of travelers would follow the 14-day self-isolation requirement upon arrival in NL, and that 50% of those who did not self-isolate would choose to self-isolate if they became symptomatic.

44. ABS results demonstrated that even with 50% reduction in travelers entering the province, and a low rate of traveler infection (0.03%), the

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[48] Rahman Affidavit, Tab 2, p.10 of 84

number of infections increases three-fold when compared to having the travel restrictions in place.[49]

G. Bill 38

45. Bill 38, an *Act to Amend the Public Health Protection and Promotion Act* was introduced on 5 May 2020 and received Royal Assent the following day. As pertains to this litigation, the relevant sections are 28.1 and 50(1):

> **Enforcement of measures**
>
> 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

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[49] Rahman Affidavit, Tab 2, p.12 of 84

(c) the location to which the individual is being taken.

Powers of inspectors

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.[50][Emphasis added]

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[50] Bill 38, An Act to Amend the Public Health and Protection and Promotion Act, First Session, 49th General Assembly 69 Elizabeth II, 2020, Respondents' Book of Authorities ("RBOA") Tab 1 ["Bill 38"]

46. The Explanatory Notes accompanying Bill 38 indicate the objective of the amendments. The objective of s.28.1 was to:

> allow the Minister of Justice and Public Safety, upon the request of and following consultation with the Minister of Health and Community Services, to authorize peace officers to enforce measures taken by the Chief Medical Officer of Health under subsection 28(1) of the *Act* during a public health emergency, including the authority to detain individuals and to convey individuals to a point of entry in the province;[51]

47. And the amendment of s.50(1), which was comprised of the addition of the term "or a measure taken", was intended to: "clarify that the powers of inspectors apply to measures taken under the *Act*".[52]

48. These legislative amendments are enforcement legislation for determining and maintaining compliance with the travel restrictions and other SMO's.

49. On 8 May 2020 the Minister of Justice and Public Safety wrote to the Chief of the Royal Newfoundland Constabulary (RNC) and the Assistant Commissioner of the Royal Canadian Mounted Police (RCMP), authorizing officers of the RNC and RCMP to exercise powers under s.28.1. The relevant part of the correspondence reads:

> I have received a request from the Minister of Health and Community Services to authorize peace officers to enforce some of the Special Measure Orders that have been imposed by the Chief Medical Officer of Health since a public health emergency was declared on March 18, 2020. The request is specific to enforcement of those Special Measure Orders that assist in preventing the importation of COVID-19 in the province.
>
> I have considered the request and, following consultation with Minister

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[51] Bill 38, RBOA Tab 1

[52] Bill 38, RBOA Tab 1

> Haggie, am writing to advise that, in accordance with the authority provided under section 28.1 of the *Public Health Protection and Promotion Act*, I hereby authorize all Royal Newfoundland Constabulary[53] officers to exercise any of those powers set out in subsection 28.1(1) for the purpose of enforcing the following Special Measure Orders issued by the Chief Medical Officer of Health, as may be amended from time to time:
>
> 1. Special Measures Order, dated April 29, 2020 and effective May 4, 2020, prohibiting entry into the province to all individuals except for residents and those whose exemption has been approved by the Chief Medical Officer of Health; and,
>
> 2. Special Measures Order, dated April 25, 2020 and effective April 27, 2020 at noon, requiring all individuals who enter the province to complete and submit a declaration form and self-isolation plan.[54]

50. The Affidavit of Katie Norman, Assistant Deputy Minister of Enforcement and Resource Services with the Department of Fisheries and Land Resources, establishes that neither the RNC nor the RCMP have used the enforcement measures under section 28.1 of the *Public Health Protection and Promotion Act*.[55]

51. While individuals attempting to enter Newfoundland and Labrador have been asked to leave if they do not fall within the exemption criteria set by the CMOH, those individuals have left voluntarily.[56]

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[53] The correspondence sent to the Assistant Commissioner of the RCMP contains the words "Royal Canadian Mounted Police" in place of "Royal Newfoundland Constabulary".

[54] Affidavit of Katie Norman ("Norman Affidavit"), Tabs 1 & 2

[55] Norman Affidavit, para. 7

[56] Norman Affidavit, para. 9

52. The Province has paid for accommodations or return transportation for non-residents who have entered without authorization and lacked the means to pay for these costs.[57]

H. Ms. Taylor

53. Ms. Taylor is a resident of Nova Scotia. On 06 May 2020, she sought to enter Newfoundland and Labrador for the purposes of attending her mother's funeral and to grieve with her family. Her request to be exempted from SMO11 was denied on 08 May 2020.[58] The denial correspondence outlined the process for reconsideration.[59]

54. On 14 May 2020, six days after receipt of her denial correspondence, Ms. Taylor submitted a reconsideration request.[60] On 16 May 2020, she was granted an exemption permitting her entry into Newfoundland and Labrador. [61]

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[57] Norman Affidavit, para. 10

[58] Fitzgerald Affidavit, para. 104

[59] Fitzgerald Affidavit, para. 104

[60] Fitzgerald Affidavit, para. 105

[61] Fitzgerald Affidavit, para. 106

PART III – LIST OF THE ISSUES

55. The issues to be determined in this Application are:

(a) Should the Canadian Civil Liberties Association (CCLA) be granted public interest standing to bring this application?

(b) Are s.28(1)(h) of the *PHPPA* and the travel restrictions issued pursuant to that section valid exercises of provincial constitutional jurisdiction?

(c) Do the travel restrictions contained in Special Measures Order 11 ("SMO11") violate s.6 of the *Charter of Rights and Freedoms*?

(d) Do the travel restrictions contained in SMO violate s.7 of the *Charter of Rights and Freedoms*?

(e) If SMO 11 violates ss.6 and 7 of the *Charter of Rights and Freedoms*, is it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the *Charter of Rights and Freedoms*?

(f) Does s.28.1 of *PHPPA* violate s.7 of the *Charter of Rights and Freedoms*?

(g) Does s.28.1 of *PHPPA* violate s.9 of the *Charter of Rights and Freedoms*?

(h) If s.28.1 of the *PHPPA* violates ss.7 and/or 9 of the *Charter of Rights and Freedoms*, is it saved by s.1?

(i) Does s.50(1) of the *PHPPA* violate s.8 of the *Charter of Rights and Freedoms*?

(j) If s.50(1) of the *PHPPA* violates s.8 of the *Charter of Rights and Freedoms* is it saved by s.1?

(k) If this court finds that there is a violation of the *Charter of Rights and Freedoms* with respect to the travel restrictions, s.28.1 or s.50(1) or SMO 11 is found to be *ultra vires* should any declaration of invalidity be temporarily suspended?

PART IV – ARGUMENT

A. Should the CCLA be granted public interest standing to bring this application?

56. The Province submits that the CCLA should not be given public interest standing to challenge SMO 11 or ss.28.1 and s.50(1) of the *PHPPA*.

57. Granting public interest standing is a discretionary decision. The leading case is *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*[62]. In that case, the Supreme Court of Canada held that courts should

> ...weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court[63]

1. Is there a serious justiciable issue?

58. The Province does not dispute that this proceeding raises a justiciable issue regarding SMO 11 because Ms. Taylor has stepped forward and alleged that her *Charter* rights were breached when she was denied an exemption by the CMOH on 08 May 2020. However, there is no similar applicant regarding the ss.28.1 and s.50(1) of the *PHPPA*. There are no facts, just the bare assertions of unconstitutionality by the CCLA.

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[62] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, RBOA Tab 2 ["*Downtown Eastside Sex Workers*"]

[63] *Downtown Eastside Sex Workers*, para 2, RBOA Tab 2

59. Canadian courts have a long history of refraining from adjudicating disputes that do not involve real people in real situations. In *Danson v. Ontario (Attorney General)*, the Supreme Court of Canada recognized the importance of ensuring that "a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack."[64]

60. Similarly, in *MacKay v. Manitoba*, Cory J. wrote:

> *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.[65]

61. In *Canadian Council for Refugees v. R*, the Federal Court of Appeal considered a *Charter* challenge to a federal law implementing the Safe Third Country Agreement between Canada and the United States. Three respondent organizations ("the Organizations"), were granted public interest standing by the lower court. The third respondent, an individual identified as "John Doe" pursuant to a confidentiality order, an individual who never attempted to enter Canada, was granted standing as well. The lower court determined that John Doe was to be considered as having presented himself at the border and as having been denied entry to Canada.[66] On appeal, the Federal Court of Appeal determined that the

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[64] *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, para. 26, RBOA Tab 3

[65] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, para. 9, RBOA Tab 4

[66] *Canadian Council for Refugees v. R*, 2008 FCA 229, para. 31, RBOA Tab 5

Organizations and John Doe should not have been given standing. The Court held that:

> [102] Consequently, in this case, the ability of the respondent organizations to bring the *Charter* challenge depends on John Doe. However, John Doe never presented himself at the Canadian border and therefore never requested a determination regarding his eligibility. Following the renewed evidence regarding the threat that the FARC poses to his life, U.S. immigration authorities agreed to reconsider his claim and he remains in the U.S. The applications Judge's conclusion that John Doe should nevertheless be considered as having come to the border and as having been denied entry runs directly against the established principle that *Charter* challenges cannot be mounted on the basis of hypothetical situations.
>
> [103] There is, in this case, no factual basis upon which to assess the alleged Charter breaches. The respondent organizations' main contention is directed at a border officer's lack of discretion to forgo returning a claimant to the U.S. for reasons other than the enumerated exceptions set out in section 159.5 of the Regulations. This challenge, however, should be assessed in a proper factual context—that is, when advanced by a refugee who has been denied asylum in Canada pursuant to the Regulations and faces a real risk of *refoulement* in being sent back to the U.S. pursuant to the Safe Third Country Agreement.[67]

62. Accordingly, the Federal Court of Appeal held that the *Charter* challenge should not have been considered.

63. With respect to ss.28.1 and 50(1) of the *PHPPA*, there is no factual basis on which to assess any *Charter* breaches. There is no applicant before this Court subject to these provisions, there is not even a "John Doe". The claim is hypothetical and speculative and therefore non-justiciable. Due to this alone, CCLA should not be granted public interest standing regarding its challenge to those sections of the *PHPPA*.

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[67] *Canadian Council for Refugees v. R*, paras. 102-103, RBOA Tab 5

2. Does the CCLA have a real stake or a genuine interest in the outcome of these proceedings?

64. The CCLA is a non-governmental organization with a self-described mandate to defend and promote the recognition of constitutional rights.[68] This does not amount to the "genuine interest" that creates a basis for standing in this matter. When the courts speak of a party having a "genuine interest" it means that the party is directly impacted by the outcome of the proceeding, not that the party is truly concerned about the matters raised in a proceeding. If CCLA's position is accepted it would mean that they would have a right to commence any action it pleased, anywhere in Canada, so long as it involved civil liberties and *Charter* rights.

65. This point was made in *Shiell v. Amok Ltd.*, a case involving an allegation that Minister of the Environment was in breach of the *Environmental Assessment Act*. Barclay J. stated:

> 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.[69][emphasis added]

66. The CCLA points to its long list of interventions as proof of its genuine interest. Again, this is evidence that the organization is truly concerned about an issue, not that it has a direct interest in the matter. Furthermore,

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[68] Affidavit of Cara Faith Zwibel, paras. 5-6.

[69] *Shiell v. Amok*, 27 Admin. L.R. 1 (SKQB), para. 22, RBOA Tab 6

it must be pointed out that the requirements for meeting the test for standing are very different from being allowed to intervene in a matter.

67. The CCLA as an organization, is distinguishable from the non-profit organization that was granted standing in *Downtown Eastside Sex Workers*. That organization had a very specific and narrow mandate, and was "run by and for current and former sex workers who live and/or work in the neighbourhood".[70] The group was asserting the rights of its members who would presumably have a right to sue themselves. It should also be pointed out that the second plaintiff in the *Downtown Eastside Sex Workers* case was a former sex worker who was now a violence prevention coordinator in the Downtown Eastside[71] at a center that offers support services for sex workers. By way of contrast, in this case there is no second plaintiff challenging ss.28.1 and 50(1) of the *PHPPA*. Furthermore, the CCLA has no direct connection to this province or the matter that is before the court, other than an assertion that the topic falls within its self-defined mandate.

3. Is the proposed suit a reasonable and effective means to bring the case to court?

68. With respect to the final factor, whether this proceeding is a reasonable and effective means of bringing the issue before the court, the Supreme Court in *Downtown Eastside Sex Workers* indicated that the following factors should be considered: (1) the plaintiff's capacity to bring forward a claim; (2) whether the case is of public interest in that it transcends the interest of those most directly affected by the challenged law; (3) whether there are realistic alternative means which would favour a more efficient and effective

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[70] *Downtown Eastside Sex Workers*, para. 58, RBOA Tab 2

[71] *Downtown Eastside Sex Workers*, para. 59, RBOA Tab 2

use of judicial resources; and (4) the potential impact of the proceedings on the rights of others who are equally or more directly affected.[72]

69. With respect to the third consideration identified above, the court in *Downtown Eastside Sex Workers*, commented that:

> Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner.[73]

70. The Court also recognized that, "[a]ll of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred."[74]

71. With respect to SMO 11, the Province submits that Ms. Taylor is an individual directly affected by the operation of SMO 11, who was able to retain counsel to represent her in these proceedings, and is an appropriate applicant to bring a challenge with respect to SMO 11. The Province submits that, in these circumstances, it would not be appropriate to grant standing to the CCLA with respect to this issue.

72. With respect to ss.28.1 and 50(1) of the *PHPPA*, the third factor set out in *Downtown Eastside Sex Workers* also does not favour granting standing to the CCLA. As noted above, the Supreme Court of Canada has consistently recognized the necessity of having a proper factual foundation in *Charter* challenge. In the situation before this court, no person is identified as being

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[72] *Downtown Eastside Sex Workers*, para. 51, RBOA Tab 2

[73] *Downtown Eastside Sex Workers*, para. 51, RBOA Tab 2

[74] *Downtown Eastside Sex Workers*, para. 37, RBOA Tab 2

subject to the enforcement provisions contained in these sections. As a result, this proceeding is not a reasonable and effective manner to bring this issue before the court.

73. In the Province's submission, an individual directly affected by ss.28.1 and 50(1) is the proper litigant to challenge the constitutionality of these sections. As the Supreme Court of Canada noted in *Danson*, 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."[75]

74. For the foregoing reasons, the Province submits that the CCLA should be denied standing with respect to both SMO 11 and ss.28.1 and 50(1) of the *PHPPA*.

B. Are s.28(1)(h) of the *PHPPA* and the travel restrictions issued pursuant to that section valid exercises of provincial constitutional jurisdiction?

1. Approach to Division of Powers Analysis

75. Where legislation is challenged on the basis of being *ultra vires*, it is necessary to engage in the two-stage division of powers analysis articulated by the Supreme Court of Canada. The first step is to determine the "pith and substance", or dominant or essential character, of the law. The second step is to classify that essential character by reference to the heads of power under the *Constitution Act, 1867* in order to determine whether the law

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[75] *Danson v. Ontario (Attorney General)*, para. 9, RBOA Tab 3

comes within the jurisdiction of the enacting government. If it does, then the law is valid.[76]

76. Incidental impacts on matters outside the jurisdiction of the enacting body do not affect its constitutional validity.[77] By "incidental" it is meant that the effects may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature.[78]

77. While both the purpose and effect of the law are relevant considerations in the process of characterization, it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity.[79] A law's purpose refers to "what the legislature wanted to accomplish".[80]

78. The effects of a measure must be considered in conjunction with, and not in isolation from, its purpose. The court will look beyond the direct legal effects to inquire into the social or economic purposes which the legislation was enacted to achieve. Such a flexible, non-technical approach to the pith and substance analysis is a recognition that the purpose of the measure often reveals its dominant characteristic. The Supreme Court has expressly recognized that this approach to the pith and substance analysis has led the Court to find measures to be constitutionally valid that would otherwise

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[76] *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, para. 15, RBOA Tab 7; *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, para. 25-26, RBOA Tab 8

[77] *Canadian Western Bank,* para. 28, RBOA Tab 8; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 SCR 494, para. 23, RBOA Tab 9.

[78] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473, para. 28, RBOA Tab 10; *Canadian Western Bank*, para. 28, RBOA Tab 8.

[79] *R. v. Morgentaler*, [1993] 3 SCR 463, para. 27, RBOA Tab 11; *Rogers Communications Inc. v. Châteauguay (City)*, [2016] 1 SCR 467, para. 107, RBOA Tab 12.

[80] *Ward v. Canada (Attorney General)*, 2002 SCC 17, para. 17, RBOA Tab 13. See also Hogg, *Constitutional Law of Canada (5th Ed. Supp.)*, pp. 15-14 to 15-15, RBOA Tab 14.

have been found, if viewed solely from the perspective of their effects, to regulate activities outside the enacting body's jurisdiction.[81]

79. The goal in a pith and substance analysis is to determine the legislature's underlying purpose in enacting a particular piece of legislation; it is not to determine whether the legislature could have achieved that purpose more effectively in other ways. The efficacy of the provision or whether it successfully achieves the legislative objective is not a relevant consideration.[82]

80. Overall legislative context is important where the impugned provision forms part of a larger scheme, the pith and substance analysis begins with the provision, however, the "matter" of the provision must be considered in the context of the larger legislative scheme.[83]

2. The Pith and Substance of s. 28(1)(h) of the PHPPA and the Travel Restrictions

81. Section 28(1)(h) of the *PHPPA* (bolded) states:

> 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;

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[81] *Rogers Communications Inc. v. Châteauguay (City)*, para. 107, RBOA Tab 12; *Ward*, para. 17-18, RBOA Tab 13; *Reference re Firearms Act*, paras. 16-18, RBOA Tab 7; *Morgentaler*, para. 27, RBOA Tab 11.

[82] *Ward*, paras. 18 & 22, RBOA Tab 13; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, para. 44, RBOA Tab 15; *Reference re Firearms Act*, para. 18, RBOA Tab 7; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 15, RBOA Tab 16

[83] *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 30, RBOA Tab 17; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, para. 56, RBOA Tab 18; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, para. 20, RBOA Tab 19.

(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;

(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.[84] [emphasis added]

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[84] *Public Health Protection and Promotion Act*, SNL 2018 c P-37.3, s. 28, RBOA Tab 20 ["*PHPPA*"]

82. The purpose of s. 28(1)(h), like the rest of s. 28(1), is clear from the opening words of that subsection – to protect the health of the population and prevent, remedy or mitigate the effects of a public health emergency.

83. Section 28 special measures can only be taken when a declaration of a public health emergency is made under s. 27 by the Minister of Health and Community Services, on the advice of the CMOH.

84. A "public health emergency" is defined in s. 2(y) of the *Act*:

> 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;[85]

85. In order to declare a public health emergency under s. 27, the Minister must be satisfied that a public health emergency exists and that it cannot be sufficiently mitigated or remedied without the implementation of the special measures available under s. 28. This significant threshold underscores the importance of these measures in addressing a serious risk to the health of the population.[86]

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[85] *PHPPA*, s. 2(y), RBOA Tab 20

[86] Hansard, November 20, 2018, Forty-Eighth General Assembly of Newfoundland and Labrador, Volume XLVIII, Third Session, Number 44, p. 2620, RBOA Tab 21.

86. Where a public health emergency results from the occurrence or imminent threat of a communicable disease (s. 2(y)(i)) or a novel or highly infectious agent (s. 2(y)(iii)), as in the case of COVD-19, the powers granted by s. 28(1)(h) to make orders restricting travel to or from the province or an area within the province provide important public health tools to reduce the spread of the infectious agent (i.e. the virus) and the communicable disease.

87. Communicable diseases and infectious agents are spread when infected individuals come into sufficiently close contact with each other. The purpose of various public health measures, including: isolation, quarantine, closing premises and conveyances, social distancing, and travel restrictions, are to reduce the frequency of that contact and thereby reduce the rate of spread of the infectious agent and incidence of the communicable disease in the population.

88. The purpose of the travel restriction introduced by the CMOH is consistent with the purpose of s. 28(1)(h) - "to protect Newfoundland and Labrador from the importation, and ultimate spread of COVID-19".[87]

89. As a result of a combination of factors, this province has experienced a relatively low number of COVID-19 cases. Other Canadian jurisdictions have been less fortunate and have significantly higher infection rates. The purpose of the travel restrictions is to reduce the importation and spread of the disease from high COVID-19 jurisdictions.[88]

90. One effect of s. 28(1)(h) and SMO 11 is to prohibit people entering Newfoundland and Labrador who do not fall within one of the exemptions (and in the case of s. 28(1)(h), also to potentially restrict movement of

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[87] Fitzgerald Affidavit, paras. 83, 89, 91, 102

[88] Fitzgerald Affidavit, paras. 83, 89, 91, 102

individuals between areas of the province). However, the other critically important effect is reducing the risk and likelihood that these individuals will bring COVID-19 into the province with them.[89]

91. When the purpose and effects of s.28(1)(h) and SMO 11 are considered as a whole in a flexible, non-technical manner, the pith and substance is clear. It is the protection of the health of the Newfoundland and Labrador population and the prevention and mitigation of the effects of a public health emergency, in this case, the COVID-19 pandemic.

