2019 Halifax No. 463399

SUPREME COURT OF NOVA SCOTIA

Between:

LORNE WAYNE GRABHER

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA as represented by the Registrar of Motor Vehicles

Respondent

Submissions of the Applicant

Hearing Date: April 23-25, 2019

Justice Centre for Constitutional Freedoms
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PART 1: Overview

The Applicant and the Plate

1. The Applicant, Lorne Grabher, is of Austrian-German heritage. His family immigrated to Canada from Europe in 1906. His father served in the Canadian Armed Forces, and was stationed in Cape Breton, Nova Scotia. The family's history, including their name and the heritage it signifies, is important to the Grabher family.[1]

2. In or around 1990, the Grabher family applied for, paid the requisite fee for and received a personalized licence plate bearing the family name (the "Plate").[2] The Plate was originally a gift for the Applicant's father. For 27 consecutive years, through three generations of Grabhers, the Registrar authorized the Plate for use on the family's motor vehicles in Nova Scotia. Each year the Registrar of Motor Vehicles renewed the Plate without issue.

3. When Mr. Grabher's son later moved to Alberta for work, he also obtained a licence plate in Alberta with the family name, which is still in authorized use on a motor vehicle in Alberta today.

Statutory Mechanism

4. Sections 10 and 38 of the *Nova Scotia Motor Vehicle Act*[3] empower the Minister of Transportation to enact regulations dealing with licence plates generally. The Minister enacted the *Personalized Number Plate Regulations* to create a mechanism for the issuance of personalized licence plates. The purpose of the ***Personalized*** *Number Plates Regulations* (the "Regulation") is to provide a means for individuals to "personalize" their licence plates.[4]

5. The Regulation allows a person, who wishes to personalize her plate, to select "a plate designation" (the intended expression) herself, which is then reviewed by the Registrar.[5] People may select a minimum two-character and maximum seven-character expression for their personalized plate.[6] Section 6 of the Regulation states that, "If the Registrar does not refuse to issue personalized number plates to an applicant under Section 5, the Registrar **must** issue to the applicant personalized number plates that bear the plate designation selected by the applicant."[7]

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[1] Affidavit of Lorne Grabher, paras. 1-3.
[2] Affidavit of Lorne Grabher, paras. 1-3.
[3] RSNS 1989, c 293 (the "Act"), Book of Authorities at TAB 1
[4] *Personalized Number Plates Regulations,* NS Reg 124/2005, section 7(2)(e). Also see Transcript of cross examination of Peter Hackett, p. 30, lines 2-5, TAB 2 [emphasis added]
[5] S. 7(2)(e) of the Regulation, TAB 2
[6] S. 7(2)(e) of the Regulation, TAB 2 [emphasis added]
[7] *Ibid*, section 6 of the Regulation, TAB 2 [emphasis added]

6. Sections 5(c)(iv) and 8 of the Regulation stipulate that the Registrar may refuse to issue (or alternatively can recall) a plate if:

> …in the opinion of the Registrar, [the plate] contains a combination of characters that expresses or implies a word, phrase or idea that is or may be considered offensive or not in good taste."[8]

7. In this case, the repeated renewal of the Plate on a yearly basis by the Registrar indicates that the Registrar's opinion was that the Plate **did not** "express or imply a word, phrase or idea that is or may be considered offensive or not in good taste."

8. According to the Registrar, the first personalized plate issued in 1989 was also a person's name: ARLENE.[9]

Complaint and Revocation

9. In October 2016, a still-unidentified individual called the Registrar of Motor Vehicles to complain about the Plate (the "Complaint"). Nothing further is known about the Complaint as the Respondent refuses to provide any further details about it or the unidentified complainant.[10]

10. As a result of the Complaint, the Registrar changed her opinion as to whether or not the Plate "is or may be considered offensive, or not in good taste". The Registrar wrote to Mr. Grabher on December 9, 2016, to inform him that his surname on the Plate "can be **misinterpreted** as a socially unacceptable slogan."[11] The Registrar did not say what slogan she might be referring to or provide any details of the supposed misinterpretation. As discussed below, there is no evidence whatsoever that the revocation of the Plate had anything to do with the 45th President of the United States, Donald J. Trump.

11. The Respondent has also not provided any evidence that Mr. Grabher's Plate harmed anyone or anything in Nova Scotia or anywhere else. The Respondent has not provided any evidence on behalf of the person who complained, why that person complained, or even whether the person who complained resided in Nova Scotia. Despite implying to the contrary in his Affidavit, the Respondent's witness, Peter Hackett, confirmed he has no evidence that Mr. Grabher's Plate harms tourism or the brand of the Blue Nose sailing ship.[12] Despite this, on or about January 13, 2017, the Registrar of Motor Vehicles revoked the Plate.

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[8] Ss. 5(c)(iv) and 8 of the Regulation, TAB 2

[9] Registry of Motor Vehicles – Personalized Plates, TAB 3 [https://novascotia.ca/sns/rmv/registration/4u2read.asp]

[10] Transcript of cross examination of Peter Hackett, pp. 55, 56, undertaking taken under advisement and subsequently refused by the Respondent.

[11] Affidavit of Lorne Grabher, Exhibit "B". [emphasis added]

[12] Transcript of cross examination of Peter Hackett, pp. 86, 87.

12. Over the years, the Registrar has created a list of prohibited words which may not appear on a personalized plate (the "Banned List").[13] The Banned List does not contain any other identifiable family surnames. There are no Anglo-Saxon "Smith", "Cooper", "Anderson", or "Miller" entries. There are plenty of sexual and racist references on the Banned List, however. In revoking the Plate, the Registrar has treated the Grabher surname as objectionable and deserving of censorship similar to the prohibited words on the Banned List. The Banned List includes the following: EATASS, FOQME, HOTCOK, BLOWJB, BRDSHT, FSTFK, FCKPIG, 8CUNT, DCHBAG, GNGBNG, and FQUALL, to name but a few. Mr. Grabher is deeply offended by the Registrar's association of his name with the words on the banned list.

13. Various individual persons holding the office of Registrar have contributed to the Banned List. No one superior to the Registrar reviews this list.[14] While the Respondent initially refused to produce the list as an undertaking from the cross examination of Peter Hackett, after the Applicant filed a Motion for the production of undertakings, the list was provided.[15]

14. A review of the Banned List evidences many innocuous and harmless words that, for no clearly discernible reason, are prohibited from being on a personalized licence plate. These words are not limited to but include:[16]

SAMPLE	WAKE	NONE	GRIT
BC	TV	NIT	WHIG
ODD	SMOKY	VEHICLE	TORY
SAFE	NUMBER	LOW	NDP
TUB	MY MOTEL	CDNNVY	LIBERAL
PREMIER	XCELR8	DRDAVE	REPO
INFUSE	KRAKEN	RTRRACE	HOLDON
GGRRR	JEB	JOE81	NONNE
PRIEST	ISEEU	ABBOT	FENCE
GOLD	UU	BEGAT	AND
GYMN	GAL	MUG	MIC

15. The above is just a small sampling. There are many more words on the Banned List that are not obviously "offensive or not in good taste", and are used in common parlance.

