SCC File No.:40952

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION and KIMBERLEY TAYLOR

APPELLANTS

and

HIS MAJESTY THE KING IN RIGHT OF NEWFOUNDLAND AND LABRADOR and JANICE FITZGERALD, CHIEF MEDICALOFFICER OF HEALTH

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PART I – OVERVIEW & STATEMENT OF FACTS

1. The COVID-19 pandemic is over. The Respondent Newfoundland and Labrador's restriction against persons with close family business to travel to the province is also over. However, virtually all the experts agree that future pandemics will come. The Court of Appeal of Newfoundland and Labrador concluded that this issue was moot[1] despite the risk that these future pandemics might encourage border restrictions that infringe on the mobility rights guaranteed under s. 6 of the *Charter*. These rights allow Canadian residents, including the Appellant, Kimberley Taylor, to "move to and take up residence in any province". Accordingly, this appeal raises three issues of public importance:

- Was the decision of the Court of Appeal correct that this appeal should be rejected as "moot" (the "**Mootness Issue**")?
- If not, was the Application Judge correct[2] that the interprovincial travel restriction did not violate s. 6(2)(a) of the *Charter* (the "**Section 6 Issue**")?
- If so, was the violation of s. 6 justified by s. 1 of the *Charter* (the "**Section 1 Issue**")?

2. The Appellants' position on these issues is as follows:

1) On the Mootness Issue, the Appellants submit that, regardless of the "form" of the "next pandemic"[3] Canadian citizens and permanent residents would benefit from clear direction on the scope of their mobility rights and the degree to which those rights can be subject to reasonable limits.

2) On the Section 6 Issue, the Appellants submit that s. 6(2)(a) of the *Charter* protects a right to interprovincial travel *simpliciter*, as confirmed by:

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[1] *Taylor v Newfoundland and Labrador*, 2023 NLCA 22 ["**Court of Appeal Decision**"] Record of the Appellants ["**AR**"], Tab 3, p 141.
[2] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 ["**Application Judge's Decision**"] AR, Tab 1, p 1.
[3] Court of Appeal Decision at paras 30–31.

i. the French version of the provision, which unambiguously provides a right to travel through the entire country;

ii. the prior jurisprudence of this Honourable Court in which it found that s. 6(2) protects the right to "move about the country"[4] "in order to further a human rights purpose" as well as an economic one;[5] and

iii. academic opinion that s. 6(2)(a) includes, at minimum, a right to physically enter any province or territory in Canada.

- Alternatively, the right to interprovincial travel *simpliciter* is protected by s. 6(1) of the *Charter*, for the reasons of the Application Judge.

3) On the Section 1 Issue, the Appellants submit that the province's interprovincial travel restriction is not saved by s. 1 of the *Charter*:

i. In light of the evidence of the Chief Medical Officer of Health ("**CMOH**") that the actual objective of the interprovincial travel restriction was to prevent non-essential travel by tourists and seasonal vacationers, the Application Judge erred in characterizing the legislative objective too broadly as "to protect those in Newfoundland and Labrador from illness and death arising from the importation and spread of COVID-19 by travelers".

ii. The Application Judge erred in finding the interprovincial travel restriction was minimally impairing when the Respondents' own evidence confirmed that two less infringing effective alternatives were available: (1) self-isolation for 14-days; and (2) a travel restriction prohibiting entry for specified non-essential purposes such as tourism, recreation, or entertainment, as the federal government had ordered.

iii. The Application Judge excessively relied on the precautionary principle.

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[4] *Black v Law Society of Alberta*, [1989] 1 SCR 591 ["***Black***"] at pp 620–621.
[5] *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 ["***Canadian Egg Marketing***"] at para 66.

Statement of Facts: The Interprovincial Travel Restriction

3. During a public health emergency, s. 28(1)(h) of the *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3 (the "***PHPPA***") authorizes the CMOH to restrict travel to Newfoundland and Labrador ("**NL**"). Section 13 of the *PHPPA* stipulates that any restriction imposed by the CMOH "shall be no greater than is reasonably required in the circumstances".[6]

4. On April 29, 2020, the CMOH issued *Special Measures Order (Amendment No. 11)* (the "**Interprovincial Travel Ban**") in response to the COVID-19 pandemic. The Interprovincial Travel Ban prohibited all individuals from entering NL effective May 4, 2020, except for:

- residents of NL;
- asymptomatic workers and individuals who are subject to the exemption order for the 14-day self-isolation; and
- individuals who are permitted entry to the province in extenuating circumstances, as approved in advance by the CMOH.[7]

5. On May 5, 2020, the CMOH issued *Special Measures Order (Travel Exemption Order)* (the "**Interprovincial Travel Exemption Order**"), which listed certain "extenuating circumstances" in which an exemption from the Interprovincial Travel Ban would be considered.[8]

6. The Interprovincial Travel Ban and the Interprovincial Travel Exemption Order are referred to collectively in this factum as the "**Interprovincial Travel Restriction**".

Kimberley Taylor's Application

7. Ms. Taylor is a Canadian citizen, born and raised in St. John's, NL. She now lives in Halifax, Nova Scotia, with her spouse and two children. Ms. Taylor has always maintained her NL roots. She and her family would return there for several weeks each year to spend time with her parents and other family members.[9]

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[6] Application Judge's Decision at paras 20–23, 34; Court of Appeal Decision at para 3.
[7] Application Judge's Decision at paras 4, 36–37; Court of Appeal Decision at para 4.
[8] Application Judge's Decision at paras 4, 38; Court of Appeal Decision at para 4.
[9] Application Judge's Decision at paras 5, 43.

8. On May 5, 2020, Ms. Taylor's mother passed away suddenly at her home in St. John's. Ms. Taylor immediately made plans to return to St. John's to grieve with her family and to attend her mother's funeral. As a non-resident, Ms. Taylor sought entry to NL by following the instructions provided on the province's website. She sent an email requesting an exemption from the Interprovincial Travel Restriction.[10]

9. While waiting for a response, Ms. Taylor researched available flights and arranged to self-isolate for a period of 14-days upon her anticipated arrival in NL. With the agreement of her family and the cooperation of the funeral director, she planned a burial service for her mother to take place after her period of self-isolation. Ms. Taylor was to attend the service with her father and younger sister.[11]

10. However, on May 8, Ms. Taylor's exemption request was denied by the CMOH. No reasons for the denial were provided.[12]

11. On May 14, Ms. Taylor submitted a reconsideration request. On May 16, 2020, she was granted an exemption permitting her to enter her home province. Again, no reasons for the exemption were provided.[13]

12. On May 20, 2020, Ms. Taylor and the Canadian Civil Liberties Association[14] (the "**Appellants**") filed an application challenging the constitutionality of the Interprovincial Travel Restriction.[15]

Procedural History

13. The application was heard August 4, 5, 6, 7, 11 and 12, 2020. In reasons dated September 17, 2020, the Application Judge found that the Interprovincial Travel Restriction infringed Ms. Taylor's right to "remain in… Canada" under s. 6(1) of the *Charter*, but not her right to "move to and take up residence in any province" under s. 6(2)(a). However, the Application Judge found the

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[10] Application Judge's Decision at paras 44–45.
[11] Application Judge's Decision at para 46.
[12] Application Judge's Decision at para 48; Court of Appeal Decision at para 5.
[13] Application Judge's Decision at para 49; Court of Appeal Decision at para 5.
[14] The CCLA was granted public interest standing by the Application Judge: see para 116.
[15] Court of Appeal Decision at para 6.

infringement was demonstrably justified under s. 1 of the *Charter* in response to the COVID-19 pandemic, as a reasonable measure to "reduce the spread" in NL.[16]

14. Concurrently with the Application Judge's decision, the CMOH gradually eased pandemic-related restrictions in 2020–2022 and vacated all mandatory travel restrictions by February 2022. In March 2022, the province declared the public health emergency caused by the COVID-19 pandemic no longer in effect.[17]

15. In the result, the parties agreed that the appeal was moot. Nonetheless, both the Appellants and the Respondents urged the Court of Appeal to exercise its discretion to hear the appeal. In reasons dated August 14, 2023, the Court of Appeal declined.[18]

16. On April 25, 2024, this Honourable Court granted leave to appeal from the decision of the Court of Appeal.[19]

PART II – STATEMENT OF ISSUES

17. Although the Court of Appeal's decision was limited to the question of mootness, the substantive constitutional issues raised in the Application Judge's decision regarding ss. 6 and 1 of the *Charter* are properly before this Honourable Court.[20] This Court has jurisdiction to hear the appeal of the Application Judge's decision on the merits if "it perceives legal principles of national, and more particularly constitutional, significance to be at stake."[21]

18. In addition, the Appellants' notice of constitutional question raises the following issue:

> Is *Special Measures Order (Amendment No. 11)*, issued pursuant to s. 28(1)(h) of the *PHPPA*, which prohibits non-residents of the province from entering the province, unconstitutional because it infringes s. 6 of the *Charter* and is not saved by s. 1 of the *Charter*?