92. Additional support for this conclusion is found by considering these measures in the context of the overall legislative scheme of the *PHPPA*, in particular, "Part VI, Public Health Emergencies". Section 28(1)(h) advances the overall purpose of this legislative scheme. It is one of several potential public health measures which the CMOH can take for the purpose of protecting the health of the population and preventing, remedying or mitigating the effects of the public health emergency. Ms. Taylor and the CCLA do not contest the constitutional jurisdiction of the provincial legislature to pass the *PHPPA*. The CCLA expressly acknowledges that the *PHPPA* is valid provincial legislation aimed at public health.[90] Section 28(1)(h) and the travel measures are integrally connected with, and take their constitutional characterization from, this overall scheme.[91]

93. The Applicants assert that the pith and substance of s. 28(1)(h) of the *PHPPA* and SMO 11 is "the regulation of interprovincial borders and

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[89] Rahman Affidavit, Tab 2, p. 9-14 of 84; Fitzgerald Affidavit, para. 89.

[90] Second Applicant's Brief, paras. 39 & 54.

[91] *Quebec (Attorney General) v. Canada (Attorney General)*, para. 30, RBOA Tab 17; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, para. 56, RBOA Tab 18; *Kirkbi AG v. Ritvik Holdings Inc.*, para. 20, RBOA Tab 19.

movement within the province" (Ms. Taylor)[92] or "restricting interprovincial travel" (CCLA).[93] With respect, these are gross mischaracterizations of the pith and substance. Ms. Taylor makes only passing reference to the measures being "in response to a public health emergency"[94] and makes no further comment on the underlying purpose of the measures or the relevance of this purpose to determining their pith and substance. The CCLA acknowledges the purpose of the travel restrictions as stated in s. 28(1), however, it asserts that s. 28(1)(h) has the effect of restricting the mobility of persons outside the province and that "the latter aspect [this effect] is the relevant one for the purpose of assessing the province's jurisdiction."[95] The CCLA provides no rationale for this assertion. This assertion runs contrary to the Supreme Court of Canada's direction on the importance of considering both purpose and effects in conjunction with each other, and the Court's observation that "the purpose of the measure often reveals its dominant characteristic".[96]

3. Relevant Heads of Power under the Constitution Act, 1867

94. Section 28(1)(h) of the *PHPPA* and SMO 11 are matters of public health and fall squarely within provincial jurisdiction.

95. The provinces have broad and extensive jurisdiction in relation to health matters deriving from sections 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a local and private nature) of the *Constitution*

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[92] First Applicant's Brief, para. 19.

[93] Second Applicant's Brief, paras. 39, 41 & 52.

[94] First Applicant's Brief, para. 18.

[95] Second Applicant's Brief, para. 41.

[96] *Rogers Communications Inc. v. Châteauguay (City)*, para. 107, RBOA Tab 12; *R. v. Morgentaler*, [1993] 3 SCR 463, para. 27, RBOA Tab 11

Act, 1867.[97] The Supreme Court of Canada has referred to the "sheer size and diversity of the provincial health power".[98] It encompasses health insurance programs,[99] the regulation of health professionals,[100] hospitals and similar institutions,[101] the provision (and in some cases, enforcement) of treatment,[102] and health information.[103]

96. Matters of public health have long been held to be within provincial jurisdiction under one or more of these heads of power.[104] In 1886 the Quebec Court of Appeal held in the case of *Rinfret v. Pope* that with the exception of the federal jurisdiction under s. 91(11) (quarantine and marine hospitals), all matters of public health are within the control of the provinces. In that case, the Court held that in so far as the federal *Quarantine and Public Health Act* purported to repeal the QC *Public Health Act*, it was *ultra vires*, and the provincial act remained in force.[105]

97. Almost 100 years later in *Schneider v. The Queen*, the Supreme Court of Canada held that "[t]his view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either

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[97] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), pp. 32-1 to 32-2, RBOA Tab 14

[98] *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, para. 68, RBOA Tab 22. See also *Québec (Procureur général) c. Canada Procureur général)*, 2010 SCC 61, paras. 134, 262-264, RBOA Tab 23

[99] *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, para. 24, RBOA Tab 24

[100] *R. v. Levkoe*, (1977) 18 O.R. (2d) 265 (ON SC), RBOA Tab 25

[101] *Constitution Act, 1867*, s. 92(7), RBOA Tab 26

[102] *Fawcett v. Ontario (A.G.)*, [1964] S.C.R. 625, RBOA Tab 27; *R. v. Lenart* (1998) 39 OR (3d) 55 (CA), RBOA Tab 28

[103] *Québec (Procureur général) c. Canada Procureur général)*, para. 133, RBOA Tab 23

[104] *Commission of Inquiry on the Blood System in Canada* (Commissioner Honourable Horace Krever), Final Report (the "*Krever Report*"), tabled in the House of Commons 26 November 1997, pp. 148-149, RBOA Tab 29

[105] *Rinfret v. Pope,* 10 L.N. 74, 12 Q.L.R. 303 (Que. C.A.), RBOA Tab 30

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".[106] The Appellant in that case challenged British Columbia's *Heroin Treatment Act, 1978,* which provided for the compulsory apprehension, assessment and treatment of drug addicts, on the ground that it was really a criminal law and therefore outside the powers of the province. The Supreme Court rejected this challenge. Dickson J. wrote the main judgment, holding that the law came within the provincial authority over public health as a local or private matter under s. 92(16).[107] Estey J. in his decision also relied on s. 92(7) and (13).[108]

98. Since *Rinfret v. Pope*, provincial public health legislation on the surveillance, management and control of communicable disease has never been seriously questioned from a constitutional division of powers perspective.

99. Consistent with this legislative jurisdiction, provinces have a mandate to protect and promote the health of their populations. This is precisely what s. 28(1)(h) and SMO 11 were designed to do. The pith and substance of these measures thus falls clearly within provincial jurisdiction under ss. 92(7), (13) and (16). Any impacts on matters outside the jurisdiction of the Legislature are purely incidental and do not diminish their constitutional validity.

100. The recent case of *R. v. Comeau*[109] provides a useful analogy. In that case, the Respondent travelled from his home in New Brunswick across the

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[106] *Schneider v. The Queen*, [1982] 2 SCR 112, para. 60, RBOA Tab 31

[107] *Schneider v. The Queen*, para. 63, RBOA Tab 31

[108] *Schneider v. The Queen*, para. 71, RBOA Tab 31

[109] *R. v. Comeau*, [2018] 1 SCR 342, RBOA Tab 32

border to Quebec where he purchased cheaper priced alcohol. Unfortunately for Mr. Comeau, he was being watched by the RCMP who had become concerned with New Brunswick residents acquiring large quantities of alcohol in Quebec in contravention of New Brunswick law. In response, the RCMP started monitoring New Brunswick visitors to commonly frequented liquor stores on the Quebec side. Quebec officers would record visitors' information and pass it on to their New Brunswick colleagues, who were waiting across the border.[110]

101. Returning home, Mr. Comeau was tracked and stopped by the RCMP. The police found a large quantity of alcohol in his vehicle. It was not in dispute that Mr. Comeau purchased quantities of alcohol in excess of the applicable limit prescribed by s. 43(c) of the *Liquor Control Act* and he was charged under s. 134(b) of the *Act* with possessing liquor in excess of allowable quantities not purchased from the New Brunswick Liquor Corporation.[111]

102. Mr. Comeau challenged the charge on the basis that s. 134(b) of the *Liquor Control Act* infringed s. 121 of the *Constitution Act, 1867* and was therefore of no force and effect. The Supreme Court of Canada dismissed his challenge.

103. Section 121 reads, "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."[112] The Court held that a claimant alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border.[113]

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[110] *R. v. Comeau*, paras. 9-10, RBOA Tab 32

[111] *R. v. Comeau*, para. 11, RBOA Tab 32

[112] *Constitution Act, 1867*, s. 121, RBOA Tab 33

[113] *R. v. Comeau*, paras. 107 & 114, RBOA Tab 32

104. Section 134(b) impedes liquor purchases originating anywhere other than the New Brunswick Liquor Corporation and therefore, in essence, it functions like a tariff, even though it may have other purely internal effects. However, the court held that the objective of the New Brunswick regulatory scheme was not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick and s. 134(b) was not divorced from the objective of the larger scheme. The primary purpose of s. 134(b) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. While one effect of s. 134(b) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(b) in essence impedes cross-border trade, this is not its primary purpose and the section does not infringe s. 121.[114]

105. The Court accepted that the purpose of s. 134(b) and similar provisions in other jurisdictions is grounded in public health concerns, holding:

> The federalism principle supports the view that provinces within a federal state should be allowed leeway to manage the passage of goods while legislating to address particular conditions and priorities within their borders. For example, the Northwest Territories and Nunavut have adopted laws governing the consumption of liquor, which include controls on liquor coming across the border into their territories. The primary objective of the laws is public health, but they have the incidental effect of curtailing cross-border trade in liquor. The Northwest Territories and Nunavut argue that these sorts of laws do not fall under the spectre of s. 121. We agree that to interpret s. 121 in a way that renders such laws invalid despite their non-trade-related objectives is to misunderstand the import of the federalism principle.[115][emphasis added]

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[114] *R. v. Comeau*, paras. 117-126, RBOA Tab 32

[115] *R. v. Comeau*, para. 86, RBOA Tab 32

106. The reasoning in this case is equally applicable to Ms. Taylor's matter. If the federalism principle allows provinces to adopt measures which are in essence tariffs that curtail interprovincial trade provided that they are for a *bona fide* provincial purpose such as public health, so too must a province be able to adopt measures to address public health emergencies, even though those provincial measures may have incidental impacts on matters outside its jurisdiction.

4. The Applicants' Arguments

107. The Applicants' argue that s.28(1)(h) of the *PHPPA* and SMO 11 fall within federal jurisdiction under a combination of ss. 91(29) and 92(10)(a). Section 91(29) grants jurisdiction to Parliament to legislate in respect of "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Section 92(10)(a) grants legislative jurisdiction to the provinces in respect of:

> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.[116]

108. The Province submits that the legislative authority granted to Parliament by a combination of ss. 91(29) and 92(10)(a) is with respect of the identified modes of transportation (e.g. lines of ships, railways) and other "works and

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[116] *Constitution Act, 1867*, s. 91(29), RBOA Tab 34; *Constitution Act, 1867*, s. 92(10)(a), RBOA Tab 26

undertakings" connecting provinces or extending beyond the limits of a province.

109. Although the Supreme Court has observed that the common thread among the enumerated transportation works and undertakings in s. 92(10)(a) is the interprovincial transport of goods or persons, the Court has also clearly stated that the enumerated examples in s. 92(10)(a) are all "instruments of or means of facilitating transport".[117] It is the modes or means of transport or the entities that run those modes of transportation that are the contemplated objects of regulation under the authority of s. 92(10)(a).[118]

110. A work has been described as a "physical thing"[119], whereas an undertaking is an "organization"[120] or "enterprise".[121] Transportation works and undertakings include ships, trains, buses, trucks and the companies that own and operate them.

111. Section 28(1)(h) of the *PHPPA* and SMO 11 in no way regulate or interfere with shipping lines, railways, bus lines, or any other interprovincial transportation work or undertaking. They do not prohibit a ferry from docking, a bus from entering, or a plane from landing in the province. Rather, s. 28(1)(h) and SMO 11 enable and restrict the entry of *individuals* into the province. This does not fall within federal jurisdiction under ss. 91(29) and 92(10)(a).

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[117] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, para. 43, RBOA Tab 35

[118] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), pp. 22-4 to 22-5, RBOA Tab 14

[119] *Montreal (City) v. Montreal Street Railway*, [1912] AC 333, para. 15, RBOA Tab 36

[120] *Employees of the Canadian Pacific Railway in Empress Hotel, Victoria (City), Re*, [1950] AC 122, para. 12, RBOA Tab 37

[121] *Ontario (Attorney General) v. Winner*, [1954] AC 541, para. 50, RBOA Tab 38

112. Ms. Taylor and the CCLA further assert that interprovincial mobility is inherent to the status of Canadian citizenship. Since citizenship is a matter of federal jurisdiction under s. 91(25), they claim that the challenged measures are outside provincial jurisdiction.[122]

113. This reasoning finds its roots in the *obiter* comments of Rand J. in the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Winner*:[123] He stated:

> ...The first and fundamental accomplishment of the constitutional act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.
>
> [...]
>
> 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.
>
> Such, then, is the national status embodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament. [124]

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[122] First Applicant's Brief, paras. 24-25; Second Applicant's Brief paras. 46-48.

[123] *Ontario (Attorney General) v. Winner*, [1951] SCR 887, RBOA Tab 39

[124] *Ontario (Attorney General) v. Winner*, [1951] SCR 887, paras. 115, 119 & 120, RBOA Tab 39

114. There are several flaws in Rand J's reasoning. Contrary to his comments, citizenship is not a source of inherent constitutional rights. It is not an unwritten constitutional principle. It is a status created and governed by the *Citizenship Act*, and as such is malleable at whims of Parliament.[125] Canadian citizenship did not even exist until 1947, when the *Canadian Citizenship Act* came into effect. Prior to 1947, individuals born in Canada and naturalized immigrants were classified as British subjects, rather than Canadian citizens.

115. Setting aside Rand J.'s misapprehension of citizenship, he nonetheless explicitly contemplates that a province could impose temporary restrictions on individuals entering on the basis of health. He states: "... a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health".[126] The *Winner* case is unhelpful to Ms. Taylor and the CCLA's case.

116. In conclusion, the pith and substance of s. 28(1)(h) of the *PHPPA* and the travel restrictions is the protection of the health of the Newfoundland and Labrador population and the prevention and mitigation of the effects of a public health emergency, in this case, the COVID-19 pandemic. This pith and substance falls squarely within provincial jurisdiction under s. 92(7), (13) and / or (16). Any impacts on matters outside provincial jurisdiction are incidental to this essential matter and do not affect the constitutional validity of the challenged measures.

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[125] *Citizenship Act*, R.S.C., 1985, c. C-29, RBOA Tab 40

[126] *Winner v. S.M.T. (Eastern) Ltd.*, [1951] SCR 887, para. 119, RBOA Tab 39; reversed on appeal, but not on this point: *Ontario (Attorney General) v. Winner*, [1954] AC 541, RBOA Tab 38.

C. Do the travel restrictions contained in Special Measures Order 11 violate s.6 of the *Charter of Rights and Freedoms*?

117. Ms. Taylor is a permanent resident of Nova Scotia who sought permission to visit Newfoundland and Labrador for the purposes of attending her mother's funeral, and grieving with her family.[127] Her request for a travel exemption was initially denied by the CMOH, but later granted after request for reconsideration.[128] There is no evidence that she intended to permanently move to Newfoundland and Labrador, nor is there evidence that she was seeking employment in the province. Her visit was temporary and personal.

118. Facts are important. This is not a private reference in which the court is making a *general pronouncement* on the constitutionality of SMO 11 in relation to section 6, rather, it is adjudicating whether Ms. Taylor's *Charter* rights have been violated. Again the words of Cory J. in *McKay v. Manitoba* are relevant, when he stated:

> *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.[129]

119. Courts should not adjudicate hypothetical scenarios and alternative fact patterns devised by imaginative counsel.

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[127] Affidavit of Kimberley Taylor, paras. 2, 11, & 12.

[128] Fitzgerald Affidavit, Tab 21

[129] *Mackay v. Manitoba*, para. 9, RBOA Tab 4. See also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, RBOA Tab 3

120. Ms. Taylor alleges that the CMOH's initial denial of an exemption violates her mobility rights under s.6 of the *Charter*. Section 6(1) deals with international travel and is not applicable to this case. Section 6(2) deals with interprovincial mobility rights. It states:

> s.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.[130]

1. Purposive Interpretation- What is the purpose of s.6?

121. The correct approach to interpreting the *Charter's* mobility rights is to employ a purposive interpretation in order to derive the purpose of the right, and to determine whether the activity in question falls within its ambit. In *R. v. Big M. Drug Mart*, Dickson J. articulated the key elements of this approach, stating:

> ...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

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[130] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 6, RBOA Tab 41

contexts.[131][emphasis added]

122. The danger of an overly generous approach, is that it will protect "behaviour that is outside the purpose and unworthy of constitutional protection".[132] As Professor Hogg states, "The effect of the purposive approach is normally to narrow the scope of the right. Generosity is a helpful idea as long as it is subordinate to purpose".[133]

123. The Province's submission will apply the key elements of *Big M. Drug Mart's* purposive approach - examination of the "historical origins" of s.6, analysis of the "language chosen to articulate the right" and the relationship of "the right to other specific rights", to demonstrate that the purpose of s.6(2)(a) is to create an economic right. The Province argues that 6(2)(a) should not be abstracted from its economic context and transformed into a mobility right to tourism and temporary travel. To do so is to overshoot the purpose of the right and divorce it from its text and history.

(a) Historical Origins of s.6 Mobility Rights

124. The history of s.6 proves that the purpose is to create "what is generally classified as an "economic civil liberty.""[134] Leading up to the creation of the *Charter*, there was concern over the "fragmentation of the Canadian economic union".[135] During the constitutional negotiations between the federal and provincial governments, the federal government issued a paper entitled "Securing the Canadian Economic Union in the Constitution". The

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[131] *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, para. 118, RBOA Tab 42

[132] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), p.36-30, RBOA Tab 14

[133] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), p.36-30, RBOA Tab 14

[134] Martha Jackman, "Interprovincial Mobility Rights Under the Charter", (1985) 43(2) U.T. Fac. L. Rev. 16, p. 16, RBOA Tab 43

[135] *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591, para. 52, RBOA Tab 44

paper examined three options for cementing the economic union: 1) expanding the federal government's trade and commerce power; 2) amending s.121 of the *BNA Act;* and 3) creating a constitutional right to mobility. The paper explains that the mobility option

> is often formulated to guarantee to individuals the right to settle, to earn a livelihood and to hold property in any province. Sometimes it is framed more generally, as in the report of the Committee on the Constitution of the Canadian Bar Association, as a guarantee that manpower may move freely without discrimination throughout the country.[136]

125. In 1982, the federal and provincial governments agreed on the mobility solution to the economic union problem. This solution is manifested in ss.6(2)-6(4) of the *Charter*.

126. "Securing the Canadian Economic Union in the Constitution" has been relied on numerous times by the courts. In *Demaere, Re,* Hugessen J.A referred to it as "persuasive evidence" of the purpose or "mischief" at which s.6 was directed.[137] La Forest J. also relied on it in *Black v. Law Society (Alberta)* for his determination that "economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights, under s.6(2) of the *Charter*".[138]

127. The CCLA asserts that La Forest J.'s decision in *Black* "specifically disagrees with the idea that mobility rights, are interconnected to the economic growth of the country".[139] With respect, this misrepresents La

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[136] "Securing the Canadian Economic Union in the Constitution", Discussion paper published by the Government of Canada (1980), p. 26, RBOA Tab 45

[137] *Demaere, Re*, [1983] 2 F.C. 755, para. 11, RBOA Tab 46

[138] *Black v. Law Society (Alberta)*, para. 53, RBOA Tab 44

[139] Second Applicant's Brief, para. 71.

Forest J.'s comments. He is absolutely and expressly clear that "economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights".[140] The CCLA's comment is also directly contradicted by the extrinsic evidence around s.6, in particular evidence found in "Securing the Canadian Economic Union in the Constitution".

128. While La Forest J. does suggest that mobility maybe an inherent aspect of citizenship, there are two important points to bear in mind. First, citizenship is a class. As indicated earlier, it did not come about in Canada until 1947 and its content is inherently malleable because it is defined by statute.[141] Second, it is not a source of unwritten constitutional rights, nor is it a basis to expand existing *Charter* rights beyond the actual text. The rights of a citizen are those set out in the Constitution. As Rand J stated in *Winner* "Citizenship is membership in a state, and in the citizen inhere those rights and duties, the correlatives of allegiance and protection which are basic to that status".[142]

129. When La Forest J.'s comments in *Black* on citizenship and mobility are examined closely there is nothing to suggest that the mobility provisions include temporary personal visits. He states: "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."[143] There is no discussion in *Black* of s.6 creating a general right to travel for temporary, non-work related purposes.