[13] Banned List, TAB 4
[14] Transcript of cross examination of Peter Hackett, line 12, page 44 – line 16, page 45.
[15] Undertakings of cross exam of Peter Hackett, TAB 4
[16] Banned List, TAB 4

16. It is apparent that the Registrar is making up the Banned List in accordance with personal fancy, not in accordance with discernible standards that may be measured and known by the public.

17. Further evidence of this is found in regard to the personalized plate, COCKERS.

18. Mr. Hackett, at his cross exam, was asked whether he was aware of a personalized plate bearing the word, "COCKERS", in use in Nova Scotia. A photo of this plate was taken by the Applicant, of a blue Ford parked at the DMV, on December 18, 2016.[17] The Respondent at first refused to produce information about the "COCKERS" plate, but after a Motion was filed to compel the production of undertakings, the Respondent confirmed that the COCKERS plate had been in use at the time that the Registrar revoked the Plate, but that it is no longer in use.[18]

19. Given the lengthy history of using the Grabher name on license plates without incident, the single anonymous complaint followed by the Registrar's cancelation of the Plate with the only explanation given being that it "can be misinterpreted as a socially unacceptable slogan" and no evidence of what the specific complaint was, what slogan was of concern or any basis for the Registrar's opinion that it "is or may be considered offensive or not in good taste", the most rational conclusions regarding the evidence are as follows:

    a. The Registrar did not have or follow any objective process or criteria for vetting the Plate to determine whether it is or may be considered offensive or not in good taste; and

    b. The Registrar concluded that since the single anonymous complainant had complained about the Plate that she should determine the Plate was offensive even though she had not thought so herself previously.

20. The Registrar could not properly form the opinion contemplated by the Regulation based on a single unspecified anonymous complaint. If the intent of the Regulation was that plates would be canceled if anyone complained about them, it would have been worded to that effect. It is not, yet the conclusion on the evidence is that the Registrar acted as though any complaint led necessarily to the opinion that it should be considered offensive and should be canceled. That cannot be a reasonable interpretation of the Regulation.

21. Since the Registrar was clear about her position for almost three decades (ascertained by the issue and repeated renewal of the Plate) that the expression on the Plate was lawful and not offensive, it was not her opinion that governed the removal of the Plate, as required by law. Rather, the governing opinion that

[17] Transcript of cross exam of Peter Hackett, p. 102.
[18] Undertakings of Peter Hackett, TAB 4

determined the fate of the Plate was that of the anonymous complainant who phoned to complain about the Plate.

Challenge to the Revocation of the Plate and the Impugned Provisions

22. The Applicant challenges the constitutionality of the revocation of the Plate. He contends that the cancellation infringed his freedom of expression and equality rights as protected by sections 2(b) and 15, respectively, of the *Canadian Charter of Rights and Freedoms.* The Applicant states that the censoring of his family's name on the Plate, after 27 years, is unreasonable, arbitrary and an act of discrimination.

23. The Applicant also challenges the constitutionality of sections 5(c)(iv) and 8 of the Personalized Number Plates Regulation (the "Impugned Provisions"), which the Crown argues authorize the actions of the Registrar in cancelling the Plate. The Applicant contends that the Impugned Provisions generate arbitrary and inconsistent decisions contrary to the principles which underpin the rule of law and freedom of expression.

24. Finally, the Applicant contends the Impugned Provisions establish insufficient parameters for either the Registrar or the public to know the limits of state authority to restrict personalized licence plates. The Regulation cannot lawfully imbue the Registrar with untrammeled discretion to restrict freedom of expression,[19] yet that is what the Impugned Provisions do, according to the Respondent. [20] According to Peter Hackett, the Registrar's superior, there is no oversight of the Registrar's discretion when making decisions under the *Motor Vehicle Act*, approving or rejecting personalized plates, or regarding what words she places on the Banned List.[21]

Part 2: The Law

25. The *Constitution Act, 1982*, in part, sets out the following:

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

[19] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1078 [*Slaight Communications*], TAB 5
[20] Transcript of cross exam of Peter Hackett, pp. 44 and 45: the Registrar of Motor Vehicles maintains a list of banned words which are prohibited from appearing on personalized licence plates in the Province of Nova Scotia. The Registrar can add any word she pleases to the list of banned words, and there is no oversight of her decision whatsoever.
[21] Transcript of cross exam of Peter Hackett, p. 44, lines 12-12, p. 45, lines 1-10, p. 53, lines 1-16.

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Multicultural heritage

27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Part 3: Argument

A. Section 2(b) Freedom of Expression

26. Freedom of expression, guaranteed in Canada by section 2(b) of the *Charter*, is a basic individual right and a fundamental value with both "instrumental and intrinsic justifications".[22] Indeed, "[i]t is difficult to imagine a guaranteed right more important to a democratic society".[23]

27. Moreover, freedom of expression is a cornerstone of all liberal democracies, recognized as a human right by the *Universal Declaration of Human Rights* and by the *International Covenant on Civil and Political Rights*, to which Canada is a

[22] *R v Keegstra*, [1990] 3 SCR 69 at para. 194, TAB 6

[23] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 (Cory J.) at para. 78, TAB 7

member state. The *Charter* is presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. International treaties binding on Canada require Canada to protect freedom of expression, and authorize restrictions on free expression only where "provided by law [and] necessary: (a) For respect of the rights or reputations of others."[24]

28. One of the core values underpinning freedom of expression is "promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit".[25]

29. The Supreme Court of Canada has "long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*", including freedom of expression.[26] According to the Court, "an activity by which one conveys or attempts to convey meaning will prima facie be protected by s. 2(b)."[27]

30. According to the Court in *Translink*,

> …the Court has recognized that s. 2(b) protects an individual's right to express him or herself in certain public places *(Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139 (airports); *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084 (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity prima facie protected, but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).[28]

The test for an infringement of section 2(b) of the *Charter*

31. The Supreme Court of Canada has adopted a three-part test to determine whether freedom of expression has been infringed:

    a. Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of the section 2(b) protection?

    b. Is the activity excluded from that protection as a result of either the location or the method of expression?

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[24] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, article 19, TAB 8; *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), article 19, TAB 9; see also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 65, and citations therein, TAB 10.
[25] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 75, TAB 11
[26] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 ["*Translink*"] at para. 27, TAB 12
[27] *Ibid*.
[28] *Ibid*.

c. If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?[29]

32. The third part of the test is met. If Mr. Grabher's expression on a personalized licence plate is protected by section 2(b) of the *Charter*, the cancellation of his Plate impairs his freedom of expression.

33. The first two parts of the test are analyzed below.

The Plate bears expressive content

34. The Minister of Transportation was not obliged to create a process by which persons may personally express themselves on their licence plates. The Minister could have left the status quo of random letters and numbers on licence plates in place, as set out in separate Regulations enacted under the Motor *Vehicle Act.*[30] Under that framework, the state generates unique licence plates, not individuals.

35. In choosing to create a space on licence plates for persons to express themselves, the Minister of Transportation (on behalf of the Province of Nova Scotia) has engaged the *Charter* rights of those citizens who choose to express themselves on their licence plates.[31]

36. The issue and subsequent 26 renewals of the Plate show the importance of the Plate to the Applicant. Mr. Grabher has demonstrated how serious he is about the expression on the Plate. He has been intentional and consistent in his use of the Plate. He has substituted no other expression on the Plate.