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[16] Application Judge's Decision at paras 298–375, 397–493; Court of Appeal Decision at para 8.
[17] Court of Appeal Decision at para 12.
[18] Court of Appeal Decision at paras 14, 40.
[19] *Canadian Civil Liberties Association, et al v His Majesty the King in Right of Newfoundland and Labrador, et al.*, 2024 CanLII 35287 (SCC).
[20] *R v Comeau*, 2018 SCC 15 at para 21.
[21] *MacDonald v City of Montreal*, [1986] 1 SCR 460 ["***MacDonald***"] at pp 510, 506–512, 467, 503–504; *Supreme Court Act*, RSC 1985, c S-26, s. 40(1); *Westar Mining Ltd (Re)*, [1993] 1 SCR 890 at pp 891–892; *Roberge v Bolduc*, [1991] 1 SCR 374 at pp 392–393.

PART III – STATEMENT OF ARGUMENT

1. The Mootness Issue

19. There is a dearth of jurisprudence on s. 6(2)(a) of the *Charter* such that guidance from this Honourable Court would have significant precedential value in an area of constitutional law that is sorely in need of clarification.[22] As the Application Judge noted, he was "unaware of any decision which squarely addresses the nature of the mobility right claimed by Ms. Taylor." He commented on the uncertainty of the law in this area, reiterating Estey J's observation in *Law Society of Upper Canada v Skapinker* that '"Mobility Rights' has a common meaning until one attempts to seek its outer limits."[23]

20. The COVID-19 pandemic was the first time in the history of Canada that provincial borders became barricades to the free movement of people. Until the spring of 2020, the right of Canadian residents to move freely throughout the country had never been questioned, let alone curtailed. Whether the Interprovincial Travel Restriction was constitutional – and whether s. 6 of the *Charter* does, in fact, protect the right of Canadian residents to travel freely across provincial borders free of provincial restrictions – is a question of public importance.

21. This Honourable Court has found that the animating purpose of s. 6(2) of the *Charter* is to enshrine freedom of movement and equal treatment regardless of province of residence as a fundamental human right for all Canadian citizens and permanent residents. At issue in this appeal is what limitations may reasonably be imposed on this right under s. 1.[24]

22. A decision is all the more important in light of the near-inevitability of a future emergency – be it public health, climate change, or even war – and the need for governments at all levels to properly plan for this eventuality. To the extent possible, public officials need to know the legal parameters in advance so they can be prepared to govern efficiently and effectively – and in accordance with the *Charter* – in times of crisis and uncertainty.

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[22] See e.g. *R v Poulin*, 2019 SCC 47 ["***Poulin***"] at paras 20, 22.
[23] Application Judge's Decision at para 303 quoting *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 ["***Skapinker***"] at p 377.
[24] See paras 76–78 of this factum; *Black* at pp 620–621; *Canadian Egg Marketing* at paras 60, 66, 122.

23. Furthermore, of relevance for all future cases concerning the infringement of *Charter* rights in the context of a public emergency, the Application Judge's use of the "precautionary principle" in the context of s. 1 of the *Charter* and posture of maximal deference to CMOH are both important constitutional issues raised in this case. Although appellate courts in Ontario, Saskatchewan, and Manitoba have endorsed the use of the precautionary principle in response to COVID-19 measures, this Court has never considered its scope and application in the context of ss. 1 and 6 of the *Charter*.[25]

24. As in *MacDonald v City of Montreal*, which concerned the minority language rights of an accused, "the tremendous importance of the constitutional issue[s] raised in this case" warrants intervention from this Court.[26]

Mootness Should Not Prevent this Honourable Court from Deciding this Appeal

25. The doctrine of mootness reflects the principle that courts will generally only hear cases that will resolve a live controversy which will or may affect the rights of parties to the litigation.[27] The exception to this rule was decided in *Borowski*, where Sopinka J. set out three factors to consider in the exercise of discretion to hear a moot appeal: (a) the presence of an adversarial context; (b) the concern for judicial economy; and (c) the need for courts to be sensitive to their role as an adjudicative branch in our political framework. This is not a mechanical process: "[t]he principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and *vice versa*".[28]

26. In declining to exercise its discretion to hear this moot appeal, the Court of Appeal considered the applicable *Borowski* factors[29] and found:

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[25] *Gateway Bible Baptist Church et al v Manitoba et al*, 2023 MBCA 56 ["***Gateway***"] at para 116; *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134 ["***Trinity Bible***"] at para 110; *Grandel v Government of Saskatchewan*, 2024 SKCA 53 ["***Grandel***"] at para 108.
[26] See *MacDonald* at p 512. See also pp 506–511, 467, 503–504.
[27] See *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 ["***Doucet-Boudreau***"] at para 17. See also *R v McNeil*, 2009 SCC 3 at paras 1–9; *R v Oland*, 2017 SCC 17 at paras 16–18.
[28] *Borowski* at p 363.
[29] Court of Appeal Decision at paras 16–18.

a) An adversarial context was not present in this appeal because the Interprovincial Travel Restriction was no longer in effect. An adversarial relationship "requires more than parties willing to present opposing positions."[30]

b) An appeal concerning the Interprovincial Travel Restriction ("which no longer exists") would be "outside the traditional role of the court" and thus risk being understood as directive of government's future conduct rather than as assessing its past actions.[31]

c) Judicial resources should not be spent deciding this appeal because (i) it would be of little practical effect to the parties and (ii) the appeal did not concern an issue of brief duration that was evasive of review.[32]

27. On this third factor, the Court of Appeal held that "there [wa]s no certainty that the section 1 analysis", which would focus on the circumstances of the COVID-19 pandemic, would "be of real assistance in assessing the propriety of measures in a future pandemic".[33] As the Court of Appeal observed:

> The next pandemic will not necessarily take the same form as COVID-19 in its consequences or communicability, or in the science of detection and treatment that the government can employ in response. It will be the specific government response to the particulars of any future pandemic that would be the subject of any future challenge. As indicated, what the Court is being asked to do in the present appeal is opine on the reasonableness of a past government response, which no longer exists. It is difficult to see how this would assist government in fostering a response to a future pandemic.[34]

28. Finally, the Court of Appeal found that the "real world" issue – whether there is a right to interprovincial travel *simpliciter* – would not necessarily be resolved by the questions raised by the parties.[35]

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[30] Court of Appeal Decision at paras 20–21 citing *Powers v Mitchell*, 2019 NLCA 16.
[31] Court of Appeal Decision at paras 36–39.
[32] Court of Appeal Decision at paras 26–35.
[33] Court of Appeal Decision at para 30.
[34] Court of Appeal Decision at para 31.
[35] Court of Appeal Decision at paras 24–25.

Why this Honourable Court Should Decide this Moot Appeal on the Merits

29. As this Honourable Court explained in *MacDonald v City of Montreal*, the public importance of answering the constitutional questions raised in this case "displace[s] the deferential posture which would otherwise be appropriate".[36]

30. All three *Borowski* factors militate strongly in favour of this Honourable Court proceeding on the merits.

There is an Adversarial Element

31. Justice Sopinka explained that the first discretionary principle – the presence of an adversarial context – helps ensure that issues are fully argued by parties who have a stake in the outcome of the case. This "requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail."[37]

32. There is an adversarial element in this case because:

- both the Appellants and the Respondents have fully developed their arguments with respect to the interpretation of s. 6 of the *Charter* and whether pursuant to s. 1 of the *Charter* the Interprovincial Travel Restriction is demonstrably justified in a free and democratic society;[38]
- both the Appellants and the Respondents continue to "argue their respective sides vigorously";[39] and
- section 28(1)(h) of the *PHPPA* continues to confer the power to "make orders restricting travel to or from the province or an area within the province", which is the subject matter of the appeal.

33. While the specific dispute between Ms. Taylor and the Respondents may be moot, the legal question of whether the *Charter* protects a right to interprovincial travel *simpliciter*, and whether this was infringed by the Interprovincial Travel Restriction, is very much a live one. The Appellants argue that Ms. Taylor's right to interprovincial travel *simpliciter* was infringed, and the

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[36] See *MacDonald* at pp 512, 510.
[37] *Borowski* at pp 358–359.
[38] *M v H*, [1999] 2 SCR 3 at para 44.
[39] *Doucet-Boudreau* at para 19.

Interprovincial Travel Restriction should not be saved by s. 1 of the *Charter*. The Respondents argue that the right to interprovincial travel *simpliciter* does not exist at all.[40]

Judicial Economy Favours Hearing the Appeal

34. The second discretionary principle concerns the "need to ration scarce judicial resources among competing claimants". This concern can be overcome where "the special circumstances of the case make it worthwhile to… resolve it", such as where an appeal raises issues of public importance and where an appeal concerns issues of a brief duration that are evasive of review.[41]

35. For the same reasons set out at paras 19–24 of this factum, the Appellants submit that this moot appeal raises constitutional issues of significant public importance, which make it "worthwhile" for this Honourable Court to decide the appeal.

36. Additionally, this appeal concerns issues "of a recurring nature but brief duration" that might otherwise evade review.[42] Public health measures in an emergency shift constantly in response to the ever-changing dynamics of the emergency. While the COVID- 19 pandemic itself was not an "event of brief duration", many of the public health restrictions imposed by the province during the course of the emergency certainly were.