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[140] *Black v. Law Society (Alberta)*, para. 53, RBOA Tab 44

[141] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), 26-5 to 26-7, RBOA Tab 14

[142] *Ontario (Attorney General) v. Winner*, [1951] S.C.R. 887, para. 115, RBOA Tab 39

[143] *Black v. Law Society (Alberta)*, para. 53, RBOA Tab 44 [emphasis added]

130. Pointing to linkages between s.6 mobility rights and citizenship or human rights does not change the purpose of s.6. In *Canadian Egg Marketing Agency v. Richardson*, the majority described s.6 rights as human rights, however, they are human rights with an economic purpose:

> The reasoning adopted in *Black, supra*, regarding the scope of s. 6 reflects the fundamental purpose underlying the section, which is to guarantee the mobility of individuals to other provinces in the pursuit of their livelihood by prohibiting discrimination based on residence. In the context of an economy characterized by modern communications and forms of goods and services which are easily transported across great distances, it must be recognized that the hallmark of mobility required by s. 6 is not physical movement to another province, but rather any attempt to create wealth in another province.[144] [emphasis added]

131. Human rights and citizenship are not purposes in themselves. The Supreme Court's decisions in *Skapinka*, *Black* and *Egg Marketing* are consistent that the purpose of s.6 is to overcome barriers to interprovincial economic activity. It does so by creating economic mobility rights for individual Canadians. There is absolutely nothing in the caselaw to suggest that purpose of s.6 is temporary travel.

(b) Textual Analysis

132. While the history of s.6 is not supportive of the purpose advocated by the Applicants, the text is even less helpful to their case. The importance of the text is not diminished by vague notions of citizenship. As Dickson J pointed out in *Big M. Drug Mart*, textual analysis is integral to purposive interpretation.[145]

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[144] *Canadian Egg Marketing Agency v. Richardson,* [1998] 3 S.C.R. 157, para. 72, RBOA Tab 47

[145] *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, para. 118, RBOA Tab 42

133. The wording of s.6(2)(a) is abundantly clear that it does not apply to temporary visits to a province. The right is, a right to "move to" and "take up residence" in a province. In the case before this court, Ms. Taylor planned to do neither. Section 6(2)(a) does not create a constitutional right to tourism, or in Ms. Taylor's case, a right to attend a family funeral. For the *Charter* to contain such a right, it would have to employ words such as "travel to" or "visit". In other words, language that suggests transient mobility rather than the existing language that conveys a degree of permanence or an economic purpose.

134. The Province's position aligns with Estey J.'s analysis of the text in *Skapinker v. Law Society of Upper Canada*, where he stated:

> I conclude, for these reasons, that cl. (b) of subs. (2) of s. 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in cl. (a) and in cl. (b)) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence.[146] [emphasis added]

135. The Applicants point to the International Covenant on Civil and Political Rights ("ICCPR") as a basis for the expansion of *Charter* mobility rights. However, the wording of the mobility right in the ICCPR is strikingly broader than that found in the *Charter*. Article 11(1) provides "Everyone lawfully within the territory of a State shall within that territory, have the right to liberty of movement and freedom to choose their residence". The Province submits that priority must be given to the *Charter* text because it is a constitutional compromise between the federal and provincial governments. By contrast, the ICCPR is a treaty negotiated and ratified by the federal government. Ever since the Judicial Committee of the Privy

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[146] *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357, para. 36, RBOA Tab 48

Council's decision in the *Labour Conventions* case of 1937, if a treaty concerns an area of provincial jurisdiction, the provinces are not bound by the treaty unless they expressly implement it in provincial law.[147]

136. Interestingly, the mobility right in Article 11(1) of the ICCPR is expressly limited in Article 11(3) by laws "necessary to protect national security, public order (ordre public) public health...". So the ICCPR rights are not applicable in a pandemic.

137. In conclusion, words mean something. There is simply nothing in the text of the *Charter* that would support Ms. Taylor having a constitutional right to temporarily visit Newfoundland and Labrador for a non-economic purpose.

(c) Context of Other Provisions

138. The final element of purposive interpretation is to put the asserted right into context "of the other specific rights and freedoms ...within the text of the *Charter*".[148]

139. The economic purpose of s.6(2) becomes very apparent when ss.6(3)(b) and 6(4) are examined. Those sections provide internal limitations on rights in s.6(2). They state:

> (3) The rights specified in section (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

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[147] *Canada (AG) v. Ontario (AG)*, (1937) UKPC 6, p. 10, RBOA Tab 49

[148] *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, para. 118, RBOA Tab 42

services.

(4) Sections (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.[149]

(d) Exemptions- No Prima Facie Infringement of the Charter

140. SMO 11 complies with s.6(2)(a) of the *Charter*. It expressly exempts individuals who "enter the province...to permanently relocate to the province" and "to fulfill a short term work contract, education internship or placement".[150] To use the words of the *Charter*, the CMOH's order allows individuals to "move to" and "take up residence" in a province. There is simply no *Charter* violation.

(e) Exemptions for Bereavement are Allowed

141. Finally, it must be noted that while Ms. Taylor was initially denied an exemption by the Office of the CMOH, this decision was reconsidered and she was subsequently granted an exemption.[151] This material fact is omitted from Ms. Taylor's affidavit. Subsequent to Ms. Taylor's denial and reconsideration, SMO 11 was amended and an exemption for bereavement purposes was added. So even if this Court is inclined to find a *Charter* breach, the breach was fleeting and is no longer an issue for Ms. Taylor or for others.

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[149] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. 6, RBOA Tab 41

[150] Fitzgerald Affidavit, Tab 16, p. 88-90

[151] Fitzgerald Affidavit, para 106

D. Do the Special Measures Orders of 29 April and 5 May 2020 issued by CMOH violate Ms. Taylor's rights under s.7 of the *Charter of Rights and Freedoms*?

142. The Applicants claim that SMO 11 violates Ms. Taylor's right to liberty under s.7 of the *Charter*. Section s.7 states 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."

1. Section 7 is not an Amalgam of Rights

143. Section 7 is not a default provision that can be invoked when plaintiffs are unable fit their claim within the ambit of an expressed right. It is not an amalgam of all the expressed rights contained within the *Charter*. The Province submits that where an expressed right exists, courts should reject such s.7 claims. The reason for this is simple. Creating parallel rights creates incoherence, with different tests and differing standards for what amounts to the same or similar rights. For example, mobility claim under s.6(2) is subject to the internal limits of s.6(4) and the *Oakes* test. Arguably, the same rights under s.7 would be subject to neither limitation but would be subject to the s.33 notwithstanding clause.

144. In claims involving ss.8-14, the Supreme Court of Canada has cautioned against parallel s.7 claims. In *R. v. Lloyd*[152], Wagner C. J.C. stated that the

> 40. ....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".
>
> 41 I turn first to coherence within the *Charter*. It is necessary to read s. 7 in a way that is consistent with s. 12. Mr. Lloyd's proposal would set a new constitutional standard for sentencing laws — a standard that is lower than the cruel and unusual punishment standard

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[152] *R. v. Lloyd*, 2016 SCC 13, RBOA Tab 50

prescribed by s. 12. As McIntyre J. (dissenting on another issue) stated in *Smith*, at p. 1107:

> While section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the *Charter*, it cannot be read so broadly as to render other rights nugatory. If section 7 were found to impose greater restrictions on punishment than s. 12 — for example by prohibiting punishments which were merely excessive — it would entirely subsume s. 12 and render it otiose. For this reason, I cannot find that s. 7 raises any rights or issues not already considered under s. 12.

42 This Court again held that ss. 7 and 12 could not impose a different standard with respect to the proportionality of punishment in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (S.C.C.), at para. 160, per Gonthier and Binnie JJ.:

> Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.[153]

145. Finding a right under s.7 would create an incoherent scheme of mobility rights. This incoherence is plainly obvious from examining to whom ss.6 and 7 apply. Section 6(2) rights are restricted to "citizens of Canada and "permanent residents" whilst s.7 applies to "everyone". The term "Everyone in s.7 has been held to include "every human being who is physically present in Canada and by virtue to such presence amenable to Canadian law".[154]

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[153] *R. v. Lloyd*, 2016 SCC 13, paras. 40-42, RBOA Tab 50

[154] *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, p. 202, RBOA Tab 51

Section 7 would create a constitutional right of interprovincial travel for foreign tourists as well as those in Canada without required documentation. This seems to be at odds with the economic impetus for protecting mobility under the *Charter*.

146. As discussed earlier, Ms. Taylor and the CCLA make much of the notion that interprovincial travel is a right inherent in citizenship. With respect, it is difficult to reconcile their citizenship arguments with the broad applicability of s.7 to "everyone". With respect, their arguments on ss.6 and 7 are more contradictory than alternative.

2. No Liberty Interest Engaged

147. No liberty interest is engaged in this case. Ms. Taylor claims that the prohibition on "her ability to travel to Newfoundland and Labrador in early May 2020 to grieve with her family and arrange for the burial of her mother" is violation of her s.7 liberty right.[155] While the visit to Newfoundland and Labrador was no doubt an important personal decision for Ms. Taylor, it does not rise to level of being a "fundamental personal choice" that attracts constitutional protection.

148. The right to make a constitutionally protected fundamental personal choice is distinguishable from unconstrained freedom in one's personal affairs. In *R. v. Videoflicks Ltd.*, Dickson C.J. explained:

> ..."liberty" in s. 7 of the *Charter* is not synonymous with unconstrained freedom. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 524, Wilson J. observed:
>
> > Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s. 7 as violations of the right to life,

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[155] First Applicant's Brief, paras.62 & 64.

> liberty and security of the person even if they can be sustained under s. 1 .
>
> Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.[156]

149. The types of fundamental personal choices that attract *Charter* protection are qualitatively different from Ms. Taylor's decision to attend a funeral. They involve choices such as determining whether one's child should receive blood transfusions[157], a women's decision to continue or terminate a pregnancy[158], the decision to end one's own life when facing a chronic incurable disease[159] and a restriction on the form by which a medical marijuana maybe ingested[160]. While the notion that fundamental personal choices could engage a s.7 liberty interest appears in minority opinions as early as the mid-1990's, it was not until 2015 that a full majority of the Supreme Court found a personal decision that was of sufficient importance to engage a s.7 liberty interest. In *Carter v. Canada*, the Court determined that the choice to continue living with a chronic and incurable disease or die was so fundamentally important that it qualified as a liberty interest under s.7. The Supreme Court has not created a test for determining what precisely qualifies as a fundamental personal choice, however, when the totality of the jurisprudence is examined, it becomes apparent that the types

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[156] *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713, para. 154, RBOA Tab 52

[157] *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, paras. 83-87, RBOA Tab 53

[158] Per Wilson in *R. v. Morgentaler* [1988] 1 SCR 30, para. 300, RBOA Tab 54

[159] *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 68, RBOA Tab 55

[160] *R v. Smith*, 2015 SCC 34, RBOA Tab 56

of decisions are those that engage some form of medical autonomy. The case before this court is completely unrelated to medical autonomy.

150. What is a "fundamental personal choice" cannot be a subjective determination, otherwise all personal choices would be constitutionally protected. The Supreme Court's decision in *R. v. Malmo-Levine* confirms this point. In *Malmo-Levine*, the Appellant argued that smoking marijuana was a personal choice that was integral to his lifestyle, such that the criminalization of its possession interfered with his right to liberty under s.7. While the Court accepted the centrality of the marijuana to the appellant's lifestyle, it concluded that "...the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle".[161]

151. Even if this court accepts that travel to another province to attend the funeral of an immediate relative goes to "the core of what it means to enjoy individual dignity and independence"[162], it does not follow that all travel attracts s.7 protection. The CCLA brief points out that "People travel within the country for a wide variety reasons including business trips, family visits, special occasions, medical care, family emergencies and leisure".[163] How many other forms of travel identified by the CCLA would constitute a "fundamental personal choice"? Would a business trip required by an employer still be a fundamental personal choice? What about a decision to take a family vacation to Newfoundland for whale watching? Would travel to this province for the purpose of attending a darts tournament be a fundamental personal choice impacting one's autonomy? The Province

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[161] *R. v. Malmo-Levine*, 2003 SCC 74, para. 86, RBOA Tab 57

[162] *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844, para. 66, RBOA Tab 58

[163] Second Applicant's Brief, para. 80

submits that the only facts that are before this court are those that relate to Ms. Taylor's case. Absent other facts, it would be pure speculation as to what types of travel are of fundamental personal importance such that they should receive constitutional protection.

3. Godbout does not Support the Applicants' Argument

152. The CCLA relies on Justice La Forest's decision in *Godbout v. Longuiel (City)* to support its argument that the travel decisions are a type of fundamental personal decision that engages liberty under s.7.[164] *Godbout* was a challenge by a city employee to a contractual requirement that obliged her to reside within city limits. La Forest J. held that the guarantee of "liberty" in s.7 conferred on the employee a right to choose her place of residence.

153. There are three reasons why this court should not rely on *Godbout*. First, La Forest J.'s decision is not a majority opinion. Six of the judges rested their decision solely on s.5 of the *Quebec Charter of Human Rights and Freedoms*. In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, the Court stressed the absence of a majority in *Godbout*, noting that "It is not clear that place of residence is a protected liberty interest under s.7 of the *Charter*... [T]he issue remains unsettled.".[165]

154. Second, the *Godbout* case is distinguishable on the facts from Ms. Taylor's application. The right to travel for temporary personal reasons is fundamentally different from being compelled to live in a place against one's wishes to maintain a job. The CCLA admits this in its brief, stating: "The

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[164] Second Applicant's Brief, paras. 79-80

[165] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, para. 93, RBOA Tab 59

Second Applicant recognizes that there is a difference between the right to choose where one lives and freedom of movement more broadly...".[166] Nonetheless, the CCLA argues that "La Forest's words are just as applicable to the case at bar". With respect, La Forest's J.'s words are, as *Cunningham* indicates, not the law with respect to place of residence never mind temporary personal travel.

155. Finally, *Godbout* is conceptually at odds with the later cases such as *Carter* and *Smith*, where the fundamental personal choices involved medical decisions and issues related to autonomy and bodily integrity. As the Supreme Court noted in *R. v. Malmo-Levine*, not all choices are constitutionally protected.[167]

156. When the jurisprudence is reviewed, and the nature of Ms. Taylor's travel is considered, it is clear that no s.7 liberty interest is engaged by the initial refusal to grant her an exemption.

4. No Violation of the Principles of Fundamental Justice

157. Ms. Taylor bears the onus of establishing that SMO 11 violates the principles of fundamental justice. In *Bedford v. Canada (Attorney General)*, McLachlin C.J.C. affirmed that "under s.7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object".[168] The Chief Justice also indicated that, "This standard is not easily met" and requires an assessment of the evidence.[169]

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[166] Second Applicant's Brief, para. 83

[167] *R. v. Malmo-Levine*, 2003 SCC 74, para. 86, RBOA Tab 57

[168] *Bedford v. Canada (Attorney General)*, 2013 SCC 72, para.127, RBOA Tab 60 ["*Bedford*"]

[169] *Bedford*, para.119, RBOA Tab 60

158. Ms. Taylor's brief is completely silent on fundamental justice.[170] No argument has been made and no evidence has been filed respecting this component of s.7.[171] As a result, there is nothing for the Province to respond to. If Ms. Taylor remedies this on reply, the Province will want sufficient time to file a sur-reply.

159. The CCLA's brief addresses the issue of fundamental justice. It claims that SMO 11 is arbitrary, overbroad and grossly disproportionate. The Supreme Court's decision in *Bedford* requires that these three components fundamental justice be assessed in relationship to the purpose of SMO11.

5. Purpose of SMO 11

160. Travel facilitates the spread of COVID-19 both domestically and internationally. It can result in a net spread of infection from areas of high-level transmission to areas of low-level transmission. The purpose of SMO 11 is to prevent this from happening. As Dr. Fitzgerald explains: "[t]he travel restrictions were introduced to protect Newfoundland and Labrador from the importation, and ultimate spread of COVID-19."[172] "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."[173]

161. In analyzing whether SMO 11 accords with the principles of fundamental justice, it is critical for this court keep in mind the nature of public health

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[170] First Applicant's Brief, paras.59-64

[171] First Applicant's Brief, paras. 59-64

[172] Fitzgerald Affidavit, para. 89

[173] Fitzgerald Affidavit, para. 102

decision making. To be effective public health measures have to broad because they are designed to work at a population level. When the goal is to avert serious illness or death the margin of error may be narrow so the measure must be broadly applied. As Dr. Wilson explains in her evidence:

> 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.[174]

162. The very nature of public health decision making renders it susceptible to accusations of arbitrariness, overbreadth and gross disproportionality. However, a failure by the CMOH to take broad and precautionary measures during a pandemic would be a dereliction of her duty. This, and the peril of under-reaction, are contextual factors this court should consider in assessing compliance with the principles of fundamental justice.

6. Arbitrariness

163. In *Bedford* the Supreme Court of Canada explained the inquiry into arbitrariness as follows:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s.7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to

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[174] Wilson Affidavit, Tab 2, p. 5

> its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.[175]

164. In order to determine that SMO 11 is arbitrary, this court is required to find that the CMOH was somehow irrational in introducing travel restrictions – that she chose a completely unsuitable means to achieve an acceptable objective. To establish arbitrariness requires CCLA to demonstrate that there is no connection between travel and the spread of the disease.

165. There is no evidence as to irrationality. The CCLA simply asserts that once Ms. Taylor promised to self-isolate, SMO 11 became arbitrary, that the deprivation of liberty no longer was rationally connected to the purpose. With respect, this reasoning does not withstand scrutiny. It is equivalent to arguing that a prohibition on speeding becomes arbitrary once an individual promises to drive safely. Arbitrariness is not determined by the good intentions of an individual.

166. The fact that there are multiple public health mechanisms for controlling a pandemic does not mean that firm adherence to one mechanism renders others arbitrary. Duplicative is not arbitrary. As Dr. Wilson explains: "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".[176]

167. The evidence of the Dr. Rahman and the Predictive Analytics Group establishes the efficacy of the travel restrictions and definitively proves that SMO 11 is neither irrational nor arbitrary. However, that is more than the

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[175] *Bedford*, para. 111, RBOA Tab 60

[176] Wilson Affidavit, Tab 2, p. 3

law requires. The CCLA must prove that the CMOH did not have a basis for a "reasoned apprehension of harm" that travelers from outside the province would cause the spread of COVID-19 in Newfoundland and Labrador. As Sharpe J.A. explained in *Cochrane v. Ontario*:

> the burden that rests upon a claimant who challenges a law under s. 7 on grounds of overbreadth. As I have stated, the test for a breach of s. 7 on grounds of overbreadth is whether the law is "arbitrary" because there is no "reasoned apprehension of harm" or whether the law is "grossly disproportionate" to the legislative objective. To meet that test, the appellant had to satisfy the onus of demonstrating that the legislature did not have a basis for a "reasoned apprehension of harm" from pit bulls or that the action taken by the legislature was "grossly disproportionate" to the risk posed by pit bulls.[177]

7. Overbreadth

168. The CCLA argues that SMO 11 is overbroad because it bears no connection to the objective. It states "unless there is some reason to believe that the people trying to enter Newfoundland and Labrador increase the risk of spreading COVID-19, then the law applies to people who are unrelated to its objective", since those people would still have to self-isolate.[178] It goes on to state that "[t]here is no scientific basis to conclude that simply by virtue of a person residing outside the province, the risk is increased."[179]

169. Contrary to the CCLA's submission, there is a scientific and factual basis to believe that visitors entering the province will carry and spread COVID-19. The following points of evidence support that position:

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[177] *Cochrane v. Ontario*, 2008 ONCA 718, para. 25, RBOA Tab 61

[178] Second Applicant's Brief, para. 91.

[179] Second Applicant's Brief, para. 91.

(a) Infection rates in other provinces are significantly higher than in Newfoundland and Labrador. Ontario and Quebec each had over 25,000 cases as of 5 May 2020.[180]

(b) Newfoundland and Labrador receives over 500,000 visitors annually[181].

(c) Not all individuals who are required to self-isolate will do so.[182]

(d) Monitoring a large number of visitors is difficult and largely relies on an honour system.[183]

(e) The spread of COVID-19 can be exponential, so ramifications of a single non-compliant visitor can have grave consequences.[184]

(f) Tourists generally visit for short periods of time thereby incentivizing non-compliance with self-isolation directives.[185]

170. Despite bearing the onus to prove overbreadth, the CCLA has no evidence to support its position. Its contention that "unless there is some reason to believe" that there is non-compliance with self-isolation then the travel ban is overbroad, is a misstatement of the burden of proof. It is up to the CCLA to prove the efficacy of self-isolation measures on a mass scale and to demonstrate that travel restrictions are completely unnecessary.

171. Should the CCLA seek to remedy its omission on reply the Province will want to file a sur-reply on not only this point, but on all others for which either Applicant submits new evidence.

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[180] Fitzgerald Affidavit, para. 71

[181] Rahman Affidavit, Tab 2, p. 36 of 84

[182] Rahman Affidavit, Tab 25

[183] Fitzgerald Affidavit, para.96

[184] Wilson Affidavit, Tab 2, p. 4

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

8. Gross Disproportionality

172. The CCLA maintains that the travel restriction is grossly disproportionate because Ms. Taylor was denied an opportunity to travel to the province despite being "prepared to take extensive precautions".[186]

173. Gross disproportionality occurs "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective measure...the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society".[187] McLachlin C.J.C. in *Bedford*, illustrates this point by citing the example of a "hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk".[188]

174. In *Malmo-Levine*, the SCC distinguished between disproportionate and grossly disproportionate, stating:

> 159 The standard set out in s. 12 of the *Charter* sheds light on the requirements of s. 7. As Lamer J. explained in *Re B.C. Motor Vehicle Act*, *supra*, ss. 8 to 14 of the *Charter* may be seen as specific illustrations of the principles of fundamental justice in s. 7. While proportionality "is the essence of a s. 12 analysis", *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39 (S.C.C.), the constitutional standard is *gross* disproportionality. As the majority explained in *Morrisey* (at para. 26):
>
> > Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable. [First emphasis added; second emphasis in

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[186] Second Applicant's Brief, para.93

[187] *Bedford*, para. 120, RBOA Tab 60

[188] *Bedford*, para. 120, RBOA Tab 60

original.]

