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:	**June 15, 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:	**Memorandum of behalf of the Second Applicant**
Court Sub-File Number, if any:	

BRIEF FILED ON BEHALF OF THE SECOND APPLICANT

I. INTRODUCTION:

1. When Minister Haggie introduced the *Public Health Protection and Promotion Act (PHPPA)* in the House of Assembly on November 20, 2018 he touted it as being a "landmark piece of legislation…that will stand out as a beacon from the East Coast of what public health can be". In comparison to the *Communicable Diseases Act*, which the *PHPPA* ultimately replaced, he said:

> *The current act does provide authority to order individuals to be detained or investigated, or even to be quarantined. The problem with that is they were written in the '70s and you could – essentially, the Canadian Charter of Rights and Freedoms does not permit those measures to be used. These are autocratic, they belong to a different era and they predate the patriation of the Constitution. So we're actually at risk currently, significant legal risk as a provincial government from a challenge to any one of these orders that would try to be used to curtail or deal with a public health issue.*
>
> …
>
> *Of the 53 pages or whatever of this act [the PHPPA], slightly more than 20 deals with one essential principle, and that's the balance between the individual's rights and freedoms under the Charter and the duty to protect the population health by building in some appropriate procedures.*
>
> *A person with a communicable disease who is spreading the infection and who will not follow medical advice is a significant public health risk. That has to be managed. So these 20, 22 pages go into some considerable detail to take the Charter of Rights and Freedoms and the constitutional law, as we understand it through justice and through our counsel, and to provide those protections for an individual who may be subject to one of these orders.*
>
> *So while in an emergency, a medical officer of health can issue an order for compliance with recommendations and if that's ignored, then that can be taken as far as the Supreme Court. There are checks and balances so there are appeal matters. Our current public health legislation is actually silent on what those checks and balances are and simply because of that will not pass constitutional muster*[1].

2. It appears that at the time Minister Haggie was fully cognizant of the need for public health measures to be *Charter* compliant.

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1 Hansard, House of Assembly Proceedings, November 20 2018, Vol XLVIII, No. 44 Tab 1.

3. While the world has changed in the intervening 18 months since those comments were made, the Second Applicant submits that a pandemic does not give the First Respondent the authority to suspend civil liberties and *Charter* protected rights.

4. Minister Haggie fully articulated the need for *Charter* compliance and for judicial oversight. Adherence to those safeguards is even more important at a time of a global pandemic. Once a declaration of a public health emergency has been made, the state has increased power to curtail rights but that power must be exercised proportionately and for legitimate purposes. It is during such a time that judicial review is crucial to ensure an appropriate balance between the legitimate exercise of state intervention and the rights of Canadian citizens and permanent residents.

5. The Second Applicant submits that the imposition of a Travel Ban pursuant to s. 28(h) of the *PHPPA*, and the increased enforcement powers granted by virtue of Bill 38, which are now found at ss.28.1 and 50(1) of the *PHPPA (hereinafter referred to as Bill 38)* are unconstitutional.

6. In the case of the Travel Ban, the Second Applicant submits that restricting the mobility of Canadian citizens and permanent residents is *ultra vires* the Province.

7. Alternatively, it submits that the Travel Ban violates s.6 of the *Charter* and cannot be saved by s.1. In the further alternative, it submits that the Travel Ban violates s.7 of the *Charter* and cannot be saved by s.1.

8. As regards the increased enforcement powers, the Second Applicant submits that Bill 38 violates s.8, s.9 and s.7 of the *Charter* and cannot be saved by s.1.

II. FACTS:

9. The facts have been outlined in the Originating Application filed with the Court on May 20, 2020. For the purposes of this Application, the relevant facts are:

    i) On March 11, 2020, the World Health Organization declared COVID-19 a pandemic;

    ii) On March 18, 2020, the Minister of Health declared a health Emergency for a period of 14 days pursuant to s.27 of the *PHPPA*. Further declarations were made on April 29th, May 14th and May 29th;

    iii) On March 20th, pursuant to s.28(h), the Chief Medical Officer of Health made a Special Measures Order requiring persons entering Newfoundland and Labrador to self-isolate for a period of 14 days;

iv) On April 29, the Chief Medical Officer of Health made a Special Measures Order banning travel into Newfoundland and Labrador (the "Travel Ban");

v) Several amendments and exceptions were later introduced;

vi) On May 5, 2020, the province adopted amendments to the *PHPPA*. Bill 38 granted new enforcement powers and enhanced existing ones pursuant to s.28.1and s.50(1);

vii) On May 16, 2020 the Chief Medical Officer of Health made a Special Measures Order exempting asymptomatic workers and health care workers traveling to and from Newfoundland and Labrador from the self-isolation requirements;

III. OVERVIEW OF ISSUES:

10. This Application challenges the constitutionality of both the amendments to the *PHPPA* introduced through Bill 38 and the Travel Ban.

11. The Second Applicant submits that the following issues are before the Court:

1) Does the Second Applicant have Standing?

2) Is the Travel Ban unconstitutional?
a. Is the Travel Ban *ultra vires* the province?
b. Does the Travel Ban violate s.6 of the *Charter*?
c. Does the Travel Ban violate s.7 of the *Charter*?
d. If the Travel Ban violates s.6 or s.7, are the violations saved by s.1?

3) Is s.28.1 of the PHPPA unconstitutional?

4) Is s.50(1) of the PHPPA unconstitutional?

5) What are the appropriate remedies?

IV. ARGUMENT:

1) The Second Respondent has Public Interest Standing to Bring this Application:

12. The First and Second Respondents argue that the Second Applicant lacks standing to bring this Application. The Second Applicant submits that this objection is directly answered by the Supreme Court of Canada's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (hereinafter referred to as *Downtown*

Eastside, Tab 1, Vol 2, Authorities), which dictates a more liberal approach to questions of public interest standing.

13. As *Downtown Eastside* recognized, where litigants' rights or freedoms are not directly at stake, a determination of constitutional validity may be sought based on "public interest standing". Notwithstanding the important purposes served by the law of standing, the Court "recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms,* there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts." (para 22)

14. To qualify for public interest standing, the litigant must demonstrate that: (1) there is a serious issue as to the validity of the legislation or administrative action; (2) they have a genuine interest in the measure's validity; and (3) the litigation is a reasonable and effective way to bring the matter before the court *(Downtown Eastside, para 37)* These factors must all be assessed by judges in a "purposive and flexible" manner.

15. While the Court recognized that a plaintiff with standing as of right "will generally be preferred" (*Downtown Eastside*, at paragraph 37), the jurisprudence emphasizes the need to approach public interest standing in a flexible and generous manner.

16. The Second Applicant submits that there can be little doubt about its ability to satisfy the first and second requirements identified in *Downtown Eastside.* The constitutionality of Special Measures Orders and legislation that place restrictions on the rights of Canadians to move freely in their own country is a serious and justiciable issue.

17. With regard to the second factor, the Second Applicant is a well-recognized public interest organization with a long history of advocacy on matters relating to civil liberties. Its history of interventions and litigation before Canadian courts in all manner of civil liberties cases establishes its general interest, and its ongoing work during the COVID-19 pandemic demonstrates its genuine interest in the issues before the Court[2].

18. The third factor asks whether the litigation is a reasonable and effective way to bring the matter before the Court. As the Supreme Court has acknowledged, the three factors are not to be treated as "hard and fast requirements or free-standing independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes."

2.*See affidavit of Cara Zwibel, tab 3, Originating Application.*

19. *Downtown Eastside* emphasized that the third factor can not be applied rigidly, but rather should be assessed purposively taking into account "whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the action to go forward will serve the purpose of upholding the principle of legality" (*Downtown Eastside*, supra, paragraph 50).

20. To highlight the practical reality in relation to the third factor, the Second Applicant points out that other means, short of litigation, were dismissed by the First and Second Respondents.