37. Between March 18, 2020 and April 29, 2020, the CMOH issued 17 Special Measures and Exemption Orders – some of which repealed, amended, or replaced previous restrictions and Orders to more adequately respond to the situation on the ground. Given the perpetual state of flux, it is likely that a challenge to any particular restriction during an emergency would be technically moot by the time it reached the appellate courts.

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[40] *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 10.

[41] *Borowski* at p 360. For "public importance" of moot appeal concerning s. 6 of the *Charter* see *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 51.

[42] *Borowski* at pp 360–361 citing *International Brotherhood of Electrical Workers, Local Union 2085 v Winnipeg Builders' Exchange*, [1967] SCR 628, which concerned the validity of an interlocutory injunction prohibiting certain strike action.

38. Indeed, a strict application of the mootness doctrine on the facts of this case could have rendered the application moot within eleven days, as the Interprovincial Travel Ban (i.e., *Special Measures Order (Amendment No. 11)*) was repealed and replaced by an updated Order on May 15, 2020. Further changes followed in the proceeding days and continued throughout the duration of the emergency. The short-lived nature of these restrictions should not immunize them from review.

Addressing the Parties' Concerns would not Exceed the Judicial Role

39. The third discretionary factor concerns the need for the Court to demonstrate awareness of its proper law-making function and not intrude into the role of the legislature.[43]

40. Nothing about the present appeal risked putting the courts in the position of legislator rather than adjudicator. The appeal goes to the root of the judicial function by deciding the interpretation of s. 6 of the *Charter* and pronouncing on the constitutional validity of the Interprovincial Travel Restriction: "the Court would be performing the function that is at the very core of its jurisdiction; ensuring that the government operated in accordance with the constitutional rights of Canadians".[44]

41. In *Forget v Quebec (Attorney General)*,[45] this Honourable Court ruled that, although the question on appeal (which concerned discrimination) was moot for the complainant, the appellant Attorney General of Québec had an interest in having a judicial ruling on the validity of regulations which had been struck down by the Court of Appeal. Though Ms. Forget could not obtain the remedy sought, the discrimination issue she raised was sufficiently important for this Court to rule on its merits. The question of discrimination in that case remained an important and present issue as does the issue on the limits of s. 6 in this case.

Conclusion on Mootness

42. For the reasons explained above, the Appellants submit that all three of the discretionary factors set out in *Borowski* weigh heavily in favour of this Honourable Court exercising its

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[43] *Borowski* at p 362; *Bancroft v Nova Scotia (Lands and Forestry)*, 2022 NSCA 78 at para 23.
[44] *Métis National Council of Women v Canada (Attorney General) (FC)*, 2005 FC 230 at para 32. See also *R v Simeunovich*, 2021 ONSC 2048 at para 40; *R v SA*, 2012 ABCA 323 at para 20.
[45] *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90.

discretion to hear this appeal. It is in the interests of justice that this constitutionally significant appeal be heard and decided in advance of the next pandemic.

The Standard of Review is Correctness

43. The Interprovincial Travel Restriction engages the important limits of s. 6 of the *Charter* – in particular, the right of every citizen to "enter, remain in and leave Canada" provided in s. 6(1) and the right of every citizen and permanent resident to "move to and take up residence in any province" provided in s. 6(2)(a).

44. There is also explicit discrimination against all non-residents of the province, contrary to s. 6(3)(a) of the *Charter*, which provides that "[t]he rights specified in subsection (2) are subject to…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".

45. The Application Judge erred by determining that s. 6(2)(a) of the *Charter* does not protect the right to interprovincial travel *simpliciter* and his failure to interpret s. 6 "liberally and generously" is subject to the correctness standard. There can be no "reasonableness" in *Charter* interpretation.[46]

2. The Section 6 Issue

46. The Application Judge found that s. 6(1) of the *Charter* it is comprised of three distinct rights: "the right to enter, remain in and leave Canada."[47]

47. On the Application Judge's reading of s. 6(1), the right to "remain in Canada" includes the right to travel within Canada. As he explained, "the mobility right, the right to travel across provincial and territorial boundaries, flows from and is a logical consequence of the citizen's choice to remain in Canada".[48]

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[46] See *Société des casinos du Québec inc. v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras 45, 94–97, and the cases cited therein.
[47] Application Judge's Decision at para 343.
[48] Application Judge's Decision at paras 349, 354, 365.

48. The Application Judge used a "simple analogy" to describe the right as sourced in s. 6(1) of the *Charter*: "[i]n common parlance, we would regard the right to come and go from one's home, and to remain in it, as surely including the right to wander freely from room to room."[49]

49. The Application Judge gave five main reasons for his conclusion that this interpretation of s. 6(1) appropriately recognizes the relationship of citizens to their country (and, moreover, is consistent with international human rights documents ratified by Canada).[50]

50. The Application Judge found that s. 6(2)protected the right to travel throughout the country, but only for the purpose of taking up residence or earning a livelihood.[51] In other words, according to the Application Judge, s. 6(2) permits people to reside or work in another province while denying them the right to simply enter it. This interpretation is bizarre and does not fulfill a "liberal and generous" view of s. 6(2).

51. At issue here is whether s. 6(2)(a) attracts a "disjunctive" interpretation of s. 6(2)(a) (i.e., as including the separate right to "move to" and to "take up residence in any province"), or, as the Application Judge held, is the language in s. 6(2)(a) to be read "conjunctively", as a singular right to move to another province for the purpose of taking up residence there?[52]

52. Since Ms. Taylor did not seek to enter NL for the purpose of earning a livelihood or to take up residence, the Application Judge found no violation of her right to mobility under s. 6(2) of the *Charter* – it was not even engaged by the Interprovincial Travel Restriction.[53]

53. Having found that s. 6(2) does not protect a right to interprovincial travel *simpliciter*, the Application Judge did not consider whether the Interprovincial Travel Restriction was a law of general application that discriminated primarily on the basis of residence under s. 6(3)(a).

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[49] Application Judge's Decision at para 353.
[50] Application Judge's Decision at paras 340–366.
[51] Application Judge's Decision at paras 367–375.
[52] Application Judge's Decision at paras 368–370.
[53] Application Judge's Decision at para 375.

The Application Judge's Error

54. The Application Judge was correct that s. 6 protects, "of necessity, […] the right to choose where in Canada one wishes to be from time to time." As he noted, Canada is a unified federation, not a series of republics. We are one people with one common country.[54]

55. The Application Judge erred in interpreting s. 6(2)(a) narrowly, to protect only a singular right to move to another province for the purpose of taking up residence there. Section 6(2)(a) also protects the simple right to move about freely throughout Canada. The Application Judge's view that interpreting s. 6(2)(a) "disjunctively" would "strain its language beyond what even a generous and liberal interpretation of the *Charter* can bear"[55] runs contrary to:

- the text of the provision, particularly the French version, which unambiguously provides two ("dualistic") rights;
- the decisions of this Court in *Black* and *Canadian Egg Marketing* in which s. 6(2) was interpreted as protecting the right "to move about the country" in order to "further a human rights purpose" (as well as an economic purpose); and
- academic opinion that s. 6(2)(a) includes, at minimum, a right to physically enter any province or territory in Canada.

The Text of s. 6(2)(a): a Purposive Interpretation

56. The interpretation of a *Charter* right is a purposive endeavor. This means s. 6(2)(a) "must be interpreted in light of the purpose or purposes driving it"[56] – that is, "in the light of the interests it was meant to protect".[57] The interpretation is to be "generous", "contextual" and done in a "large and liberal manner".[58] However, as this Honourable Court explained in *Toronto (City) v Ontario (Attorney General)*, the analysis "must begin with, and be rooted in, the text."[59]

57. The French and English texts of the *Charter* are equally authoritative. This means both versions must be read together. In the event of any discordance, the interpretation that should be

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[54] Application Judge's Decision at paras 348, 353.
[55] Application Judge's Decision at para 369.
[56] *Poulin* at para 32.
[57] *R v Stillman*, 2019 SCC 40 ["***Stillman***"] at para 21.
[58] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 7.
[59] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 14.

adopted is the shared meaning most in keeping with the purpose of the right in question. This is known as the "shared meaning rule".[60]

58. This Court has adopted a two-step approach for determining the shared meaning of English and French *Charter* rights.[61]

59. The first step is to determine whether there is discordance between the English and French versions and, if so, whether a shared meaning can be found. Where a provision may have different meanings, the court has to determine what kind of discrepancy is involved. There are three possibilities:[62]

- If there is ambiguity[63] in one version, but not the other, the two versions must be reconciled. The Court is to look for the meaning that is common to both versions. The shared meaning is the version that is plain and not ambiguous.[64]
- If neither version is ambiguous, or they both are, and one meaning is broader than the other, the shared meaning is "normally" the narrower version.[65]
- If the two versions are irreconcilable, there is no common meaning, and the Court must determine which version is most consistent with the purpose of the *Charter* right.[66]

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[60] See s. 57 of the *Constitution Act, 1982; Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 ["***Dickson***"] at para 121; Michel Bastarache et al, *The Law of Bilingual Interpretation* (Markham: LexisNexis Canada Inc, 2008) at pp 96–101, Book of Authorities of the Appellants ["**ABA**"], Tab 1; *R v Cadman*, 2018 BCCA 100 at para 35. See generally Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed, (Toronto: LexisNexis, 2022) at § 5.03 (QuickLaw), ABA, Tab 6.

