C.A. No. 497266

2020

NOVA SCOTIA COURT OF APPEAL

Between:

LORNE WAYNE GRABHER

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA AS REPRESENTED BY THE REGISTRAR OF MOTOR VEHICLES

Respondent

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

FACTUM OF THE APPELLANT

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PART 1 - OVERVIEW

1. This case stems from the growing conflict between the right of citizens to express themselves in a free society, and the desire of often anonymous moral busybodies to use the power of the state to curtail or even punish all manner of "offensive" expression, even where, as here, the expression was considered inoffensive for 27 years.

2. The Appellant, Lorne Grabher, is a retired senior citizen who, for nearly three decades, owned a personalized licence plate bearing his family name "Grabher" (the **"Plate"**). In October of 2016, a still-unidentified individual contacted the Registrar of Motor Vehicles (the **"Registrar"**) to complain about the Plate. The Respondent refused to provide any further details about the complaint or the unidentified complainant.[1]

3. Despite having renewed the Plate on multiple occasions over 27 years without any concern, the Registrar deferred her better judgment to a single complainant, and opted to revoke the Plate in January of 2017.

4. Mr. Grabher filed a Notice of Application with the Supreme Court of Nova Scotia, challenging the revocation of the Plate as an infringement of his rights under sections 2(b) and 15 of the *Canadian Charter of Rights and Freedoms* (the **"*Charter*"**) .

5. At the lower court, the Appellant argued that personalized license plates were made available to the public for the very purpose of displaying expressive content, and that such expression is not disqualified from protection by section 2(b) of the *Charter* by either its location or method of expression.

6. Mr. Grabher also argued that the application of the *Personalized Number Plate*

[1] Transcript of cross examination of Peter Hackett, pp. 55, 56, undertaking taken under advisement and subsequently refused by the Respondent. [**Appeal Book ("AB") Tab 20]**

Regulations, N.S. Reg. 124/2005 (the **"*PNP Regulations*"**) in a manner which interpreted Mr. Grabher's ethnically-German surname as an English slur or offensive slogan, resulted in the creation of a distinction based on an enumerated ground under section 15 of the *Charter*, namely nationality, race or ethnic origin.

7. Mr. Grabher further challenged the constitutionality of sections 5(c)(iv) and 8 of the *PNP Regulations*, given that the lack of sufficient parameters for either the Registrar or the public to know the limits of state authority to restrict personalized licence plates results in arbitrary and inconsistent decisions which undermine the rule of law.

8. On January 31, 2020, the Learned Justice Jamieson dismissed Mr. Grabher's Application (the **"Decision"**).

PART 2 - STATEMENT OF FACTS

A. THE PARTIES

9. Mr. Grabher's family is of Austrian-German heritage. His father's family immigrated to Canada from Europe in 1906. His father served in the Canadian Armed Forces, and was stationed in Cape Breton, Nova Scotia, where he met Mr. Grabher's mother, and subsequently raised their family. Prior to retirement, Mr. Grabher worked for 26 years with the Nova Scotia Department of Corrections, wearing his surname emblazoned on his uniform.[2]

10. Mr. Grabher is proud of his Austrian-German heritage as well as his family's history, including their name and the heritage it signifies. Accordingly, around 1990, the Grabher family applied for, paid the requisite fee for and received the Plate. Originally, the Plate was a gift for Mr. Grabher's father.[3]

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[2] Affidavit of Lorne Grabber, sworn November 1, 2017, para 9. [**AB Tab 22]**
[3] Affidavit of Lorne Grabber, sworn November 1, 2017, paras. 1-3. [**AB Tab 22]**

11. 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 renewed the Plate without any issue.[4]

12. The Respondent in this matter is the Registrar of Motor Vehicles for the province of Nova Scotia. The Regulation grants the Registrar authority to process personalized license plate applications. The Registrar is subject to the *Charter.*

B. REGULATORY MECHANISM

13. The *PNP Regulations*, issued pursuant to ss. 10 and 38 of the *Motor Vehicle Act*[5], allow the owner of a vehicle to make an application for a personalized registration number to be placed on the standard form plate.[6] The Minister enacted the *Personalized Number Plate Regulations* to create a mechanism for the issuance of personalized licence plates to individuals wishing to exercise that form of expression.[7]

14. The *PNP Regulations* authorized such individuals to select "a plate designation" (the intended expression) which is then reviewed by the Registrar.[8]