21. The Second Applicant wrote to the government expressing its concerns about the constitutionality of the Special Measures Order and provisions of Bill 38, but the government dismissed those concerns.[3]

22. The First Respondent likewise dismissed the opportunity to discuss concerns prior to the commencement of this application during a media briefing on May 6, 2020 wherein he stated "If any body feels that their Charter rights have been abridged in any way they have the right and the ability to go to court and challenge it".

23. It is also noteworthy that during the proceedings in the House of Assembly, dated May 5, 2020, the Leader of the Opposition made the following comments:

> *As a further safeguard, I do believe the government has agreed to receive any comments the Canadian Bar Association, Newfoundland branch, may wish to make on the conformity of both the amendment in front of us and the Special Measures Order, which deals with travel, and the government will give due consideration to any comments the Canadian Bar Association wishes to make on conformity of the order or the amendment with section 13 of the act of with the Charter of Rights and Freedoms and act accordingly.*
>
> *Mr. Speaker, with the understanding that those amendments to the special order will occur, and with the understanding that the government is willing to be open-minded and consider relevant comments in writing from the Canadian Bar Association, our caucus is content that the amendment should go*[4].

24. The Canadian Bar Association did, in fact, write the Premier on May 14, 2020 outlining its concerns and asking that the Government reconsider its position[5]. On May 21, Minister Parsons

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3 *See correspondence dates May 11, 2020 and May 14, 2020, at Tab 10 of the Originating Application.*

4 *See Hansard, Tab 9, Originating Application, page 1858*

5 Letter From CBA, dated May 15, 2020, and Reply dated May 21, 2020, Tab, 2.

responded to the CBA but refused to comment on the concerns contained therein, citing this ongoing court Application.

25. The Second Applicant submits that these factors all indicate that public interest standing should be granted. As Canadians face states of emergency across the country, it is unrealistic to expect a single individual to mount a challenge of this nature on their own. While the First Applicant has been directly affected by the Travel Ban and thus has private interest standing to challenge it, she has not been the subject of the enforcement measures.

26. To that end, while the legislation does not confine the new enforcement powers to the Travel Ban, it is clear from the proceedings in the House of Assembly on May 5, 2020, that they are inextricably linked.

> *The problem, however, with the travel prohibition is that the policing agencies, lawyers with Justice and Public Safety, have advised is that they require specific authority to locate, detain and convey a person in the province in contravention of the travel ban*[6].

27. Given the seriousness of the rights infringements that may flow from the application of the enforcement provisions, the Second Applicant submits that it is an appropriate and economical use of judicial resources to challenge these provisions in the within Application and not wait for individual rights to be impacted by detention and removal from the province.

28. Jurisprudence from this province recognizes the importance of public interest standing in cases dealing with constitutional issues. While the case dealt with intervention, Justice McGrath, in *Dichmont Estates v. Newfoundland and Labrador,* [2019] NLSC 25 (attached, Vol 2, Authorities, Tab 2) , wrote:

> *[12] When public law issues are involved, case law indicates there has been a relaxation of the criteria for intervention. This was noted in the 1997 decision of Ward v. Canada (Attorney General) (1997), 1997 CanLII 16051 (NLSC), 153 Nfld. & P.E.I.R. 135, 35 W.C.B. (2d) 12 (Nfld. S.C. (T.D.)), at paragraphs 17 and 18, in which Hickman, C.J. referred, with approval, to the decision of the Ontario Court of Appeal in Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 1990 CanLII 6886 (ON CA), 45 C.P.C. (2d) 1, 22 A.C.W.S. (3d) 292 (Ont. S.C. C.A.). At paragraph 6 of that Ontario decision, Dubin, C.J. noted as follows:*
>
> > *6. In constitutional cases, including cases under the Charter of Rights* and Freedoms, *which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and,*

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6. *See Hansard, Tab 9, Originating Application, page 1856*

> *for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.*

(See also David Suzuki Foundation v. Canada-Newfoundland and Labrador Offshore Petroleum Board, 2018 NLSC 146)

29. The Second Applicant submits that the principles are equally applicable to the question of standing as a party as they are to intervention. In light of the foregoing, the Second Applicant submits that the Court should grant it public interest standing to bring this Application.

2) The Travel Ban is Unconstitutional:

31. Section 27 of the *PHPPA* allows for the Minister of Health to declare a public health emergency. Declarations were made on March 18, April 29, May 14 and May 29, 2020.

32. While a declaration of a public health emergency is in effect the Chief Medical Officer has the authority to enact special measures pursuant to s.28.

33. On March 20, 2020 the Chief Medical Officer of Health made a Special Measures Order requiring persons coming into the province to self isolate for 14 days.

34. Section 28(h) states that the CMOH may make orders restricting travel to or from the province or an area within the province.

35. The Travel Ban was made by Special Measure Order (SMO) on April 29th, effective May 4, 2020. According to s. 2 of the SMO:

> *All individuals are prohibited 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 Updated Exemption Order effective April 22, 2020 (exemption to the requirement to self-isolate for 14 days);*
>
> c. *Individuals who have been remitted entry into the province in extenuating circumstances, as approved in advance by the Chief Medical officer of Health*

36. On May 5, 2020, exemptions to the Travel Ban Order were made by SMO. They included individuals who:

> a. *Have a significant injury, condition or illness and require the support of family members resident in NL;*
>
> 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 work 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*

a. The Travel Ban is Ultra Vires the Province

37. It is the submission of the Second Applicant that the Travel Ban is *ultra vires* provincial jurisdiction. To the extent that limits can be placed on interprovincial travel during a pandemic, this power falls within the federal heads of power set out in s. 91 of the *Constitution Act, 1867*.

38. The analysis of a division of powers question involves two steps. The first is to identify the "matter" of the challenged legislation or provision. The second is to determine to which head of power the matter should be assigned.

i) Pith and Substance: Restricting Interprovincial Travel

39. The Second Applicant does not argue that the *PHPPA* is beyond the province's jurisdiction. Rather, the federalism concern arises in respect of the Travel Ban which has been implemented pursuant to s. 28(h) of the *PHPPA*. Thus, the question is: what is the pith and substance of s.28(h) of the *PHPPA* and of the Travel Ban itself? (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 S.C.R. 693, paras 30-31, Attached, Vol 2, Authorities, tab 4).

40. Section 28(h) of the *PHPPA* reads:

> *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:*
>
> > *(h) make orders restricting travel to and from the province or an area within the province;*

41. While the section clearly states the purpose of travel restrictions, the Second Applicant submits that a pith and substance analysis requires scrutiny of both the purpose and effect of the challenged provision in the context of the statute as a whole. Although the Act as a whole is clearly concerned with the health of the province's population, the challenged provision has the effect of restricting the mobility of persons outside the province. The Second Applicant submits that the latter aspect is the relevant one for purposes of assessing the province's jurisdiction.

ii) Relevant Heads of Power

42. The Second Applicant submits that movement between provinces is assigned to the federal Parliament pursuant to ss. 91(29) and 92(10)(a) of the *Constitution Act, 1867*. Further, the federal Parliament's jurisdiction over citizenship matters encompassed by s. 91(25) supports this view.
43. Section 92(10) lays out provincial power over certain matters subject to the exceptions set out in the subsections. It states that the province has power over:

> 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;
>
> (b) Lines of steam ships between the province and any British or foreign country;
>
> (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

44. Section 91(29) allocates to the federal Parliament power over the classes of subjects which are expressly excepted from the provincial list. Thus, the subsections of s. 92(10) fall within federal jurisdiction. As Hogg explains:

> *The essential scheme of s. 92(10) is to divide legislative authority over transportation and communication on a territorial basis. The specific references in s. 92(10)(a) to "lines of steam or other ships, railways, canals, telegraphs" do not allocate those modes of transportation or communication unqualifiedly to the federal Parliament. The references must be read in the context of the later reference to "other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province", and the whole of paragraph (a) must be read as an exception to the grant of provincial authority over local works and undertakings. The effect is to allocate to the federal Parliament the authority of* ***interprovincial or international*** *shipping lines, railways, canals, telegraphs and other modes or transportation or communication; and to allocate to the provincial Legislatures the authority over* ***intraprovincial*** *shipping lines, railways, canals, telegraphs and other modes of transportation or communication.* (Hogg, Peter,

Constitutional Law of Canada, 5th Edition (hereinafter Hogg) – s. 22.1, pp 22-2 – 22-3; emphasis in original, Tab 3)

45. A long line of jurisprudence extending from the pre-*Charter* era into the present demonstrates that the commonality between the items enumerated in s. 92(10)(a) is "the interprovincial transport of goods or persons." [*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* 2009 SCC 53 Attached, Vol 2, Authorities, tab 4), at para. 43; see also e.g. *Winner v. S.M.T.,* [1951] S.C.R. 887 (tab 5); *Bell Canada v. Quebec (Commission de la Sante et de la Securite du Travail,* [1988] 1 S.C.R. 749 (tab 6)]

46. In addition to being encompassed in the powers set out in s. 92(10)(a), interprovincial movement is an inherent aspect of citizenship. *Winner v. S.M.T., supra,* is often credited as the genesis of the notion that interprovincial mobility is "inherent to the institution of Canadian Citizenship". This notion was explicitly endorsed by Justice La Forest in *Black v. The Law Society of Alberta* [1989] 1 S.C.R. 591 (paragraph 39) (Attached hereto, Vol 2, Authorities, tab 7).

47. As Peter Hogg points out at s.26.3 of The Constitutional Law of Canada, (5th Edition, vol 1, chapter 26) (tab 4), 'citizenship', as we now know it, was an unknown concept at the time of confederation. However, citizenship falls within the federal division of powers pursuant to s.92(25).

48. This position was recently endorsed by the Federal Court in *Galati v. Canada (Governor General),* [2015] F.C.J. No 79 (attached hereto, Vol 2, Authorities, tab 8). At paragraph 95 Justice Rennie states:

> ***95*** *Section 91(25) complements the general power, and reinforces the conclusion that all aspects of citizenship are within the exclusive and plenary authority of Parliament. It is implicit, indeed logically imperative, that legislative competence over naturalization includes competence over citizenship. If it did not, it would leave unanswered the question as to the end result of the naturalization process -- naturalized to what? Similarly implicit in the concept of "alien" is a legal state or status from which one is alienated. "Naturalization" and "alien" both require, for their understanding and meaning, juxtaposition or distinction with citizenship or nationality.*

49. Support for the proposition that citizenship includes mobility and is thus within the ambit of the federal division of power can be found in the *International Covenant of Civil and Political Rights (tab 5)*, to which Canada is a signatory. Article 12 reads:

> ***Article 12***
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

50. Likewise, Article 13 of the *Universal Declaration of Human Rights (tab 6)*, adopted by the U.N. General Assembly, reads,

    a. Everyone has the right to freedom of movement and residence within the borders of each State.

    b. Everyone has the right to leave any country, including his own, and to return to his country.

51. This right to liberty of movement can be restricted when necessary to protect public health. However, the Second Applicant submits that the inclusion of this limitation in the *ICCPR* indicates that this is a federal power, and thus necessarily can only be limited by the federal government. A province cannot circumvent a right granted by an international covenant.

52. In the event that the Court does not characterize the pith and substance of the impugned provision as restricting interprovincial travel, but characterizes it as a matter relating primarily to public health, there are a number of provincial heads of power that the First Respondents may argue authorize s. 28(h) and the Travel Ban.

53. It is well recognized that health matters do not fall exclusively within the jurisdiction of either level of government – aspects of this subject matter fall under both levels of government. For example, s. 92(16) confers the power to make laws in relation to "all matters of a merely local or private nature in the province". Matters of local public health have also been assigned to the province under s.92(13); property and civil rights in the province. Further, s.92(7) confers the power to the province over the establishment, maintenance and management of hospitals, within the province, other than marine hospitals.

54. The Second Applicant accepts that the *PHPPA* is valid provincial legislation aimed at public health pursuant to s.92(16). In that regard, it is a convenient, and therefore attractive argument to conclude that the Travel Ban is incidental to the legitimate public health purpose of the *PHPPA*.

55. The Second Applicant submits that endorsing such a conclusion mischaracterizes the dominant feature of the provision at issue in this Application, which is to ban entry into the province. A Travel Ban in the midst of a global pandemic is not "a matter of a merely local or private nature in the province." By its very definition, a Travel Ban during a pandemic

is of national concern. It ONLY applies to people in other jurisdictions and is not merely incidental or ancillary to the province's exercise of its jurisdiction.

56. The very definition of "incidental" implies an inadvertent consequence. Merriam Webster's dictionary defines "incidental" as:

a) being likely to ensue as a chance of minor consequence; or

b) occurring merely by chance or without intention or calculation.

57. The Travel Ban meets neither of those definitions. The Second Applicant submits that the restriction on interprovincial mobility, even in the context of public health protection, is beyond the jurisdiction of the province.

58. While the Second Applicant submits that the impugned Travel Ban falls within the federal heads of power set out in s. 91 of the Constitution Act, 1867, it acknowledges that even a validly enacted federal law or order banning interprovincial travel would have to be considered in light of the *Charter*. Thus, the Second Applicant submits that the extent of the Travel Ban's compliance with the *Charter* must be considered.

b. <u>The Travel Ban Violates Section 6 of the Charter:</u>

59. Should this Court determine that the imposition of a travel ban is *intra vires* the province, the Second Applicant submits in the alternative that the travel ban is prohibited as it breaches mobility rights guaranteed by s. 6 of the *Charter*.

60. The question of whether a province or territory can bar Canadian citizens or permanent residents from entering that province or territory does not appear to have been previously considered by Canadian courts.

61. Section 6 reads as follows:

> *Mobility Rights*
>
> *s.6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.*
>
> *(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right*
>
> *(a)to move to and take up residence in any province; and*
>
> *(b) to pursue the gaining of a livelihood in any province.*
>
> *(3) The rights specified in subsection (2) are subject to*

(a)any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b)any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

62. Clearly, s.6(1) states that every Canadian citizen has the right to enter into and remain in Canada. It does not, however, on its face, refer to movement within the country. So, while it is clear that a province could not prevent someone from entering from outside Canada, the Second Applicant submits that the right to enter into and remain in Canada includes the right to move freely within it.

63. There appear to be no cases dealing specifically with interprovincial travel bans. Courts have not had occasion to deal with such a prohibition since the implementation of the *Charte*r and, significantly, pre-*Charter* jurisprudence does not address the issue either. The right to move freely within the country is such an ingrained feature of citizenship that it is implied and appears to have never been seriously questioned. As Hogg notes:

> *Paragraph (a) of s. 6(2) confers the right "to move to and take up residence in any province." This freedom existed in practice before the Charter, in that* ***people have always been free to travel from one province to another without the necessity for documentation or border checks****. However, it had never been squarely held that there was a constitutional right to move freely between provinces. (Emphasis added)(tab 7)*

i) <u>Mobility Rights Pre-Charter</u>

64. In the pre-*Charter* case of ***Winner v . S.M.T.*** referenced above, mobility was recognized as an inherent part of citizenship and fundamental to a unified country. While the case dealt with the interprovincial provision of services, Justice Rand grounded his ruling in the notion that mobility is a fundamental aspect of citizenship.

> *... 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.