> See *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), *per* Lamer J., as he then was, at p. 1072:
>
> > The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. [Emphasis added.][189]

175. This court has to determine if the objective of the law - the prevention of the spread of a deadly disease to a vulnerable population is grossly disproportionate to the deprivation of liberty brought about by Ms. Taylor's inability to attend her mother's funeral. In *Cochrane v. Ontario*, Sharpe J.A. stated that "[t]he test of gross disproportionality clearly incorporates a substantial measure of deference to the legislature's assessment of the risk to public safety and the need for the impugned law: *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at p. 793; Clay, at para. 40".[190]

176. The Province submits that in light of a pandemic that has killed over a half million people globally, the restrictions preventing non-essential travel to which Ms. Taylor was subject, are not so draconian and excessive that they are out of sync with societal norms to the point of being abhorrent.

177. In conclusion, the Applicants' torture s.7 of the *Charter* until it confesses to possessing a right to temporary travel for personal reasons. There is no liberty interest engaged because this type of travel is not a fundamental personal choice that impacts ones bodily integrity. Furthermore, no

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[189] *R. v. Malmo-Levine*, 2003 SCC 74, para. 159, RBOA Tab 57

[190] *Cochrane v. Ontario*, 2008 ONCA 718, para. 31, RBOA Tab 61

evidence exists to support the Applicants' assertion that SMO 11 is arbitrary, grossly disproportionate or overbroad.

E. If SMO 11 violates ss.6 and 7 of the *Charter and Rights and Freedoms*, is it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the *Charter*?

178. If this Court determines that SMO 11 and its exemptions violate ss.6 and s.7 of the *Charter*, then the Province submits that the violations are justified under s.1.

179. Section 1 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."

180. Under s.1, this court must balance the mobility rights of people who reside elsewhere against the rights of Newfoundland and Labrador residents to "life and security of the person". This is a case in which restraining liberty is not just necessary for the common good, but essential for the preservation of human life. This Court would not be breaking new ground if it found such a limitation reasonable during a pandemic. The notion that individual rights must give way to the common good during an outbreak of disease was recognized by the U.S. Supreme Court over a hundred years ago in *Henning Jacobson, Plff. In Err., v. Commonwealth of Massachusetts*[191]. That case dealt with a constitutional challenge to a compulsory smallpox vaccination law. In upholding the law and determining that "a community has the right to protect itself against an epidemic of disease which threatens the safety of

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[191] *Henning Jacobson, Plff. In Err., v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), RBOA Tab 62

its members",[192] the Court noted that even when constitutional liberty is at play "There are manifold restraints to which every person is necessarily subject to for the common good".[193]

1. Oakes Test

181. To justify limiting a *Charter* right, the Province must demonstrate that the limit is prescribed by law and is "reasonable" in a free and democratic society. The analytical framework developed by the Supreme Court of Canada in *R. v. Oakes*,[194] and refined in *Dagenais v. Canadian Broadcasting Corporation,*[195] requires the Province to first demonstrate that the objective of the travel restriction is a pressing and substantial concern. Second, the Province must show that the objective is rationally connected to the means chosen to attain it, that they constitute the least drastic means, and that there is proportionality between the effects of the legislation and the objective.[196]

182. The Supreme Court of Canada was clear in *R. v. Keegstra* that s.1 should be applied in a sensitive and flexible manner and that it is "dangerously misleading" to view s.1 as "a rigid and technical provision offering nothing more than a last chance for the state to justify incursions into the realm of fundamental rights."[197]

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[192] *Henning Jacobson, Plff. In Err., v. Commonwealth of Massachusetts*, p. 7, RBOA Tab 62

[193] *Henning Jacobson, Plff. In Err., v. Commonwealth of Massachusetts*, p. 6, RBOA Tab 62

[194] *R v. Oakes*, [1986] 1 S.C.R. 103, RBOA Tab 63

[195] *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, RBOA Tab 64

[196] *R. v. Oakes*, paras. 73-74, RBOA Tab 63

[197] *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 47, RBOA Tab 65

183. The starting point for any s.1 analysis is to consider the context in which the alleged violation has occurred.[198] Contextualism has become the obligatory standard for *Charter* interpretation.[199] As Bastarache J. pointed out in *Thomson Newspapers Co. v. Canada (Attorney General)*[200]:

> The analysis under s.1 of the *Charter* must be undertaken with a close attention to context...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.[201]

184. The contextual approach ensures that courts are sensitive to other rights and values that may compete with the asserted right. It allows courts to achieve a proper balance amongst these values.

185. While the Province acknowledges the sad context in which Ms. Taylor applied for entry into the province, it submits that there is a competing context, which is the global pandemic and the CMOH's obligation to take precautionary action to protect the health of the residents of the province.

2. Context- Newfoundland and Labrador and COVID-19 Pandemic.

186. The context surrounding the implementation of SMO 11 is set out in detail in Part II of this brief.

187. The key facts related to the s.1 analysis, are restated below:

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[198] *M. v. H.*, [1999] 2 S.C.R.3, para. 80, RBOA Tab 66

[199] *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326, para. 12, RBOA Tab 67; *R. v. Keegstra*, para. 43, RBOA Tab 65

[200] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, RBOA Tab 68

[201] *Thomson Newspapers Co. v. Canada (Attorney General)*, para. 87, RBOA Tab 68

(a) On 11 March 2020, the WHO declared the global outbreak of COVID-19 a pandemic.[202] The first presumptive case of COVID-19 occurred in Newfoundland and Labrador on 14 March 2020.[203]

(b) On 18 March 2020, the Minister of Heath and Community Services, on the advice of Chief Medical Officer of Health, declared a public health emergency pursuant to section 27 of the *PPHA*.[204]

(c) COVID-19 causes severe illness and death. In Canada, 8.2% of COVID-19 cases have died. The Canadian mortality rate is 23.1 deaths per 100,000 population (8,684 deaths/37,589,262 total population).[205]

(d) There is no vaccine and no pharmacological therapies yet available for COVID-19.[206]

(e) The false negative rate for testing is as high as 30%.[207]

(f) 14-day self-isolation is difficult to monitor and is largely an honour system.[208] A UK study has shown that despite regulations requiring self-isolation, adherence is poor.[209]

(g) The CMOH possesses medical expertise in public health and is statutorily required to "exercise his or her powers and perform his or

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[202] Fitzgerald Affidavit, para. 17

[203] Fitzgerald Affidavit, para. 21

[204] Fitzgerald Affidavit, para. 22

[205] Fitzgerald Affidavit, para. 44

[206] Fitzgerald Affidavit, para. 34

[207] Fitzgerald Affidavit, para. 59

[208] Fitzgerald Affidavit, para. 96

[209] Rahman Affidavit, Tab 25

her duties independently and impartially in order to best protect and promote the health of the people in the province".[210]

(h) The evidence proves that when insufficient public health measures are taken, COVID-19 can spread exponentially.[211] Once community spread occurs, controlling the disease is extremely difficult.

(i) Public health decision making during an emergency necessitates rapid decision making often on incomplete evidence. Waiting for complete evidence is not always possible.[212]

(j) Newfoundland and Labrador's population is particularly vulnerable because of high rates of comorbidity.[213] The province has a high prevalence of metabolic disease, cancer and increased prevalence of many autoimmune diseases.[214] Advanced age is the strongest risk factor for complications arising from COVID-19.[215] The mean age in this province is 47.1 years as compared to the national average of 40.8 years.[216]

(k) The capacity of Newfoundland and Labrador's healthcare system to cope with a COVID-19 outbreak is limited.[217]

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[210] *PHPPA*, s. 9(2), RBOA Tab 20

[211] Wilson Affidavit, Tab 2, p. 4

[212] Wilson Affidavit, Tab 2, p. 5

[213] Parfrey Affidavit, para. 6

[214] Rahman Affidavit, Tab 2, p. 6-7 of 84

[215] Rahman Affidavit, Tab 2, p. 7 of 84

[216] Rahman Affidavit, Tab 2, p. 7 of 84

[217] Fitzgerald Affidavit, para. 97

(l) Travel is the mechanism by which the disease enters the province. Over 65% of the cases in Newfoundland and Labrador are linked to single travel relate outbreak.[218]

(m) Newfoundland and Labrador receives over 500,000 visitors in a typical year.[219]

(n) The efficacy of the travel restrictions was tested using two different modelling methodologies- NL Branching Process Model and Agent Based Simulation. Both models demonstrate that there is a significant increase in cases with elimination of travel restrictions.[220]

3. Context - Deference & Public Health Decision Making

188. This case is a challenge to the CMOH's management of a public health emergency. Ms. Taylor and the CCLA want this court to second-guess the CMOH's decision to implement travel restrictions. The Province submits that this Court should accord the CMOH a high degree of deference in executing her duty to protect the health and the lives of the residents of this province. There is a long line of cases in which the Supreme Court of Canada has acknowledged, that depending on the nature of the decision, deference may be appropriate in the conduct of a s.1 analysis.[221]

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[218] Fitzgerald Affidavit, para. 64

[219] Rahman Affidavit, Tab 2, p. 36 of 84

[220] Rahman Affidavit, Tab 2, p. 14 of 84

[221] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 para. 80, RBOA Tab 69; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, para. 83, RBOA Tab 70; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, paras. 41 & 43, RBOA Tab 71; *Carter v. Canada*, para. 98, RBOA Tab 55, *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, paras. 78 & 130-134, RBOA Tab 72; *M v. H.* [1999] 2 SCR 3, para. 78, RBOA Tab 66

189. According government a degree of deference is not an abdication of the court's responsibility to conduct a thorough judicial review. Rather, it is a consideration of the context in which a decision was made. The Supreme Court of Canada in *Harper v. Canada (Attorney General)* and *R. v. Bryan*,[222] employed a contextual approach to assist in determining the appropriate level of deference. In doing so, the Court considered four factors, these were: 1) the nature of the harm and the inability to measure it; 2) the vulnerability of the group that the legislation seeks to protect; 3) the subjective fears and apprehension of harm and 4) the nature of the infringed activity.[223]

190. Applying these criteria to the travel restriction, supports the Province's position that the CMOH's decision to implement SMO 11 should attract a high level of deference from this court.

a. Nature of the harm

191. Regarding the nature of the harm, there is no question that COVID-19 causes illness and death. The global death toll is at 528,204 and the Canadian death toll is 8,684.[224] Sixty-eight percent of cases in this province are linked to a single traveler.[225] The Province does not have to prove the efficacy of the travel restrictions to establish a need for deference. In *Harper*, the Supreme Court accorded deference despite questions over the ability to measure the harm and efficaciousness of the remedy chosen by Parliament.[226]

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[222] *R. v. Bryan*, 2007 SCC 12, paras. 16-27, RBOA Tab 73

[223] *Harper v. Canada (Attorney General)*, 2004 SCC 33, paras.76-88, RBOA Tab 74

[224] Fitzgerald Affidavit, para. 45

[225] Fitzgerald Affidavit, para. 64

[226] *Harper v. Canada (Attorney General)*, 2004 SCC 33, para. 79, RBOA Tab 74

b. Vulnerability of the Group

192. The second factor – "vulnerability of the group" is extremely important in this case. The travel ban protects the most medically vulnerable residents of this province. The evidence of Drs. Parfrey, Rahman, and Fitzgerald confirms that Newfoundland and Labrador is particularly susceptible to COVID-19 because of the high levels of co-morbidity. Dr. Parfrey applied the Centre for Disease Control's risk factors for severe COVID-19 illness to existing health data from this province in order to demonstrate that Newfoundland and Labrador has higher rates of COVID-19 co-morbidity than other provinces.[227] As Dr. Rahman pointed out in his affidavit: "population demographics, disease rates, and lifestyle characteristics set NL apart from the rest of Canada, and must be considered when developing policies for the management of COVID-19 in NL".[228]

c. Subjective Fears of Apprehension of Harm

193. Given the high death rate from the COVID-19 and the partial shutdown of the global economy, it is fair to take notice that there is a heightened degree of fear that opening the province to unrestricted travel will cause illness.

d. Nature of the Infringed Activity

194. The fourth factor for consideration is the nature of the infringed activity. The activity in this case was a short-term visit for personal reasons by a non-resident.

195. SMO11 is aimed at tourists and those coming into the province for non-essential personal reasons. The definition of "resident" in SMO 11 expressly

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[227] Parfrey Affidavit, para. 6; Parfrey Affidavit, Tab 3

[228] Rahman Affidavit, Tab 2, p. 7 of 84.

excludes "tourist and transient" visitors. The 5 May 2020 exemptions allow people to enter the province for essential purposes including: medical reasons, short term work or too permanently relocate

196. While the factors identified in *Harper*, support a high level of deference in the s.1 analysis, there are two other factors that this court should consider: 1) the expertise of the CMOH, and 2) the institutional capacity of the courts to make public health decisions.

e. Expertise of the CMOH

197. While SMO 11 has the force of law, it is in essence a medical decision about protecting the collective health of the residents of Newfoundland and Labrador. The directive was issued by a medical practitioner with training and experience in the field of public health. Section 9(1) of the *PPHA* requires that the CMOH be "a Fellow of the Royal College of Physicians and Surgeons of Canada in Public Health and Preventative Medicine, or has equivalent experience and training".[229]

198. In her role as the province's leading public health officer, the CMOH has access to a variety of specialized resources including:

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;

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[229] *PHPPA*, s. 9(1), RBOA Tab 20

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[230]

199. These resources, combined with the CMOH's training and experience, allow her to make informed decisions based on the best available medical evidence.

f. Institutional Capacity of the Courts

200. Judges are lawyers by trade, and courts lack the expertise and institutional competence to weigh complex epidemiological evidence and assess the merits of a variety of pandemic management strategies. Iacobucci J. cautioned about institutional competence in *M. v. H.* stating:

> These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research: *Irwin Toy*, *supra*, at p. 993, *per* Dickson C.J. and Lamer and Wilson JJ. Courts must be cautious not to overstep the bounds of their institutional competence in reviewing such decisions. The question of deference, therefore, is intimately tied up with the nature of the particular claim or evidence at issue....[231]

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[230] Fitzgerald Affidavit, para. 13

[231] *M. v. H,* para. 79, RBOA Tab 66

201. The U.S. Supreme Court recently expressed concern over institutional competence when it denied an application for injunctive relief from a restriction on religious gatherings due to COVID-19. In *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California* the majority stated:

> 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 officials "undertake[ ] to act in areas 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.[232]

202. By its very nature, public health decision making during a pandemic should attract deference. Dr. Brenda Wilson's evidence provides insight into the complexity and difficulty of public health decisions during a crisis. She explains that:

> 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

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[232] *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, No. 19A1044 (USSC), p. 2, RBOA Tab 75

prevent potential harm. [233]

203. In conclusion, the Province submits that the CMOH used her "best judgment to prevent potential harm". This type of public health decision making during a pandemic should attract the highest level of deference from the court as it conducts its s.1 analysis.

4. Pressing and Substantial Objective

204. The first step in conducting a s.1 analysis is to determine whether the objectives of the law are sufficiently important to warrant the limitation of the constitutional right. In other words, is the purpose of the law a pressing and substantial objective.

205. The pressing and substantial objective of SMO11 is to protect residents of Newfoundland and Labrador from severe illness and potentially death caused by the importation and spread of COVID-19 by travelers.

206. The threshold requirement of establishing a pressing and substantial objective is not a high one. As Dickson C.J.C. noted in *PSAC v. Canada*[234], "A 'pressing and substantial concern' need not amount to an emergency".[235]. In *PSAC*, the Court held that reducing inflation was sufficient to constitute a pressing and substantial objective.

207. The following evidence supports that COVID-19 is an emergency and that preventing its importation by travel is a pressing and substantial objective:

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[233] Wilson Affidavit, Tab 2, p. 5

[234] *PSAC v. Canada*, [1987] 1 S.C.R. 424, RBOA Tab 76

[235] *PSAC v. Canada*, para. 30, RBOA Tab 76

a. On 11 March 2020, the WHO declared the global outbreak of COVID-19 a pandemic[236]

b. On 15 January 2020, the Public Health Agency of Canada activated the Emergency Operation Centre to support Canada's response to COVID-19.[237]

c. On 22 January 2020, Canada implemented screening requirements related to COVID-19 for travelers returning from China to major airports in Montréal, Toronto, and Vancouver.[238]

d. On 18 March 12020, Dr, John Haggie the Minister of Health and Community Services, on the advice of the CMOH, declared a public health emergency pursuant to section 27 of the *PPHA*.[239]

e. Newfoundland and Labrador has a highly vulnerable population by virtue of the province's high levels of co-morbidity.[240]

f. The death toll in Canada from COVID- 19 presently sits at 8,684.[241]

g. 68% or 178 cases of COVID cases in Newfoundland and Labrador are travel related stemming from the Caul's cluster.[242]

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[236] Fitzgerald Affidavit, para. 17

[237] Fitzgerald Affidavit, para. 18

[238] Fitzgerald Affidavit, para. 18

[239] Fitzgerald Affidavit, para. 22

[240] Parfrey Affidavit, para. 6; Rahman Affidavit, Tab 2, p. 6-7 of 84

[241] Fitzgerald Affidavit, para. 45

[242] Fitzgerald Affidavit, para. 64

208. There is no doubt that COVID-19 constitutes a public health emergency globally, nationally and provincially. The threat is neither contrived nor imagined. It has cost lives of thousands of elderly and medically vulnerable Canadians.

209. Ms. Taylor argues that the pressing and substantial objective of the travel restrictions is "flattening the curve", and due to the low number of infections in Newfoundland and Labrador and this objective no longer had merit by the time the restrictions were imposed on 04 May 2020.[243] The CCLA points to Dr. Proton Rahman's 27 April 2020 comments that the citizens of the province had "really helped crush the curve" to support its point that travel restrictions were unnecessary. With respect, this is fallacious reasoning, and the very opposite is in fact true. Travel restrictions are most effective when infections are high in an exporting province and low in an importing one. As Dr. Rahman explains in his evidence:

> 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.[244]

210. COVID-19 has an exponential growth curve in a population where low levels of the disease has resulted in no immunity. As Dr. Rahman explains:

> 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,

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[243] First Applicant's Brief, para. 68

[244] Rahman Affidavit, Tab 2, p. 6 of 84

respectively.[245]

211. In conclusion, the objective of stemming the importation of COVID-19 from travelers is a pressing substantial objective. The objective is even more important when there are low levels of the disease in the province and high rates of co-morbidity.

5. Rational Connection

212. The rational connection requirement calls for an assessment of how well the legislative garment was tailored to suit its purpose.[246] As McLachlin C.J.C. explained in *Hutterian Bretheren of Wilson County v. Alberta*, it "is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."[247][emphasis added]. In *Harper*, the Court found that the rational connection requirement in *Oakes* is not so stringent as to require government to adduce empirical evidence; logic and reason are sufficient.[248]

213. Dr. Fitzgerald explains the reasons for the introduction of the of the travel restriction in her affidavit, and they are by no means arbitrary. She explains:

> 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

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[245] Rahman Affidavit, Tab 2, p. 11 of 84.

[246] *R. v. Oakes*, para. 74, RBOA Tab 63

[247] *Hutterian Bretheren of Wilson Colony v. Alberta* 2009 SCC 37, para.48, RBOA Tab 77

[248] *Harper v. Canada (Attorney General),* para. 104, RBOA Tab 74

> seeing increasing cases of disease and we were having success at controlling the outbreak 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.[249]

214. Dr. Fitzgerald in her evidence acknowledges that this province has a low prevalence rate of COVID-19. However, she determined that "the biggest risk is an introduction of the disease from importation from other jurisdictions".[250]

215. While the Supreme Court of Canada has noted that "empirical evidence" is not required to establish a rational connection, there is nonetheless evidence before this Court of the efficacy of the travel restrictions. Dr. Rahman and the Predicative Analytics Group modelled the effects of the travel restrictions using two independent simulations: the NL Branching Process Model (BPM) and the Agent Based Simulation (ABS) model.

216. The BPM assumed 3 infected travelers per month 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.[251]

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[249] Fitzgerald Affidavit, para. 89

[250] Fitzgerald Affidavit, para. 91

[251] Rahman Affidavit, Tab 2, p. 20 of 84

217. The ABS employed a different methodology. It compared 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

218. The simulation considered two possible infection rates for travelers: 0.03% and 0.1%. It assumed that 75% of travelers would follow the stated requirement of a 14-day self-isolation upon arrival in NL, and that 50% of those who did not self-isolate would choose to self-isolate when they become symptomatic.