[61] See *R v Daoust*, 2004 SCC 6 ["***Daoust***"] at paras 26–31; *R v SAC*, 2008 SCC 47 ["***SAC***"] at paras 14–16; *Stillman* at para 32.

[62] *SAC* at para 15; *Daoust* at paras 27–29.

[63] An ambiguity in this context is an interpretation that gives rise to "two or more plausible readings" each equally in accordance with the purpose of the *Charter* provision: see *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 29.

[64] *Daoust* at para 28; *Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48 at para 72; *Sullivan on the Construction of* Statutes at § 5.03[4], ABA, Tab 6.

[65] See *Daoust* at paras 29, 36–37; *Sullivan on the Construction of* Statutes at § 5.03[6], ABA, Tab 6.

[66] *Daoust* at para 27; *Sullivan on the Construction of Statutes* at § 5.03[5], ABA, Tab 6; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 39–40.

60. The second step is to determine whether the shared meaning (provided there is one) is consistent with the purpose of the *Charter* right at issue. If the French and English versions are irreconcilable, the version that is most consistent with the purpose of the right should be adopted.[67]

The French and English Texts Confirm that s. 6(2)(a) protects the Right to Interprovincial Travel Simpliciter

61. The French and English versions of s. 6(2)(a) are as follows (emphasis added):

Liberté d'établissement	**Rights to move and gain livelihood**
(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :	**(2)** Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;	(a) to move to and take up residence in any province; and
b) de gagner leur vie dans toute province.	(b) to pursue the gaining of a livelihood in any province.

62. In the French version, "se déplacer" means "to move" in the sense of "to get around" or "to travel". Thus, the direct translation of the French text of s. 6(2)(a) is: "to get around/travel through the entire country and" – a second right – "to establish their residence in any province". This language leaves no room for debate: s. 6(2)(a) protects two rights (the "**Dual Rights**" interpretation), not, as the Application Judge held, a singular right to move to a different province specifically for the purpose of residing there.[68]

63. The French language has a specific word – "déménager" – for the concept of "moving" in the sense of "changing residence".[69] If s. 6(2)(a) were meant to protect only the right to "move to" any province for the purpose of taking up résidence, one might expect its French text to read: "de

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[67] *Daoust* at para 30; *SAC* at para 16; Bastarache et al, *The Law of Bilingual Interpretation* at pp 96–101, ABA, Tab 1.
[68] *Collins* "English translation of 'se déplacer'" (2024), online.
[69] *Collins* "English translation of 'déménager'" (2024), online.

déménager et d'établir leur résidence dans toute province", or "de déménager dans toute province afin d'établir leur residence". It does not, perhaps because such phrasing would be redundant.[70]

64. In the Appellants' submission, the English version of s. 6(2)(a) is clear and accords with the Dual Rights interpretation of the French text.[71] It protects the rights to move to *and* to take up residence in another province. To interpret it as protecting only a singular right would be to render the English text redundant.[72] Moreover, it would be bizarre if s. 6(2)(a) permitted people to reside in another province while denying them the right to simply enter it; surely the greater must include the lesser.

65. To the extent there is ambiguity in the English version of the text, it is the Dual Rights interpretation which is shared with the French text. The Dual Rights interpretation is also the most consonant with the purpose of s. 6 of the *Charter*, which, as explained in detail below, is not just to encourage economic integration, but to enshrine freedom of movement and equal treatment regardless of province of residence as fundamental human rights for all Canadian residents.[73]

This Court has Already Adopted the Dual Rights Interpretation of s. 6(2)

66. The decisions in *Black v Law Society of Alberta* and *Canadian Egg Marketing* confirm that the Application Judge misinterpreted s. 6(2)(a). These cases establish:

- s. 6(2) has been interpreted as protecting both the freedom "to move about the country" *simpliciter* and the right to do so for the purpose of taking up residence and/or gaining a livelihood in another province;
- the right to move about the country extends to permanent residents, not just citizens; and
- the animating purpose of s. 6(2) was not just to encourage economic integration, but to enshrine freedom of movement and equal treatment regardless of province of residence as fundamental human rights for all Canadians.

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[70] *Canada v Canada North Group Inc*, 2021 SCC 30 at para 64 quoting *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 36; *Sullivan on the Construction of* Statutes at § 8.03[1], ABA, Tab 6.
[71] *Sullivan on the Construction of* Statutes at § 5.03[3], ABA, Tab 6.
[72] See FN70 of this factum.
[73] See paras 76–78 of this factum.

67. The Application Judge failed to appreciate that in both *Black* and *Canadian Egg Marketing*, this Honourable Court embraced, albeit in *obiter*, the exact Dual Rights interpretation of s. 6(2)(a) that he rejected.

68. In *Black*, La Forest J. considered whether two rules of the Law Society of Alberta contravened the right to gain a livelihood in any province under s. 6(2)(b). The rules prohibited Alberta residents from entering into a law partnership with non-residents and prohibited members of the Law Society from participating in dual or multiple partnerships. In examining the history and purpose of s. 6(2), La Forest J. noted that it was intended to protect the rights of Canadian citizens and permanent residents (i) to move about the country, (ii) to reside anywhere in the country, and (iii) to pursue a livelihood anywhere in the country, so as to guarantee their equal treatment throughout Canada:

> [A] purposive approach to the *Charter* dictates a more comprehensive approach to mobility. What section 6(2) was intended to do was to protect the right of a citizen (and by extension 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, of course, regulate these rights (as *Skapinker* holds). But, subject to the exceptions in ss. 1 and 6 of the *Charter*, they cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his capacity as a citizen throughout Canada. Those rights are extended now to those who have the status of a permanent resident of Canada.[74]

69. Justice La Forest noted that this interpretation is consistent with the rights of citizens recognized by this Court in the pre-*Charter* decision of *Winner*,[75] the concerns expressed when the *Charter* was being negotiated, the express language of the *Charter*, and a generous and purposive approach to *Charter* interpretation.[76]

70. This Honourable Court reiterated the Dual Rights interpretation of s. 6(2)(a) in *Canadian Egg Marketing*. Justices Iacobucci and Bastarache, writing for the majority, recognized that the

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[74] *Black* at pp 620–621 [emphasis added].

[75] *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [“***Winner***”] was a pre-*Charter* case in which this Court held that a province could not bar a Canadian from entering it, save perhaps in temporary circumstances, for a reason such as health.

[76] *Black* at p 621.

rights protected by s. 6(2) to "move about, reside, and work" in any province had been recognized before the advent of the *Charter* in *Winner*, albeit through the lens of federalism rather than human rights: "The right to move about the country and settle where one wished was considered an essential attribute of citizenship with which the provinces were not permitted to interfere."[77]

71. Justice McLachlin (as she then was) and Major J. agreed with the majority's interpretation of s. 6(2) as encompassing a right to move about the country *simpliciter*:

> [Section 6(2)] has two purposes, one collective, one individual: (1) to promote economic union among the provinces; and (2) to ensure to all Canadians one of the fundamental incidents of citizenship: the right to travel throughout the country, to choose a place of residence anywhere within its borders, and to pursue a livelihood, all without regard to provincial boundaries.[78]

72. Although the Application Judge discussed both *Black* and *Canadian Egg Marketing* at some length, he failed to appreciate that both of these decisions endorse the Dual Rights interpretation of s. 6(2)(a), which he rejected as "strained".

73. The Appellants submit that the Application Judge erred in so finding. *Black* and *Canadian Egg Marketing* make clear that s. 6(2)(a) protects the right "to move about" the country, as well as the right to take up residence in any province (i.e., the Dual Rights interpretation).

74. The only decision of this Honourable Court that might be considered ambiguous on whether s. 6(2)(a) includes the right to "move about" the country is *Skapinker*, in which Estey J. described s. 6(2) as protecting "two rights… relat[ing] to movement into another province, either for the taking up of residence, or to work without establishing residence."[79]

75. *Skapinker* marked the very first time that this Honourable Court was asked to grapple with s. 6. The question was whether s. 6(2)(b) created a standalone right to work, unrelated to interprovincial mobility. To the extent that Estey J. described s. 6(2) as guaranteeing "two rights" in this context, this Court's later decisions in *Black* and *Canadian Egg Marketing* did not follow

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[77] *Canadian Egg Marketing* at paras 59, 50–67.
[78] *Canadian Egg Marketing* at para 122 [emphasis added].
[79] *Skapinker* at p 382.

suit. And even in *Skapinker* itself, Estey J. noted that "the expression 'Mobility Rights' must mean rights of the person to move about, within and outside the national boundaries."[80]

The Dual Rights Interpretation is Most Consistent with the Human Rights Purpose of s. 6(2)

76. The Application Judge justified his restrictive interpretation of s. 6(2)(a), in part, on the understanding that its underlying purpose was purely economic. For the Application Judge, since "the historical purpose of s. 6(2) […] had as its concern the economic integration of the country", the provision only guarantees the right to "move" for a reason connected to economic integration.[81]

77. Authorities of this Court have shown that the purpose of s. 6(2) is far more fundamental than merely to encourage economic unity.[82] It is to consecrate the right of Canadian citizens and permanent residents – as an attribute of their identity and status as such – to live, work, or just *be* anywhere in the country, without regard to provincial borders. As McLachlin J. wrote in *Canadian Egg Marketing* (dissenting, but not on this point) "[p]ersonal mobility is not just a function of citizenship, but a basic human right", which enables "the habits, customs, and cultural ties" – including Ms. Taylor's attendance at her mother's funeral and being together with her family – "which are essential to [ou]r identity."[83] The Dual Rights interpretation of s. 6(2)(a), which protects a right to interprovincial travel *simpliciter*, is most consonant with this purpose. A more narrow purpose would stunt the liberal and generous interpretation of a key provision of the *Charter*.

