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 IN RIGHT OF NEWFOUNDLAND AND LABRADOR**	**FIRST RESPONDENT**
AND:	**JANICE FITZGERALD, CHIEF MEDICAL OFFICER OF HEALTH**	**SECOND RESPONDENT**

SUMMARY OF CURRENT DOCUMENT

Court File Number(s)	**2020 01G 2342**
Date of Filing Documents:	**July 27, 2020**
Name of Filing Party or Person:	**Kimberley Taylor and Canadian Civil Liberties Association**
Application to which Document being filed relates:	**Originating Application dated May 20, 2020 Re: Constitutionality of The Travel Ban and Bill 38 of the *PHPPA***
Statement of purpose of filing:	**Reply on Behalf of the Second Applicant**
Court Sub-File Number, if any:	

REPLY FILED ON BEHALF OF THE SECOND APPLICANT

1. In this Reply brief, the Second Applicant addresses three issues that are raised by the Respondents in their brief:

    a. the CCLA's standing as a public interest litigant;

    b. the argument that parts of the Application lack an adequate factual foundation; and

c. the question of deference in relation to the Special Measures Order and the amendments to the *Public Health Protection and Promotion Act.*

A) CCLA Should be Granted Public Interest Standing

2. The Respondents take issue with the CCLA's standing as a public interest litigant on a number of grounds and under each of the factors identified as relevant to assessing public interest standing.

3. Overall, the Respondents' submissions on standing are out of step with contemporary jurisprudence which has evolved to recognize the value of granting public interest standing in a much broader category of cases than would have previously been considered. While the Supreme Court in *Downtown Eastside* counsels that public interest standing must be addressed in a flexible, liberal and generous manner,[1] the Respondents' outdated approach is the opposite: rigid and stingy.

4. For example, the Respondents argue that the CCLA lacks the "genuine interest" required pursuant to the test for public interest standing, stating that this branch of the test "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." (para 64 of Respondents' Brief (RB))

5. In support of this proposition, the Respondents rely on *Shiell v. Amok Ltd.,* a 1987 decision of the Saskatchewan Court of Queen's Bench. This decision not only pre-dates the Supreme Court's decision in *Downtown Eastside,* but also the earlier Supreme Court precedent,

[1] *Canada (Attorney General) v. Downtown Eastside Sex workers United Against Violence Society,* 2012 SCC 45 at para 48 [*Downtown Eastside*]. [Tab 1, Vol 2, Brief of the Second Applicant]

Canadian Council of Churches[2]. Significantly, in *Downtown Eastside,* the Court stated clearly that the "genuine interest" factor should not be read so narrowly, but rather:

> …reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody…this factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise…in *Canadian Council of Churches,* the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants." (*Downtown Eastside*, para 43, emphasis added)

6. With respect to the challenge to the Special Measures Order banning travel into the province (SMO), the Respondents' primary objection is that it "would not be appropriate to grant standing to the CCLA with respect to this issue" (para 71 of RB) because the Applicant, Kim Taylor, has standing to bring the challenge directly. Once again, this illiberal approach to standing is not in line with current case law.

7. The Supreme Court has explicitly recognized that the "presence of other claimants does not necessarily preclude public interest standing; the question is whether litigation is a reasonable and effective means to bring a challenge to court…Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand."[3]

8. The practice of a private individual and public interest organization joining to bring a significant constitutional case is not novel - it is increasingly common. The Federal Court recently considered the question of the standing of a group of organizations as co-applicants

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[2] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. [Tab 5, Respondent's List of Authorities]

[3] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 43. [Tab 1, attached hereto].

to affected individuals in a case challenging provisions of the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations*.[4]

9. In that case, the Respondents had suggested that the public interest organizations did not require standing as a party, but could simply assist the directly affected applicants behind the scenes or seek leave to intervene in the cases. Diner J. rejected these suggestions and undertook an analysis, in accordance with the Supreme Court's guidance in *Downtown Eastside* and *Manitoba Metis* which recognized the important role that public interest organizations can play, even in litigation where there is a directly affected party before the Court. With respect to the argument that the Organizations should have simply assisted the parties, the Court noted that it is "generally not appropriate for 'ghost' parties to lurk in the background, providing extensive funding, evidence, advice, or information."[5]

10. The Second Applicant respectfully submits that it does meet the requirements for acting as a public interest litigant in this case, and asks that the Court exercise its discretion in favour of granting standing.