37. As stated in *CBC v. Canada*, the Supreme Court's decision in *Irwin Toy Ltd. v. Quebec (Attorney General),*[32] "lay the groundwork for a large and liberal interpretation of freedom of expression" in holding that "prima facie, freedom of expression protects all expressive activity".[33] As a result, for an expressive activity to be considered expressive and meet the first part of the test, the applicant must merely demonstrate that the activity "attempts to convey meaning".[34]

38. The first part of the test is met. Mr. Grabher uses the Plate to publicly publish his family's name on the Plate. For Mr. Grabher, the Plate is an expression of his family's identity and immigrant history.

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[29] *Canadian Broadcasting Corp. v. Canada Attorney General*, 2011 SCC 2 ("*CBC v. Canada*") at para. 38, TAB 13

[30] *Number Plates Regulations,* NS Reg 173/95, TAB 14

[31] *Translink*, at para. 121: "Having chosen to make the sides of buses available for expression on such a wide variety of matters, the Transit Authorities cannot, without infringing s. 2(b) of the Charter, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law." TAB 12

[32] [1989] 1 S.C.R. 1030 *[Irwin Toy*], TAB 15

[33] *CBC v, Canada*, at 34, TAB 13

[34] *Irwin Toy*, at para. 42, TAB 15

The expression is not disqualified from protection by section 2(b) by virtue of either location or method of expression

39. Personalized licence plates are the property of the Nova Scotia government, just as the sides of city buses were in the *Translink* case.

40. Much as in *Translink*, where the City of Vancouver determined to permit advertising on city buses, the Province of Nova Scotia has decided to create an avenue for members of the public to express themselves on licence plates.

41. According to the Respondent's website, the personalized plate program is intended for the use of the public, including to express the use of names, occupations, hobbies, and other personal slogans which are intended to communicate something about the registered owner of the plate in question.[35] Like the side of a bus in *Translink*, the primary purpose of a personalized plate is not expression, but this does not mean that expression is not permitted, or, once permitted, protected. In fact, past practice shows that expression is not only permitted in this space but encouraged.

42. Neither the location of the expression (on a personalized licence plate) or the method of expression (the mounting of the Plate on a motor vehicle) give any indication that the expression in question is not protected. On the contrary, the Respondent specifically created the personalized plate program to facilitate such expression, and the Applicant made use of that venue to express himself for many consecutive years, with the continuous approval of the Respondent.

43. In *Translink,* the Court found support for the premise that expression on the sides of public buses was protected by section 2(b) of the *Charter* due in part to the historic use of that medium for advertising. There was also evidence in that case that private parties continued to pay for advertising space on the sides of buses.[36] Further, the Court noted that the advertising on the sides of buses neither impaired the normal use of a bus to navigate the roads and carry passengers, nor did it "undermine the values underlying freedom of expression."[37]

44. The Supreme Court found in *Canadian Broadcasting Corp v. Canada (Attorney General)* that, if either the method or the location of the conveyance of a message is to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by 2(*b*): self-fulfillment, democratic discourse and truth finding.[38]

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[35] Registry of Motor Vehicles – Personalized Plates, TAB 3 [https://novascotia.ca/sns/rmv/registration/4u2read.asp]
[36] *Translink* at para. 42, TAB 12
[37] *Ibid*
[38] *CBC v. Canada*, at para. 37, TAB 13

45. In this case, the government collects a fee in exchange for displaying "personalized" expression on a licence plate. The historical and actual use of personalized plates evidences the history of public expression in this medium. The use of personalized licence plates does not "undermine the values underlying freedom of expression." On the contrary, it advances those values. The personalized plate program creates a space where the uniqueness of the individual can be expressed on a licence plate, each of which must also be unique).

Conclusion on whether the actions of the Respondent have infringed section 2(b)

46. The Registrar cancelled the Plate due to the content of the expression on it and restricted the Applicant's "fundamental" freedom of expression as protected by section 2(b) of the *Charter*. In *Translink*, the Court held that the Respondent was required to justify the infringement of expressive rights protected by the *Charter* under section 1 of the *Charter*. The Respondent in this case is required to do the same.

B. Section 15 Equality Rights

47. Section 15(1) of the *Charter* grants equal protection to every Canadian before the law, without discrimination based on enumerated grounds. It states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

48. The Supreme Court has affirmed a two-part test for assessing whether there has been a violation of section 15(1): "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[39] Section 15(1) applies to government actions and decisions as it does to laws.[40]

49. According to s.27 of the *Charter*, section 15 must "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[41]

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[39] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 30, TAB 16

[40] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 ("*Little Sisters*") at para. 110. In this case, the Court phrased the consideration as whether "the law, program or **activity** imposes differential treatment." TAB 17 [emphasis added]

[41] *Charter*, s. 27, TAB 18

Distinction based on race or ethnic origin

50. Mr. Grabher is of Austrian-German descent, and his "race" "national" and "ethnic origin" are reflected in his surname. The Registrar is aware that the Plate is the surname of the Applicant.[42] As a government official, and a public servant dealing with the diverse public, the Registrar is, or ought to be, aware that many immigrant families form the cultural mosaic that is Canada. The first part of the test is met: the Regulation (which is only the "opinion of the Registrar") has resulted in the creation of a distinction based on an enumerated ground, namely nationality, race or ethnic origin, by treating an ethnically German name as an English phrase and attaching an idiosyncratic and demeaning reading to it.

51. The personalized plate program exists to personalize one's licence plate. This may include reference to one's profession, one's hobbies, or one's name,[43] provided that the characters used number more than two and less than seven.

52. The Nova Scotia *Multiculturalism Act*[44] states that the "recognition and acceptance of multiculturalism" is "an inherent feature of a pluralistic society."[45] According to the *Multiculturalism Act*, it was established to promote multiculturalism by "establishing a climate for harmonious relations among people of diverse cultural and ethnic backgrounds **without** sacrificing their distinctive and ethnic identities" and "encouraging the continuation of a multicultural society as a mosaic of different ethnic groups and cultures."[46]

53. The association of Mr. Grabher's surname with the words on the Banned List is offensive to the Applicant, and an affront to his dignity. As the Supreme Court noted, a surname "symbolizes, for many, familial bonds across generations."[47]

54. In *Kindler v. Canada (Minister of Justice),*[48] the Supreme Court of Canada considered the principle of personal dignity, which has been developed by the Court in the section 15 jurisprudence. In interpreting the *Charter*, and particularly section 15, the courts should consider the "respect for the inherent dignity of the human person" and "respect for cultural and group identity."[49]

55. According to the Court, "the promotion of equality" under section 15 means the "promotion of a society in which all are secure in the knowledge that they are

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[42] December 9, 2016 Letter of the Registrar to Lorne Grabher, Amended Affidavit of Lorne Grabher, Exhibit "B".
[43] Registry of Motor Vehicles – Personalized Plates, TAB 3 [https://novascotia.ca/sns/rmv/registration/4u2read.asp].
[44] *Multiculturalism Act*, RSNS 1989, c 294
[45] *Multiculturalism Act*, s. 3(a), TAB 19
[46] Excerpts of Multiculturalism Act, TAB 19 [Emphasis added]
[47] *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34 at para. 17, TAB 20
[48] [1991] 2 SCR 779 ("*Kindler*"), TAB 21
[49] *Kindler* at para. 145, citing *R. v. Oakes,* TAB 21

recognized at law as human beings equally deserving of concern, respect and consideration."[50]

56. In any section 15 case where discrimination has been alleged, "a court's central concern will be with whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim".[51]

57. The Court in *Quebec (Attorney General) v. A,*[52] noted that the principle of substantive equality at the heart of section 15 of the *Charter* is closely aligned with the principle of human dignity.[53] Section 15 exists "to eliminate any possibility of a person being treated in substance as "less worthy" than others.[54] Section 15 recognizes that "society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences."[55]

Distinction or disadvantage based on prejudice

58. The second stage of the section 15 test asks whether or not the distinction creates a disadvantage by perpetuating prejudice or stereotyping?