78. It may also be noted that two justices of this Honourable Court have suggested, in concurring reasons, that the economic aspect of s. 6(2) lies in ss. 6(2)(b) and 6(4), not in s. 6(2)(a). In *Reference Re Public Service Employee Relations Act (Alta)*, McIntyre J. observed that "the *Charter*, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights." Justice Lamer (as he then was) agreed with this observation in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*.[84]

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[80] *Skapinker* at p 377 [emphasis added].
[81] Application Judge's Decision at para 374.
[82] *Canadian Egg Marketing* at paras 60, 66, 122; *Black* at pp 620–621.
[83] *Canadian Egg Marketing* at para 124.
[84] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at p 412; *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at pp 1170–1171.

Legal Scholarship on s. 6(2) Supports the Dual Rights Interpretation

79. Legal scholarship also strongly supports the Dual Rights interpretation. While the precise scope of s. 6(2)(a) was debated in early academic writing on s. 6, scholars agreed that at a minimum it protected the right to physically enter any province or territory in Canada. The question was whether it protected more than that. As Douglas Schmeiser and Katherine Young wrote in their article "Mobility Rights in Canada", "[w]hatever the scope of s 6(2)(a), it must mean more than just the right to take oneself physically into another province and exist there."[85]

80. In "Mobility Rights Under the *Charter*", John B Laskin (now Laskin J.A. of the Federal Court of Appeal) queried whether, in light of *Winner*, s. 6(2)(a) precludes the provinces from denying any and all of the essential attributes of Canadian citizenship, or whether it "merely prevents a province from expressly creating prohibitions on entry and residence by non-residents".[86]

81. The minimum content of s. 6(2)(a) was similarly described by Tanya Lee & Michael J Trebilcock in "Economic Mobility and Constitutional Reform" as preventing prohibitions on both "entry and residence":

> If section 6(2) (a) is to be given independent force and section 6(2) (b) is concerned with gaining a livelihood, what substantive content does section 6(2) (a) have? Does it merely prevent a province from creating prohibitions on entry and residence by non-residents or from requiring border checks and documentation of non-residents?

Noting that *Winner* would not forbid the federal government from such actions given the federal power over citizenship, Lee & Trebilcock observed that "[s]ection 6(2)(a) at the very least precludes such action by both levels of government".[87]

82. In "Mobility Rights: Section 6 of the *Charter* and the Canadian Economic Union", Peter Bernhardt remarked that while s. 6(2)(a) "may be read as merely prohibiting a province from

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[85] Douglas Schmeiser & Katherine Young, "Mobility Rights in Canada", (1983) 13 Man LJ 615 at p 634 [emphasis added].
[86] John B Laskin, "Mobility Rights Under the *Charter*" (1982) 4 SCLR 89 at p 96, ABA, Tab 3, [emphasis added].
[87] Tanya Lee & Michael J Trebilcock, "Economic Mobility and Constitutional Reform" (1987) 37 UTLJ 268 at p 287, ABA, Tab 4 [emphasis added].

expressly preventing non-residents from entering that province or taking up residence there", the *dicta* in pre-*Charter* cases suggested a broader right than that.[88]

83. More recently, in their text *The Charter of Rights and Freedoms*, Robert J Sharpe (formerly Sharpe J.A. of the Ontario Court of Appeal) and Kent Roach noted that in a federal system like Canada, the right to move freely about the country is fundamental to a sense of nationhood:

> An important element of individual freedom is the right to enter and leave one's country and to move about it freely. In countries with federal systems, such as Canada, it is fundamental to a sense of national citizenship that individuals be able to move to and work in other provinces without prejudice because of their province of origin. The mobility rights protected by section 6 of the Charter of Rights and Freedoms are designed to promote and foster these objectives.[89]

84. In this case, Ms. Taylor sought to move to NL to pay respects at her mother's funeral. Such a right goes beyond the "economic right" envisaged by the Application Judge. It is a human right not to have Canadian families bisected by interprovincial laws.

The Interprovincial Travel Restriction discriminates primarily on the basis of province of residence under s. 6(3)(a)

85. Finding that s. 6(2)(a) includes a right of interprovincial mobility *simpliciter* does not end the inquiry. By virtue of s. 6(3)(a), the rights protected by s. 6(2) are subject to "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".

86. In *Canadian Egg Marketing*, this Court explained that s. 6(3)(a) is not an external 'saving provision' like s. 1. Section 6(3)(a) is instead an internal qualification on the rights protected by s. 6(2). The two sections must be read together. Borrowing the dialectic used by the Quebec Superior Court in *Malartic Hygrade Gold Mines Ltd v Quebec*, Iacobucci and Bastarache JJ explained the internal qualification of s. 6(2)(b) – which would apply *mutatis mutandis* to s. 6(2)(a) – as follows:

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[88] Peter Bernhardt, "Mobility Rights: Section 6 of the *Charter* and the Canadian Economic Union" (1987), 12 Queen's LJ 199 at pp 208–209, ABA, Tab 2 [emphasis added].
[89] Robert J Sharpe & Kent Roach, *Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021) at p 249, ABA, Tab 5 [emphasis added].

a) The principle: the right to pursue the gaining of a livelihood in any province.

b) The exception: this right is subject to any laws or practices of a general application in force in that province.

c) The exception to the exception: except if these laws discriminate among persons primarily on the basis of province of residence.[90]

87. Determining whether a law of general application[91] discriminates primarily on the basis of province of residence involves comparing residents of the origin province who attempt to engage in the activity at issue with residents of the destination province who attempt to do so.[92]

88. According to the majority in *Canadian Egg Marketing*, the use of the word "primarily" in s. 6(2) suggests that other purposes and effects must be weighed to determine whether the residential aspect of the discrimination is primary. Whether the discrimination is unacceptable in the context of s. 6 will depend "entirely on which basis of discrimination is characterized as dominant, as denoted by the term 'primarily'". The majority viewed this exercise as "closely analogous to the pith and substance approach to legislative classification used in considering division of powers questions".[93]

89. In *Canadian Egg Marketing*, this Honourable Court found that Canada's national egg marketing scheme did not discriminate against egg producers from the Northwest Territories under s. 6(3)(a) because the basis of the differential treatment was historical production patterns rather than place of residence. Justices Iacobucci and Bastarache held that the Northwest Territories egg producers had failed to establish a discriminatory effect that would displace this purpose as the law's dominant feature: there was no evidence that they were in a worse position than the appropriate comparator group, which was new egg producers in the destination province who also had no historical quota.[94]

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[90] *Canadian Egg Marketing* at paras 51, 54; *Malartic Hygrade Gold Mines Ltd v Quebec*, 1982 CanLII 2870 (QC CS) at para 47.
[91] See *Kruger and al v The Queen*, [1978] 1 SCR 104 at p 110; *Black* at p 625.
[92] *Canadian Egg Marketing* at para 74.
[93] *Canadian Egg Marketing* at paras 89, 98.
[94] *Canadian Egg Marketing* at para 102.

90. In this case, however, even an overly broad statement of the objective of the Interprovincial Travel Restriction (i.e., "to protect those in [NL] from illness and death arising from the importation and spread of COVID-19 by travelers")[95] is explicitly discriminatory on the basis of province of residence. Because Ms. Taylor lived in Nova Scotia, she was not permitted to enter. She was not a Canadian, free to move about her country, but a mere "traveler".

The Interprovincial Travel Restriction discriminated primarily on the basis of province of residence

91. The Interprovincial Travel Restriction prohibited non-residents of the province from entering unless they fell into an exempted category, while residents remained free to enter and exit at will.

