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

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NUNAVUT, ATTORNEY GENERAL OF PRINCE EDWARD ISLAND, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF YUKON TERRITORY, CANADIAN CONSTITUTION FOUNDATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

REPLY FACTUM
(CANADIAN CIVIL LIBERTIES ASSOCIATION and KIMBERLEY TAYLOR, APPELLANTS)

(Pursuant to the Order of Justice Martin, dated September 13, 2024)

PAPE CHAUDHURY LLP
Suite 1701 – 150 York Street
Toronto ON M5H 3S5

Paul J. Pape
Mitchell McGowan
Tel: (416) 364-8755
Fax: (416) 364-8855
Email : paul@papechaudhury.com
mitchell@papechaudhury.com

Counsel for the Appellant, Canadian Civil Liberties Association

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Cory Giordano
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca
cgiordano@supremeadvocacy.ca

Agents for Counsel for the Appellants

AND

ROEBOTHAN MCKAY & MARSHALL
P.O. Box 5236
34 Harvey Road
5th Floor, Paramount Building
St. John's, NL A1C 2G1

John F.E. Drover
Tel: (709) 753-5805
Fax: (709) 753-5221
Email: jdrover@wrmmlaw.com

Counsel for the Appellant,
Kimberley Taylor

N.L. DEPARTMENT OF JUSTICE
Office of the Attorney General
Department of Justice & Public Safety
100 Prince Phillip Drive
PO Box 8700
4th Floor, East Block
Confederation Building
St. John's, NL A1B 4J6

Justin S.C. Mellor
Donald E. Anthony K.C.
Mark P. Sheppard
Tel: (709) 729-6564
Fax: (709) 729-2129
Email: jmellor@gov.nl.ca
donanthony@gov.nl.ca
marksheppard@gov.nl.ca

Counsel for the Respondents

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Respondents

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
601 - 400 St Mary Ave
Winnipeg, MB R3C 4K5

Sharlene Telles-Langdon
Joseph Cheng
Tel: (204) 295-1026
Fax: (204) 983-3636
Email: sharlene.telles-langdon@justice.gc.ca
joseph.cheng@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
50 O'Connor Street. 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF NEW BRUNSWICK
P.O. Box 6000
675 King Street, Piece 2018
Fredericton, NB E3B 5H1

Isabel Lavoie-Daigle, K.C.
Rose Campbell
Tel: (506) 238-1652
Fax: (506) 453-3275
Email: isabel.lavoiedaigle@gnb.ca
rose.campbell@gnb.ca

Counsel for the Intervener,
Attorney General of New Brunswick

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener,
Attorney General of New Brunswick

DEPARTMENT OF JUSTICE (NS)
Legal Services, 8th Flr.,
1690 Hollis St.
PO Box 7, Stn. Central
Halifax, NS B3J 2L6

Edward A. Gores, K.C.
Tel: (902) 424-3297
Fax: (902) 424-1730
Email: edward.gores@novascotia.ca

Counsel for the Intervener,
Attorney General of Nova Scotia

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener,
Attorney General of Nova Scotia

NUNAVUT DEPARTMENT OF JUSTICE
Legal & Constitutional Law Division
Sivummut Building – 1st Floor
PO Box 1000 Stn. 540
Iqaluit, NU X0A 0H0

John L. MacLean
Adrienne Silk
Tel: (867) 975-6323
Fax: (867) 975-6349
Email: jmaclean@gov.nu.ca
asilk@gov.nu.ca

Counsel for the Intervener, Attorney General of Nunavut

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Graham Ragan
Tel: (613) 786-8699
Fax: (613) 563-9869
Email: graham.ragan@gowlingwlg.ca

Agent for Counsel for the Intervener, Attorney General of Nunavut

ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
4th Floor, Shaw Building
95 Rochford Street
Charlottetown, PE C1A 7N8

Caroline Davison
Tel: (902) 368-5145
Email: carolinedavison@gov.pe.ca

Counsel for the Intervener, Attorney General of Prince Edward Island

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener, Attorney General of Prince Edward Island

MINISTRY OF JUSTICE AND ATTORNEY GENERAL
820-1874 Scarth Street
Regina, SK S4P 4B3

Theodore Litowski
Noah Wernikowski
Tel: (306) 787-6642
Fax: (306) 787-9111
Email: theodore.litowski@gov.sk.ca
noah.wernikowski@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener, Attorney General of Saskatchewan

ARVAY FINLAY LLP
360-1070 Douglas Street
Victoria, BC V8W 2C4

Catherine Boies Parker, K.C.
Caroline North
Tel: (250) 380-2788
Email: cboiesparker@arvayfinlay.ca
cnorth@arvayfinlay.ca