15. People may select a minimum two-character and maximum seven-character expression for their personalized plate.[9]

16. Section 6 of the *PNP Regulations* 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

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[4] Affidavit of Lorne Grabber, sworn November 1, 2017, para 6. [**AB Tab 22]**
[5] R.S.N.S. 1989, c 293. **[BOA Tab 26]**
[6] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 [The Decision] at para 25. [**AB Tab 2]**
[7] *Personalized Number Plates Regulations*, NS Reg 124/2005, section 7(2)(e). **[BOA Tab 28]**. See also Transcript of cross examination of Peter Hackett, p. 30, lines 2-5, [emphasis added] **[AB Tab 20]**
[8] S. 7(2)(e) of the *PNP Regulation*. **[BOA Tab 26]**
[9] S. 7(2)(e) of the *PNP Regulation*. **[BOA Tab 28]**

applicant."[10]

17. Sections 5(c)(iv) and 8 of the *PNP Regulations* 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.[11]

18. The annual renewal by the Registrar of Mr. Grabher's Plate over a 27-year period indicates that, in the Registrar's opinion, the Plate **did not** "express or imply a word, phrase or idea that is or may be considered offensive or not in good taste."

C. THE COMPLAINT AND SUBSEQUENT REVOCATION

19. In October 2016, the Registrar received a solitary complaint concerning Mr. Grabher's Plate, which called for the Plate to be revoked because the wording was "offensive".[12] As a result of this single complaint, the Registrar apparently changed her opinion as to whether or not the Plate "is or may be considered offensive, or not in good taste".

20. 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."[13] The Registrar did not say which slogan she might be referring to, or provide any details of the supposed misinterpretation. The Respondent has also not provided any evidence that Mr. Grabher's Plate harmed anyone in Nova Scotia or anywhere else, nor any evidence as to who complained, why they complained, or even whether they resided in Nova Scotia.

21. On or about January 13, 2017, the Registrar revoked the Plate as a result of this single

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[10] *S.* 6 of the *PNP Regulations*. **[BOA Tab 28]**
[11] Ss. 5(c)(iv) and 8 of the *PNP Regulations*. **[BOA Tab 28]**
[12] The Decision at para 13. [**AB Tab 2]**
[13] Affidavit of Lorne Grabber, sworn November 1, 2017, Exhibit "B". [emphasis added] [**AB Tab 22]**

complaint.

22. Over the years, the Registrar has created a list of prohibited words which may not appear on a personalized plate (the "**Banned List**"). The Banned List does not contain any other identifiable family surnames. There are however numerous sexual and racist references on the Banned List.

23. 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 profoundly insulted and humiliated by the Registrar's association of his name with the words on the banned list.[14]

24. Various individual persons holding the office of Registrar have contributed to the Banned List from time to time. No one superior to the Registrar reviews this list.[15] The Banned List also contains many innocuous words that, for no clearly discernible reason and not based on publicly available or objective standards, are prohibited from being on a personalized licence plate, such as “GAB”, “GOLD”, “LOW” and “SAMPLE”.[16]

25. 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. As a result of a single anonymous complaint, the Registrar determined that the Plate should be deemed offensive, even though she had not thought so herself previously.

26. Since the Registrar and/or her predecessors were consistent in their position for almost

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[14] Affidavit of Lorne Grabher, sworn May 22, 2018, paragraph 9 [**AB Tab 18**]
[15] Transcript of cross examination of Peter Hackett, line 12, page 44 - line 16, page 45. **[AB Tab 20]**
[16] The Decision at para 134. [**AB Tab 2]**

three decades that the expression on the Plate was lawful and not offensive, it was clearly not *her* opinion that governed the removal of the Plate, as required by law. Rather, the governing opinion that determined the fate of the Plate was that of the anonymous complainant who phoned to complain about the Plate.

PART 3 - ISSUES

27. It is respectfully submitted that the Honourable Lower Court Judge erred in:

a) concluding that section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter"*) does not apply to an individual's expression on personalized license plates in Nova Scotia;

b) ignoring, or alternatively failing to take notice, that one statutory purpose of personalized license plates in Nova Scotia is specifically to provide a platform to the public to express themselves;

c) finding that section 5(c)(iv) of the *Personalized Number Plates Regulations*, NS Reg 124/2005 is not unconstitutional on the grounds of vagueness and arbitrariness and by misconstruing the subjective test in the Regulation of "in the opinion of the Registrar";

d) failing to find that Nova Scotia's arbitrary assemblage of banned words which are not permitted on personalized license plates is relevant to considerations under the rational connection and minimal impairment stages of the *Oakes* test;

e) finding that expression of the name "Grabher" on a personalized license plate promotes sexualized violence and is potentially harmful to the community in the absence of evidence;

f) finding that the Province's anglicizing of an Austrian/German name for the purpose of constructing an objectionable phrase, and then censoring it, is not an

infringement of section 15 of the *Charter*;

g) holding that the legislative objective of section 5(c)(iv) satisfied the requirements of the *Oakes* test; and

h) relying on the report of Professor Rentschler, and in failing to adequately assess and provide reasons for her reliance upon one expert's evidence to the exclusion of another, when the evidence before her was contradictory.