92. The CMOH explained this in her evidence. When asked whether any COVID-19 cases could be traced to non-residents who had received an entry exemption, she said no – the reported travel-related COVID cases had come from residents, who did not need an exemption:

> Q. Okay. And as of today, are you aware of any cases that are associated with people who got in under exemptions?
> A. No.
> Q. No?
> A. No. That's -- actually today.
> Q. Okay. So, and –
> A. One case.
> Q. - I'm speaking specifically -- I know that in the media there was a woman who came from southeast Asia and she tested positive.
> A. She's a resident.
> Q. Right. But was she -- she didn't get – that wasn't about an exemption?
> A. So you don't need an exemption if you're a resident.
> Q. Okay. And there were people who came -- like, for instance, again anecdotally from the media, a gentleman came to Central. I think he was exempted for work and then infected two people in his family. Is that –
> A. So he's from here?
> Q. Yeah.
> A. So again, he's a resident, so he doesn't have to get an exemption.
> Q. Okay.
> A. Residents are allowed to come home.[96]

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[95] Application Judge's Decision at para 436. See also paras 111–114 of this factum.
[96] Cross-Examination of Dr. Fitzgerald at pp 170 line 13 – 171 line 15, AR, Tab 25, p 44 [emphasis added].

93. As the CMOH's evidence confirms, if Ms. Taylor had been a resident, she would have been permitted to enter, with no need for an exemption.

94. Unlike in *Canadian Egg Marketing*, we are not dealing here with two potential bases of discrimination, one of which offends s. 6(2) (province of residence) and one of which does not (historical egg production patterns). In the present case, the only basis for the differential treatment is province of residence. There is no second, non-discriminatory basis. The CMOH may have thought it reasonable that only residents of a province would retain their right to enter and exit it at will, but such a measure is nonetheless discriminatory and contrary to s. 6(3)(a). This differential treatment of Canadians based on their province of residence is exactly what s. 6(2) was designed to prevent.

95. Thus, Ms. Taylor's right to interprovincial mobility *simpliciter* under s. 6(2)(a) was infringed when she was denied entry to the province as a result of the Interprovincial Travel Restriction. Whether this discriminatory treatment was justified by the public health objective falls to be considered under s. 1.

3. The Section 1 Issue

96. The Application Judge made three errors in his analysis of s. 1 of the *Charter*.

97. First, he characterized the legislative objective of the Interprovincial Travel Restriction inaccurately. The evidence of the CMOH was that the actual public health objective was to prevent non-essential travel by tourists and seasonal vacationers. There is no suggestion that Ms. Taylor wished to travel "touristically" to NL or for other "non-essential purposes". Thus, the Application Judge erred in describing the objective as "to protect those in [NL] from illness and death arising from the importation and spread of COVID-19 by travelers".

98. Second, he found the Interprovincial Travel Restriction was minimally impairing when the Respondents' own evidence confirmed that two less infringing effective alternatives were available: (1) self-isolation for 14-days; and (2) a travel restriction prohibiting entry for specified non-essential purposes such as tourism, recreation or entertainment, as the federal government had ordered.

99. Third, he was overly deferential to the CMOH, in part, because of the CMOH's reliance on the precautionary principle.

The Application Judge's s. 1 Analysis

100. The Application Judge framed the s. 1 analysis as a contest between the Respondents' "collective goals" and the Appellants' arguments that the Interprovincial Travel Restriction was an unnecessary and unjustified measure.[97] Ultimately, the Application Judge concluded that the "collective benefit to the population as a whole" must prevail over Ms. Taylor's s. 6 rights. He found that the infringement of her right to interprovincial mobility was demonstrably justified in a free and democratic society.[98]

Contextual Factors

101. At the outset of his analysis, and in reliance on *Thomson Newspapers Co v Canada (Attorney General)*,[99] the Application Judge identified four contextual factors which he said were relevant to his assessment of the Interprovincial Travel Restriction:

a) the nature of the harm to NL society and the inability to measure it;

b) the vulnerability of NL society;

c) subjective fears and apprehension of harm to NL society; and

d) the nature of the infringed activity.[100]

102. The Application Judge's assessment of the context resulted in the importation of concepts which distorted the s. 1 analysis. (This Court has not applied the *Thomson Newspapers* contextual factors since 2007.)[101]

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[97] See e.g. Application Judge's Decision at paras 399–400, 492.
[98] Application Judge's Decision at para 493.
[99] *Thomson Newspaper Co v Canada (Attorney General)*, [1998] 1 SCR 877 at paras 87–95.
[100] Application Judge's Decision at paras 403–416.
[101] See *R v Bryan,* 2007 SCC 12. This Court signalled a clear retreat from the "contextual factors" approach, and a renewed emphasis on *Oakes* in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.

103. Regarding the nature of the harm and the CMOH's inability to measure it, the Application Judge found that "in public health decision making the 'precautionary principle' supports the case for action before confirmatory evidence is available."[102] While other courts have since considered the application of this principle,[103] the Application Judge's reliance on it to form his justification for maximal deference to the CMOH in the face of minimally impairing alternatives was an error.

104. The Application Judge next observed that there was a "heightened fear of contracting" COVID-19 in the province, which was "particular[ly] vulnerable" given the relative age of the population and high rankings for co-morbidities and other risk factors associated with COVID-19. However, he provided no evidential basis for the relevance of "fear" in justifying the infringement of Ms. Taylor's rights.[104] To the extent that "fear" motivated the implementation of the Interprovincial Travel Restriction, it should not be saved by s. 1 of the *Charter*.[105]

105. With respect to the nature of the infringement, the Application Judge found that the right to move freely throughout the country is "not a right to be taken lightly", but that the infringement of Ms. Taylor's mobility right in this case was "fleeting".[106]

The Application Judge's s. 1 Analysis: Oakes

106. The Application Judge then considered the "specific requirements" the government must meet under s. 1 of the *Charter* to justify the infringement of Ms. Taylor's s. 6 rights (i.e., the *Oakes* test). First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with the right or freedom in question, meaning that: (i) the measure adopted must be rationally connected to the objective; (ii) the means chosen must impair as little as possible the right in issue; and (iii) there must be proportionality between the effects of the measures and the objective.[107]

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[102] Application Judge's Decision at paras 410–411.
[103] See e.g. *Trinity Bible* at para 110; *Grandel* at para 108; *Gateway Bible* at para 116.
[104] Application Judge's Decision at paras 412–413.
[105] *Trinity Bible* at para 111.
[106] Application Judge's Decision at para 415.
[107] Application Judge's Decision at paras 417–424 citing *R v Oakes*, [1986] 1 SCR 103 ["***Oakes***"].

107. The Application Judge defined the objective of the Interprovincial Travel Restriction as "to protect those in [NL] from illness and death arising from the importation and spread of COVID-19 by travelers". The Application Judge found that this objective was both pressing and substantial, and that the Interprovincial Travel Restriction was rationally connected to this objective.[108]

108. The Application Judge then held that the Interprovincial Travel Restriction was the least drastic means available to achieve the objective. In so finding, he rejected the Appellants' argument that, given the requirement of self-isolation on arrival, barring entry into the province could not be considered the least impairing means of reducing the importation of COVID by travelers. In coming to this conclusion, he relied heavily on evidence relating to complaints about non-compliance with the self-isolation requirement.[109]

109. The Application Judge further found that it was appropriate to show deference to the CMOH, in recognition of the expertise of her office and the sudden emergence of COVID-19 as a novel and deadly disease.[110]

110. Finally, in considering the balance between the salutary and deleterious effects of the Interprovincial Travel Restriction, the Application Judge concluded: "[t]o ask the question, is to answer it"; "the collective benefit of the population as a whole must prevail"; and "Ms. Taylor's *Charter* right to mobility must give way to the common good".[111]

The Application Judge's Errors

i. Characterizing the Objective

111. The Application Judge erred by characterizing the legislative objective of the Interprovincial Travel Restriction too broadly as "to protect those in [NL] from illness and death arising from the importation and spread of COVID-19 by travelers." The CMOH's evidence establishes the actual objective was narrower. The intent was not to target entry into the province for legitimate reasons, but rather to prevent non-essential travel by tourists and seasonal vacationers:

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[108] Application Judge's Decision at paras 436–437, 451.
[109] Application Judge's Decision at paras 465–466, 470–475, 477, 485–487.
[110] Application Judge's Decision at para 464.
[111] Application Judge's Decision at paras 488–492.

> [102] The intent of the travel restrictions was not to prevent people from returning to the province if they were unemployed, intending to work in Newfoundland and Labrador, or returning to take care of a loved one. The intent is to prevent those that do not need to travel to Newfoundland and Labrador during the pandemic. The travel ban will help prevent the unnecessary spread of the disease by tourist or seasonal vacationers that may be carrying the virus from entering the province by controlling importation. Furthermore, travel itself is a high-risk activity for the transmission of COVID-19. Non-essential travel places Newfoundland and Labrador at greater risk of those unknowingly carrying the virus to the province as well as those unknowingly catching the virus while travelling to the province.
>
> […]
>
> [92] […] Any unnecessary importation of the disease from tourism or seasonal vacationers may add further strain on the health care system in rural communities and inhibit the system ability to respond to a potential COVID-19 outbreak. Any additional strain on the health care system, COVID-19 related or not, impacts available personal protective equipment, intensive care unit beds, and other health care resources that are currently stretching thinly due to COVID-19.[112]

112. Importantly, the CMOH acknowledged it was not possible to eradicate COVID-19 in the province. The objective was to reduce and manage unnecessary importation, rather than to eliminate all importation.[113]

113. The Application Judge erred by failing to adopt the narrow characterization of the objective provided by the CMOH. Doing so would have materially affected the outcome of the s. 1 analysis because the specific means selected by the CMOH are more clearly disproportionate to the narrow objective of reducing and managing unnecessary importation.[114] The actual objective of the Interprovincial Travel Restriction was to protect those in NL from the importation and spread of COVID-19 by non-essential travellers.