Counsel for the Intervener,
Attorney General of Yukon

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Graham Ragan
Tel: (613) 786-8699
Fax: (613) 563-9869
Email: graham.ragan@gowlingwlg.com

Agent for Counsel for the Intervener,
Attorney General of Yukon

CASSELS BROCK & BLACKWELL LLP
Suite 3200, Bay Adelaide Centre - North
Tower 40 Temperance Street
Toronto, ON M5H 0B4

Jessica L. Kuredjian
Tel: (416) 815-4251
Fax: (416) 360-8877
Email: jkuredjian@cassels.com

Hardeep Dhaliwal
Tel: 416.869.5434
Fax: 416.360.8877
Email: hdhaliwal@cassels.com

Counsel for the Intervener,
Canadian Constitution Foundation

OSLER, HOSKIN & HARCOURT LLP
Suite 3000, Bentall 4 1055 Dunsmuir Street
Vancouver, BC V7X 1K8

Emily MacKinnon
Emily Wang
Tel: (604) 692-2705
Fax: (778) 785-2745
Email: emackinnon@osler.com
ewang@osler.com

Counsel for the Intervener,
British Columbia Civil Liberties Association

OSLER, HOSKIN & HARCOURT LLP
320, World Exchange Plaza
100 Queen Street Ottawa, ON K1P 1J9

Dan Hnatchuk
Tel: (613) 787-1102
Fax: (613) 235-2867
Email: dhnatchuk@osler.com

Agent for Counsel for the Intervener,
British Columbia Civil Liberties Association

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1. The facta of the intervening Attorney Generals of Canada, Nova Scotia, Prince Edward Island ("**PEI**"), New Brunswick, Saskatchewan, Nunavut, and Yukon (the "**Intervener AGs**") present arguments already dealt with in the Appellants' factum, which will not be repeated here. In this reply factum, the Appellants respond to two new arguments raised by the Intervener AGs and submit the following:

- reliance on the precautionary principle was not necessary in the circumstances of this case, and, in any event, the precautionary principle is inapplicable to the s 1 analysis; and
- the application judge correctly applied *Oakes* instead of *Doré*.

The Precautionary Principle is Inapplicable

2. The Intervening AGs, save Nova Scotia, submit that, when conducting a s 1 analysis, courts should afford significant deference to public decision-makers (such as the CMOH[1]) that have acted pursuant to the precautionary principle.[2] Specifically, New Brunswick submits that the precautionary principle is a relevant contextual factor in the s 1 analysis, particularly at the minimal impairment stage.[3] Nunavut, Yukon, and PEI, likewise submit that the principle applies at the minimal impairment stage.[4] Canada submits that "[t]he precautionary principle informs the entire s. 1 analysis."[5]

Defining the Principle

3. Academic commentators describe the precautionary principle as providing guidance on "how scientific uncertainty regarding the probability or the severity of a specific harmful outcome ought to affect public decision-making."[6]

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[1] Chief Medical Officer of Health.
[2] Factum of the Intervener, AG PEI at para 56; Factum of the Intervener, AG Yukon at para 13; Factum of the Intervener, AG Sask at para 72. See also FNs 3–5 of this reply factum.
[3] Factum of the Intervener, AG NB at paras 45, 49.
[4] Factum of the Intervener, AG PEI at paras 53, 58; Factum of the Intervener, AG Yukon at paras 22, 25; Factum of the Intervener, AG Nunavut at paras 54–55.
[5] Factum of the Intervener, AG Canada at paras 36–48.
[6] See Érik Labelle Eastaugh, "Is the Precautionary Principle Compatible with the Proportionality Analysis Required to Justify Limits to Constitutional Rights?" presented to the 2024 Public Law

4. It is clear from reading the facta of the Intervener AGs that there is not one simple formulation of the principle.[7] Rather, there are various formulations, which fall along a spectrum.[8] In some cases, the principle is "negative" in character, and holds that scientific uncertainty should *not preclude* the state from taking preventative action to avoid serious or irreversible damage.[9] In other cases, the principle is "positive", and holds that the state *ought to take* preventative action to avoid serious or irreversible damage despite scientific uncertainty.[10]

5. Importantly, "scientific uncertainty" refers to the probability or the severity of the damage at issue (i.e., in this case, damage to public health from COVID-19) – not, as New Brunswick submits, "[s]cientific uncertainty as to the precise outcome of legislative measures designed to improve public health".[11]

Why the Intervener AGs' Use of the Precautionary Principle is Wrong

6. There are two problems with the Intervener AGs' submissions on the applicability of the precautionary principle.

Conference at the University of Ottawa, 3–5 July 2024 ["**Eastaugh**"] at p 7 [emphasis removed] [**Book of Authorities, Tab 1**].