59. The revocation of the Plate has become a highly publicized matter. The case has been mentioned in numerous news articles, and even in the House of Commons prior to the commencement of this litigation.[56]

60. The Respondent's continued legal opposition to the Applicant's claim is well-known. The significant public resources spent fighting against the Applicant's claim communicates to the public that the state believes that it is suddenly a matter of serious public import (despite nearly three decades of use with no demonstrable harm or issues with renewal) to keep the Grabher name off of a personalized licence plate. The Respondent is undeterred by the fact that it has no proof of harm resulting from the use of the Plate. To remedy this lack of evidence of harm, the Respondent has been compelled to make vague allusions to the effect that the Plate hurts tourism in the province.[57] On cross examination, these innuendos have been shown to be groundless. There is no proof that the

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[50] *Kindler* at para. 147, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, TAB 21
[51] *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 at para. 83, TAB 22
[52] [2013] 1 SCR 61 ("*Quebec v. A*"), TAB 23
[53] *Quebec v. A* at para. 100, TAB 23
[54] *Ibid.*
[55] *Ibid.*
[56] On March 24, 2017, the MP for Peace River—Westlock, AB rose in the House of Commons and stated, in part, "Yesterday we learned that a certain Mr. Grabher came face to face with the "I'm offended" buzz saw. For 25 years, Mr. Grabher has had a license plate with his last name on it. However, now it seems, on the basis of a single complaint, the plate was cancelled."
[https://openparliament.ca/debates/2017/3/24/arnold-viersen-1/]
[57] Affidavit of Peter Cameron Hackett, affirmed December 14, 2017, pages 4-5.

Plate ever hurt tourism in Nova Scotia, or that it would hurt tourism if reinstated. Frankly, the very proposition is absurd.

61. The Registrar's cancellation of the Plate and her continued public efforts against the Applicant convey the message to the public that there is something objectionable about the Grabher surname, and therefore about the Grabhers themselves. This is deeply hurtful to the Applicant.

62. For the Applicant, this case is about more than a personalized plate. It is about his family's name, personal dignity, and the ongoing insult by the Respondent in its censorship of the Plate.

63. According to the Court, the inquiry of whether there has been discrimination must be conducted from the subjective perspective of the Applicant, and from no other perspective.[58] The Court also must determine whether the Applicant is being objective about his assertions of discrimination.[59]

64. The subjective element is satisfied: Mr. Grabher has testified about the continued impact of the revocation of the Plate, the insult to his family's name, and his observations regarding the inconsistencies in the Respondent's conduct.[60] The Applicant notes the long history of the Plate, without issue. He notes the existence of other government place names,[61] which each could be viewed as far more offensive than his surname.

65. Mr. Grabher's sense of the insult to his family's immigrant status and foreign ancestry which results from the censorship of his family name is real and ongoing.

66. The objective element is also satisfied. Not only was the Plate revoked, the standard of measurement for its revocation is demonstrably arbitrary and capricious. The only existing standard is the changeable standard of the Registrar's opinion, and it has shown to be subject to influence by even one anonymous person who calls to complain.

67. The classification of his surname with the common obscenities on the Banned List is a crowning insult to the Applicant.

68. The Applicant submits the test under section 15(1) of the *Charter* has been met.

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[58] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 ("Law") at para. 59, TAB 22

[59] *Ibid*.

[60] Amended Affidavit of Lorne Grabher, paras. 9-15.

[61] *Ibid*, paras. 16-18.

The Revocation of the Plate is unreasonable

69. The decision of the Registrar to cancel the Plate infringed the Applicant's *Charter* rights, as protected by sections 2(a) and 15, and undermined the associated fundamental *Charter* values of self-fulfillment and human flourishing, multiculturalism, and equality – all of which are integral to the proper functioning of Canada's liberal democratic society.[62]

70. Unless the negative impact on the *Charter* rights and values at stake has been proportionately balanced with an applicable statutory mandate, if there is one, the decision to cancel the Plate is unreasonable.[63]

71. The Regulation's mandate is to create a mechanism whereby citizens can express themselves on their licence plates. Mr. Grabher has done so for 27 years without incident. The Applicant is not arguing that the Registrar cannot limit certain expression on licence plates. The Applicant argues that any such restriction must occur pursuant to a discernible standard, a factor which does not exist in the instant case. There cannot legally be a statutory mandate to restrict a fundamental freedom pursuant to the arbitrary whim of one single bureaucrat.

72. The Plate has not been demonstrably shown in any way to cause harm incompatible with society's proper functioning.

73. There is no discernable benefit to Nova Scotia by the discontinuance of the Plate. Yet the impairment of the *Charter* rights and values at stake is severe. Mr. Grabher has been denied the ability to continue to fulfill himself through the expression of his heritage and to be treated equitably in doing so.

74. A proportionate balancing of a statutory mandate and the *Charter* rights and values invoked is "one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate." In the within circumstances, no effect was given to the *Charter* protections at stake. Only a proportionate decision can be reasonable.[64] The decision to cancel the Plate is entirely disproportionate and therefore unreasonable.

C. The Court's ability to craft a remedy under Section 24(1) of the *Charter*

75. This Court has the authority to craft a suitable remedy to address this claim pursuant to section 24(1) of the *Charter*. Mr. Grabher claims his constitutional freedoms and equality rights have been infringed by cancellation of his Plate and

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[62] *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 at para. 21, TAB 24; *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 49, TAB 25

[63] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 ("*Loyola*") at paras. 32-38, TAB 26

[64] *Loyola*, at paras. 39-40, TAB 26

seeks the reissuance of the Plate. If the claimed infringement is made out, then this Court is empowered to craft a suitable remedy under section 24(1) of the *Charter* to rectify it. The Court may order the reissuance of the Plate under the *Charter*.

76. In the 2004 case of *R. v. Innocente*,[65] the Nova Scotia Court of Appeal held that the discretion granted under section 24(1) of the *Charter* is "very broad"[66] and quoted the following passage from the Supreme Court of Canada case in *R. v. Mills*[67] with approval:

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[68]
> [Emphasis by the Court of Appeal in *Innocente*]

77. A *Charter* claim alleging an infringement of rights may seek a remedy that requires the government to take positive steps to act or to cease to act, or both. Such an Order may be similar to *certiorari* or mandamus or *habeas corpus* or *quo warranto*, or any other administrative law remedy (having its roots in the prerogative writs of the English courts), but that does not mean that the *Charter* relief sought is actually an administrative remedy. The *Charter* codifies citizens' constitutional rights, and while similar to some administrative rights in some respects, *Charter* freedoms are separate and distinct, and codified on a national and constitutional level.