219. The ABS 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.[252]

220. Dr. Rahman's report concludes that "[t]he results from our simulation modelling demonstrates that travel restrictions significantly reduced the COVID-19 spread in the NL population".[253]

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

[253] Rahman Affidavit, Tab 2, p. 3 of 84

221. Ms. Taylor points to the number of exemptions as evidence that there is no rational connection between restricting travel and preventing COVID-19.[254] This argument is pure speculation, and is completely disproven by the modelling evidence. The ABS simulation discussed above takes into account 1000 exemptions being issued per week as its baseline. Even with that many exemptions, the simulation still demonstrates that the travel restrictions produce a significant reduction in the spread of COVID-19 in Newfoundland and Labrador.

222. While the Applicants perceive that the number of exemptions is large, it is relatively small in relation to the total number of travelers entering the province in a given year. Between 4 May and 2 June 2020, 4537 exemptions were issued.[255] In a normal year, the province receives well over 500,000 visitors.[256] Even assuming that the rate of exemptions continued at approximately 4000 per month for an entire year, the travel restriction would still reduce the number of visitors by over 90%.

223. In conclusion, there is no question that restricting travel is a rational means to reduce the importation and spread of COVID-19.

6. Least Drastic Means

224. The *Oakes* test requires that the law not impair the disputed right any more than is necessary in order to achieve the desired objective. In other words, the law should accomplish its objective by the least drastic means.

225. At this stage, deference plays a significant role in reviewing the means government selected to address the problem. Government must be afforded a

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[254] First Applicant's Brief, para. 71

[255] Fitzgerald Affidavit, Tab 18, para. 4

[256] Rahman Affidavit, Tab 2, p. 36 of 84.

degree of flexibility in selecting solutions. As La Forest J. stated in ***R. v. Videoflicks Ltd.***:

> 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 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.[257]

226. This part of the *Oakes* test requires the court to inquire into what reasonably feasible and less impairing alternatives might exist that would achieve the same objective.

(a) Examining the Range of Alternatives

227. A single right answer to as complex a problem is not always possible, and this is especially true in a public health emergency. To successfully manage a pandemic may require a combination of public health measures such as testing, contact tracing, travel restrictions and social distancing.[258] As Dr. Rahman explains:

> 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

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[257] *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R.713, para. 214, RBOA Tab 52

[258] Rahman Affidavit, Tab 2, p. 5-6 of 84

measures.[259]

228. Courts have to proceed carefully in conducting the least drastic means analysis since it is always possible to imagine measures other than the one chosen by government. As Binnie J. pointed out in *Newfoundland (Treasury Board) v. N.A.P.E.* "resourceful counsel, with the benefit of hindsight, can multiply the alternatives".[260] When examined closely, not all alternative measures will have equal efficacy. This is especially true when it comes to pandemic management.

229. The Province's submission will now examine some of the possible alternative public health measures and explain why they are not valid substitutes for travel restrictions.

a. Self-isolation

230. The CCLA argues that travel restrictions are unnecessary because the already existing 14-day self-isolation requirements for those entering the province was sufficient to "flatten curve". This argument is problematic because it assumes that self-isolation is one hundred percent effective in containing the spread of COVID-19.

231. Research has shown that in the UK, 75.1 % of those with COVID-19 symptoms, or with a household member with symptoms, failed to self-isolate in contravention of government orders. In Smith, Louise E et al. "Factors Associated with Adherence to Self-Isolation and Lockdown Measures in the UK; a Cross-Sectional Survey." *MedRxiv*, June 2020, researchers concluded "that self-reported adherence to self-isolation measures was poor", and that

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[259] Rahman Affidavit, Tab 2, p. 5-6 of 84

[260] *Newfoundland (Treasury Board) v. N.A.P.E*, para. 96, RBOA Tab 70

"This has important implications for policies that attempt to prevent the spread of COVID-19 through self-isolation, such as contact tracing...". [261]

232. Not only is self-isolation compliance shown to be poor, but it is almost impossible to monitor on a large scale with a high degree of vigilance. Newfoundland and Labrador comprises of a vast geographical area with many rural communities. It receives over 500,000 visitors per year[262], with the majority arriving during the summer. It would be virtually impossible for the CMOH to monitor with any degree of certainty that many individuals. As LaForest J. stated, "[i]t must be remembered that the business of government is a practical one."[263]

233. The Agent Based Simulation conducted by the Predictive Analytics Group used higher rates of self-isolation compliance than those demonstrated by the UK study, and still the ABS found a considerable increase in COVID-19 cases if travel restrictions were lifted. The Group explained the rationale for low compliance:

> 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 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.[264]

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[261] Rahman Affidavit, Tab 25

[262] Rahman Affidavit, Tab 2, p. 36 of 84

[263] *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R.713, para. 214, RBOA Tab 52

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

234. Newfoundland and Labrador is not immune from non-compliance with self-isolation orders. The Provincial Government has received a number of complaints from individuals and businesses suggesting that the directive has not been followed.[265] Marine Atlantic has confirmed "that a number of travelers were entering the province with a reservation for a return sail for a date less than 14 days".[266] The CMOH concluded based on this information, "it was apparent that the tourists in particular were less inclined to follow the 14-day self-isolation requirement."[267]

235. The evidence is compelling that 14-day isolation is not an elixir to the problems of travelers importing COVID-19 into the province. 14-day isolation must be used in conjunction with other public health tools.

b. Testing

236. Another alternative would be to test all incoming travelers. However, testing is also a poor substitute for travel restrictions. As the CMOH's affidavit explains:

> 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 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

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[265] Fitzgerald Affidavit, para. 94

[266] Fitzgerald Affidavit, para. 95

[267] Fitzgerald Affidavit, para. 95

and, if not taken properly, can produce in a false negative test result.[268]

237. Importantly, the false negative rate for COVID-19 tests can be as high as 30%.[269] So while testing has utility, it too must be used in conjunction with other measures.

c. Contact Tracing

238. Contact tracing "is 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".[270]

239. While contact tracing is a critical public health tool, it does not prevent the importation of COVID-19. Its utility lies in its ability to contain infections by preventing onward spread. Contact tracing, like other public health tools are enhanced by travel restrictions. As Dr. Fitzgerald explains, travel restrictions:

> ...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. 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.[271]

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[268] Fitzgerald Affidavit, para. 103

[269] Fitzgerald Affidavit, para. 59

[270] Fitzgerald Affidavit, para. 37

[271] Fitzgerald Affidavit, para. 93

240. In conclusion, when it comes to reducing the risk of the import of COVID-19, there are no other reasonable and viable options that can take the place of travel restrictions.

(b) Exemptions- SMO 11 is not Blanket Prohibition

241. The Province's position that SMO 11 is the least drastic means is also supported by the fact that it is not a blanket prohibition on all non-resident travelers entering the province, rather, it is carefully aimed at non-essential travel. As Dr. Fitzgerald explains:

> 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.[272][emphasis added]

242. The minimally impairing nature of SMO 11 is evident from the extensive list of exemptions. These are detailed in the CMOH's answer to Interrogatory #2. The exemptions include: individuals visiting a family member in Newfoundland and Labrador who is critically or terminally ill, persons with a significant injury or illness who require support from family members resident in the province, those permanently relocating to the province and those returning for bereavement.[273] When the totality of the

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[272] Fitzgerald Affidavit, para. 102

[273] Fitzgerald Affidavit, Tab 18, para. 3(e)

exemptions are examined it is clear that SMO 11 is carefully tailored to accommodate those with extenuating personal circumstances. The CMOH has indicated that if a non-resident applies for an exemption based on extenuating circumstances not previously considered, then the Travel Request Exemption Team consults with the Public Health Division and the CMOH to determine the disposition.[274]

243. The exemption process also complies with tenets of procedural fairness. Non-residents who are denied an exemption have recourse to an appeal process. Those individuals may within 7 days apply for a reconsideration by the CMOH. The reconsideration process of is set out in the answers to CMOH's Interrogatory #'s 5 and 6.[275]

244. The pandemic is an evolving situation which mandates constant reconsideration of the travel restrictions. As Dr. Fitzgerald explains in her affidavit: "The necessity of travel restrictions are regularly reassessed. I consider the epidemiology of other jurisdictions and the capacity of the Newfoundland and Labrador health system to respond to a surge in the decision to modify travel restrictions".[276]

245. In conclusion, the CMOH has very clearly employed the least drastic means available to keep the resident population of this province safe. The Applicants seek to have this court declare that the alternative of 14-day isolation is sufficient to achieve this goal. The evidence of the Province proves the efficacy of the travel ban and establishes the weakness of relying solely on a system of self-isolation. Deference should be shown to the CMOH in her selection and use of public health tools to manage the pandemic.

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[274] Fitzgerald Affidavit, Tab 18, para. 3(d)

[275] Fitzgerald Affidavit, Tab 18, paras. 6 & 7

[276] Fitzgerald Affidavit, para. 90

There will always be individuals and organizations that believe that the measures taken by the CMOH are too much or too little.

7. Proportionality

246. The third part of the proportionality analysis requires proportionality between the deleterious and salutary effects of the measure selected. As McLachlin C.J.C explained in *Hutterian Bretheren*, "The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the costs of the rights limitations".[277]

247. The real question for this court is whether the harm done by preventing non-essential travel by non-residents outweighs the public benefit gained from the prevention of the importation of COVID-19 into the province.

248. The Province submits that the salutary effects of travel restriction are clearly set out in the affidavit evidence of Dr. Rahman and Dr. Fitzgerald. There is no dispute that COVID-19 is a virulent and potentially fatal disease, and as the modelling proves, travel restrictions are effective reducing the importation of the disease into a province with a highly vulnerable population.

249. Against this important collective benefit, the court must weigh the impact of the restrictions on non-residents whose mobility or liberty rights are impacted. While the restrictions on non-essential travel are inconvenient and may cause mental anguish to those non-residents subject to them, they do not ultimately deprive those non-residents of their health and lives.

250. The Province submits that personal travel, tourism and inconvenience are not sufficient grounds to put an entire population's health and lives in

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[277] *Hutterian Brethren of Wilson Colony v. Alberta*, para. 77, RBOA Tab 77

jeopardy. Residents should not have to pay with their lives to facilitate the personal travel needs of non-residents.

8. S.1 Conclusion

251. The Province has discharged its requirement under s.1 to prove that SMO 11 is a reasonable restriction of the ss. 6 and 7 mobility rights of non-residents during a deadly pandemic. Unlike *Newfoundland (Treasury Board) v. N.A.P.E.*, there is a robust evidentiary record in this case to support the s.1 argument.

252. Lastly, this is a case in which the court should extend a large margin of appreciation to the CMOH in the execution of her duties. The consequences of her taking no action or under reacting would have been dire. The CMOH took measures to avoid the very type of hazard that Justice Krever identified in the contaminated blood inquiry when he found that a "national public health disaster" occurred because "the principal actors in the blood supply system in Canada refrained from taking essential preventive measures until causation had been proved with scientific certainty".[278]

F. Does s.28.1 of *PHPPA* violate s.7 of the *Charter of Rights and Freedoms*?

253. Section 28.1 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:

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[278] Wilson Affidavit, Tab 8, p. 989

(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.

254. Attached as Exhibits "A" and "B" to the Affidavit of Katie Norman are, respectively, 08 May 2020 letters from the Minister of Justice and Public Safety to the Chief of the RNC and the Assistant Commissioner of the RCMP authorizing the officers of the RNC and RCMP "B" Division to:

> exercise any of those powers set out in subsection 28.1(1) for the purpose of enforcing the following Special Measure Orders issued by the Chief Medical Officer of Health, as may be amended from time to time:
>
> 1. Special Measures Order, dated April 29, 2020 and effective May 4, 2020, prohibiting entry into the province to all individuals except for residents and those whose exemption has been approved by the Chief Medical Officer of Health; and,
>
> 2. Special Measures Order, dated April 25, 2020 and effective April 27, 2020 at noon, requiring all individuals who enter the province to

complete and submit a declaration form and self-isolation plan.[279]

255. The authority extended by the Minister of Justice and Public Safety is clearly limited "to enforcement of those Special Measure Orders that assist in preventing the importation of COVID-19 in the province."[280]

256. The Province notes the approach that should be taken in the analysis of s. 28.1. In *Application under s. 83.28 of the Criminal Code (Re)*, Justices Iacobucci and Arbour wrote:

> The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. This is the prevailing and preferred approach to statutory interpretation: see, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.
>
> Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted: see *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, 1998 CanLII 815 (SCC), [1998] 1 S.C.R. 439, at

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[279] Norman Affidavit, Tabs 1 & 2

[280] Norman Affidavit, Tabs 1 & 2

para. 66; and *Sharpe*, *supra*, at para. 33.[281]

257. Before proceeding, the Province addresses a flaw that permeates the very heart of the CCLA's argument, that being the lack of any factual basis.

1. A Charter challenge cannot be mounted in the abstract

258. It is well-established that a *Charter* challenge cannot be brought in the absence of a factual matrix.[282] In *Canadian Council for Refugees*, the Federal Court of Appeal held:

> In my respectful view, this hypothetical approach, which the applications Judge entertained, goes against the well-established principle that a *Charter* challenge cannot be mounted in the abstract. The only exception is where it can be shown that the impugned legislation would otherwise be immune from challenge (*Canadian Council of Churches* (S.C.C), at pages 255-256):
>
> From the material presented, it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court. On this ground the applicant Council must fail. I would hasten to add that this should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. Here there is no such immunization as plaintiff refugee claimants are challenging the legislation. Thus the very rationale for the public interest litigation party disappears. [My emphasis.]
>
> ...
>
> *Consequently, in this case, the ability of the respondent organizations to bring the Charter challenge depends on John Doe. However, John Doe never presented himself at the Canadian border and therefore never*

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[281] *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, paras. 34-35, RBOA Tab 78

[282] *Canadian Council for Refugees v. Canada*, 2008 FCA 229, para. 100, RBOA Tab 5

> *requested a determination regarding his eligibility.* Following the renewed evidence regarding the threat that the FARC poses to his life, U.S. immigration authorities agreed to reconsider his claim and he remains in the U.S. *The applications Judge's conclusion that John Doe should nevertheless be considered as having come to the border and as having been denied entry runs directly against the established principle that Charter challenges cannot be mounted on the basis of hypothetical situations.*
>
> *There is, in this case, no factual basis upon which to assess the alleged Charter breaches.* The respondent organizations' main contention is directed at a border officer's lack of discretion to forgo returning a claimant to the U.S. for reasons other than the enumerated exceptions set out in section 159.5 of the Regulations. *This challenge, however, should be assessed in a proper factual context*—that is, when advanced by a refugee who has been denied asylum in Canada pursuant to the Regulations and faces a real risk of refoulement in being sent back to the U.S. pursuant to the Safe Third Country Agreement.
>
> *It follows that the Charter challenge should not have been entertained by the applications Judge.* I would therefore decline answering the third certified question.[283]

259. In the case at bar, there is no applicant who has been subject to the impugned provisions. There are no facts for this Court to consider the constitutional issues before it.

260. Professor Lorne Sossin (as he then was) wrote:

> Whereas speculative questions involve disputes which will only arise if certain facts occur, abstract or academic questions arise where a dispute lacks a factual foundation altogether. The principle underlying this rule is that the adversarial system requires a factual dispute to which the relevant law can be applied. If there is no dispute, or if the relevant law cannot be so applied, the court should decline to hear the matter. Scarce judicial resources should not be allocated to resolve

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[283] *Canadian Council for Refugees v. Canada*, 2008 FCA 229, paras. 100-104, RBOA Tab 5 [Italicized emphasis added.]

> questions in which the parties have no live interest. ...[284]

261. Facts are not optional in *Charter* analysis. Justice Cory was emphatic on this point when he wrote the heading, "The Essential Need to Establish the Factual Basis in *Charter* Cases", in *McKay v. Manitoba*. He stated:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society... In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.[285]

262. While the CCLA may take comfort from the phrase "in most *Charter* cases", it is clear from *Canadian Council of Churches* (cited in *Canadian Council for Refugees*, above) that the Supreme Court of Canada intended that the only exception is where it can be shown that the impugned legislation would otherwise be immune from challenge. Such is clearly not the case here. Individuals have been denied entry to the Province – turned back upon arrival. Surely one of those individuals, should they have been subject to s.28.1 detention or removal would be better suited to bring forth this question.

263. Further to the need for facts, Sopinka J. wrote for the Court in *Danson*:

> This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack

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[284] Lorne Sossin in "Mootness, Ripeness and the Evolution of Justiciability", in Todd L. Archibald and Randall Scott Echlin, *Annual Review of Civil Litigation 2012* (Toronto: Carswell, 2012), p. 18, RBOA Tab 79

[285] *McKay v. Manitoba*, [1989] 2 S.C.R. 357, para. 8, RBOA Tab 4

thereof). As Beetz J. pointed out in Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, [1987] 1 S.C.R. 110 at 113, 25 Admin. L.R. 20, 18 C.P.C. (2d) 273, [1987] 3 W.W.R. 1, 38 D.L.R. (4th) 321, 73 N.R. 34, 46 Man. R. (2d) 241, [1987] D.L.Q. 235 (headnote only):

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian *Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter*, and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[Emphasis added.]

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. As Morgan put it, supra, at p. 162:

> the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology.[286]

264. The Province submits that the situation that Justice Cory cautioned about in *Mackay v. Manitoba* precisely describes the current situation before this Court. This Court is in a factual void - the abhorred vacuum. This Court is left with the "unsupported hypotheses of enthusiastic counsel" for the

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[286] *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, paras. 31-32, RBOA Tab 3

purposes of making an important *Charter* decision with respect to the interaction of principles of fundamental justice, detention and search and seizure with the health and very lives of Newfoundlanders and Labradorians.

2. *Does Section 28.1 of the PHPPA violate Section 7 of the Charter of Rights and Freedoms?*

265. The CCLA challenges the validity of s.28.1 of the *Act* under s. 7 of the *Charter*. The basic analysis of a s.7 claim is distilled to the following questions:

1. Is there a deprivation of life, liberty, or security of the person?

    i. Life – when state action leads to death or an increased risk of death, directly or indirectly

    ii. Liberty – can be either regarding physical liberty or the freedom to make inherently private choices that go to the core of individual independence

    iii. Security of the person – threats to personal autonomy or control over their body free from state interference

2. If so, is the deprivation caused by state action?

3. Is the deprivation consistent with the principles of fundamental justice?

266. The CCLA asserts an obvious impact on liberty and security of the person both through direct engagement of s.9 of the *Charter* (presumably through a s.28.1 detention) and the threat of removal from the province without due process.

267. *R. v. Bedford* changed the approach to s.7. The Court moved from an approach in which "the applicant was required to weigh the actual ability of the law to further its objective against negative effects of the law on the life,

liberty, and/or security of the person of all affected individuals",[287] to an individual approach.

268. The Supreme Court of Canada explains the new "individualistic approach" as follows:

> All three principles--arbitrariness, overbreadth, and gross disproportionality--compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. 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.[288]

269. Under the *Bedford* approach, a violation of arbitrariness, overbreadth or gross disproportionality "is established by demonstrating an unconstitutional effect on a single person, without considering to what extent empirical evidence could otherwise prove that the law achieved its purpose."[289]

270. With respect to ss. 28.1 and 50(1), the CCLA has not demonstrated an unconstitutional effect on a single person. It has put no evidence before this Court in reference to s.7, only hypotheticals and possibilities. It is important in this regard to again consider the importance of facts in constitutional litigation.

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[287] Colin Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disprportionality", 51 U.B.C. L. Rev. 55, p. 2, RBOA Tab 80

[288] *Bedford*, para. 123, RBOA Tab 60 [emphasis in original]

[289] Fehr, p. 1, RBOA Tab 80

271. To reiterate, the onus is on the CCLA to establish that s.28.1 violates the principles of fundamental justice. As McLachlin C.J. stated in *Bedford v. Canada (Attorney General)*, "under s.7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object".[290] The Chief Justice also indicated that, "[t]his standard is not easily met" and requires an assessment of the evidence.[291]

272. Notwithstanding the absence of any factual matrix underlying the assertion of offence to the principles of fundamental justice, the Province will endeavor to address each of the elements of arbitrariness, overbreadth, gross disproportionality and due process in turn.

(a) Arbitrariness

273. As previously stated, in *Bedford* the SCC explained the inquiry into arbitrariness as follows:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.[292]

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[290] *Bedford*, para. 127, RBOA Tab 60

[291] *Bedford*, para. 119, RBOA Tab 60

[292] *Bedford*, para. 111, RBOA Tab 60

274. Professor Stewart describes the problem captured by arbitrariness as follows:

> The defect of an arbitrary law is that it affects the section 7 interests for no reason. The lack of connection that is the key to arbitrariness can be demonstrated by showing either that the law undermines its own purpose or that the law does not connect with that purpose at all.[293]

275. Here the onus lies with the CCLA to establish the lack of a rational connection between the purpose of the law (to enforce the travel restrictions) and the limits it imposes on life, liberty or the security of the person. By no measure can the CCLA be said to have discharged that onus.