65. The Second Applicant submits that the Court's reference to the rare exceptional circumstances in which a province might be able to prevent a Canadian from entering it does not circumscribe the scope of the mobility rights of Canadians. Rather, any exceptions to freedom of movement ought to be addressed under section 1 of the *Charter.*

ii) <u>Charter Recognition of Mobility Rights</u>

66. The implementation of the *Charter* seems only to have strengthened the notion that freedom of movement within Canada is an inherent aspect of citizenship.

67. In *Black v Law Society of Alberta* [1989] 1 S.C.R. 591 La Forest stated the following:

> *[62] In truth, a purposive approach to the Charter dictates a broad approach to mobility. Section 6(2) protects the right of a citizen (and of a permanent resident)* ***to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries****. The provinces may regulate these rights but, subject to ss. 1 and 6 of the Charter, cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his or her capacity as a citizen throughout Canada. This approach is consistent with the rights traditionally attributed to the citizen and with the language of the Charter.* [Emphasis Added]

68. The Second Applicant submits that La Forest's comments recognize that the right to chose where one resides or the right to pursue one's livelihood is situated within a broader, more fundamental acknowledgement that mobility is an inherent aspect of citizenship. At paragraph 38 La Forest stated:

> ***38*** *Before the enactment of the Charter, however, there was no specific constitutional provision guaranteeing personal mobility, but it is fundamental to nationhood, and even in the early years of Confederation there is some, if limited, evidence that the courts would, in a proper case, be prepared to characterize certain rights as being*

fundamental to, and flowing naturally from a person's status as a Canadian citizen. In Union Colliery Company of British Columbia v. Bryden, [1899] A.C. 580, the Privy Council dealt with the validity of a British Columbia enactment that prohibited people of Chinese origin or descent from being employed in mines. The Privy Council found the provision to be ultra vires the provincial legislature and thus illegal. Lord Watson based his reasons on s. 91(25) of the British North America Act, which gives exclusive legislative authority over "naturalization and aliens" to the Parliament of Canada. "Naturalization", it was held at p. 586, includes "the power of enacting ... what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized." Provincial interference with a resident's right to live and work in the province was thus not permitted; see also Cunningham v. Homma, [1903] A.C. 151, at p. 157.

69. La Forest then specifically adopted Justice Rand's comments in *Winner* reproduced above.

70. Indeed, in *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 (attached hereto, Vol 2, Authorities, tab 9) the Supreme Court of Canada rendered its first *Charter* decision. *Skapinker* was a "mobility" case that dealt with the relationship between s.6(2) (a) and (b). However, that "mobility rights" include the right to move freely within the country appears to have been readily accepted. At page 13, Estey, J stated:

I return, therefore, to the words of the section itself. "Mobility Rights" has a common meaning until one attempts to seek its outer limits. In a constitutional document relating to personal rights and freedoms, the expression ***"Mobility Rights" must mean rights of the person to move about, within and outside the national boundaries.*** [Emphasis Added]

71. Both *Black* and *Skapinke*r dictate that *Charter* rights should be interpreted broadly and with a purposive approach. In fact, Justice La Forest in *Black* specifically disagrees with the idea that mobility rights are interconnected to the economic growth of the country.

[41] These economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights, under s. 6(2) of the Charter. But ***citizenship****, and the rights and duties that inhere in it are relevant not only to state concerns for the proper structuring of the economy. It defines the relationship of citizens to their country and the rights that accrue to the citizen in that regard, a factor not lost on Rand J., as is evident from the passage already quoted. This approach is reflected in the language of s. 6 of the Charter, which is not expressed in terms of the structural elements of federalism, but in terms of the rights of the citizen and permanent residents of Canada.* ***Citizenship*** *and nationhood are correlatives. Inhering in* ***citizenship*** *is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries. Under Charter disposition, that right is expressly made applicable to citizens and permanent residents alike. Like other individual rights guaranteed by the Charter, it must be interpreted*

generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country.

iii) Mobility Rights and International Law

72. Given the lack of case law in Canada specifically on the issue of mobility rights vis a vis the freedom to move within one's own country, one could look to the United States. The U.S. Constitution does not explicitly provide for the right to move freely between states. However, the U.S. Supreme Court found exactly that in *Shapiro v. Thompson* (1969) 394 U.S. 618 (attached hereto, Vol 2, Authorities, tab 10).

73. In *Black*, La Forest cites with approval the U.S. approach to mobility rights from the U.S.:

> **44** The American constitution does not have a specific clause dealing with "mobility rights" but some of its provisions have been judicially interpreted as protecting these rights. This has been done primarily by Art. IV, s. 2(1) of the United States Constitution, which provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The United States Supreme Court in Toomer v. Witsell, 334 U.S. 385 (1948), stated that the aim of the privileges and immunities clause was "to help fuse into one Nation a collection of independent, sovereign States." But it is noteworthy that this aim, as in the case of the Charter, was achieved by according rights to the citizen. The aims of Art. IV are similar to those of s. 6 of the Charter and the United States courts have imported [page614] rights similar to s. 6(2) into Art. IV. The same state economic concerns and the right of the citizen are intertwined.

74. The Second Applicant submits that guidance should also be taken from the international covenants referenced above, namely Article 12 of the *International Covenant of Civil and Political Rights*, and Article 13 of the *Universal Declaration of Human Rights*. It would be inconceivable to conclude that Canada signed onto international covenants allowing freedom of movement within the country's borders while intending something more restrictive in its own Constitution.

c. The Travel Ban Violates Section 7 of the Charter:

75. Should this Court determine that the Travel Ban does not offend s.6 of the *Charter*, the Second Applicant submits in the alternative that it violates s.7. Section 7 states:

> *s.7 Everyone has the right to life, liberty and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice.*

76. Section 7 involves a two-step analysis:

1. Is there an infringement of life, liberty or security of the person?

2. If so, is the deprivation in accordance with the principles of fundamental justice?

i) <u>The Travel Ban Implicates Liberty Interests</u>

77. The Second Applicant submits that liberty, in the context of s.7, includes the right to move freely within Canada.

78. As was stated by Wilson J in in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (attached hereto, Vol 2, Authorities, tab 11), the liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy. She stated:

> *[A]n aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in [Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177], is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.*

79. Justice La Forest adopted Wilson J.'s definition in *Godbout v. Longueuil* (City), (1997) 3 S.C.R. 844 (attached hereto, Vol 2, Authorities, tab 12) at paragraph 66:

> *The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in <u>s. 7</u> of the <u>Charter</u> protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in B. (R.) should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in B. (R.), that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the <u>s. 7</u> right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.*

80. People travel within the country for a wide variety of reasons including business trips, family visits, special occasions, medical care, family emergencies and leisure. As a general

rule, Canadians are not and should not be expected to justify their reasons for travel within the country to the government.

81. In *R. v. Heywood*, [1994] 3 S.C.R. 761 (attached hereto, Vol 2, Authorities, tab 13), the Supreme Court had no difficulty finding that restriction of movement engages the liberty interest in s.7. In that case, Mr. Heywood was a convicted sex offender subject to s.179(1)(b), a vagrancy law that prohibited loitering. The law was struck down as it violated the principles of fundamental justice. There was no question that the liberty interest in question, the right to move freely, fit squarely within s.7.

82. La Forest, in *Godbout*, considered the right to choose where one lives in the context of s.7, relying in part on Article 12 of the *International Covenant of Civil and Political Rights.*

> *Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, to which Canada became a party in 1976. As the respondent informed us, Article 12(1) of that convention reads as follows:*
>
> > *12. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*
>
> *While subsection (3) of that provision provides that the right at issue can be limited by states for certain stipulated reasons, the fact remains that the right to choose where to reside is itself enshrined as one of the Covenant's fundamental guarantees. Given this Court's previous recognition of the persuasive value of international covenants in defining the scope of the rights guaranteed by the Charter (see, e.g., Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at p. 348, per Dickson C.J. (dissenting), cited with approval in Slaight, supra, at pp. 1056-57), I regard Article 12 as strengthening my conclusion that the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.*

83. While the Second Applicant recognizes that there is a difference between the right to choose where one lives and freedom of movement more broadly, it is submitted that La Forest's words are just as applicable to the case at bar.

ii) ***Deprivation of Liberty is not in Accordance with the Principles of Fundamental Justice***

84. The next question to be determined is whether the deprivation is in accordance with the principles of fundament justice.