78. In the case of *Doucet-Boudreau v. Nova Scotia (Minister of Education),*[69] francophone parents applied for an Order to compel Nova Scotia to comply with the requirement in the *Constitution Act, 1867*, to provide education in the French language. The Court of Appeal in that case had struck down a portion of the trial judge's decision that required the Province to provide ongoing reports detailing its efforts to comply with section 23 of the *Charter*. The Court of Appeal held that the trial judge was *functus officio* following the issuance of his decision and that he therefore did not have the authority to make an order that required progressive updates to himself so that he could monitor compliance.

79. On appeal, the majority of the Supreme Court of Canada held that:

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[65] 2004 NSCA 18 ("*Innocente*"), TAB 27
[66] *Innocente* at para. 19, TAB 27
[67] *R. v. Mills*, [1986] 1 S.C.R. 863, TAB 28
[68] *Innocente* at para. 20, TAB 27
[69] *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, TAB 29

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances.[70]

80. In the instant case, this Honourable Court has the authority to order the reissuance of the Plate and even to monitor compliance with that Order pursuant to section 24(1) of the *Charter*, if it deems necessary.

D. Both section 52(1) and 24(1) arguments in this case

81. Mr. Grabher seeks remedies under both section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*.

82. The unusual nature of this case dictates that Mr. Grabher proceed on both grounds. First, the flawed nature of the Regulation requires this Court to act pursuant to section 52(1) to prevent unconstitutional regulations from being left in force and further undermining the rule of law and *Charter* rights.[71] Consideration of the words on the Banned List[72] shows that the effect of the Regulation is the Registrar censoring lawful speech, without justification.

83. Second, it is submitted that Mr. Grabher has successfully proven that his *Charter* rights have been infringed by the Registrar, without justification.

84. Mr. Grabher does not seek damages in this case. The Applicant only seeks to clear of his family name from the discriminatory and arbitrary decision of the Registrar.

85. According to the Supreme Court of Canada, "[t]he jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy."[73] Mr. Grabher, who for the two years has been prohibited by the Respondent from displaying the Plate, also warrants a declaration pursuant to section 24 that the Registrar's Decision violate his *Charter* rights.

86. If the Regulation is struck down, it does not provide the Applicant with a remedy. According to the Court in *Ferguson*, "section 52 does not create a personal

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[70] *Doucet-Boudreau* at para. 87, TAB 29

[71] *See R. v. Ferguson*, 2008 SCC 6 ("*Ferguson*") at paras 65-66, TAB 30; *Translink* at para 89, TAB 12; *Doucet-Boudreau*, at para. 87, TAB 24.

[72] See page 5 of this Brief. For the complete list of banned words, see the Undertakings from the cross examination of Peter Hackett, TAB 4.

[73] *Ferguson* at para 63, TAB 30

remedy."[74] That is the function of section 24(1). Hence, both are plead in this case.

E. Argument on Constitutionality of the Regulations under section 52(1) of the *Constitution Act, 1982*[75]

87. The Applicant challenges the constitutionality of section 5(c)(iv) and 8 of the Regulation (the "Impugned Provisions"), pursuant to section 52(1) of the *Constitution Act, 1982.*[76]

88. The purpose of section 52(1) is different than the purpose of section 24(1) of the *Charter*. "Section 52(1) provides a remedy for laws that violate *Charter* rights either in purpose or in effect,"[77] whereas section 24(1) provides a remedy to persons who themselves have had a *Charter* right infringed.[78]

89. The Applicant has claimed that the Impugned Provisions infringe his *section* 2(b) and 15 of the Charter in their purpose or effects.

90. In order to justify the infringement of a "fundamental freedom", in this case freedom of expression, and section 15 equality rights, the Respondent must show that the limitation is in accordance with "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[79]

Prescribed by law

91. According to the Supreme Court of Canada, the "prescribed by law" requirement exists to protect "the public against arbitrary state limits on *Charter* rights."[80] While this issue will be more comprehensively examined in the section dealing with the constitutional challenge to the Impugned Sections themselves, it should be noted that the Registrar does not have, and cannot have been delegated, "untrammelled discretion"[81] under the Regulation.

92. The Court quoted Professor Hogg in regard to the protection against arbitrary state action:

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[74] *Ibid* at para. 59, TAB 30

[75] This is not a judicial review, and the Applicant submits that the standard by which the conduct of the Registrar must be judged is correctness, pursuant to the test set out by the Supreme Court of Canada in *R v. Oakes.*

[76] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, TAB 31

[77] *Ibid* at para. 61, TAB 30

[78] *Ibid*.

[79] *Charter*, s. 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[80] *Translink at* para. 51 citing *R. v. Therens*, [1985] 1 S.C.R. 613, TAB 12

[81] *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at para. 41, TAB 32

> The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.[82]

93. This case shows that the opinion of the Registrar is a moving target. The Respondent can point to no system, no standard, for scrutinizing the Plate except the Registrar's opinion. The requirement that laws be precise, however, is fundamental to the rule of law and constitutionalism to ensure that citizens know what the law is, and to ensure that the government knows what the law is, as well. In this case, the Regulation does neither. This type of unknowable subjectivity fails to conform to the objective standards established by the Supreme Court of Canada in *Translink*.

94. The Applicant should be able to rely on the law. For three decades, Mr. Grabher understood that his name could lawfully be displayed on a personalized plate. Mr. Grabher has been consistent in his following of the legal requirements. He has not done anything wrong. He has relied not only on the Regulation, but also on his right of expression as protected by the *Charter*. Neither the *Charter* nor the Regulation has changed. But the Plate has still been revoked.

95. This result is an enigma from the standpoint of public policy and the rule of law. From Mr. Grabher's vantage, there might as well not be a law governing the legality of his Plate. The same law which repeatedly authorized the Plate's use is relied on by the Respondent for its revocation.

96. Worse, the same bureaucratic official (the Registrar) who repeatedly approved the Plate has now revoked it. When the Registrar wrote to advise the Applicant that the Plate was revoked, it was not to point to any law which governed her action. She referred to no statute or Regulation. The Registrar does not even refer Mr. Grabher to her own opinion, but rather to the opinion of the unidentified caller who complained.[83] The Registrar provides no further details.

97. It is clear that the revocation of the Plate and the phone call from the unidentified Complainant are linked. The Plate was always renewed without issue and had never previously been revoked. The Registrar herself points to the Complaint as a determinative factor.[84]

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[82] *Translink* at para. 50, TAB 12
[83] Amended Affidavit of Lorne Grabher, Exhibit "B"
[84] *Ibid.*

98. The Registrar does not have the authority under the Regulation to substitute, or fetter, her opinion for that of anyone else. The Registrar alone is tasked with determining if a Plate "is or may be considered offensive or not in good taste." Fettering occurs when a decision-maker does not genuinely exercise independent judgment, such as when she binds herself to another person's opinion. It is a common sense rule of the common law that the person bestowed with discretion must exercise it,[85] not cede it to another.

99. Despite the Registrar's mistake, the Registrar can make whatever decisions she wants in regard to personalized licence plates.[86] According to Mr. Hackett, the Registrar can ban any word she wants.[87] There is no oversight of the exercise of this discretion, and no standard. The Registrar answers to no one in the regard to the exercise of her discretion.[88] This means that the Registrar has "untrammelled discretion", when at law this cannot be the case.