[7] See FNs 9–10 of this reply factum. Saskatchewan refers to the precautionary principle at para 72 but does not define it. Nova Scotia makes no reference to it.

[8] Eastaugh at p 9.

[9] Eastaugh at pp 9–10. See e.g., Factum of the Intervener, AG PEI at paras 54–55; Factum of the Intervener, AG Yukon at para 18; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 31; *R v Michaud*, 2015 ONCA 585 at para 102; *Ontario v Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 145, aff'd 2023 ONCA 134, leave to appeal denied in 2023 CanLII 72135 (SCC).

[10] Eastaugh at pp 9–14. See e.g., Application Judge's Decision at paras 60, 411, 467; Factum of the Intervener, AG Canada at paras 2, 18; Factum of the Intervener, AG NB at para 6; Factum of the Intervener, AG Nunavut at para 54; *Grandel v Saskatchewan*, 2022 SKKB 209 at para 84, aff'd 2024 SKCA 53; *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 at para 73, leave to appeal denied in 2023 CanLII 72130 (SCC).

[11] Factum of the Intervener, AG NB at para 25.

(a) Scientific Uncertainty Not Present in this Case

7. First, "scientific uncertainty" is not present in this case. There was not an absence of "confirmatory evidence"[12] before the CMOH about the probability and severity of COVID-19. There was clear evidence that COVID-19 was a deadly disease, that the mortality rate was substantially higher than that of influenza, and that a greater proportion of those infected required intensive hospital care.[13] Thus, recourse to the precautionary principle was unnecessary to implement the Interprovincial Travel Restriction[14].[15] It should therefore have no application to the s 1 analysis in this case.

(b) The Precautionary Principle Does Not Supersede the Government's Obligation to Justify Charter Infringement

8. Second, the Intervener AGs are attempting to dilute the "stringent standard of justification"[16] required under *Oakes* by arguing that the precautionary principle informs the s 1 analysis. Instead of a principled and evidence-based test, the Intervener AGs would prefer that courts issue an "EasyPass" once a health crisis is of a certain uncertainty. In essence, the Intervener AGs argue that once the state refers to the "precautionary principle" the argument is at an end and the measure is justified.

9. The uncertainty surrounding a public health crisis can and should be taken into account in a s 1 analysis *without* raising a "principle"[17] of precautionary prudence. This is easily accommodated in the *Oakes* test, where the government is obliged to identify a pressing objective and demonstrate proportionality (e.g., whether the restriction is "minimally impairing" in light of the public health crisis and its salutary benefits outweigh the deleterious consequences).

10. The overarching purpose of the *Oakes* analysis is to assess the moral relationship between the rights breach and the advantages that the state claims will accrue from engaging in it. The precautionary principle, by contrast, does not purport to resolve an acute moral dilemma of this kind.

[12] See Application Judge's Decision at paras 60, 411, 467.
[13] See e.g., application Judge's Decision at paras 62–64. See also Eastaugh at p 42.
[14] I.e., *Special Measures Order (Amendment No. 11)* [AR, Tab 18R(i)] and *Special Measures Order (Travel Exemption Order)* [AR, Tab 18 R(ii)].
[15] See also Eastaugh at p 42.
[16] *R v Oakes*, [1986] 1 SCR 103 at p 136; *R v KRJ*, 2016 SCC 31 at para 91.
[17] See Eastaugh at p 49.

Instead, it merely establishes a general rule for the use of discretionary regulatory power under conditions of uncertainty.[18]

11. For this reason, the precautionary principle *itself* is not well suited as a contextual factor under *Oakes* from which deference ought to flow. Its invocation is not a magic wand, which can justify any policy choice.[19] Reliance on the principle cannot shield the measures chosen from the appropriate level of scrutiny under s 1. As McLachlin J cautioned in *RJR MacDonald*, "care must be taken not to extend the notion of deference too far".[20]

12. The Intervening AGs are asking this court to give deference more than its due. The Appellants reiterate that, in this case, the application judge overstated the objective of the Interprovincial Travel Restriction[21] and underplayed the existence of two carefully tailored and less infringing alternatives, which were available on the respondents' own evidence.[22] The CMOH's reliance on the precautionary principle cannot save the respondents from failing to meet their burden under s 1 of the *Charter*.[23]

13. In sum, as Professor Eastaugh argues:

> A public culture in which [the precautionary] principle is granted free-standing moral authority and viewed as capable of justifying substantial limitations on individual freedoms is one in which the default position has been moved closer to that of a state of emergency, making it more difficult to resist government error, carelessness, incompetence or abuse even when the true emergency phase has passed. Similarly, case-law that requires or encourages the courts to respect the mere invocation of this principle to support rights limitations weakens their ability to ensure that governments uphold their obligation to justify such limits with reasons and evidence, especially since courts will already be inclined to show considerable deference to the executive under such circumstances.[24]

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[18] Eastaugh at p 28.
[19] Eastaugh at FN 89.
[20] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 ["***RJR-MacDonald***"] at para 136.
[21] Factum of the Appellants at paras 111–114.
[22] Factum of the Appellants at paras 115–143.
[23] See e.g., *RJR-MacDonald* at para 129.
[24] Eastaugh at pp 47–48.