85. In *R. v. Bedford* [2013] 3 S.C.R. 1101 (attached hereto, Vol 2, Authorities, tab 14), the Supreme Court of Canada succinctly summarized the evolution of the principles of fundamental justice.

> *[94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 ("Motor Vehicle Reference"), at p. 512).*
>
> *[95] The principles of fundamental justice have significantly evolved since the birth of the Charter. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the Motor Vehicle Reference, this Court held otherwise:*
>
> > *. . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of Charter rights in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, per Estey J., and Hunter v. Southam Inc., supra. [pp. 501-2]*
>
> *[96] The Motor Vehicle Reference recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.*
>
> *[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel Charter claims.*

86. While it is easy to confuse the principles of fundamental justice analysis with the kinds of considerations at issue under section 1, the Second Applicant notes that *Bedford* warns against this.

> *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. (Bedford, para. 123, emphasis in original)

(See also Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill L.J. 575, Tab 9)

87. Since the s. 7 analysis may consider the impact on a single individual's liberty, the Second Applicant will consider the circumstances of the First Applicant, or someone in a position similar to her, for purposes of assessing the Travel Ban's compliance with the principles of fundamental justice. In comparing the rights infringement caused by the ban with the law's objective, the Second Applicant assumes that the Court will have found that the purpose of the Travel Ban is to slow spread of COVID -19 in the province and "flatten the curve" so as not to overburden the health care system.

88. Arbitrariness describes a situation where there is no connection between the effect and the object of the law. The First Applicant was prepared, on arrival in the province, to self-isolate for a period of 14 days before seeing her family or tending to the matter of laying her mother to rest. In the circumstances, there is no connection between depriving her of the freedom to travel to the province and slowing the spread of the virus[7].

89. For related reasons, the impact of the Travel Ban on the First Applicant is overbroad. "Overbreadth" describes a situation where the law goes too far and interferes with some conduct that bears no connection to its objective.

90. In *Heywood*, the Court ruled that a vagrancy law set out in s. 179(1)(b) was overbroad as it captured offenders who did not pose a danger to children, applied to places that children were unlikely to attend, and thus was unrelated to its objective.

91. The logic from *Heywood* is equally applicable in this case. 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 entering the province would still have to abide by the self-isolation guidelines.

7.See affidavit of the First Applicant, Tab 2 of the Originating Application

There is no scientific basis to conclude that simply by virtue of a person residing outside the province, the risk is increased.

92. For example, suppose that the First Applicant's sister, a Newfoundland resident, had been visiting her in Nova Scotia just prior to the sudden passing of their mother. The First Applicant's sister could return to Newfoundland, self-isolate, and then mourn with her father and attend to her mother's passing. As a result of the Travel Ban, the First Applicant could not.

93. In the circumstances, the Travel Ban also results in a deprivation of liberty that is grossly disproportionate to the objective. In the First Applicant's case, despite being prepared to take extensive precautions and make arrangements delaying her mother's funeral, she was denied the opportunity to travel to the province. By the time that the First Applicant's exemption reconsideration request was ultimately granted, she had lost an opportunity that can never be regained.

94. For all of the reasons stated above, the Second Applicant submits that the travel ban violates s.7 of the Charter in a manner contrary to the principles of fundamental justice.

d. <u>The Travel Ban Cannot be Saved by Section 1:</u>

95. Section 1 of the *Charter* reads as follows:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

96. Once a *Charter* breach has been found, the burden shifts to the government to satisfy the Court, on a balance of probabilities, that the Travel Ban is a reasonable limit prescribed by law and that it can be demonstrably justified in a free and democratic society. In light of the burden, the Second Applicant reserves its right to present more fulsome arguments on s.1 pending review of the First and Second Respondents' evidence and argument.

97. The Travel Ban is a limit prescribed by law. The Special Measures Order is authorized by s. 28(h) of the *PHPPA*.

98. In *R. v. Oakes* (1986), 1 S.C.R 103 (attached hereto, Vol 2, Authorities, tab 15), the Supreme Court of Canada devised the criteria for establishing that a limit on a right is reasonable and justified:
    1. The objective of the law must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;

2. The law must be rationally connected to the objective;

3. The law must impair the right no more than necessary to accomplish the objective; and

4. There must be proportionality between the law and the effect on the people to whom it applies.

99. The Second Applicant submits that the following facts are relevant in considering whether the rights violation occasioned by the Travel Ban is reasonable and demonstrably justified:

a. On March 20, 2020, shortly after the province declared a state of emergency, it instituted a rule requiring those entering the province from elsewhere to self-isolate for a period of 14 days [Special Measures Order dated March 20, 2020];

b. By April 29, 2020, when the Travel Ban was instituted, the province had effectively flattened its infection curve. By April 27, 2020, the province had experienced zero deaths in the last two weeks, only two cases in the prior 10 days and no hospital admissions in at least a week. According to Dr. Proton Rahman, a professor of medicine and a clinical researcher at Memorial University's school of medicine, who joined the government's daily briefing on April 27, 2020, "You really helped crush that curve … What the data shows is that the first wave, the peak has actually occurred." Further, by April 30, 2020, there were only 33 active cases, as the other 225 known cases had been resolved;

c. The Travel Ban created exemptions for residents of Newfoundland and Labrador, as well as essential workers from various industries. Additionally, the Travel Ban created exemptions for certain individuals depending on extenuating circumstances and compassionate grounds;

d. Between May 4 and June 5, 2020, the Province had received "approximately 4125 exemption requests" some of which are for more than one person. The province issued 4537 individual exemptions between May 4 and June 2, 2020 and denied 574 applications. Of 117 requests for reconsideration, 17 were approved, 24 were denied, and the balance are under review. [Answers to interrogatories, affidavit of Fitzgerald paras. 2, 4 and 5);

e. From May 1 to June 14, the province reported one new case of COVID-19 (on May 28th). The case involved an individual coming from out of province who was admitted pursuant to the exemption for workers;

f. Significantly, the Travel Ban and the various exemptions to it do not consider whether a person is coming from a place with a high rate of infection, whether they have engaged in a prolonged period of self-isolation elsewhere, whether they have been exposed to COVID-19 or are engaged in employment where they may be more likely to have been exposed, nor whether they have previously tested positive for the virus or already been treated and/or recovered;

g. In addition, as of April 22, 2020, out of province workers who were previously exempt from the travel ban no longer have to self-isolate upon entering the province;

h. Residents of the province are permitted to leave NL, travel to another province or territory, and then return to NL, so the fact that someone has spent time in another part of the country immediately before entering NL does not preclude them from entering;

i. As of June 8, 2020, foreign nationals who have no independent constitutional right to enter Canada, may be admitted to the country (and the province if that is where they choose) for family reunification purposes.

100. Item 8 of the interrogatories put to the First and Second Respondent asked for the scientific research relied upon in support of the travel restrictions and for "copies of any scientific reports prepared for government to inform its COVID-19 response and Special Measures Orders, and any peer-reviewed scientific and medical publications relied on." The Second Respondent's answer is set out at paragraph 9 of her Affidavit and Exhibits 3-8. Exhibits 6 and 7 are not relevant to the basis on which the Travel Ban was instituted as both post-date the Travel Ban Order.