114. The Appellants accept that this objective was pressing and substantial.

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[112] Affidavit of Dr. Fitzgerald at paras 102, 92, AR, Tab 18, pp 203-205 [emphasis added]; Application Judge's Decision at para 436.
[113] Cross-examination Dr. Fitzgerald at p 127 line 4 – line 11, AR, Tab 25, p 33.
[114] *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 ["***RJR-MacDonald***"] at paras 144, 153–175; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 45.

ii. The CMOH did not select the least impairing means

115. At the minimal impairment stage, the Respondents must show that the Interprovincial Travel Restriction impairs the *Charter* right as little as reasonably possible in furthering its objective. To be minimally impairing, a measure must therefore be "carefully tailored" to ensure that rights are impaired "no more than is reasonably necessary".[115] There is a statutory basis to ensure careful tailoring in this case – s. 13 of the *PHPPA* stipulates that any restriction imposed by the CMOH "shall be no greater than is reasonably required in the circumstances".

116. The Application Judge erred in finding that the Interprovincial Travel Restriction was the minimally impairing means of achieving the objective. While the means chosen by government are accorded a degree of deference,[116] the Respondents' own evidence confirms that less infringing alternatives were available: (1) self-isolation for 14-days; and (2) a travel restriction prohibiting entry for specified non-essential purposes such as tourism, recreation or entertainment, as the federal government had ordered. In the face of such evidence, the Interprovincial Travel Restriction "is simply too invasive" of s. 6 of the *Charter*.[117] It was not carefully tailored.

117. The Appellants recognize that the minimal impairment requirement does not hold the legislator to a standard of perfection. However, as McLachlin C.J. wrote in *Alberta v Hutterian Brethren of Wilson Colony*, "[w]hile the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."[118]

118. The Respondents have failed to meet that test.

Self-isolation was effective

119. The Application Judge accepted that "self-isolation is shown to be effective when those required to do so actually self-isolate", but held that self-isolation was not a viable alternative means of achieving the legislative objective because "in reality not all those required to self-isolate

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[115] *RJR-MacDonald* at para 160; *Oakes* at p 139.
[116] *Dickson* at para 403.
[117] *Dickson* at para 408.
[118] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55 [emphasis added].

actually comply."[119] In doing so, the Application Judge relied on hypotheticals rather than the actual evidence before him, which established not only that self-isolation can be effective, but that it had been effective in controlling the importation of COVID-19 into NL.

120. From the beginning of the pandemic, the CMOH had successfully used self-isolation as a means of reducing and managing the importation of COVID-19 into the province.

121. The Caul's Funeral Home outbreak, which occurred between March 15-17, 2020 (before the March 18 declaration of a public health emergency, and thus before any public health measures were in place) was cited by the CMOH as an example of how travelers could contribute to rapid spread of the virus. The CMOH responded to the Caul's outbreak not with a travel ban, but by issuing a self-isolation order on March 18. The Caul's outbreak was resolved by April 13.[120]

122. Dr. Fitzgerald explained that in the context of a pandemic, measures taken to control the spread of a disease are regularly reassessed and adjusted as necessary, on the basis of the best available evidence:

> The following principles underpin Canadian pandemic preparedness and response activities and decision-making:
>
> […]
>
> b. Evidence-informed decision-making - decisions should be based on the best available evidence to the extent possible. It is recognized that other factors also enter into decision-making, such as legal and institutional constraints, values, costs and availability of resources.
>
> c. Proportionality - the response to a pandemic should be appropriate to the level of the threat.
>
> d. Flexibility- actions taken should be tailored to the situation and subject to change as new information becomes available.[121]

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[119] Application Judge's Decision at para 472.

[120] Cross-examination Dr. Fitzgerald at pp 139 line 19 – 143 line 17, AR, Tab 25, pp 36-37; Affidavit of Dr. Fitzgerald at paras 63–64 AR, Tab 18, p 197; March 20, 2020 *Special Measures Order (Amending Order)*; March 20, 2020 *Exemption Order*; Application Judge's Decision at paras 101–102.

[121] Affidavit of Dr. Fitzgerald at para 75, AR, Tab 18, p 199 [emphasis added].

123. On April 23, the CMOH issued *Special Measures Order (Amendment No. 6)*, which imposed more stringent self-isolation requirements on incoming travelers but did not include any restriction on travel. Thus, up to April 23, the CMOH did not consider a travel ban necessary.

124. This means that from March 18 to April 23, the CMOH regularly assessed the need for a travel ban on the best evidence, in the context of a multipronged public health approach, knowing that importation of the virus was the greatest risk to the province – and concluded that a travel ban was unnecessary. As late as April 23, she accepted that a multi-pronged approach, relying on self-isolation requirements to control importation from travelers, had been effective in protecting NL.

125. In defending the necessity of the Interprovincial Travel Restriction, the CMOH asserted that "[i]t is impossible to know what would have happened if travel measures had not been put in place." But this ignores the reality of the situation in NL before the Interprovincial Travel Restriction was issued. In cross- examination, the CMOH accepted that the number of cases from April 26-29 remained static at 258. Of these, 178 cases dated back to the Caul's cluster. In other words, self-isolation of travelers in NL on "essential" travel and the multi-pronged public health measures had successfully stemmed the spread of COVID, without the need for a travel ban.[122]

126. The CMOH testified that the Interprovincial Travel Restriction was issued in response to fears of non- compliance with self-isolation requirements: "we implemented travel restrictions when we felt that there was quarantine escape." The CMOH was particularly concerned that "tourists in particular" were not complying with self-isolation requirements:

> Although all travelers are required to self-isolate when arriving in Newfoundland and Labrador, the Provincial Government has received a number of complaints from individuals and businesses suggesting that this directive has not been followed.
>
> I understand and do verily believe that discussions with Marine Atlantic further confirmed that a number of travelers were entering the province with a reservation for a return sail for a date less than 14 days. Based on the information provided and the travel itineraries, there was concern that the tourists in particular were less inclined to follow the 14-day self-isolation requirement.[123]

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[122] Affidavit of Dr. Fitzgerald at para 83, AR, Tab 18, p 202; Cross-examination of Dr. Fitzgerald at pp 137 line 3 – 138 line 18, p. 140 lines 1 – 8, AR, Tab 25, pp 36-37; Exhibits JF 1 and JF 2, AR, Tabs 20-21, pp 222-226.

[123] Affidavit of Dr. Fitzgerald at paras 61(e), 94–95, AR, Tab 18, pp 197, 204 [emphasis added].

127. The evidence regarding complaints of non-compliance was as follows:

> Around 22 March 2020 a public reporting form was introduced, with the result that between that date and 5 May 2020 there were 3,453 reports and e-mails. As a result, public health officials were made aware of 989 complaints that individuals were not complying with self-isolation requirements. Complaints were also received from members of the House of Assembly.[124]

128. No further particulars of these complaints were put in evidence. The complaints were investigated. No one was charged. There was no evidence that the behaviour reported in the complaints led to any COVID-19 cases. When asked whether any of the complaints were substantiated, the CMOH indicated: "So I – to the best of my knowledge, there was some education that was done with people that they did have to go and explain self-isolation to them, but I could not give you a number". Indeed, the CMOH accepted that many of the complaints amounted to nothing but unsubstantiated rumour.[125]

129. The Respondents led no evidence of substantiated complaints that might have prompted the Interprovincial Travel Restriction. While the Mayor of Bonavista complained to the CMOH about tourists, even that complaint appears to have been unsubstantiated.[126]

130. Thus, contrary to the Application Judge's findings, there was no probative evidence of significant non-compliance with self-isolation requirements in the province. Even in the context of a pandemic, fear,[127] rumour, and conjecture should not meet the standard of proof.

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[124] Application Judge's Decision at para 107; Affidavit of Dr. Fitzgerald at para 69 AR, Tab 18, p 198 [emphasis added].
[125] Application Judge's Decision at para 107; Cross-examination of Dr. Fitzgerald at pp 149 line 9 – 151 line 15, pp 149 line 22 –150 line 1, and pp 158 line 8 – 159 line 1, AR, Tab 25, pp 39, 41.
[126] Cross-examination of Dr. Fitzgerald at pp 157 line 10 – 159 line 1, AR, Tab 25, p 41.
[127] There must be some rational basis for the subjective fears or apprehensions of harm. Public opinion alone does not justify deference to legislative choices: see *RJR-MacDonald* at para 127; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 20. Fears are often based on majoritarian perspectives, contrary to the purposes of the *Charter.*

Targeted Prohibition & Minimal Impairment

131. The Respondents argued, and the Application Judge accepted, that a further reason for rejecting self-isolation as a viable alternative to the Interprovincial Travel Restriction was the difficulty of monitoring for compliance with self-isolation requirements if an influx of seasonal visitors arrived in NL. As he put it, "I am satisfied that removing the restriction and opening the province to an influx of visitors, most of whom arrive in the summer, would render effective monitoring for compliance impossible".[128]

132. A minimally impairing response would have been to prohibit entry for specified non-essential purposes such as tourism, recreation, or entertainment, rather than prohibiting entry for all purposes subject to specified exemptions. Indeed, this was the approach taken by the federal government towards incoming foreign nationals during the pandemic.