Doré* Applies to this Case, Not *Oakes

14. The Attorney General of Nova Scotia ("**AGNS**") argues that the application judge "should have engaged in a *Doré* analysis"[25] – not an *Oakes* analysis – because "public health orders are administrative decisions under delegated authority and less like laws of general application."[26] The AGNS is the only party that raises this argument. It does so for the first time in this case, as an intervener.

15. The *Doré* analysis applies when reviewing discretionary/adjudicative administrative decisions for *Charter* compliance. A decision will be reasonable if it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate underlying the decision.[27]

16. The *Oakes* analysis applies when reviewing laws of general application for *Charter* compliance. As Abella J, writing for this Court in *Doré*, explained, "the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual".[28]

17. *Doré* concerned the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.[29] At the outset of her reasons, Abella J emphasized that <u>the appellant did not challenge the constitutionality of the provision in the *Code of Ethics* under which he was reprimanded but, instead, challenged the adjudicative decision against him</u>.[30] In these circumstances, Abella J addressed whether the *Oakes* framework should be used in such a context:

> [3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect <u>in the context of adjudicated administrative decisions</u>. Normally, if a discretionary administrative decision is made by an adjudicator

[25] Factum of the Intervener, AG NS at para 22 referring *Doré v Barreau du Québec*, 2012 SCC 12 ["***Doré***"].
[26] Factum of the Intervener, AG NS at para 10.
[27] *Doré* at para 58.
[28] *Doré* at para 36. See discussion in *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 ["***Conseil-scolaire***"] at paras 1001–1057, aff'd in part in 2020 SCC 13 (which applied *Oakes*).
[29] *Doré* at para 1.
[30] *Doré* at para 2.

> within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.
>
> [4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision **is not like a law** which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? [Emphasis added.][31]

18. The leading decisions of this Court applying the *Doré* analysis likewise involve the review of individual adjudicative/discretionary decisions:

- *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 concerned a ministerial decision denying a Catholic school's request for an exemption from teaching a required Ethics and Religious Culture program;
- *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 concerned a law society's refusal to accredit an evangelical Christian law school; and
- *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 concerned a ministerial decision denying the applications of five parents to have their children admitted to a French language education program.

19. In contrast to these cases, this appeal does not concern an adjudicative/discretionary decision by an administrative-decision maker. Ms. Taylor's appeal does not challenge the CMOH's decision to deny her exemption request.[32]

[31] *Doré* at paras 3–4.

[32] See Appellants' Factum at paras 8–11. See also Application Judge's Decision at para. 9.

20. Rather, this appeal concerns the constitutionality of *Special Measures Order (Amendment No. 11)* and *Special Measures Order (Travel Exemption Order)* (i.e., the Interprovincial Travel Restriction) as a whole.

21. The Interprovincial Travel Restriction is a law of general application[33] in the form of delegated legislation.[34] It applies to "[a]ll individuals arriving in Newfoundland and Labrador from outside of the province."[35] It is legislative and general – not administrative and specific.[36] In the result, contrary to the submissions of the AGNS, the application judge was correct to apply *Oakes* – not *Doré* – in the circumstances of this case.[37] As the application judge correctly held, "this is not an administrative law case."[38]

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 8th day of November, 2024

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

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

[33] Albeit one that discriminates primarily on the basis of province of residence *vis-à-vis* s. 6(3)(a) of the *Charter*: see e.g., *Waldman et al v The Medical Services of British Columbia et al*, 1999 BCCA 508, at paras 49–50.

[34] See generally Andy Yu, "Delegated Legislation and the *Charter*" (2020) 33:1 Canadian Journal of Administrative Law & Practice 49.

[35] See *Special Measures Order (Amendment No. 11)* and *Special Measures Order (Travel Exemption Order)*.

[36] *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 53.

[37] See reasoning in *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (Div Ct) at paras 51– 62; *Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219 at paras 32–36, aff'd in 2023 MBCA 56 (see para 57), leave to appeal dismissed in 2024 CanLII 20245 (SCC); *Conseil-scolaire* at paras 1051–1057.

[38] Application Judge's Decision at para 9.

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SECONDARY SOURCES	
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