101. The Second Applicant submits that the crux of the answer is summed up in paragraphs 9(g), (h), and (i) of the Second Respondent's Affidavit.

i) Sufficiency of Objective

102. As regards the sufficiency of the objective, for the purpose of the s.1 analysis it is the objective of the infringing measure that is at issue, not the objective of the *PHPPA* as a whole. The SA submits that while one purpose of the *PHPPA* may be to prevent the spread of disease generally, the expressed purpose of the Travel Ban is to prohibit entry by non residents of NL, symptomatic residents who work outside the province and anyone else who has not been otherwise permitted entry in extenuating circumstances, in order to prevent the spread of COVID-19 in the province.

ii) Rational Connection

103. As was stated in *Oakes*, the law must be carefully designed to achieve the objective in question and cannot be arbitrary, unfair or based on irrational considerations. The Second Applicant submits that the Respondents have failed to establish a rational connection between the Travel Ban and preventing the spread of COVID-19.

104. The absence of a rational connection between the Travel Ban and the objective comes into sharp relief when considering the initial scope of the Special Measures Order that instituted it, the subsequent exemptions, the granting of individual exceptions and the differential treatment experienced by residents of Newfoundland who leave the province and then return.

105. The Second Respondent has stated that "Several studies have suggested that travel restrictions have delayed the exportation of the disease from China to the rest of the world, giving health systems time to prepare and respond to the pandemic. One study that looked at the effect of European travel restrictions found that there was faster spread of the virus across Europe with unconstrained travel."

106. In this regard, the Second Applicant submits that the timing of the Travel Ban is significant. The province began by requiring those entering to self-isolate and instituted the Travel Ban well after it had already had time to prepare its health system to respond to the pandemic. Indeed, as noted above, the Travel Ban was instituted only two days after it was announced that the province had "crushed the curve". None of the evidence adduced by the Respondents address how the evidence supports the timing of the Travel Ban.

107. The evidence also fails to demonstrate why a self-isolation requirement was deemed insufficient to achieve the government's objective, particularly when the best evidence the province had – it's own tracking of the infection rate in the province – demonstrated that the self-isolation requirement had been effective in slowing the spread.

iii) Least Drastic Means

108. At this stage of *Oakes,* the burden is on the government to establish that the impugned measures impair the *Charter* right as little as possible. As Hogg notes: "The requirement of least drastic means has turned out to be the heart and soul of s. 1 justification…for the great majority of cases, the arena of debate is the third step, the requirement of least drastic means." (Hogg, Vol 2, Chapter 38.11(a) – pp 38-36 – 38-37, attached hereto at tab 8)

109. It is also worth noting that the *PHPPA* explicitly recognizes the need to infringe rights in the least restrictive means possible. Section 13 reads as follows:

Restrictions on rights and freedoms

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

110. In many *Charter* cases, there may be several conceivable measures that could achieve the legislative objective in a manner that impairs rights less than the impugned measure. While the least drastic means is a fundamental part of the *Oakes* analysis, courts have recognized a "margin of appreciation", providing some deference to legislatures to choose among means, provided that the means chosen impairs the right "as little as is reasonably possible" (*R v. Edwards Books and Art*, [1986] 1 S.C.R. 713 at 772 (attached hereto, Vol 2, Authorities, tab 16).

111. It might be suggested by the Respondents that the level of deference owed is greater in a state of emergency. However, it is worth noting that the Travel Ban, while authorized by the legislature pursuant to s. 28 of the *PHPPA,* is not itself the act of the provincial legislative assembly. No bill was proposed, debated, studied and voted upon. Rather, the Travel Ban is ***an order made by a single unelected public health official.*** The Second Applicant submits that the deference that might be owed to a deliberative legislative body should not be extended in the circumstances.

112. Moreover, while in many cases a less drastic measure has to be imagined or invented by the Court or the parties, this case is one where a less drastic measure was in fact in place *prior* to the institution of the Travel Ban. Pursuant to the Special Measures Order of March 20th, when the state of emergency was first declared, the Chief Medical Officer required all individuals entering the province to self-isolate for a period of 14 days. Not only was this measure less impairing of the rights to mobility and liberty than the Travel Ban, it proved to be sufficient to achieve the public health objectives sought, namely, "flattening the curve".

113. While it may raise other civil liberties concerns, it is worth noting that excluding some individuals from the province in a manner that is more narrowly tailored to address the potential risks of infection would also be less restrictive than the measure currently in place. For example, it could apply only to individuals who have not been engaged in a prolonged period of self-isolation in their home province or territory or who are exposed to enhanced risks based on their means of travel into the province. In the circumstances, the Travel Ban cannot be upheld as the least drastic means of limiting the fundamental mobility rights that it infringes.

*iv) **Proportional Effect***

114. This stage requires balancing of the objective sought by the Travel Ban against the infringement on mobility and freedom of movement. In essence, the balancing required under this stage of *Oakes* has arguably already been done in determining that the objective of the impugned provision is sufficiently pressing to warrant overriding *Charter* rights. As Hogg notes:

> *Obedient to Oakes, when the Court engages in s. 1 analysis, it nearly always goes through the motion of this fourth step. So far as I can tell, however, this step has never had any influence on the outcome of any case. And I think that the reason for this is that it is redundant. (Hogg, 38.12 (pp 38-43- 39-44).*

115. In any event, the Second Applicant notes at this stage that the mobility rights protected by section 6 of the *Charter* are not even subject to the notwithstanding clause in s.33. This fact highlights the importance the drafters of the *Charter* assigned to freedom of movement in Canada and the heavy burden the government bears in justifying limitations on the right.

3) Section 28.1 of the *PHPPA* is Unconstitutional

BILL 38

116. The *PHPPA* came into force on July 1, 2019.

117. Bill 38 came into effect on May 6, 2020. The purpose, according to Minister Haggie's comments in the House on May 5, 2020, was to give increased powers to the RCMP and RNC to enforce the special measures orders (Hansard, Tab 9, Originating Application, page 1856).

118. Bill 38 has two components. It added s.28.1 to give the police extraordinary powers of enforcement while the special measure orders are in effect. It amended s 50(1) to broaden the powers of inspectors to apply during special measures orders.

Section 28.1

119. Section 28.1 reads:

> ***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

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

a. *General problems with s.28.1*

120. Section 28.1 is an attempt to address a gap in the legislation. Previously, the Act had granted no such power to locate, detain and remove during special measures orders. The Second Applicant submits that these new enforcement powers violate s.9 and s.7 of the *Charter.*

121. Prior to the amendment, all enforcement powers were covered by PART VII of the PHPPA. PART VII It is divided into four parts:

v) Communicable diseases Orders;
vi) Apprehension and treatment Orders;
vii) Health Hazard Orders, and
viii) Orders Generally

122. PART VII is a complete code that outlines the powers, duties, obligations, process and safeguards that are necessary to ensure *Charter* compliance and due process when one's liberty interests are at stake. It is clear that PART VII was written without consideration of Special Measures Orders.

123. It clearly outlined the enforcement process required when dealing with either communicable disease orders (ss.32-37) and health hazard orders. The processes and enforcement powers are regarding communicable diseases order is triggered when there are grounds to believe that a person has or may have a communicable disease or has been exposed or may have been exposed to a communicable disease.

124. Once those grounds exist an order can be made. Non-compliance with the order can result in an Application to Supreme Court. Due process is engaged. A person subject to such an order has the right to be heard and the right of appeal.

125. COVID-19 is included in the regulations as a communicable disease. Therefore, a person who has or may have COVID- 19, should be subject to the existing provisions in PART VII.

126. Section s.28 which authorizes the special measures orders is outside PART VII and therefore does not afford a person the procedural safeguards included therein.