B) The Factual Foundation is Adequate

11. The Respondents claim at a number of points in their brief that there is an inadequate factual foundation for some of the claims raised in the Application – and in particular with respect to the claims that ss. 28.1 and 50(1) of the *PHPPA* are unconstitutional. Although the nature of the factual foundation is related to the "serious justiciable issue" prong of the test for public

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[4] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship),* 2017 FC 1131. [Tab 2, attached hereto]
[5] *Ibid.,* para. 68.

interest standing, the Second Applicant submits that the questions of standing and the adequacy of the factual foundation are distinct. While the Respondents agreed that the issue of standing would be argued in submissions and after the hearing, it is important not to conflate the two distinct issues. With respect, this Court ought to make a determination of standing prior to and independent of consideration as to whether the factual foundation supporting any of the claims are lacking.

12. The Respondents, at paras. 258-264 of their brief, argue that the CCLA's challenge to s. 28.1 lacks a factual matrix and cannot be assessed. However, the Second Applicant submits that the full nature of the factual foundation cannot be evaluated until after cross examinations are complete.

13. In any event, the Second Applicant reminds the Court of the important distinction between adjudicative and legislative facts. The Supreme Court in *Danson v. Ontario* notes that adjudicative facts are those concerning the parties to the dispute, while legislative facts "establish the purpose and background of legislation, including its social, economic and cultural context."[6] *Danson v. Ontario* stated that adjudicative facts are specific and require proof via admissible evidence, whereas legislative facts are general and more easily admissible.

14. The questions being litigated in this case are: a) are the travel restrictions *ultra vires* or contrary to the *Charter*? and b) do the extraordinary police powers violate the *Charter*? In this case, the Respondents frankly acknowledge that both ss. 28.1 and 50(1) of the *PHPPA* were amended to allow for enforcement of the Special Measures Order that limits travel into

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[6] *Danson v. Ontario (Attorney General),* [1990] 10 S.C.R. 1086 at para.27 [Tab 3 of the Respondent's List of Authorities]

the province. Their validity will stand or fall based on their purpose relative to constitutionally protected rights.

15. The Respondents further suggest that the "only exception" to the general rule requiring a factual foundation is "where it can be shown that the impugned legislation would otherwise be immune from challenge". The Second Applicant rejects this interpretation for a number of reasons.

16. The question of immunity from challenge is more complex than the Respondents' arguments allow. The legislature has amended public health legislation in a way that grants the police extraordinary powers, but argues that those powers cannot be reviewed unless and until the powers are used (or abused). In that regard, the law *is* immune from challenge. There *is* no person to challenge it because it hasn't been invoked (Affidavit of Katie Norman, para 8 and 9). The logical corollary to this argument is that unconstitutional laws may remain on the books indefinitely, so long as they are not used.

17. This problematic approach to adjudicating the constitutionality of statutory provisions is brought into sharp relief when one considers that the exercise of the powers under s. 28.1 and 50(1) are entirely within the discretion of the police and inspectors, respectively. By failing to exercise the powers granted pursuant to the statute, those charged with carrying out the law can effectively immunize the government from review.

18. To take an example referenced in the Respondents' brief and in the Supreme Court's decision in *Bedford* – the idea of gross disproportionality 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." (Bedford, para 120). According to the Respondents, an individual wishing to challenge such a law must spit on the sidewalk and be prosecuted.

19. Further, the Second Appellant submits that Chief Justice McLachlin comments in *R v Nur*, [2015] 1 SCR 773[7] are conclusive. *Nur* involved the question of whether mandatory minimum sentences violated s.12 of the *Charter*. McLachlin, C.J., swiftly and firmly rejected the notion that the person before the Court had to show that his individual rights were violated by the mandatory minimum sentence. In *Nur*, the Applicant accepted that his rights were not infringed but argued the reasonably foreseeable application of the law on other, hypothetical offenders could violate section 12. Paragraph 51 states:

> ***51*** *I turn first to the general jurisprudence of Charter review. This Court has consistently held that a challenge to a law under s. 52 of the Constitution Act, 1982 does not require that the impugned provision contravene the rights of the claimant: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 314; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; R. v. Heywood, [1994] 3 S.C.R. 761; R. v. Mills, [1999] 3 S.C.R. 668; R. v. Ferguson, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 58-66. As I wrote in Ferguson, "[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties": para. 59. This is because "[i]t is the nature of the law, not the status of the accused, that is in issue": Big M, at p. 314, per Dickson J. Section 52 of the Constitution Act, 1982 entrenches not only the supremacy of the Constitution but also commands that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If the only way to challenge an unconstitutional law were on the [page803] basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: Big M, at p. 313. This reflects the principle that the Constitution belongs to all citizens, who share a right to the constitutional application of the laws of Canada.*

20. Despite the fact that s. 28.1 and s. 50(1) have not yet been employed, these provisions authorize extraordinary powers by state officials without meaningful due process protections. For instance, the individuals referred to at paragraph 9 of Katie Norman's Affidavit, who "left the province voluntarily" were denied due process.

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[7] [Tab 3, attached hereto]

21. In the circumstances of this case, the Second Applicant submits that the factual foundation is adequate to assess the ss. 28.1 and 50(1) claims.

C) The Appropriate Level of Deference

22. References to the importance of deference are strewn throughout the Respondents brief and are the subject of focus at paras. 188-203. The Second Applicant does not dispute that some level of deference is appropriate, but submits that the approach suggested by the Respondents would be an abdication of the Court's responsibility to act as a guardian of the Constitution and the rule of law.

23. The Respondents urge the Court to "accord the CMOH a high degree of deference in executing her duty to protect the health and the lives of the residents" of the province, and refer to a "long line of cases" in which the Supreme Court acknowledges the appropriateness of deference in a section 1 analysis.

24. The Respondents fail to acknowledge a key distinction between the Supreme Court cases upon which they rely and the case before this Court: the party to whom deference is being afforded. While the jurisprudence relied upon by the Respondents acknowledges the appropriate role of deference to Parliament or a provincial legislative assembly, the SMO at issue in this Application is a measure written by a single, unelected individual – the Chief Medical Officer of Health.

25. The CMOH is appointed by the Minister, and Special Measures Orders she issues are neither debated nor approved by the legislative assembly. Indeed, pursuant to the *Public Health Protection and Promotion Act,* the Special Measures Orders need not even be approved by the Minister.

26. The Respondent further contends that the CMOH's medical expertise means that she is owed the highest level of deference, and argues that "[b]y its very nature, public health decision making during a pandemic should attract deference" and that "[t]his 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" (para 203 of RB).

27. With respect, this approach ignores the fact that the Special Measure Order is not purely a "public health decision". The decisions to close parts of the economy, close schools, and close borders, are complex policy decisions that require input from individuals with a variety of expertise. The government cannot offload this kind of decision-making to the CMOH and then claim that her expertise in public health immunizes the decision from review.

28. The level of deference the Respondents seek in this case effectively eliminates the requirement that the government justify measures that restrict constitutional rights. The pandemic is not a magic wand that can be waved around to make constitutional rights disappear.

29. Restrictions on *Charter* protected rights must be reasonable and justified. Even if the Court defers to decision-makers in light of the extraordinary nature of the current health crisis, and accepts that these decisions may be governed in part by the "precautionary principle" in public health, government actors (including the CMOH) must consider the impacts that their decisions will have on *Charter*-protected rights and adduce the evidence that was relied upon to assess the proportionality of the approach taken. Indeed, section 13 of the *Public Health Protection and Promotion Act* explicitly states that:

> Where an individual's rights or freedoms are restricted as a result of the exercise of a power or the performance of a duty under this Act, the regulations or an order made under this Act or the regulations, the restriction shall be no greater than is reasonably

required in the circumstances to respond to a communicable disease, health hazard, public health emergency or contravention of this Act, the regulations or an order made under this Act or the regulations. (emphasis added)

30. With respect to the justification for issuing the SMO limiting travel, the CMOH's evidence is minimal and contained primarily in her response to Interrogatory #8, set out at para. 9 of her Affidavit dated June 8, 2020 as well as exhibits 3-8 thereto. There is no meaningful discussion of why the approach taken up to that point (i.e. requiring those entering the province to self-isolate) was considered insufficient.

ALL OF WHICH is respectfully submitted by

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