276. In support of their arbitrariness assertion, the CCLA has stated only that the Ministers of Health and Community Services and Justice and Public Safety, in consultation, can direct the location, detention and removal of an individual, and since there appears to be no criteria that govern the discretion, it must be arbitrary. This falls far short of establishing that the law undermines its own purpose or that it does not connect with that purpose at all.

(b) Overbreadth

277. In *Bedford*, the Supreme Court of Canada described overbreadth as a situation in which "the law goes too far and interferes with some conduct that bears no connection to its objective".[294] The Court went on to state:

> Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court

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[293] Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ 575, p. 5, RBOA Tab 81

[294] *Bedford,* para. 101, RBOA Tab 60

> to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.[295]

278. Stewart comments that:

> A law is overbroad if it "is so broad in scope that it includes some conduct that bears no relation to its purpose"; an overbroad law "is arbitrary in part." The defect of an overbroad law is that the section 7 interests of some (though not all) people it applies to are affected for no reason.[296]

279. In support of the assertion that s.28.1 is overbroad, the CCLA states only:

> The debate in the House (Hansard May 5, 2020, page 1856) indicate (*sic*) that the amendments were made because of concern over enforcement of the Travel Ban. Yet, the powers included in the amendments are not confined to the Travel Ban. They apply to all measures imposed pursuant to s.28.[297]

280. There are, in fact, no powers to be exercised at all in the absence of an authorization from the Minister of Justice and Public Safety, in consultation with the Minister of Health and Community Services, and only then during the pendency of a measure taken by the CMOH. And, as previously noted, the authority to exercise s.28.1 powers has already been extended by the Minister of Justice and Public Safety and is clearly limited "to enforcement of those Special Measure Orders that assist in preventing the importation of COVID-19 in the province."[298]

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[295] *Bedford,* para. 117, RBOA Tab 60 [emphasis in original]

[296] Stewart, p. 5, RBOA Tab 81

[297] Second Applicant's Brief, para. 148

[298] Norman Affidavit, Tabs 1 & 2

281. The CCLA has not established (and the onus is on them to do so[299]) that s.28.1 is overbroad. On the contrary, the evidence before this Court is that the legislation does not go "too far by sweeping conduct into its ambit that bears no relation to its objective."

(c) Gross Disproportionality

282. Once again, *Bedford* provides the framework for the gross disproportionality analysis:

> Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.[300]

283. Where is the grossly disproportionately affected individual required to establish a violation of the norm? Once again, the Court has absolutely no facts. The CCLA argues:

> In the result, the powers are disproportionate. Even accepting for the sake of argument that there is a legitimate purpose to the provision, the fact that they apply to all measures is hugely problematic. Taken to their logical conclusion, they allow for the possibility that a person who resides in NL could actually be brought to an airport or a ferry terminal and presumably made to leave the island. While that may be an unlikely result, the mere fact that the possibility exists highlights the arbitrariness, overbreadth and disproportionality of the provision.

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[299] *Cochrane v. Ontario*, 2008 ONCA 718, para. 18, RBOA Tab 61

[300] *Bedford*, para. 120, RBOA Tab 60

[emphasis added][301]

284. The above is the totality of the CCLA's written submission on disproportionality as it pertains to s.28.1. The hypothetical affected individual they have presented to the Court to assess disproportionality, is possibly a person that could be moved to a point of entry and presumably be told to leave, all of which is qualified in the stultified prediction of it being an unlikely event.

285. Professor Stewart describes disproportionality as follows:

> A grossly disproportionate law is not necessarily arbitrary: whatever its other defects, it may well be rationally connected to its purpose. Nor is it necessarily overbroad: it may affect only those people whom it needs to affect to achieve its purpose. But its impact on the life, liberty, or security of the person of those people "is so severe that it violates our fundamental norms." A grossly disproportionate law is one which, even if it achieves its purposes completely, does so at too high a cost to the life, liberty, and security of individual persons.[302]

286. Notwithstanding Stewart's assertion that a disproportionate law may be neither arbitrary nor overbroad, the CCLA relies on their determination that s.28.1 is arbitrary and overbroad as the sole determinant that it is therefore disproportionate.[303]

287. The CCLA has not established that s.28.1 is disproportionate. Can they be said to have met the test from *Bedford* of proving on balance that "[t]he connection between the draconian impact of the law and its object [is]

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[301] Second Applicant's Brief, para. 149.

[302] Stewart, p. 5, RBOA Tab 81

[303] Second Applicant's Brief, para. 149.

entirely outside the norms accepted in our free and democratic society."?[304] The answer is clearly no.

(d) Due Process

288. The CCLA's submission on due process reads as follows:

> There is no opportunity in the provision for a person subjected to it to determine the merits of their detention and removal for [*sic*] the province.

289. There is little to which the Province can respond. The CCLA's assertion is without evidence as to the actual effect of a detention or removal (the actual wording of s.28.1(c) does not speak to removal but rather conveyance of "an individual who is in contravention of the measure to a specified location, including a point of entry to the province"). The only evidence before this Court regarding the operation of s.28.1 is Katie Norman's Affidavit and that certainly does not suggest a denial of due process.

(e) Conclusion re s. 7

290. Professor Stewart summarized the effect of *Bedford* as follows:

> According to *Bedford*, determining whether the law violates norms against overbreadth, arbitrariness, and gross disproportionality apparently does not require any empirical analysis of the effectiveness of the law; instead, the Court asks whether the effect of the law on the section 7 interests of any one person is overbroad, arbitrary, or grossly disproportionate in light of the purposes the law is intended to serve.[305]

291. "[T]he section 7 interests of any one person". Consider the effects of s.28.1 on the section 7 interests of the traveler that originated the infection at Caul's Funeral Home. If by providence s.28.1 predated that outbreak and

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[304] *Bedford,* para. 120, RBOA Tab 60

[305] Stewart, p. 9, RBOA Tab 81

that one traveler was detained or "removed", how would the complexion of COVID-19 have differed in Newfoundland and Labrador? No less than 178 people would not have contracted the disease; 12 people would not have been hospitalized, 5 of those in intensive care; and 2 people would still be alive.[306] Is the affect of s.28.1 on the s.7 interests of that one person overbroad, arbitrary or grossly disproportionate in light of protection of health and preservation of life - the purpose it intends to serve?

292. The evidence before this Court does not support a finding that s. 28.1 violates s.7 of the *Charter*.

G. Does Section 28.1 of the *PHPPA* violate Section 9 of the *Charter of Rights and Freedoms*?

293. Section 9 of the *Charter* reads, "Everyone has the right not to be arbitrarily detained or imprisoned." It is important to note that arbitrariness is concerned solely with the adequacy of the standards prescribed by law for a detention or imprisonment. It is not assessed in terms of the severity of the detention or imprisonment, including the nature and duration of the detention, which are more appropriately reviewed under s. 12 of the *Charter*. Arbitrariness is also not determined through a lens of procedural concerns about the detention, including a lack of procedural safeguards, which are properly reviewed in a s.7 analysis.[307]

294. There must be a finding of detention before the question of arbitrariness is determined. In *R. v. Mann*, Justice Iacobucci for the majority held:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so,

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[306] Fitzgerald Affidavit, paras. 64 & 67.

[307] Peter Hogg, Constitutional Law of Canada (5th Ed. Supp.), pp. 49-9, RBOA Tab 14

> the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.[308]

295. The CCLA has the burden of establishing that the detention is arbitrary. In this instance, there is no evidence before the court of the nature of a detention because the CCLA has presented no factual underpinning for the within challenge. There is no evidence of a detention pursuant to s.28.1 ever having occurred. On the contrary, there is the evidence of Katie Norman that neither the RNC nor the RCMP have exercised any powers authorized by s.28.1 since being empowered to do so.[309]

296. As to the nature of "the detention", then, we have only hypotheticals advanced by the CCLA. The CCLA asserts that the detention contemplated by s.28.1 cannot be an investigative detention because the ministers (Health and JPS) have decided a person is in breach of the special measures order. This interpretation contemplates only a situation in which an individual has been identified and authority has been extended for the location, detention and removal of that specifically identified individual. It is on this basis that the CCLA asserts the detention cannot be investigative in nature.

297. As discussed above, the authority has been extended to RNC and RCMP officers to exercise the powers enumerated in s.28.1(1) since 08 May 2020 for the purposes of enforcing SMO 11, so the CCLA's assertion must fail. This is in no way different than an authorization to detain individuals pursuant to the *Highway Traffic Act,* perhaps located by way of a complaint

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[308] *R. v. Mann*, 2004 SCC 52, para. 19, RBOA Tab 82

[309] Norman Affidavit, para. 7.

from the member of the public, and it cannot be said that those detentions are, by definition, incapable of being investigative.

298. Consider s. 201.1 of the *Highway Traffic Act*, which reads:

> **Peace officer may stop vehicles**
>
> 201.1 (1) A peace officer, in the lawful execution of his or her duties, may require the driver of a motor vehicle to stop, and the driver of the motor vehicle, when signaled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.
>
> (2) A peace officer may, at any time when a driver is stopped,
>
> (a) require the driver to give his or her name, date of birth and address to the officer;
>
> (b) require the driver to produce his or her licence, and the vehicle's insurance certificate and registration and another document respecting the motor vehicle that the peace officer considers necessary;
>
> (c) inspect an item produced under paragraph (b);
>
> (d) request information from the driver about whether and to what extent the driver consumed alcohol or drugs before or while driving;
>
> (e) require the driver to go through a field sobriety test;
>
> (f) request information from the driver about whether and to what extent the driver is experiencing a physical or mental condition that may affect his or her driving ability; and
>
> (g) inspect the motor vehicle's mechanical condition and request information from the driver about it.
>
> (3) For the purpose of enforcing a provision of this Act or the regulations, a peace officer may require a vehicle's passenger to give his or her name, date of birth and address to the officer.

> (4) A peace officer is not required to inform a driver or passenger of his or her right to counsel, or to give the driver or passenger the opportunity to consult counsel, before doing anything subsection (2) or (3) authorizes.
>
> (5) Nothing in this section limits or negates a peace officer's authority to request information from a driver or passenger or to make observations of a driver or passenger that are necessary for the purpose of road safety enforcement.[310]

299. The detained driver is required to remain at a stop until permitted to depart by the officer. The driver is required to produce documentation, as well as personal identifying and medical information. They may be required to submit to testing of their sobriety and a mechanical inspection of their vehicle. The passenger is also required to provide identifying information. All of the foregoing is authorized to be done prior to the peace officer being required to advise the driver and/or passenger of their right to counsel or providing an opportunity to consult counsel.

300. Contrast this with the requirements of s.28.1(2) which instructs:

> (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
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> (c) the location to which the individual is being taken.[311]

301. A random traffic stop was the subject matter of *R. v. Hufsky*, which the CCLA offers in support of the proposition that detention will be considered

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[310] *Highway Traffic Act*, RSNL 1990 c H-3, s. 201.1, RBOA Tab 83

[311] *PHPPA*, s.28.1(2), RBOA Tab 20

arbitrary if "there are no criteria, express or implied, which govern its exercise". In *Hufsky*, the random check was found to be "in the absolute discretion of the police officer" and was therefore arbitrary.[312] Section 28.1 is not subject to absolute discretion of an officer. It can only be used if two ministers consult and agree, and only during a public health emergency, which can only be done on the advice of the CMOH.

302. It is also noteworthy that while the random "spot check" in *Hufsky* was found to be arbitrary, the violation was saved by s.1 of the *Charter* given the importance of stops in:

> increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving.... The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and control in the interests of safety, is proportionate to the purpose to be served.[313]

303. As established by the Supreme Court of Canada in *Grant*, and reasserted in *Le*, in order for a detention of an accused to not be arbitrary, the detention must be authorized by law and the law must not be unreasonable or arbitrary.[314] Clearly, s.28.1 detentions are authorized by law and the Province submits that the law in question is neither unreasonable nor arbitrary.

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[312] *R. v. Hufsky*, [1988] 1 SCR 621, para. 24, RBOA Tab 84

[313] *R. v. Hufsky*, para. 23, RBOA Tab 84

[314] *R. v. Grant*, 2009 SCC 32, para. 56, RBOA Tab 85; *R. v. Le*, 2019 SCC 34, para. 124, RBOA Tab 86

304. There are parallels between a "detention" pursuant to s.28.1 and customs officials conducting routine questioning and random luggage searches at ports of entry. These have been held to not constitute detention.[315]

305. Further, detention as arises in the context of customs does not require reasonable and probable grounds. Given the unique nature of border crossings, it is sufficient if an officer has reasonable grounds to suspect a violation of the *Customs Act* in order to avoid a claim of arbitrariness.[316] It is reasonable to contemplate analogies arising in the circumstance of enforcing travel restrictions.

306. Also, police have the common law authority to investigate criminal activity which includes a limited power to detain for investigative purposes. In *Mann*, the Supreme Court of Canada enunciated that in order for a police officer to lawfully detain for investigative purposes, that police officer must have articulable cause to detain on the basis of a public interest in investigating crime and safeguarding the public. Justice Iacobucci states:

> "...The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform

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[315] *R. v. Simmons*, [1988] 2 S.C.R. 495, para. 53, RBOA Tab 87

[316] *R. v. Jacques*, [1996] 3 SCR 312, para. 31 RBOA Tab 88

> the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test."[317]

307. There is no evidence before this Court to suggest that any s.28.1 detention would conflict with the test as set out in *Mann*.

H. If Section 28.1 of the *PHPPA* violates Sections 7 and/or 9 of the *Charter of Rights and Freedoms*, can it be saved by Section 1?

308. The Province repeats and adopts the previous submissions on Context, Deference & Public Health Decision Making and Pressing and Substantial Objective presented in sections E.2, E.3 and E.10, above, as those portions of the analysis are obviously of equal application in the conduct of the *Oakes* test to all of the alleged violations.

309. Similarly, the analysis under the heading of Rational Connection in section E.11 above is apposite as s.28.1 is, in essence, an enforcement provision of the travel restrictions. The Explanatory Notes accompanying Bill 38 state the objective of s.28.1 is to:

> allow the Minister of Justice and Public Safety, upon the request of and following consultation with the Minister of Health and Community Services, to authorize peace officers to enforce measures taken by the Chief Medical Officer of Health under subsection 28(1) of the Act during a public health emergency, including the authority to detain individuals and to convey individuals to a point of entry in the province[318]

310. The purpose of the enforcement mechanism legislation, in this case s.28.1 (and later, s. 50(1)) is the same as that of the travel restrictions. As such,

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[317] *R. v. Mann*, 2004 SCC 52, para. 34, RBOA Tab 82

[318] Bill 38, RBOA Tab 1

the same arguments in support of the rational connection of the travel restrictions to the objective of the legislation will extend in support of the enforcement of the travel restrictions being appropriately tailored to suit purpose.

(a) Least Drastic Means

311. The Supreme Court of Canada in *R. v. Ladouceur* decided on the constitutionality of "routine checks" which once again considered the issue of random stops previously canvassed in *Hufsky*. After determining that the routine checks constituted a violation of s.9, the Court considered whether they could be justified under s.1 of the *Charter*. Justice Cory, for the majority, wrote:

> Le Dain J. held in *Hufsky*, *supra*, at pp. 636-37 that "The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case . . . is proportionate to the purpose to be served." This observation is equally applicable to the routine check made in this case. These stops are and must be of relatively short duration, requiring the production of only a few documents. There is a minimal inconvenience caused to the driver. The Canada Police Information Centre (C.P.I.C.) data system accessible to police officers from their police cars ensures the speed and reliability of the process. The driver generally is questioned in his or her own vehicle or at worst, when there is an infraction, in the police cruiser. There is seldom a need to bring the driver to the police station. Nor is there usually a need for intrusive searches of the driver or the vehicle. If they were intrusive, they would probably be subject to challenge as infringing s. 8 of the *Charter*. The routine check impairs the s. 9 guarantee against arbitrary detention as little as possible.[319]

312. When one considers the analysis Justice Cory provides in terms of the detention that is authorized by s.28.1, similarities are found in the hypothetical impugned detention. Presumably such a detention would be

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[319] *R. v. Ladouceur*, [1990] 1 SCR 1257, para. 59, RBOA Tab 89

brief, requiring the production of only a few documents; minimal inconvenience; seldom (not never) a need to bring the driver to the police station; hallmarks of a detention that impairs the s. 9 right as little as possible.

313. Again, we are left with a situation where the CCLA can conjure a far more offensive hypothetical detention that might actually occur, but we have no reason to believe these imagined detentions would come to pass because there is no evidence. The CCLA makes assertions such as, "[s]ection 28.1 creates a real danger that people will be located, detained and removed from the province without grounds..."[320] without any evidence of anyone ever having been located, detained or removed, nor resultantly, any evidence about the conduct of those actions. On the contrary, the uncontradicted evidence before this Court is that the RNC and RCMP have not exercised any s.28.1 powers.[321]

(b) Proportionality

314. To measure the proportionality between the salutary and deleterious impacts of s.28.1, the Province finds guidance in the finding of the Alberta Court of Appeal in *Sahaluk v Alberta (Transportation Safety Board).*[322] There the Court weighed the salutary and deleterious effects of a universal administrative licence suspension regime. The Court wrote:

> It is not disputed that removing impaired drivers from the roads will have salutary effects, and will reduce the deaths, injuries and property damage arising from impaired driving offences: *Goodwin* at para. 1. Suspending the driver's licences of impaired drivers will remove them from the road, and therefore the suspensions also have a salutary effect.

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[320] Second Applicant's Brief, para. 143

[321] Norman Affidavit, para. 7

[322] *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153, RBOA Tab 90

> This appeal, however, is concerned with the incremental salutary effects that are derived from the immediate, automatic and universal suspension of the driver's licences of all those who are merely charged with an alcohol related offence.
>
> The evidence supporting any incremental salutary effect from the universal administrative licence suspension regime is weak. The statistical evidence that there was a significant or continuous pattern of change in fatalities after the implementation of the new regime is, at best, slim; there are also a number of shortcomings to the statistics: *supra*, paras. 29, 31.
>
> Meanwhile the deleterious effects are evident. There are significant punitive consequences for the individual drivers: see *supra*, paras. 89-98. Further, the regime overall seriously compromises some of the fundamental principles of criminal justice: see *supra*, paras. 99-100.
>
> On balance, the government has not met the burden of proving that the salutary effects of the immediate and universal administrative licence suspension regime are proportional to the deleterious effects.[323]

315. This Court must weigh whether the evidence presented by the Province as to the salutary effects of the enforcement of the travel restrictions establish them to be proportional to the deleterious effects.

316. As to the former, the Province has thoroughly established the salutary effects of the travel restrictions through the admission of the evidence of Drs. Fitzgerald, Parfrey, Wilson and Rahman. By implication, the salutary effects of travel restrictions must extend to the enforcement of those restrictions and therefore, the Province has led evidence to establish the real-world benefit of s.28.1 to the public.

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[323] *Sahaluk*, paras. 145-148, RBOA Tab 90

317. In contrast, the Court is possessed of no evidence as to the deleterious effects of the impugned legislation. Rather this Court is required to indulge in abstracts to imagine what those deleterious effects would be.

318. Justice Cory wrote in *Mackay v. Manitoba*:

> 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.[324]

319. On balance, the Province has discharged its burden of proving proportionality.

320. The Province maintains that any violation of s.7 should be similarly saved pursuant to the foregoing analysis. The Province points to the decision in *Bedford* to stand for the proposition that such saving is within the contemplation of the *Charter*:

> It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter (Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.[325]

321. The Province has justified any constitutional violation found in Section 28.1 by demonstrating that the provision addresses a pressing and substantial

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[324] *Mackay v. Manitoba*, para. 20, RBOA Tab 4

[325] *Bedford*, para. 129, RBOA Tab 60

problem, and that the means chosen to address it are proportionate. The proportionality test is satisfied as: (1) the means adopted are rationally connected to the objective, (2) the law is minimally impairing of the violated right, and (3) the deleterious and salutary effects of the law are proportionate to each other

I. Does Section 50(1) of the *PHPPA* violate Section 8 of the *Charter of Rights and Freedoms*?

322. Section 8 of the *Charter* provides that "everyone has the right to be secure against unreasonable search or seizure".

323. S.50(1) of the *PHPPA* provides powers for inspectors to administer or determine compliance with the *Act*. In the case at Bar, s.50(1) is an enforcement mechanism relating to the travel restrictions.

324. Section 50 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.
>
> (2) Notwithstanding subsection (1), an inspector shall not enter a dwelling house without the consent of an occupant except under the authority of a warrant issued under section 52. [326]

325. It is important to note that the *Act* does not allow an inspector to enter a dwelling house without the consent of an occupant except with a warrant issued under the *Act*.[327] This exclusion gives significant weight to the argument that individual subject to the search may have no right to privacy in the premises.