127. However, s.56 makes it a summary conviction offense to violate *any* section of the Act. Section 28 was always in the Act, so even prior to the amendments charges for non-compliance with a special measures order could have been laid if the police had reasonable grounds to lay them. This begs the question: what is the purpose of s.28.1? Under what scenario would the police need the extraordinary powers to locate, search and remove a person who did not meet the requisite reasonable grounds to believe that contravention of the Act had occurred?

128. There is a disconnect between the purpose of the Act, the enforcement measures already in place and the extraordinary powers granted in s.28.1.

129. Following that through to its natural conclusion, if a person who has or may have COVID-19 breached a special measures order they should be dealt with under PART VII and/or charged pursuant to s.56. If a person without COVID-19 is thought to have breached a special measures order they are subject to the enforcement powers of s.28.1. This leads to the ridiculous conclusion that the person who has or may have COVID-19 is afforded procedural safeguards under PART VII whereas a person whose circumstances don't even rise to the reasonable grounds standard is afforded no such protections.

130. Section 28.1(b) allows for the Minister of Justice to direct a police officer to locate, detain and remove of an individual who is in contravention of a special measures order. It is unclear upon what basis a person is determined to have been in contravention. There is no indication of what criteria that have to be met. Nor is it clear what investigatory steps are taken prior to direction being given.

131. According to paragraph 11 in the Answers to Interrogatories, complaints are made either by a public report form or by an email to covid19@gov.nl.ca. These are followed up by the police. According to paragraph 13 in the Answers to Interrogatories, as of May 5th, 989 complaints were made to the police with no charges being laid. One would assume that if no charges were laid, the police did not have the grounds to lay them. This begs

the question: in what scenario would the police not have grounds to lay a charge, but the ministers would be justified to direct an officer to locate, detain and convey a person to a point of entry?

132. Furthermore, once the determination is made that an individual is in contravention of the measure, there is no right to challenge it.

133. Perhaps more problematic, while debate in the house clearly indicates that the amendment was required to deal with enforcement of the Travel Ban.[8] There is nothing in the provision that confines the power to that situation. In fact, the provision clearly allows the powers listed therein to be invoked in relation to any special measure and as against any individual, including Newfoundland residents.

134. More specifically, s.28.1 violates s.9 of the *Charter*.

b. Section s.28.1 Violates s.9 of the Charter

135. Section 9 of the *Charter* reads:

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

136. Section 28.1 of *PHPPA* simply refers to the power to detain. There are no limits on how long that detention can last. There is no indication of the purpose of or basis for the detention.

Is this Investigative detention?

137. The wording of the provision seems to suggest that the ministers have decided a person is in breach of the special measures order. As such, investigative detention does not seem to be the purpose of the location, detention and removal. However, given that there are no limits to the detention, this goes beyond mere investigative detention. As *R. v. Mann*, [2004] 3 S.C.R. 59 (attached hereto, Vol 2, Authorities tab 17) suggests, investigative detention is meant to be brief and minimally intrusive. Detaining a person for an indeterminate amount of time, and conveying them to a point of entry does not qualify. As *Mann* makes clear, even investigative detention requires an officer to have articulable cause. Paragraph 34 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*

8 Hansard, May 5, 2020, Tab 9 Originating Application, page 1856

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 [page77] interference with individual liberty is necessary to perform 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.

138. While not all detentions are arbitrary, detention will be considered so if "there are no criteria, expressed or implied, which govern its exercise." (*R. v. Hufsky*, [1988] 1 S.C.R. 621, attached hereto, Vol 2, authorities tab 18). The wording of s.28.1 conveys a discretion on the ministers without any expressed or implied criteria.

Is the Person Arrested or Charged with an Offense?

139. Section 495 of the *Criminal Code* authorizes arrest without a warrant of a person found committing an indictable offense or for whom there are reasonable grounds to believe has committed an indictable offense.

140. Section 6 of the *Provincial Offenses Act*, SNL 1995, c.P-31.1 adopts all relevant sections of the *Criminal Code*. Practically, this means that a person believed to be in contravention of a provincial offense cannot be arrested without a warrant.

141. Beyond that, it is trite to say that no one can be arrested without reasonable grounds. *R. v. Storrey*, [1990] 1 S.C.R. 241 is the seminal case on whether or not an arrest is arbitrary.

142. The *PHPPA* is provincial legislation. A person who for whom there is reasonable grounds to suspect is in contravention cannot be arrested without a warrant. However, according to paragraph 13 in the answers to interrogatories, between March 21 and May 5, 2020, 989 complaints were received regarding people contravening the self isolation special measures order, yet no charges were laid. Presumably, upon follow up reasonable grounds did not exist to support laying charges.

143. Section 28.1 creates a real danger that people will be located, detained and removed from the province without grounds to do so, and those people will have no legal recourse.

What Happens once the Person is Detained?

144. Section 10(c) reads:

> *"Everyone has the right on arrest or detention to have the validity if the detention determined by way or habeas corpus and to be released if the detention is not lawful.*

145. There is nothing in the legislation to suggest what happens to a person once they are detained. At the most drastic end of the spectrum of possibilities, they can be conveyed to a point of entry, presumably an airport or a ferry terminal. Effectively, they are removed from the province. If they are charged with a summary offense they will be afforded due process. However, if they are simply detained and removed, there is no mechanism for them to challenge this action.

c. Section 28.1 Violates Section 7 of the Charter

146. Section 7 is engaged because of the obvious impact on liberty and security of the person. Not only is s.9 directly engaged, the threat of removal from the province without due process would engage the right to liberty and security of the person. The question then, becomes whether the deprivation of those rights is contrary to the principles of fundamental justice. A summary of the position is outlined below, however, the Second Applicant reserves the right to expand on these issues pending review of the Respondent's materials.

Arbitrary:

147. As regards s.28.1, the minister of health, after consultation with the minister of justice, can direct an officer to locate, detain and remove a person from NL. There is no basis upon which a person could determine the validity of that determination. The provision is arbitrary because there appear to be no criteria that govern the Ministers' discretion in directing a peace officer to locate, detain or remove a person

Overbroad:

148. The provisions are also overbroad. The debate in the House (Hansard May 5, 2020, page 1856) indicate 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.

Disproportionality:

149. 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.

Due Process:

150. There is no opportunity in the provision for a person subjected to it to determine the merits of their detention and removal for the province.

d. Section 1

151. The Second Respondent reserves the right to address s.1 upon review of the First and Second Respondent's materials.

4) *Section 50(1) of the PHPPA is Unconstitutional*

152. Section 50(1) was amended to broaden powers of inspectors to include determining compliance with special measures orders. The only amendment was the addition of the word 'measure'. It reads:

> ***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.

(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.

153. The Second Applicant submits that this section violates s.8 of the *Charter*. Section 50(1) lacks the constitutional minimum standard of reasonable probable grounds to justify a search.

a. General Problems with s.50(1)

154. The Second Applicant submits that the language is s.50(1) is problematic. The phrase "at all reasonable times" should cause pause for concerns.

155. Furthermore, there are very few, and very clear, circumstances wherein a warrantless search is justified.

b. Section 8

3. Section 8 of the Charter states as follows:

"Everyone has the right to be secure against unreasonable search and seizure".

4. There is no doubt that s.50(1) allows for warrantless searches of premises and seizure of information.

5. Section s.8 applies where a person has a reasonable expectation of privacy in the object and the subject matter of the target of the search as well and the information gleaned from the object and the subject matter of the search. (*R. v. Marakah*, [2017] 2 S.C.R. 608, attached hereto, Vol 2, Authorities tab 19).

6. The section refers to "premises". Premises is defined in s.2(v) of the *PHPPA* as:

(v) "premises" means

(i) bodies of water,

(ii) trailers and structures designed or used as a residence, business or shelter,

(iii) boats, ships or similar vessels,

(iv) motor vehicles and aircraft, and

(v) any land or structure, or part of any land or structure, whether portable, temporary or permanent;

7. Section 50(1) allows entry into a premise and requires a person to give access to books and records, to answer questions and to submit to testing.