100. The Registrar's cancellation of the Plate was arbitrary, and in accordance with no discernible consistent standard. According to the Supreme Court, limitations on *Charter* freedoms "resulting from arbitrary state action continue to fail the "prescribed by law" requirement."[89]

101. It is submitted that this demonstrable arbitrariness causes section 5(c)(iv) to fail the "prescribed by law" test in section 1.

Oakes Analysis

102. The next part of the section 1 analysis is the two-part test set out in *R. v. Oakes.*

103. The first part of the *Oakes* test requires the Respondent to establish whether there is a pressing and substantial objective regarding the limitation of expression on personalized licence plates.

104. The second part of the *Oakes* test is the proportionality test. The Respondent must show:

- First, that the measures adopted to establish the objective must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective;

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[85] *Homburg Canada Inc. v. Nova Scotia (Utility and Review* Board), 2010 NSCA 24, para. 35, TAB 33
[86] Transcript of cross examination of Peter Hackett, lines 5-22, page 110.
[87] *Ibid*, line 12, page 44 – line 2, page 45.
[88] *Ibid*, lines 3-16, page 45.
[89] *Translink* at para. 55, TAB 12

- Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question;

- Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[90]

Pressing and Substantial Objective

105. In the Affidavit of Peter Hackett, the Affiant claims that Nova Scotia has a mandate to ensure “welcoming, safe, caring and respectful” roadways. Mr. Hackett conceded that this mandate is not reflected anywhere in the *Motor Vehicle Act.* There is no such mandate in the Regulation.

106. However, for the purposes of this matter, the Applicant concedes that the Respondent would be justified in limiting some expression on personalized plates, provided that there is a discernible, testable standard to govern such limitations. The Regulation establishes no such standard.

Proportionality

107. The first part of the proportionality test requires an analysis of whether the measures taken to achieve the objective are rationally connected to that goal. The measures cannot be “arbitrary, unfair or based on irrational considerations”.[91]

Rational Connection

108. The Applicant submits that the evidence in this case illustrates that the “measures” (for the purposes of this case, s. 5(c)(iv) and 8 of the Regulation) are arbitrary, unfair and based on irrational considerations.

109. Instead of creating an objective standard as to what is or is not unlawful expression on a personalized plate (for example, speech prohibited under the *Criminal Code*, or obscene expression), the Respondent has created an unknowable and shifting standard of measurement: the opinion of the Registrar. It is the opinion of the Registrar alone which governs a determination of “what is or may be considered offensive or not in good taste”.[92]

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[90] *R v. Oakes*, [1986] 1 S.C.R. 103 at paras. 73-75, TAB 34

[91] *Oakes*, [1986] 1 S.C.R. 103 at para. 74, TAB 34

[92] According to Peter Hackett, the Registrar is known to sometimes consult www.urbandictionary.com in its determination of whether a prospective word is “offensive or not in good taste.” Mr. Hackett knew nothing about who maintains that particular website or how words are uploaded to it – transcript of cross exam of Peter Hackett, pp. 48, 34.

110. As a result, the Registrar can do whatever she wants, as in this case. She is accountable to no one, other than this Court. The lack of checks and balances or oversight, coupled with the authorization of arbitrary conduct, undermines any rational connection to the objective of ensuring that there are standards to ensure state censorship is not arbitrary and capricious.

111. The arbitrariness and irrationality of the Respondent's "measures" is apparent when one considers the widespread public usage of words by government, both municipal and provincial, which might be considered far more objectionable than the surname of the Applicant on the Plate.

112. For example, there is a "Dildo, Newfoundland", a "Swastika, Ontario", and a "Red Indian Lake, Newfoundland". There is a "Crotch Lake, Ontario", and a "Old Squaw Islands, Nunavut". There is a "Blow Me Down Provincial Park, Newfoundland". There is a "Come By Chance, Newfoundland". Here in Nova Scotia, there is a "Cape Negro."[93] These places' names are on maps and city signs. They could be construed as sexist, racist, and/or misogynistic. But they are officially the names of established Canadian locations.[94]

113. Such official public place names are inconvenient for the Respondent. The Respondent filed and argued a Motion before the Honourable Justice Muise on February 1, 2018, requesting that the Court strike out references to the place names from the Affidavit of Lorne Grabher, as though striking out their reference in an Affidavit nullified their existence.

114. Justice Muise refused to strike out the place names, however, noting in his oral decision on the Respondent's Application that the words "offensive" and "not in good taste" are undefined in the Regulation, and the list of Canadian place names assist to establish a benchmark as to permissible speech in regard to what "is or may be considered offensive or not in good taste."[95]

115. The Respondent also attempted to strike portions of Mr. Grabher's Affidavit dealing with the Halifax Water Board's bus ad campaign on the backs of city buses.[96] In his decision on the Respondent's Motion, Justice Muise refused to strike the ads for the same reason as the Canadian place names. The ads included the following phrases:

    a. "Powerful sh*t";
    b. "Be proud of your Dingle"; and
    c. "Our minds are in the gutter".[97]

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[93] Nova Scotia Archives: Place-Names, TAB 35
[https://novascotia.ca/archives/places/page.asp?ID=107]
[94] Amended Affidavit of Lorne Grabher filed May 22, 2018, paras. 16-18; Exhibits J – O.
[95] Oral Decision of Justice Muise, February 2, 2018, TAB 36
[96] *Ibid*.
[97] Affidavit of Lorne Grabher, para. 13.

116. In an email dated September 28, 2017, James Campbell of Halifax Water offered the following explanation for the bus ads:

> The intent of these busboards is certainly not to offend, but to raise awareness of the importance of the full water cycle… Raising awareness around these issues, which most people don't think about at all, required eye catching graphics and messaging to get people thinking and talking.[98]

117. Similarly, the intent of Mr. Grabher is not to offend. It is simply to display his name.

118. Finally, the Respondent, relying on its expert evidence, may urge the Court to infer somehow that the Registrar revoked the Plate because of comments by Mr. Donald Trump in 2005, prior to becoming President of the United States of America. There is no evidence before this Court that the Registrar considered Donald Trump at all.

119. Even if there were such evidence that the Registrar revoked the Plate because she was considering comments made by Donald Trump, the comments of celebrities or foreign dignitaries are not a benchmark for whether expression is lawful or not. This Honourable Court should reject contentions by the Respondent to the contrary.

Expert Report of Dr. Rentschler and Rebuttal Expert Report of Dr. Soh

120. The Respondent informed Mr. Grabher that it was revoking the Plate on December 9, 2016.[99] The Respondent communicated that it had received "a complaint" about the Plate. No details were provided about the Complaint. The Respondent said that Mr. Grabher's surname could be "misinterpreted" as a "socially unacceptable slogan", and that the Respondent was cancelling the Plate as of January 13, 2017.[100]

121. In this proceeding, the Respondent has never claimed that the revocation of the Plate was related in any way to the comments of Donald Trump in 2005 prior to becoming President of the United States in 2016. In fact, the Respondent initially took steps to disassociate the revocation of the Plate from President Donald Trump.