326. In order to seek a remedy under s. 8 of the *Charter*, the Applicant must first establish on a balance of probabilities a reasonable expectation of privacy in the thing that was searched.[328] Without being pedantic, the Province asks, what was the "thing" searched here? Again, the absolute factual vacuum makes the analysis impossible, or at best unreliable. *R v. Edwards* demands that the determination of whether or not state action has interfered with a reasonable expectation of privacy (so as to constitute a search or seizure) is

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[326] *PHPPA*, s. 50, RBOA Tab 20

[327] *PHPPA*, s. 50(2), RBOA Tab 20

[328] *R. v. Edwards*, [1996] 1 S.C.R. 128, para. 33, RBOA Tab 91

to be determined on the basis of the totality of the circumstances. The CCLA establishes no circumstances.

(a) Is there a reasonable expectation of privacy relative to a Section 50(1) search?

327. It is a fundamental prerequisite to an application for relief under s. 8 of the *Charter* that an applicant establish the existence of a personal privacy right. As Finlayson, J.A. stated in *R. v. Pugliese*, "the true test of a protected Constitutional right under s. 8 of the *Charter* is whether there is a reasonable expectation of privacy."[329] Cory J. in *R. v. M. (M.R.)* set out the circumstances necessary for granting relief under s. 8. He stated:

> Did the appellant have, in the circumstances presented, a reasonable expectation of privacy, and if he did, what was the extent of that expectation? The appellant must first establish that in the circumstances he did have a reasonable expectation of privacy. This is apparent because if there is no reasonable expectation of privacy held by an accused with respect to the relevant place, there can be no violation of s. 8 (see, e.g. R. v. Edwards, [1996] 1 S.C.R. 128; Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841). The need for privacy "can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion" (R. v. Colarusso, [1994] 1 S.C.R. 20, at p. 53). A reasonable expectation of privacy is to be determined in light to the totality of circumstances (Colarusso; Edwards, at para. 31; R. v. Wong, [1990] 3 S.C.R. 36, at p. 62).[330] [Emphasis added]

328. In *R. v. Edwards*, the Supreme Court of Canada summarized the principles to be considered with respect to s. 8 of the *Charter* as follows:

> A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against

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[329] *R. v. Pugliese*, [1992] O.J. No. 450 (CA), para. 14, RBOA Tab 92

[330] *R. v. M (M.R.)*, [1998] 3 S.C.R. 393, para. 31, RBOA Tab 93

unreasonable search or seizure can be derived. In my view they may be summarized in the following manner:

1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.

2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places. See *Hunter*, supra.

3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese*, supra.

4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings*, supra.

5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, supra, at p. 54, and *Wong*, supra, at p. 62.

6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:

   (i) presence at the time of the search;

   (ii) possession or control of the property or place searched;

   (iii) ownership of the property or place;

   (iv) historical use of the property or item;

   (v) the availability to regulate access, including the right to admit or exclude others from the place;

   (vi) the existence of a subjective expectation of privacy;

and

(vii) the objective reasonableness of the expectation.

See *United States v. Gomez*, 16 F.3d 254 (8th Cir . 1994), at p. 256.

7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.[331]

329. Section 8 of the *Charter* does not provide unqualified protection, but rather protection against unreasonable search or seizure. The qualification of "unreasonable" is critical to a proper interpretation of the provision. Even as the SCC prescribed the stringent standards to be met in a search, the unanimous court recognized that there would be circumstances in which, "...the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."[332]

330. An analysis of s. 8 requires a contextual approach, as a unanimous court affirmed in *R. v. Jarvis*:

> [63] At this stage, it is a firmly established principle that the *Charter* must receive contextual application. The scope of a particular *Charter* right or freedom may vary according to the circumstances...
>
> ...
>
> [64] For present purposes, where ss. 7 and 8 of the *Charter* are at issue, it is instructive to note both that the requirements of fundamental

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[331] *R. v. Edwards*, [1996] 1 S.C.R. 128, para. 45, RBOA Tab 91

[332] *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 SCR 145, para. 25, RBOA Tab 94

> justice relevant to the former section "are not immutable; rather, they vary according to the context in which they are invoked"...and that context will determine the expectation of privacy that one can reasonably expect the latter section to protect...
>
> ...
>
> [69] ...What is reasonable, however, is context-specific...[333]

331. Section 50(1) is such a case where the individual interest must reasonably give way to the state interest. The nature and circumstances of COVID-19 are novel, but the exigencies wrought by its emergence are not. These exigencies include the urgent need to protect life, public health, and the well-being of communities, all long-settled guiding principles in statute and case law across Canada. It is in this context that s. 50(1) searches are both necessary and reasonable.

332. Reasonableness in the context of a s. 8 search is measured using the "totality of the circumstances" test, guided by four lines of inquiry[334]:

(a) an examination of the subject matter of the search;

(b) a determination as to whether the claimant had a direct interest in the subject matter;

(c) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and

(d) an assessment as to whether this subjective expectation of privacy was objectively reasonable

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[333] *R. v. Jarvis*, 2002 SCC 73, paras. 63, 63 & 69, RBOA Tab 95 [*Jarvis*]

[334] *R. v. Tessling*, 2004 SCC 67, para. 32, RBOA Tab 96 [*Tessling*]

333. In *Tessling*, the unanimous court went on to cite "the particular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation." endorsed by Cory J. in *R. v. Edwards*.[335]

i. Section 50(1) Searches Engage a Low Subjective Privacy Expectation

334. The subjective expectation of privacy in the information sought by a s. 50(1) inspection is relatively low. Section 50(1) inspections **are all conducted outside of the home** and thereby automatically involve diminished privacy expectations, varying with the nature of the space.[336]

335. The subject matter at issue likewise engenders a lower privacy expectation. A s. 50(1) inspection is concerned with the protection and promotion of health and the prevention of disease. In the COVID-19 context, an individual could experience this as having to produce documents or submit to COVID-19 testing ("Testing" or "Test"). Again, we cannot say what the nature of the search would be for certain (apart from the blackletter of s.50(1) itself) as the CCLA is unable to provide any factual matrix from which examples can be discerned. However, with regard to Testing, the Province asserts this type of information is not within the scope of the "biographical core" defined in *R. v. Plant*, as tending to "reveal intimate details of the lifestyle and personal choices of the individual"[337] and could

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[335] *Tessling*, para. 19, RBOA Tab 96, citing *R v. Edwards*, [1996] 1 SCR 128 at para. 45, RBOA Tab 91

[336] *Tessling*, para. 22, RBOA Tab 96

[337] *R. v. Plant*, [1993] 3 SCR 281, para. 27, RBOA Tab 97 [*Plant*]

not fairly be described as "aspects of one's individual identity" akin to "intimate relations or political or religious opinions".[338]

336. A section 50(1) inspection is a fact-finding exercise. It does not involve a value judgement and is unconcerned with "why" questions. Rather, the focus is on identifying, slowing, and extinguishing the spread of a communicable disease. The result of this narrow, neutral focus is that s. 50(1) inspections are not in danger of exposing deeply personal information within the scope of s. 8.

337. Further, the information that is collected is governed by confidentiality and disclosure provisions in the *PHPPA* itself[339] in addition to applicable provisions of the *Access to Information and Protection of Privacy Act, 2015* and the *Personal Health Information Act*.[340]

338. The Province submits that s. 50(1) does not conflict with the high value of bodily integrity established in the jurisprudence. Even accepting as a starting point that a Test engages the privacy of the person, a Test does so in a manner that is clearly distinguishable from the considerations that justified the extension of s. 8 protections in the case law. The Province does not contest the principles of bodily integrity laid down in *Dyment*, *Golden*, *Pohoretsky*, *Simmons*, and their progeny.[341]

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[338] *R. v. Mills*, [1999] 3 S.C.R. 668, para. 80, RBOA Tab 98

[339] *PHPPA*, ss. 14-17, RBOA Tab 20

[340] *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2., RBOA Tab 99; *Personal Health Information Act*, SNL 2008, c.P-7.01, RBOA Tab 100

[341] *R. v. Golden*, [2001] 3 S.C.R. 679, paras. 87, 98-99, RBOA Tab 101 [*Golden*]; *R. v. Dyment*, paras. 32, 39, RBOA Tab 102 [*Dyment*]; *R. v. Pohoretsky*, [1987] 1 SCR 945, para. 5, RBOA Tab 103 [*Pohoretsky*]; *R. v. Simmons*, [1988] 2 S.C.R. 495, RBOA Tab 87 [*Simmons*].

339. Where a s. 50(1) inspection differs is in the nature and the context of the state intrusion. Testing involves a nasal swab.[342] There is no removal of clothing and the test is finished within seconds. There may also be a temperature check with an infrared thermometer, which requires no physical contact at all.

340. These procedures are brief, painless, minimally intrusive, respectful of personal dignity, and produces the minimum of information required to protect public health, i.e.: positive, negative, and body temperature. *Dyment* involved police seizure of medical samples.[343] *Simmons* involved strip and cavity searches.[344] The police in *Pohoretsky* took medically unnecessary samples from an "incoherent and delirious" man.[345] *Tessling* and *Stillman* rightfully condemn violations of this kind.[346]

341. However, a test administered under s. 50(1) does not engage the concerns found in those cases. In fact, in *R. v. S.A.B.*, the unanimous court held that "a buccal swab is quick and not terribly intrusive."[347] There, the SCC determined that, where a sample was taken "in a manner that respects the offender's privacy" and "a person would not ordinarily be required to expose a part of the body that is not ordinarily exposed to view", such an intrusion would be considered "reasonable in the circumstances".[348] Additionally, the court found that the taking of blood samples "by pricking the surface of the skin [is] not particularly invasive in the physical sense", nor was, "with the

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[342] Fitzgerald Affidavit, para. 57

[343] *Dyment*, paras. 11-15, RBOA Tab 102

[344] *Simmons*, para. 12, RBOA Tab 87

[345] *Pohoretsky*, para. 4, RBOA Tab 103

[346] *Tessling*, para. 21, RBOA Tab 96; *R v. Stillman*, [1997] 1 S.C.R. 607, para. 42, RBOA Tab 104

[347] *R. v. S.A.B.*, [2003] 2 S.C.R. 678 at para. 44, RBOA Tab 105 [*SAB*].

[348] *SAB* at para. 45, RBOA Tab 105

exception of pubic hair, the plucking of hairs...a particularly serious affront to privacy or dignity."[349]

342. Subsequently in *R. v. Saeed*, the court held that even a penile swab for a complainant's DNA was "in some ways less invasive" than both taking dental impressions or plucking hair samples.[350] Key to this finding was that such swabs were "quick and painless", non-invasive, non-penetrative, and posed no risk to the accused's health.[351]

343. The CCLA may protest that *SAB* involved the aegis of a DNA warrant. While true, the information obtained through a Test for COVID-19, versus a DNA sample, are at on opposite ends of the spectrum from each other. A DNA sample possesses "enormous utility and power" to identify a person.[352] Excepting identical twins, it is literally unique. Conversely, a COVID-19 Test possesses no such identifying power. It produces one of two answers: positive or negative for the disease. At no point does state possession of the sample imperil the individual with criminal or quasi-criminal sanction—a key factor for engaging ""the "full panoply" of *Charter* rights".[353] In this context, the concerns animating DNA warrant protections are absent entirely.

344. Can an acute illness such as COVID-19 really be an integral part of an individual's identity or biographical core? COVID-19 runs its course in most

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[349] *SAB*, para. 44, RBOA Tab 105

[350] *R. v. Saeed*, [2016] 1 S.C.R. 518, para. 49, RBOA Tab 106 [*Saeed*].

[351] *Saeed*, paras. 49 & 55, RBOA Tab 106

[352] *SAB*, para. 51, RBOA Tab 105

[353] *Jarvis*, para. 96, RBOA Tab 95

individuals within a matter of weeks. Though deadlier, it is no more part of a person's identity than the flu or mononucleosis.

345. As an acute illness, COVID-19 is much closer to an intruder in a human body than any component part of one. Consequently, any privacy expectations in it is low. It is akin to the heroin pellets swallowed by a drug smuggler. In *R. v. Monney*, the unanimous court ruled that

> "...heroin pellets contained in expelled faecal matter cannot be considered as an "outward manifestation" of the respondent's identity. An individual's privacy interest in the protection of bodily fluids does not extend to contraband which is intermingled with bodily waste and which is expelled from the body in the process of allowing nature to take its course."[354]

346. The Province submits that the presence of COVID-19 detected by a s. 50(1) test is analogous.

347. Section 50(1) inspections involve Testing for disease in a manner that is unobtrusive, narrowly focused, and reveals little of an individual's private sphere. Particularly in the context of a global pandemic, if a subjective expectation of privacy exists, it is significantly limited and necessarily low.

ii. Section 50(1) Searches Also Engage a Low Objective Privacy Expectation

348. The low subjective privacy expectation is also objectively reasonable. It would be the rare Canadian who has not yet learned of the chaos, disruption, and death that the emergence of COVID-19 has wrought. Testing, tracing, travel restrictions, and heavy fines were widely enacted in attempts to stem the outbreak as it swelled into a global pandemic. As of 9 July 2020, 8,749 Canadians have died of COVID-19. There have been over 100,000 cases in

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[354] *R. v. Monney*, [1999] 1 SCR 652, para. 45, RBOA Tab 107 [*Monney*].

Canada. In this context, a reasonable person would be aware of the unprecedented efforts required to bring COVID-19 under control and understand that temporary restrictions or state intrusion are necessary.

349. The necessity of state intrusion in certain contexts is well-settled. It is uncontroversial that the state may intrude to the extent necessary to protect life, health, and the well-being of communities. Section 50(1) of *PHPPA* is novel, but its motivations, which likewise animate statutes ranging from traffic to schools to food safety, are not.

350. The overriding state need to protect road users is the cornerstone of the *Highway Traffic Act* and its statutory kin.[355] Not every incompetent road user will cause injury, just as every drunk driver will not kill an innocent person. Nevertheless, legislatures see fit to regulate the operation of motor vehicles and punish violators, a scheme of which statutory searches are a part.[356] In *R. v. Belnavis*, the majority recognized that "Vehicular traffic must be regulated, with opportunities for inspection to protect public safety. A dangerous car is a threat to those on or near our roads."[357]

351. Before going on to dismiss the s. 8 challenge, the *Belnavis* court considered that the officer had been polite, the search had not been arbitrary, and what breach existed was acceptable, being "isolated and brief", and "in no way deliberate, wilful or flagrant.[358] Ultimately, the court held that "the

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[355] *Highway Traffic Act*, RSNL 1990, c H-3, RBOA Tab 83

[356] *Highway Traffic Act*, ss. 10-42, 198-214, RBOA Tab 83

[357] *R. v. Belnavis*, [1997] 3 S.C.R. 341, para. 39, RBOA Tab 108 [*Belnavis*]

[358] *Belnavis*, para. 41, RBOA Tab 108

reasonable expectation of privacy in a car must, from common experience and for the good of all, be greatly reduced."[359]

352. Recently in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, the Supreme Court again considered the constitutionality of roadside searches.[360] Though the court ultimately found fault with the manner in which British Columbia operationalized the scheme, the court held that preventing death and serious injury remained a valid compelling purpose and that, "where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards."[361]

353. A regulatory statute does not require the spectre of death or injury to give primacy to the state interest. In *R. v. McKinlay Transport Ltd.*, requirements under the *Income Tax Act* (ITA) to produce documents were upheld, with Wilson J. writing that "undoubtedly there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed."[362] This was the case even though the ITA carried penalties for noncompliance which included both fines and imprisonment.[363]

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[359] *Belnavis*, para. 39, RBOA Tab 108

[360] *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, RBOA Tab 109 [*Goodwin*].

[361] *Goodwin*, paras. 59-60, RBOA Tab 109

[362] *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, para. 25, RBOA Tab 110 [*McKinlay*]

[363] *McKinlay*, para. 18, RBOA Tab 110

354. Wilson J. went on to adopt the reasoning of Reid and Young in "Administrative Search and Seizure under the *Charter*"[364] to say there would be:

> ...situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. *For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance.* Rather, they are *based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance.* They are based on a view that *inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose.*[365] [Emphasis added.]

355. Similarly, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, no s. 8 violation was found in an order to produce documents under the *Combines Investigation Act*. La Forest J. held that, although forcing an individual to reveal aspects of their personal life would be deeply intrusive, an order for documents and records pertaining to enforcing the statute, would not.[366] Section 50(1) of *PHPPA*, with its narrow focus, is analogous.

356. Reflecting Wilson J.'s reasoning in *McKinlay*, La Forest J. went on to determine that a lower degree of privacy should be reasonably expected here

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[364] A. D. Reid and A. H. Young in "Administrative Search and Seizure under the *Charter*" (1985), 10 Queen's L.J. 392, pp. 398-400, RBOA Tab 111

[365] *McKinlay*, para. 30, RBOA Tab 110

[366] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, para. 153, RBOA Tab 112 [*Thomson*]

and for other "administrative and regulatory legislation", reasoning that because "much of the conduct the Director must be able to inquire into produces no "smoking gun":[367]

> "...it would be regrettable if the power to order production of documents was dependent, as it would be under the *Hunter v. Southam Inc.* criteria, on the ability to establish reasonable and probable grounds to believe that an offence under the Act had been committed."[368] [Emphasis added.]

357. In both *Thomson* and *McKinlay*, the non-penal nature of the statutes was key to the findings of constitutionality.[369] This reasoning was reaffirmed by the unanimous *Jarvis* court, which recognized that, although individuals were entitled to full *Charter* protections if an ITA inspection became penal (e.g.: if tax fraud is discovered), "courts must guard against creating procedural shackles on regulatory officials" merely because a statute includes the possibility of a penal conclusion.[370] For the proper functioning of the statutory scheme, "[t]he Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act."[371]

358. Beyond intermittent and preventative inspections, the state possesses broad authority to intrude in circumstances where a *bona fide* belief of life at risk emerges. In *R. v. Godoy*, the court was unanimous in determining that the "public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's

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[367] *Thomson*, para. 156, RBOA Tab 112

[368] *Thomson*, para. 154, RBOA Tab 112

[369] *McKinlay*, para. 34, RBOA Tab 110; *Thomson*, para. 126, RBOA Tab 112

[370] *Jarvis*, para. 89, RBOA Tab 95

[371] *Jarvis*, para. 89, RBOA Tab 95

privacy interest."[372] Provided that the intrusion was not a colourable attempt at obtaining arrest and was genuinely to "protect life, prevent death and prevent serious injury", then "criminal activity is not a prerequisite for assistance."[373]

359. This good faith approach in the public interest was upheld in *R. v. Wise*, where police affixed a tracking device to a car without a warrant.[374] In the pursuit of a local serial killer, the police homed in on a suspect in the "bona fide belief that they were protecting the public".[375] The SCC determined that the "markedly decreased" expectation of privacy in a vehicle, combined with a scenario wherein there "clearly existed a pervasive threat of violence and sense of urgency", in combination, ultimately justified the police action.[376]

360. The Province submits that the parallels to the current situation are obvious. An invisible killer again stalks the community. The contagious, and sometimes asymptomatic[377] nature of COVID-19 arguably makes these circumstances even more urgent than any single murderer or drunk driver could ever be.

361. The CCLA may protest that *Godoy* and *Wise* involved the police acting to preserve life as opposed to the s. 50(1) inspectors contemplated by *PHPPA*. The Province submits that the use of s. 50(1) inspectors in place of peace

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[372] *R. v. Godoy*, [1999] 1 SCR 311, para. 22, RBOA Tab 113 [*Godoy*]

[373] *Godoy*, paras. 16 & 25, RBOA Tab 113

[374] *R. v. Wise*, [1992] 1 SCR 527, RBOA Tab 114 [*Wise*]

[375] *Wise*, para. 16, RBOA Tab 114

[376] *Wise*, paras. 7 & 38, RBOA Tab 114

[377] Fitzgerald Affidavit, para. 28

officers actually further lowers the need for concern. And, in fact, the inspectors are clearly also trying to preserve life.

362. The ""full panoply" of *Charter* rights" are roused by the threat of penal sanction against the individual.[378] The SCC has repeatedly emphasized that it is where the administrative or regulatory arms of the state blur with its punitive judicial functions that the rights of the individual must be most jealously guarded.[379] No such danger arises here.

363. Section 50(1) inspections are conducted by a class of "Inspectors" defined in s. 49(1) of *PHPPA*. Inspectors under *PHPPA* are doctors, scientists, or a person or class of persons designated by the minister.[380] These are not police officers. Section 50(1) inspections are not conducted with an eye toward arrest, but public safety. Indeed, doctors swear an oath to do no harm.

364. It is artificial to delineate a community's "effective emergency response system" as merely the 911 system, or police welfare checks.[381] The state interest in intruding to "protect life, and prevent death and serious injury" predates both concepts.[382] At the core of this interest is the recognition that in times of urgency there is justifiable state intrusion to protect public interests, in this case public health and the protection of life.

365. In light of broad-based precedent, the Province submits that a low expectation of privacy for searches conducted under s. 50(1) is objectively reasonable. Justifiable state intrusions on the privacy interest are a

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[378] *Jarvis*, para. 96, RBOA Tab 95

[379] See, eg: *R. v. Colarusso*, [1994] 1 S.C.R. 20, para. 42, RBOA Tab 115; *Jarvis*, para. 97, RBOA Tab 95; *Goodwin*, para. 63, RBOA Tab 109.