133. The federal orders, issued on March 22 and April 20, 2020, prohibited three categories of foreign nationals from entering Canada:

- individuals with symptoms of COVID-19;
- individuals travelling to Canada for an "optional or discretionary purpose, such as tourism, recreation or entertainment";
- individuals whose travel purpose or itinerary did not permit them to quarantine for 14 days.[129]

134. The federal orders were designed to achieve a similar objective as the Interprovincial Travel Restriction, but in a more focused manner: they prohibited entry only for specific purposes deemed non-essential, rather than prohibiting entry, *prima facie*, and then allowing for specific exemptions. Unlike the Interprovincial Travel Restriction, the federal orders did not bar entry for a non-optional/discretionary purpose by an asymptomatic individual who could abide by quarantine rules.

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[128] Application Judge's Decision at para 475.
[129] Exhibit 2 to the Affidavit of Dr. Parfrey at pp 8–9, AR, Tab 15, pp 189-190; Order of the Governor in Council dated March 22, 2020, PC# 2020-0162; Order of the Governor in Council dated April 20, 2020, PC # 2020-0263.

135. This means that while the Interprovincial Travel Restriction was in place, it was easier for foreign nationals to enter Canada than for people residing in Canada to enter NL – despite Canadians having a *Charter*-protected right of entry into the province.

136. While the Respondents led evidence on the existence of the federal border restrictions, they did not explain why the CMOH chose a different and more impairing approach.

137. The Application Judge erred by failing to recognize the significance of less impairing alternatives for the constitutional validity of the CMOH's Interprovincial Travel Restriction. As McLachlin J. (as she then was) explained in *RJR-MacDonald*, "the courts must accord some leeway to the legislator", but "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[130]

138. If the Interprovincial Travel Restriction had been appropriately structured as a targeted ban on travel for non-essential/recreational purposes, rather than a blanket ban on all travel subject to specific exemptions and residual discretion, the application would never have been necessary. Travel for the bereavement of an immediate family member falls outside the Interprovincial Travel Restriction's objective of prohibiting non-essential (e.g., seasonal, tourist, recreational) travel. The specified exemptions did not capture all essential travel purposes. Nor did the CMOH's residual discretion adequately compensate for the over-breadth of the ban, as evidenced by the fact that Ms. Taylor was initially denied entry.

iii. The Application Judge's approach was overly deferential

139. In finding that the Interprovincial Travel Restriction satisfied the minimal impairment requirement, the Application Judge emphasized the importance of affording deference to the CMOH in recognition of the expertise of her office and the context of the sudden emergence of COVID-19 as a novel and deadly disease. The Appellants acknowledge that a measure of deference is appropriate in these circumstances. However, in overstating the legislative objective and underplaying the existence of less infringing alternatives, the Application Judge gave deference more than its due. As McLachlin J. cautioned in *RJR-MacDonald*, "care must be taken not to extend the notion of deference too far":

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[130] Exhibit 2 to the Affidavit of Dr. Parfrey at pp 8–9, AR, Tab 15, pp 189-190; *RJR-MacDonald* at para 160.

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[131]

140. The context of the COVID-19 pandemic cannot shield the measures chosen to address it from the appropriate level of scrutiny. Of course, that context is relevant, but as McLachlin J. asserted, "it cannot be carried to the extreme." This would be to undercut the obligation on government to justify limitations which it places on *Charter* rights and would be to substitute *ad hoc* judicial deference for the reasoned demonstration contemplated by the *Charter*.[132]

141. Moreover, the significance of context in an emergent situation swings both ways. It is tempting, in a time of crisis, to defer to the authorities charged with managing it. But times of crisis are also precisely when the civil liberties and fundamental freedoms that define our society are at greatest risk. The instinct to defer in such situations must be tempered by the knowledge that the judiciary serves as the population's only contemporaneous protection against legislative overreach. Even in a pandemic, the precautionary principle does not erase the constitutional requirement that the state infringe *Charter*-protected rights as little as reasonably possible. The courts must ensure that law-makers, even when well-intentioned, do no more harm than necessary to these rights.

142. Appellate courts have endorsed the use of the precautionary principle and a high degree of deference in the context of COVID-19.[133] The emerging trend is that:

- where provincial governments are faced with a complex and challenging threat to public safety; and

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[131] Application Judge's Decision at para 464; *RJR-MacDonald* at para 136 [emphasis added].
[132] *RJR-MacDonald* at para 134 [emphasis added].
[133] *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 at paras 151–152; *Trinity Bible* at para 110; *Grandel* at para 103.

- there is a demand for timely and decisive action in the face of uncertain circumstances and inconclusive scientific evidence,

significant deference will be afforded by the courts where provincial decision-makers have taken a precautionary approach.[134]

143. However, the imposition of the Interprovincial Travel Restriction in this case was done in the face of carefully tailored minimally-impairing alternative measures. This Honourable Court should definitively reject an approach which elevates public demands to do something (e.g., the Mayor of Bonavista) above measured consideration of the *Charter* rights at stake. In the circumstances of this case, it is an approach which unduly excuses the CMOH's failure to select a carefully tailored alternative, which was more appropriately suited to achieving its stated objective.

iv. Consideration of the Salutary and Prejudicial Effects

144. At the final stage, the Application Judge was obliged to consider whether there was proportionality between the overall effects of the Interprovincial Travel Restriction and its objective.[135]

145. Freedom of mobility is a cornerstone of democracy and a free society. Denying citizens and permanent residents the right to interprovincial travel to a mother's funeral can inflict harm on affected individuals.[136] This is particularly true where there is simply no convincing rationale – in the face of carefully tailored alternatives – to deny entry into the province.

146. The Application Judge gave short shrift to the last step in the proportionality analysis, finding that "[t]o ask the question is to answer it. While restriction on personal travel may cause mental anguish to some, and certainly did so in the case of Ms. Taylor, the collective benefit to the population as a whole must prevail."[137]

147. There is more at stake here than the Application Judge appreciated. As this Honourable Court has explained, and indeed as the Application Judge has earlier recognized, the right to move freely across provincial borders is a fundamental part of what it means to be a Canadian resident.

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[134] *Grandel* at paras 28–33, 103.
[135] *Frank v Canada (Attorney General)*, 2019 SCC 1 ["***Frank***"] at para 76.
[136] *Frank* at para 82.
[137] Application Judge's Decision at paras 491–492.

148. Prior to the COVID pandemic, the closing of a provincial border would have seemed unthinkable. For Canadians, all of Canada is home. Denying the right of entry into a province strikes at the heart of the Canadian identity and Canada's existence as a unified nation. Interprovincial travel bans come at the cost of fracturing the country. Thus, while the Appellants concede that *some* salutary effects of the Interprovincial Travel Restriction are undeniable, they are outweighed by its deleterious effects.

PART IV – SUBMISSIONS CONCERNING COSTS

149. The Appellants do not seek costs and ask that no costs be awarded against them.

PART V – ORDER SOUGHT

150. The Appellants respectfully ask that the appeal be granted without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July, 2024.

Marie-France Major, as agent for

Paul J. Pape & Mitchell McGowan
Counsel for the Appellant,
Canadian Civil Liberties Association

Marie-France Major, as agent for

John F. E. Drover
Counsel for the Appellant,
Kimberley Taylor

PART VI – TABLE OF AUTHORITIES

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SCC File No.:40952

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION and KIMBERLEY TAYLOR

APPELLANTS

and

HIS MAJESTY THE KING IN RIGHT OF NEWFOUNDLAND AND LABRADOR and JANICE FITZGERALD, CHIEF MEDICALOFFICER OF HEALTH

RESPONDENTS

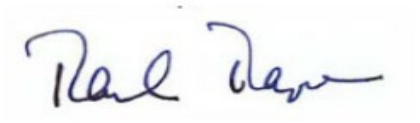
NOTICE OF CONSTITUTIONAL QUESTION
(CANADIAN CIVIL LIBERTIES ASSOCIATION and KIMBERLEY TAYLOR, APPELLANTS)
(Pursuant to Rule 33 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that I, Paul Pape, counsel for the Canadian Civil Liberties Association, and John Drover, counsel for Kimberley Taylor, assert that the appeal raises the following constitutional question:

(i) Is Special Measures Order (Amendment No. 11), issued pursuant to s. 28(1)(h) of the *Public Health Protection and Promotion Act*, S.N.L. 2018, c. P-37.3, which prohibits non-residents of the province from entering the province, unconstitutional because it infringes s. 6 of the Charter and is not saved by s. 1 of the Charter?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at the City of Toronto, in the Province of Ontario, this 27th day of May, 2024.



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