122. In March 2017, Michael Tutton, a reporter with the Canadian Press, contacted the Registrar for information about the revocation of the Plate. Mr. Tutton was referred to Brian Taylor, then-Media Relations Advisor for the Department of Transportation. Mr. Tutton asked Mr. Taylor two questions: "Did the complainant raise Trump's "Grab her" comment in any way" and were Trump's comments "a

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[98] *Ibid*, para 14 and Exhibit "I"
[99] Affidavit of Lorne Grabher, para. 7.
[100] *Ibid*, also see Exhibit "B" to the Affidavit of Lorne Grabher.

factor in the government's decision". Media Relations Advisor Taylor's response was succinct: "it wasn't referenced in any of the official correspondence I saw."[101] Mr. Taylor provided Mr. Tutton with his phone number.

123. Michael Tutton subsequently published an article in HuffPost following his contact with Brian Taylor. Mr. Tutton reports that Brian Taylor said that "the rejection of Grabher's licence wasn't related to obscene comments made by Donald Trump in 2005 and released during last fall's U.S. presidential campaign, in which Trump said he grabbed women by the genitals."[102]

124. Mr. Taylor has not contested Mr. Tutton's recounting of his communications with Mr. Taylor. There is no evidence in this case connecting the revocation of the Plate to Donald Trump or anything he said.

125. The reality is that the supposed connection between the revocation of the Plate and Donald Trump is a poorly-veiled afterthought relied on by the Respondent to justify an action (the cancellation of the Plate) that was not justifiable on any proper basis at the time it was made.

126. The Respondent's expert in this matter, Professor Carrie Rentschler, provides opinion evidence about what she perceives is a social link between the Plate and Donald Trump.[103] Professor Rentschler uses these perceived links to contend that the Plate is broadly "offensive" to the public.[104] Professor Rentschler provides no examples of any specific people or studies who find the Plate offensive, however, or any examples of real world people who see the Plate and think of Donald Trump or any comments he made.

127. Specifically, Professor Rentschler's evidence is that she discusses "critical academic scholarship that examines how Donald Trump's use of the phrase "grab them by the pussy" was reported during the 2016 US presidential election.[105] Professor Rentschler claims that:

> …the public visibility of Trump's statement and the broad public debate that formed around this major news event thus became significant cultural and media phenomenon that created key interpretive frameworks for understanding the specific meanings of the license plate expression "Grabher" as supportive of violence against women.[106]

128. Dr. Rentschler claims that, "even though the license plate statement did not include "by the pussy," the license plate expression "Grabher" had a direct

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[101] Affidavit of Brian Taylor filed January 24, 2018, Exhibit "A"
[102] Affidavit of Lorne Grabher, sworn January 16, 2018, Exhibit "A"
[103] Affidavit of Carrie Rentschler, see for example pps. 17-24.
[104] *Ibid.*
[105] Affidavit of Carrie Rentschler, p. 13
[106] *Ibid,* p. 17

cultural referent [sic] in Trump's statement "grab them by the pussy."[107] Dr. Rentschler's opinion is also that media coverage generally of sexual assault cases contributes to the public offensiveness, and risk of sexual assault against women, from the Plate.[108] She opines repeatedly that the Plate endangers the general public.[109] She provides no examples of this being true.

129. The Applicant has filed a Rebuttal Expert Report from Dr. Debra Soh. Dr. Soh has a PhD in Psychology in the area of Brain, Behaviour, and Cognitive Sciences from York University, and a Postgraduate Diploma in Criminological Psychology from the University of Birmingham in the United Kingdom. She has 11 years of experience conducting research on male sexuality, including on the topic of sexual offending, and has worked clinically with violent sexual offenders in the context of assessment and therapy.[110]

130. After review of Dr. Rentschler's Affidavit, Dr. Soh's evidence was as follows:

    a. "There is no discernible connection between coverage [in the media] of sexual assault cases and whether or not a license plate increases violence against women";[111]

    b. The word, "grab," is defined by the Oxford Dictionary as "grasp or seize suddenly and roughly;" however, this definition does not make any assumptions that doing so would be without an individual's consent. One could imagine any number of circumstances in which grabbing an individual could be a positive experience; for example, in an instance of playfulness";[112]

    c. "There exists no empirical evidence or research to suggest that exposure to cultural slogans normalizes sexual violence against women or leads an individual who would not otherwise behave in this way, to commit a sexual offense. A psychologically healthy person will not feel justified in committing a sexual offense, even if they were exposed to a phrase that explicitly condoned sexual violence against women, whether or not the individual believes that the statement is being endorsed by the provincial government";[113]

    d. "In the 2 years since this news initially broke [re: Access Hollywood 2005 Trump and Billy Bush], it is unlikely that members of the public would be primed to make an association between seeing the letters "Grabher" on a license plate and the words "by the pussy," based on

[107] *Ibid*
[108] *Ibid*, pp. 3, 4, 6.
[109] *Ibid*, for example pp. 13, 15, 16
[110] Soh, p. 6
[111] Soh, p. 9
[112] Soh, p. 12
[113] Soh, p. 13

comments made by Trump during the U.S. Presidential election. Furthermore, even if this association were made in the viewer's mind, it would not lead a psychologically healthy individual to commit a sexual offense, or to support attitudes endorsing sexual violence against women";[114]

e. "There are no empirical, quantitative (i.e., numbers-based) studies to suggest that "aggrieved white masculinity" supports violent acts or sexual assault against women. Further, there is no evidence that "aggrieved white masculinity" is a social phenomenon in Nova Scotia, or that Mr. Grabher or anyone else suffers from it. It is doubtful whether "aggrieved white masculinity" is even a real thing, or that it is sufficiently ascertainable to make it relevant to the question of whether or not the license plate in this case creates an elevated risk of harm to society. Certainly, no evidence on these points is provided by Professor Rentschler";[115]

f. There is no evidence at all that Mr. Grabher's plate creates an elevated risk of rape. Therefore, there is no reason to think that people who see his name will fear being raped simply because others can see his name also;"[116]

g. To suggest that Mr. Grabher's surname is "a statement in support of physical violence against women" (p. 29) is completely unfounded;[117]

h. That the English language is not read as Professor Rentschler contends: the word, "together", for example, represented on a license plate as "2gether", is not demonstrably a trigger for violence simply because it may be taken to contain the words, "To Get Her". Similarly, the public use of the written stand-alone word "together" is not a trigger for sexual violence. Again, if it were, it would be empirically demonstrable";[118]

i. In response to Dr. Rentschler's contention that Canada is supportive of "rape culture": "there is no evidence that Canada is a "rape culture" or "a culture supportive of violence" and that incidents of sexual violence are decreasing not increasing;[119]

j. The Dr. Rentschler makes unfounded claims against male sexual violence – "This is not what would typically be seen in most men; as mentioned, most men do not find the thought of committing sexual

[114] Soh, p. 16
[115] Soh, p. 17
[116] Soh, p. 19
[117] Soh, p. 19
[118] Soh, p. 12
[119] Soh, p. 13

assault pleasant. Most would instead be horrified at the thought";[120] and

k. The Plate does not encourage a culture supporting sexual violence against women, and if the Registrar were to reinstate it, allowing it on the road will not lead to women in society being less safe."[121]

131. Dr. Rentschler was qualified as an expert in "representations of gendered violence across media platforms".[122] Justice Muise found her to be capable of providing opinion evidence in relation to: the effect of social and cultural context on interpretation of expression; whether "language that supports gendered violence plays a contributing role in promoting violence against women"; and, the impact of such expression."[123]

132. Justice Muise also ruled that Professor Rentschler's opinions must stay confined to these subject areas in order to be admissible.[124]

133. In this case, there is no evidence that the Plate is an expression of violence, or that it has ever contributed to the perpetration of a violent act. There is no evidence that any roadway or motorist or citizen, female or male, was ever once endangered by the Plate. There is therefore no evidence that the Plate represents "language that supports gendered violence" or that the "Plate promotes violence against women", which are the parameters that Professor Rentschler was required by this Honourable Court to stay within in her opinion. Professor Rentschler has strayed outside of these parameters and advanced conclusions which are not supported by the evidence.