8. That a person has a right to privacy in the premise as defined may well be debatable depending on the circumstances, however, the Second Applicant submits that it is dwarfed by the overwhelmingly obvious conclusion that they would have a privacy interest in the subject matter of the search. Section 50(1) includes materials that clearly fit within the "biographical core of personal information" referred to by Chief Justice McLaughlin in *Marakah*.

9. Requiring a person to pass over records and books, electronic or otherwise constitutes a search (*R. v. Potash*, [1994] 2 S.C.R. 406 (tab 20); *R. v. Fearon*, [2014] 3 S.C.R. 621 (tab 21)). So too does requiring someone to submit to testing. (*R. v. Stillman*, [1997] 1 S.C.R. 607 (tab 22); *R. v. Dyment*, [1988] 2 S.C.R. 417 (tab 23)).

10. Once a person establishes a reasonable expectation of privacy, the burden shifts to the state to justify a warrantless search (*Hunter v. Southam, [1984] 2 S.C.R. 145, attached hereto, Vol 2, Authorities, tab 24*).

11. To consider whether a warrantless search could be justified in the circumstances contemplated in the *PHPPA*, one need go no further than *Hunter v. Southam*, [1984] 2 S.C.R. 145 to conclude that the search and seizure authorized by s.50(1) of the *PHPPA* contravenes s. 8.

12. *Hunter v. Southam* was the first s.8 case decided under the *Charter*. The facts are similar to the case before the Court. In *Hunter* the *Combines investigation Act* authorized the Director or a representative to enter premises where it was believed there may be evidence related to an investigation under the Act and to seize any evidence found. Authorization was required from a member of the commission but a judicial authorization was not required. The Supreme Court of Canada found that the search was unreasonable. The Court determined that a search would only be reasonable if it were authorized by statute requiring (1) a warrant (2) issued by an impartial arbiter (3) on a sworn information establishing reasonable and probable grounds to believe evidence would be found within the premise sought to be searched.

13. Subject to those criteria, a warrantless search would only withstand constitutional scrutiny if the state could show exigent circumstances such as danger of loss or destruction of evidence.

14. Section 50(1) allows for warrantless searches, by an "inspector", at "all reasonable times". Nothing in the wording of s.50(1) conforms with the plethora of jurisprudence from the Supreme Court of Canada on the constitutionally protected minimum standard. In that regard, the section pre-amendment would not have passed constitutional scrutiny. The amendment rendering it applicable to special measures orders is equally flawed.

15. At a bare minimum, the Respondent may attempt to justify a search under s.50(1) as search of a vehicle incident to an arrest or investigative detention under s.28.1 (keeping in mind the Second Applicant's position as regards the legality of such an arrest or detention outlined above). However, caselaw clearly dictates that this rationale would not pass constitutional muster. Firstly, the language in the section does not contemplate arresting a person. However, in relation to investigative detention, leaving aside the need to establish grounds to detain (dealt with under s.9) the Supreme Court of Canada has confirmed that search incident to investigative detention does not authorize search of evidence of the 'crime' under investigation.

16. In *R. v. Mann*, [2004] 3 S.C.R. 59 the Supreme Court dealt for the first time with the common law police of investigative detention and the power to search incident thereto. In relation to the later, the Court stated:

> ***40*** *The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.*

17. There is no power to require a person to produce documents and submit to testing incidental to investigative detention or arrest. For the search powers contemplated in s.50(1), a warrant is required.

18. All of which is to say that without common law authority to detain or arrest a person in the first place, no search could meet the constitutionally accepted threshold. Section 50(1) is completely silent on any lawful basis which could possibly justify a warrantless search. The wording of "at all reasonable times" is not sufficient to amount to reasonable and probable grounds. The wording of s.50(1) allow for the search and

seizure of information to which a person has a very high expectation of privacy seemingly at the unfettered discretion of an 'inspector'

19. It is important to note that when the *PHPPA* was introduced in the House in November 20, 2018, Minister Haggie acknowledge that its predecessor was not *Charter* compliant (Hansard, November 20, 2018, Tab X, page 2617). Ironically, the Search powers contained within the *Communicable Diseases Act,* at s.13 (Tab 10) offer much more *Charter* and procedural protections than the current legislation. Section 13 required a search warrant which, at the very least, involves judicial oversight.

c. Section 1

20. The Second Respondent reserves the right to address s.1 upon review of the First and Second Respondent's materials.

V. REMEDIES:

21. The Second Applicant seeks remedies in respect of both the Travel Ban and the impugned provisions of the *PHPPA*. In both cases, the measures should be deemed to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982* which provides as follows:

> *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

22. The effect of the supremacy clause has been affirmed by the Supreme Court of Canada and, as Hogg notes, "merely articulates the previous practice" since "Canadian courts long ago assumed and exercised the power of judicial review to enforce the distribution-of-powers rules of federalism and other restrictions contained in the British North America Act." (Hogg 40.1(a) – p 40-2) (See also *R. v. Therens,* [1985] 1 S.C.R. 613 at 638 (tab 25); *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 148)

23. In *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (attached hereto, Vol 2, Authorities tab 26) 312, Dickson C.J.C. said:

> *Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.*

24. The Second Applicant submits that both the Travel Ban and ss. 28.1 and 50(1) of the *PHPPA* are "law" within the meaning of s. 52(1) and thus should be declared of no force or effect to the extent of any inconsistency with the Constitution. The Travel Ban is akin to delegated legislation since it is authorized under s. 28(h) of the *PHPPA*. (See *R. v. Guignard,* 2002 SCC 14 (attached hereto, Vol. 2, Authorities, tab 27) where a municipal by-law was struck down pursuant to s. 52(1)).

1) Remedies in relation to the Travel Ban

25. Pursuant to s. 52(1) of the *Constitution Act, 1982,* the Second Applicant seeks the following:

a) A declaration that the Travel Ban Order imposed by the Chief Medical Officer of Health's Special Measures Order is *ultra vires* the jurisdiction of the province and therefore of no force or effect;

b) In the alternative, a declaration that the Travel Ban Order violates s. 6 of the *Charter* and cannot be saved by s. 1 and is therefore of no force or effect; and

c) In the further alternative, a declaration that the Travel Ban Order violate s. 7 of the *Charter* and cannot be saved by s. 1 and is therefore of no force or effect.

26. In the event that the Court finds that the Travel Ban Order should be assessed not as a statute but rather an act of a government official with delegated power – a proposition the Second Applicant strongly resists – it is submitted that s. 24(1) of the *Charter* is engaged and that the Court should issue an Order requiring that the Travel Ban be rescinded or deemed of no force or effect.

2) Remedies in relation to Bill 38

27. The Second Applicant seeks a declaration that ss. 28.1 and 50(1) of the *PHPPA* are of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982.* This remedy flows naturally from any remedial action that strikes down or rescinds the Travel Ban but is also independently supported by the infringements of ss. 7, 8 and 9 of the *Charter* described above.

28. If the Travel Ban Order is declared of no force or effect, the impugned provisions should not be permitted to stand. As noted above, the legislative assembly's consideration of the amendments to the *PHPPA* was premised on the notion that those amendments were necessary in order to enforce the Travel Ban. If the Travel Ban falls, so too must these provisions.

29. Moreover, regardless of the Court's determination in respect of the Travel Ban, the Second Applicant seeks a declaration that:

a) Section 28.1 of the *PHPPA* violates ss. 7 and 9 of the *Charter* and cannot be saved by s. 1 and is therefore of no force or effect; and

b) Section 50(1) of the *PHPPA* violates ss. 7 and 8 of the *Charter* and cannot be saved by s. 1 and is therefore of no force or effect.

30. The Second Applicant has brought the within Application as a public interest matter, does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH is respectfully submitted by

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