[380] *PHPPA*, ss. 2(g), (o), 9, 10, 11, 12, 49(1)(a)-(d), RBOA Tab 20

[381] *Godoy*, para. 22, RBOA Tab 113

[382] *Godoy*, para. 25, RBOA Tab 113

necessary component of a free and democratic society that protects life and seeks to prevent harm to the community. Invisible, contagious, and potentially fatal, COVID-19 poses a threat demanding an urgent and comprehensive response.

366. Section 50(1) inspections strike the balance for reasonableness by constraining searches and tests to the narrowest possible scope. Testing uses the least intrusive manner in the jurisprudence that remains effective, producing only the factual binaries of positive or negative. In these circumstances, s. 50(1) represents the minimal intrusion required to protect life and readily meets the requirements of an objectively low privacy expectation.

iii. Has the Second Applicant established, on a balance of probabilities, a reasonable privacy interest?

367. As stated in *Edwards*, the onus is on the CCLA to establish a reasonable expectation of privacy. With respect, they have not. The CCLA raises the spectre of a privacy interest in the subject matter of a search; that it is "overwhelmingly obvious"; that s.50(1) includes materials that speak to the "biographical core of personal information"; but completely fails to establish it on a balance of probabilities.

(b) If there is a reasonable expectation of privacy, is a Section 50(1) search otherwise lawful?

368. When one considers the usual circumstance in which a *Charter* challenge of this sort is properly made, the deficiency of a factual matrix is clear. The next step after the Applicant establishes a reasonable expectation of privacy (which is not admitted but denied) and a warrantless search is alleged to be in violation of s. 8 of the *Charter* the Crown bears the burden of satisfying the court on a balance of probabilities that the search was reasonable within the meaning of the *Charter*.

369. How does the Province do that effectively? What search? What seizure? CCLA is unable to provide a fact pattern against which the reasonableness of an intervention can be measured.

370. The framework for scrutinizing warrantless searches for *Charter* compliance was summarized by the Supreme Court of Canada in *Mann*:

> Any search incidental to the limited police power of investigative detention described above is necessarily a warrantless search. Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265. Under *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30 , at para. 32.[383]

i. Was the search authorized by law and is the law reasonable?

371. Was "the search" authorized by law is difficult to determine in the absence of a search. The CCLA in its brief relies on *Hunter v. Southam* as being sufficient to establish that a s.50(1) search and seizure would be, de facto, unreasonable. Interestingly, applying the criteria established in *Hunter*, the CCLA asserts that "a warrantless search would only withstand constitutional scrutiny if the state could show exigent circumstances such as danger of loss or destruction of evidence." Exigent circumstances denotes not merely convenience but urgency, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public

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[383] *R. v. Mann*, [2004] 3 S.C.R. 59, para. 36, RBOA Tab 82

safety.[384] At the risk of reading as melodramatic, what could possibly be more exigent than potentially preventing the transmission of one of the most infectious diseases of our lifetime, for which there is no approved therapy for treatment or prevention, into a population for which the complication risk for COVID-19 is magnified.[385]

372. The CCLA states that the Province may attempt to characterize a s.50(1) as a search incident to arrest or investigative detention, but dismisses that characterization on the basis that there are no reasonable grounds to detain. The Province has established that a s. 28.1 detention is proper and, therefore, any search incident thereto is justifiable. Additionally, the Province maintains that there are parallels to be drawn between a search conducted after a s.28.1 detention and a safety search.

373. If a s. 50(1) search is analogous to an search incident to arrest or investigative detention pursuant to s.28.1, then the Province points to *Cloutier* as authority for the search. In *Cloutier v. Langlois*, the Supreme Court of Canada held that, once authority to arrest exists, there is authority to search incidental to that arrest. The officer does not require additional reasonable grounds, as the authority for the search is derived from the lawful arrest. This includes the right to conduct a cursory search of the person and his or her immediate surroundings and seize anything found there.[386]

374. *Cloutier* further sets out the criteria for lawful justification of a warrantless search. In balancing the state's interests in law enforcement and the protection of the public against the arrested person's interest in order to

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[384] *R. v. Paterson,* 2017 SCC 15, paras. 32-33, RBOA Tab 116

[385] Fitzgerald Affidavit, para 32; Rahman Affidavit, Tab 2, p.6-7 of 84

[386] *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, paras. 50.53-, RBOA Tab 117

determine whether a search was a reasonable and justifiable use of police power, L'Heureux-Dube J. when discussing the police power to search incident to arrest, stated:

> 1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.
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> 2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case for example if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.
>
> 3. The search must not be conducted in an abusive fashion and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.[387]

375. This standard was further developed in *Caslake* where the Supreme Court of Canada set out a two-stage test to determine whether a search incident to arrest was properly conducted:

> As L'Heureux-Dube J. stated in *Cloutier*, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why.

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[387] *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, paras. 61-63, RBOA Tab 117

> There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.
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> To be clear, this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did. [emphasis in original][388]

376. In *R. v. MacDonald* the Supreme Court of Canada refined the *Collins* test in conjunction with the *Waterfield* test to assess whether a safety search is authorized by law and reasonable.[389]

377. In the first stage of this analysis, the court must consider whether "the action falls within the general scope of a police duty imposed by statute or recognized at common law." The Supreme Court of Canada held that this requirement is easily satisfied in relation to safety searches.[390]

378. Once the first stage of this analysis is satisfied, one must then look at whether the action constitutes a justifiable exercise of powers associated with the duty and that in order "for the infringement to be justified, the police action must be *reasonably necessary* for the carrying out of the particular duty in light of the circumstances."[391]

379. In *MacDonald* the Supreme Court of Canada established a three-part test to be used in determining whether a safety search was reasonably

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[388] *R. v. Caslake*, [1998] 1 SCR 51, paras. 19-20, RBOA Tab 118

[389] *R. v. MacDonald*, 2014 SCC 3, RBOA Tab 119

[390] *R. v. MacDonald*, 2014 SCC 3, para. 35, RBOA Tab 119

[391] *R. v. MacDonald*, 2014 SCC 3, para. 36, RBOA Tab 119

necessary. If these three factors, when weighed together and balanced against the liberty interest in question, lead to the conclusion that the police action was reasonably necessary, then the action in question will not constitute an unjustifiable use of police powers and the safety search will be authorized by law. Those three factors and the analysis were enunciated in paragraphs 37 and 39:

(a) *The importance of the duty to the public good*. No one can reasonably dispute that the duty to protect life and safety is of the utmost importance to the public good and that, in some circumstances, some interference with individual liberty is necessary to carry out that duty.

(b) *The necessity of the infringement for the performance of the duty*. When the performance of a police duty requires an officer to interact with an individual who they have reasonable grounds to believe is armed and dangerous, an infringement on individual liberty may be necessary.

(c) *The extent of the interference with individual liberty*. The infringement on individual liberty will be justified only to the extent that it is necessary to search for weapons. Although the specific manner (be it a pat-down, the shining of a flashlight or, as in this case, the further opening of a door) in which a safety search is conducted will vary from case to case, such a search will be lawful only if all aspects of the search serve a protective function. In other words, the authority for the search runs out at the point at which the search for weapons is finished. The premise of the Collins test — a warrantless search is presumed to be unreasonable unless it can be justified — must be borne in mind in determining whether the

> interference with individual liberty involved in a safety search is reasonable.[392]

380. Safety searches are necessary to eliminate an imminent threat to the safety of the police or the public. However, the power to conduct such a search by the police is not unlimited, but:

> ...will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (*Mann*, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see R. v. *Tse*, 2012 SCC 16 (CanLII), [2012] 1 S.C.R. 531, at para. 33). [393]

381. In *MacDonald*, it was held that the police officer involved had the requisite authority to push open the door of the residence of the accused in order to investigate whether he was holding a weapon, as he had reasonable grounds to believe that there was an imminent threat to the safety of the public or police and that the intrusive search was necessary to eliminate that threat.

382. In this matter, the inspector's authority is limited to conduct a search at "reasonable times" and, if it is incident to a s.28.1 detention by a peace officer, the inspector will know that the detention was made at the direction of the Minister of Justice and Public Safety at the request of and in consultation with the Minister of Health and Community Services; all of which being in the context of there existing grounds to believe that there has been a contravention of a valid health measure (s.28.1) or to administer or determine compliance with the Act (s.50(1)). It is trite to say that a person with COVID-19 constitutes a threat to the safety of the public.

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[392] *R. v. MacDonald*, 2014 SCC 3, para. 39, RBOA Tab 119 [emphasis added]

[393] *R. v. MacDonald*, 2014 SCC 3, para. 41, RBOA Tab 119

ii. Was the manner in which the search was carried out reasonable?

383. Once a safety search is deemed reasonable, one must then consider whether the search was carried out in a reasonable manner. Again, *MacDonald* indicates that:

> ...the overall reasonableness of the search must be assessed in light of the totality of the circumstances (*Mann*, at para. 44). It is necessary to consider not only the extent of the interference, but how it was carried out. This inquiry turns on whether the search was minimally intrusive on the privacy interest at stake. In other words, the manner in which the search was carried out must have been reasonably necessary to eliminate any threat. [394]

384. We cannot consider the totality of the circumstances here as we have no factual example. However, the Province has already suggested methods of search and seizure above and have established them to be minimally intrusive and also that there would be a minimal privacy interest in the subject matter. Accordingly, it is the position of the Province that an individual's s. 8 *Charter* rights would not be violated as "the search" would be authorized by law, the law is reasonable and the search would be as conducted in a reasonable manner.

(c) Section 50(1) of the PHPPA does not violate Section 8 of the Charter of Rights and Freedoms

385. Section 50(1) inspections are narrow in scope and pose a limited, reasonable, and necessary intrusion that does not violate s. 8 of the *Charter*. To be constitutional, warrantless searches such as s. 50(1) inspections are justifiably scrutinized to ensure that such intrusions are lawful, reasonable,

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[394] *R. v. MacDonald*, para. 47, RBOA Tab 119

and go no further than necessary to obtain the law's object.[395] The Province submits that s. 50(1) inspections clearly meets this standard.

386. It is uncontested that s. 50(1) inspections, being part of *PHPPA*, are authorized by law.

387. The Province submits that the law is also reasonable. To give purposive effect to s. 8, "what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful."[396] This context-specific analysis recognizes that the *Southam* framework, which outlined reasonableness requirements in cases of criminal sanction, "will not usually be the appropriate standard for a determination made in an administrative or regulatory context", which requires "application of a less strenuous approach."[397]

388. The unprecedented COVID-19 outbreak drives the nature and purpose of the legislative scheme. Section 50(1) inspections were established with the intent to prevent death and serious injury. If the prevention of drunk driving is a "compelling purpose" that "weighs heavily in favour of the reasonableness" of the state intrusion, then the suppression of COVID-19 must be, at a minimum, no less compelling a purpose.[398]

389. Moreover, the mechanism and manner employed in a s. 50(1) inspection would be as minimally intrusive as possible while remaining effective. Warrants or consent are required for entry into the home, and testing utilizes the least intrusive swabbing method available, in a manner approved by the SCC. The components of s. 50(1) inspections are

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[395] *Tessling*, para. 18, RBOA Tab 96

[396] *McKinlay*, para, 30, RBOA Tab 110

[397] *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, para, 57, RBOA Tab 120

[398] *Goodwin*, para, 59, RBOA Tab 109

recommended by Health Canada, major health organizations around the world, and the results are governed by statutory privacy and disclosure provisions.

390. Viewed in the factual context and as a whole, no s. 8 violation arises from the operation of s. 50(1). The narrowly focused inspections reveal little, if any, of an individual's biographical core or intimate details, and what intrusion there is, is readily outweighed by the pressing need to act quickly and comprehensively to prevent death and protect life, public health, and the well-being of communities in the face of an unprecedented pandemic. As the court recognized in *Tessling*:

> [S]ocial and economic life creates competing demands. The community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns. Thus s. 8 of the *Charter* accepts the validity of reasonable searches and seizures. A balance must be struck.[399]

J. If Section 50(1) of the *PHPPA* violates Section 8 of the *Charter of Rights and Freedoms*, can it be saved by Section 1?

391. The Province repeats and adopts the previous submissions on Context, Deference & Public Health Decision Making and Pressing and Substantial Objective presented in sections E.2, E.3 and E.10, above, as those portions of the analysis are obviously of equal application in the conduct of the *Oakes* Test to all of the alleged violations.

392. Similarly, the analysis under the heading of Rational Connection in section E.11 above is apposite as s.50(1) is, in essence, an enforcement provision of the travel restrictions. Section 50(1) reads in part:

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[399] *Tessling*, para, 17, RBOA Tab 96.

> 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...[400][Emphasis added]

393. The purpose of the legislation is to administer and determine compliance with the travel restrictions is the same as that of the travel restrictions. As such, the same arguments in support of the rational connection of the travel restrictions to the objective of the legislation will extend in support of the enforcement of the travel restrictions being appropriately tailored to suit purpose.

(a) Least Drastic Means

394. The Supreme Court of Canada discussed minimal impairment succinctly in *J. (K.R.)*:

> The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55).[401]

395. This reasoning was applied by the Alberta Court of Queen's Bench in *R v Canfield* in a challenge that s.99(1)(a) of the *Customs Act* violated s.8 of the *Charter*. The impugned legislation allowed for the inspection of electronic devices at the Canadian border, which in *Canfield* disclosed the presence of images of child pornography. Before applying *KRJ*, the Court considered

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[400] Bill 38, RBOA Tab 1

[401] *R. v. J. (K.R.)*, 2016 SCC 31, para, 70, RBOA Tab 121 [*J. (K.R.)*]

Simmons where the SCC "accepted that there is a lower expectation of privacy at the border which is a function of maintaining national sovereignty"[402]:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travelers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.[403]

396. The Court in *Canfield* considered *KRJ* and *Simmons* in holding:

> At the first level of scrutiny identified in *Simmons*, it is difficult to identify a less harmful means of achieving the government subjective of maintaining border security in the context of efficiently processing millions of entrants into Canada every year.[404]

397. The application of this analysis to the case at Bar, again in a factual vacuum otherwise, leads to a reasonable finding that it is difficult to imagine a less harmful way to achieve the objective of protecting residents of Newfoundland and Labrador from severe illness and potentially death caused by the importation and spread of COVID-19.

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[402] *R v. Canfield*, 2018 ABQB 408, para, 27, RBOA Tab 122 [*Canfield*]

[403] *Simmons*, para. 30, RBOA Tab 87

[404] *Canfield*, para. 82, RBOA Tab 122

(b) Proportionality

398. To measure the proportionality between the salutary and deleterious impacts of s.28.1, the Province directs the Court again to the SCC decision in *J. (K.R.)*. There, as to proportionality of effects, the Court writes:

> At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (Carter, at para. 122). This final stage is an important one because it performs a fundamentally distinct role. As a majority of this Court observed in Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 (S.C.C.):
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> The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed... . The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [para. 125]
>
> ...
>
> I agree. While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1.7 It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 Osgoode Hall L.J. 1, at p. 66). In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative

objective.[405]

399. In applying this reasoning to the question of the Constitutional validity of the *Customs Act* in *Canfield*, the Alberta Court of Queen's Bench held:

> Maintaining a secure border is a function of protecting the greater public good.
>
> Whether one is concerned with child pornography or other threats to the public good, s 8 infringements are clearly overborne by the greater public good.
>
> In my view, Canada's free and democratic society would be undermined if pernicious material like child pornography could flow evermore freely into Canada.
>
> Given the reality that modern electronic devices are increasingly the mechanism for storing such images and given the reality of the threat posed by child pornography being imported, these searches at the border constitute a minimal impairment of s 8 rights.[406]

400. Surely the greater public good achieved through the beneficial effect of the s.50(1) search (i.e., the limitation of the spread of COVID-19) vastly outweighs the impairment (if any, as none has been established through evidence) of a s.8 right.

401. As previously stated, the balance that this Honourable Court must measure is whether the evidence presented by the Province as to the salutary effects of the enforcement of the travel restrictions establish them to be proportional to the deleterious effects.

402. And again, as to the former, the Province has thoroughly established the salutary effects of the travel restrictions through the admission of the

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[405] *J. (K.R.)*, paras. 77-79, RBOA Tab 121

[406] *Canfield*, paras. 84-87, RBOA Tab 122

evidence of Drs. Fitzgerald, Parfrey, and Rahman. By implication, the salutary effects of travel restrictions must extend to the enforcement of those restrictions and therefore, the Province has led evidence to establish the real-world benefit of s.50(1) to the public.

403. In contrast, this Court possesses of no evidence as to the deleterious effects of the impugned legislation. Rather this Court is required to indulge in abstracts to imagine what those deleterious effects would be.

404. On balance, the Province has discharged its burden of proving proportionality.

405. The Province has justified any constitutional violation found in Section 50(1) by demonstrating that the provision addresses a pressing and substantial problem, and that the means chosen to address it are proportionate. The proportionality test is satisfied as: (1) the means adopted are rationally connected to the objective, (2) the law is minimally impairing of the violated right, and (3) the deleterious and salutary effects of the law are proportionate to each other.

K. If this court finds that there is a violation of the *Charter of Rights and Freedoms* with respect to the travel restrictions, s.28.1 or s.50(1) or SMO 11 is found to be *ultra vires* should any declaration of invalidity be temporarily suspended?

406. The Province submits that, if this court finds that SMO 11 or s.28.1 or s.50(1) of *PHPPA* is *ultra vires* the Province's jurisdiction or violates the *Charter*, the appropriate remedy would be to suspend the declaration of invalidity to allow the Legislature and the CMOH an opportunity to consider whether further Special Measures Orders or legislative amendments are necessary to ensure the safety of the residents of Newfoundland and Labrador.

407. In *Schachter v. Canada*, the Supreme Court of Canada held that:

> A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public ...[407]

408. In *JH v. Alberta Health Services*, the Alberta Court of Queen's Bench found that certain sections of the Alberta *Mental Health Act*, violated the *Charter*. However, the court determined that it would be appropriate to suspend the declaration of invalidity for 12 months. The court held that:

> I am cognisant that an immediate declaration of invalidity of the certifying (detention) sections ... would pose a potential risk to certain individuals and the safety of the public. Accordingly, it is appropriate to suspend this declaration for a period of twelve months from the date of these reasons to afford the Legislature the opportunity and time to consider the necessary amendments required to ensure compliance with the *Charter*.[408]

409. The Supreme Court of Canada has also recognized that matters of great public concern could also be a sufficient reason to suspend a declaration of invalidity. In *Bedford v. Canada (Attorney General)*, the Supreme Court of Canada considered a constitutional challenge to certain provisions of the *Criminal Code* related to prostitution. The court did find that the provisions violated Section 7 of the *Charter*. The court then considered whether to suspend the declaration of invalidity and stated that:

> On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter

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[407] *Schachter v. Canada*, [1992] 2 S.C.R. 679, para. 80, RBOA Tab 123

[408] *JH v. Alberta Health Services*, 2019 ABQB 540, para. 315, RBOA Tab 124

> of great public concern, and few countries leave it entirely unregulated ...Whether immediate invalidity would pose a danger to the public or imperil the rule of law ... may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.[409]

410. The court in *Bedford* also considered that leaving the unconstitutional provisions temporarily in effect could leave prostitutes at increased risk. However, the Court considered all the interests at stake and ultimately decided to suspend the declaration of invalidity.[410]

411. While suspended declarations of invalidity may be more commonly seen when there is a *Charter* violation, the Province submits that a suspended declaration of invalidity can also be granted when a provision is *ultra vires* the province's jurisdiction. In *Morton v. British Columbia (Minister of Agriculture & Lands)*, the British Columbia Supreme Court found that certain provincial regulations were *ultra vires* the province. The court noted that "the absence of sufficient legislation ... could well be more harmful to the public than the perpetuation of the impugned legislation ..."[411] As a result, the court suspended the declaration of invalidity for a period of 12 months.

412. In the situation before this court, the Province submits that the interests at play weigh more heavily in favour of a suspension of a declaration of invalidity. There is no evidence that suspending the declaration of invalidity

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[409] *Bedford,* para. 167, RBOA Tab 60

[410] *Bedford*, paras. 168-169, RBOA Tab 60

[411] *Morton v. British Columbia (Minister of Agriculture And Lands)*, 2009 BCSC 136, para. 198, RBOA Tab 125

would result in any harm to any individual wishing to enter the Province, as was the case in *Bedford*.

413. The Province submits that the COVID-19 pandemic is a rapidly evolving and fluid public health situation. If SMO 11 or s.28.1 or s.50(1) of *PHPPA* were to be immediately struck down, the safety of the residents of the Province of Newfoundland and Labrador could be affected. Accordingly, the Province submits that any declaration of invalidity should be suspended to allow the CMOH and the legislature the opportunity to issue further Special Measures Orders or amend the *PHPPA*.

PART V – RELIEF SOUGHT

414. The Province submits that the Application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day 13 of July, 2020.

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