134. According to Dr. Soh, Professor Rentschler has engaged in speculation.[125] The Applicant submits that Professor Rentschler has failed to stay within the parameters set for her opinion by the Court.

135. As cited by Justice Muise on the preliminary Application to strike Professor Rentschler's first Affidavit, the trial judge has an ongoing gatekeeper function that may require expert evidence to be excluded at the ultimate hearing on the merits if prejudicial effects become apparent.[126]

136. Only expert evidence that is necessary to a case is admissible. According to the Supreme Court of Canada, the purpose of expert witnesses is to "explain the

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[120] Soh, p. 14.
[121] Soh, p. 15.
[122] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 [*Grabher v. Nova Scotia*], para. 92, TAB 37
[123] *Ibid.*
[124] *Ibid*, para. 148.
[125] Soh, p. 13.
[126] *Grabher v. Nova Scotia*, para. 149, TAB 37

effect of facts of which otherwise no coherent rendering could be given."[127] Ultimately, Dr. Rentschler has no more evidence that the Plate is harmful to the community than any common person observing this litigation because no such evidence has been tendered. It does not exist in the Court record.

137. Due to the special dangers regarding expert testimony to taint the trial process, the Supreme Court of Canada recently tightened the law in regard to the admission of expert opinion evidence.[128] Meeting the basic threshold for admissibility does not end the questions of admissibility and weight to be given to expert testimony. Professor Rentschler's evidence has already been rejected once at the gatekeeping stage pending its revision despite meeting the initial threshold test for admissibility.[129] It should be rejected at this stage of the proceeding as likely to taint the hearing process. It is speculation and conjecture cloaked in the guise of authority.

Minimal Impairment

138. The second step of the proportionality analysis is to determine whether, if there is a rational connection between the measures and the statutory objective, if those measures only impair freedom of expression to the extent necessary.

139. The lack of minimal impairment is evidenced by the list of banned words that has been compiled by the Registrar, which shows that completely inoffensive words have been banned.

140. In addition, the COCKERS plate further illustrates the whim of the Registrar. "COCKERS" could be creatively interpreted several ways, some of which could be construed to have sexual connotations. Nevertheless, the plate was approved by the Registrar. The COCKERS plate was in use when the Plate was revoked. Once the undertaking to produce information about the COCKERS plate was finally answered by the Crown (after a Motion to compel undertakings was filed), the Respondent informed the Applicant that the COCKERS plate was no longer in use.

141. The "measures" (the Regulation) do not minimally impair freedom of expression. Because of the lack of a discernible standard or oversight, the Registrar can place harmless words which are not unlawful, who's censoring is arbitrary, on the Banned List. Even the word "SAFE" is on the Banned List. The exercise of the Registrar's discretion to ban such expression is not a minimal impairment.

142. The revocation of the Plate is also not a minimal impairment. The expression on the Plate is not a pithy or favourite saying. The Plate contains expression which is the identity of the family.

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[127] *Kelliher (Village) v. Smith (1931),* [1931] S.C.R. 672 ("Kelliher"), at para. 18, TAB 38
[128] *White Burgess Langille Inman v. Abbott and Haliburton Co.,* [2015] 2 SCR 182, 2015 SCC 23, TAB 39
[129] *Grabher v. Nova Scotia*, paras 149, 152, TAB 37

143. The Respondent claims that the Applicant can apply for any other personalized plate with different expression, and it will supplant the loss of the expression of his own name. This assertion ignores the purpose of expression in the first place: to convey a particular meaning. No other expression on the Plate would communicate the same idea as the family surname. It is insensitive and unrealistic to propose that the Applicant replace the expression of his name with some other article that does not mean the same thing.

Proportionality Between Effects and Objective

144. There is no evident proportionality between the impact of the revocation of the Plate and the objective of the Respondent. After 27 consecutive years of use, without incident, it is difficult to rationalize how any public good is served by revoking the Plate. There is no evidence whatsoever that the province of Nova Scotia is better off, in any way, by not having the Plate on the road. The only demonstrable harm is to the Applicant.

145. According to Mr. Hackett, there is no evidence that the Plate hurts tourism in Nova Scotia, or that not having the Plate on the road helps tourism.[130] The Respondent has introduced no evidence of an increase in criminal activity during the time the Plate was in use, or of any harm resulting from the Plate at all, even circumstantially. There is no evidence that there is less crime in Nova Scotia, or in Mr. Grabher's neighborhood, since the Plate was revoked. There is no evidence that anyone, including the anonymous applicant, has suffered any harm as a result of the Plate.

Conclusion on Oakes

146. The limitation of the "opinion of the Registrar" is prescribed, not by discernible qualifications suitable to general application, but by demonstrably changeable and arbitrary opinion.

147. No proper law gave the Registrar the guidance as to whether she should or should not revoke the Plate. Moreover, the Registrar made no determinations in regard to the rights and freedoms of the Applicant, and she was neither trained nor lawfully empowered to do so. The Registrar is not empowered to restrict *Charter* freedoms arbitrarily or without oversight.

148. The Applicant submits that the Respondent is unable to justify the infringement of the Applicant's freedom of expression under the *Oakes* analysis. Further, as set

[130] Transcript of cross exam of Peter Hackett, line 25, page 86 – line 6, page 87.

out above, the Applicant submits that the Regulation's standard of permissible expression, the "opinion of the Registrar", fails the "prescribed by law" test.[131]

Part 4: Conclusion

149. For the reasons set out above, Mr. Grabher requests the following:

a) A declaration pursuant to section 24(1) of the *Charter* that the cancellation of the Applicant's Plate unjustifiably infringes the section 2(b) (freedom of expression) and section 15 (equality rights) *Charter* rights of the Applicant;

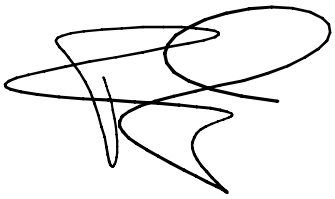
b) A declaration pursuant to section 52(1) of the Constitution Act, 1982, that sections 5(c)(iv) and 8 of the *Personalized Number Plates Regulations* infringes section 2(b) of the *Charter* and are of no force of effect;

c) An Order reissuing the Plate;

d) Costs; and

e) Such further and other relief as this Honourable Court deems just and equitable.

All of which is respectfully submitted this 1st day of March, 2019.



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Jay Cameron
Justice Centre for Constitutional Freedoms
Counsel for Lorne Wayne Grabher

[131] In the alternative, if this Honourable Court determines that the standard of reasonableness should apply as per the decision of the Supreme Court in *Dore,* the Applicant states that the conduct of the Registrar is not reasonable. The Registrar does not have untrammeled discretion to do whatever she wants, despite what the Respondent has claimed. Further, this case is not a judicial review. It is a section 24(1) *Charter* challenge.