PART 4 - STANDARD OF REVIEW

28. In *Housen v Nikolaisen*,[17] the Supreme Court of Canada outlined the standard of review in civil appeals. For findings or inferences of fact and for questions of mixed fact and law, the standard is that of a "palpable and overriding error".[18] A standard of palpable and overriding error is applied when "the legal principle is not readily extractible"[19], or "where the issue on appeal involves the trial judge's interpretation of the evidence as a whole."[20]

29. For questions of law, the standard of review is correctness.[21]

30. The Supreme Court of Canada recognized that, "Matters of mixed fact and law lie along a spectrum":[22] with some errors, the legal question can be extracted from the factual question and be subject to the correctness standard as an error of law. This occurs when "an incorrect [legal] standard" is applied or there has been "a failure to consider a required element of a legal test, or similar error in principle."[23]

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[17] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 ["*Housen*"]. **[BOA Tab 6]**
[18] *Housen* at paras 10, 21, 25, 37; **[BOA Tab 6];** see also Mouvement laïque québécois v Saguenay (City), 2015 SCC 16, [2015] 2 SCR 3 at para 33. **[BOA Tab 11]**
[19] *Housen* at para 36. **[BOA Tab 6]**
[20] *Housen* at para 36. **[BOA Tab 6]**
[21] *Housen* at para 8. **[BOA Tab 6]**
[22] *Housen* at para 36. **[BOA Tab 6]**
[23] *Housen* at para 36. **[BOA Tab 6]**

31. Given the foregoing, for errors in law, namely grounds a) and c) above, the standard of review is correctness. For errors in mixed fact and law, namely ground e), the standard of review is palpable and overriding error. For errors in law or in mixed fact and law, namely grounds b), d), f), g) and h), the standard of review is either correctness or palpable and overriding error.

PART 5 - ARGUMENT

Issue #1: *Charter* Section 2(b) Applies to Expression on Personalized License Plates

32. Freedom of expression, as guaranteed in Canada by section 2(b) of the *Charter*, is a fundamental individual right. Indeed, "[i]t is difficult to imagine a guaranteed right more important to a democratic society".[24] Yet, because it is an essential bulwark against tyranny, this cornerstone of liberal democracy is increasingly under attack by those who seek a society based on conformity and enforced adherence to their preferred political ideology.

33. While a form of expression that is inherently limited to seven characters on a license plate may seem to be a trifling matter, the principle which undergirds it is not. Indeed, in our current cultural moment, it is crucial that the foundational pillar of free expression be given full-throated support in the face of even the smallest transgressions, if it is to have any hope of withstanding the increasing onslaughts of 'cancel culture'.

34. 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.[25] According to the Court, "an activity by which one conveys or attempts to convey

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[24] *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326 (Cory J.) at para. 3. **[BOA Tab 2]**
[25] *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 *["Translink"]* at para. 27. **[BOA Tab 4]**

meaning will *prima facie* be protected by s. 2(b)."[26] 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".[27]

35. The Supreme Court of Canada has adopted a three-part test to determine whether freedom of expression has been infringed.[28] The first part considers whether the activity in question has expressive content, thereby bringing it, *prima facie*, within the scope of the section 2(b) protection. Since Madam Justice Jamieson correctly found that personalized license plates do contain expressive content, this question is not in dispute.[29]

36. The second prong of the test considers whether the activity is excluded from that protection as a result of either the location or the method of expression. The Appellant submits that the lower court's finding that the Plate was so excluded was incorrect and should be overturned.

37. According to the Court in *Greater Vancouver Transportation Authority v. Canadian Federation of Students* ["*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).[30]

38. Personalized licence plates are the property of the Nova Scotia government, just as the sides of city buses were in the *Translink* case. As in *Translink*, where the City of Vancouver

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[26] *Translink* at para. 27. **[BOA Tab 4]**
[27] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 75. **[BOA Tab 20]**
[28] *Canadian Broadcasting Corp. v. Canada Attorney General,* 2011 SCC 2 *("CBC v. Canada")* at para. 38. **[BOA Tab 1]**
[29] The Decision at para 49. [**AB Tab 2]**
[30] *Translink* at para. 27. **[BOA Tab 4]**

chose to permit advertising on city buses, the Province of Nova Scotia has voluntarily decided to create an avenue for members of the public to express themselves on licence plates.

39. According to the Respondent's website, the personalized plate program was created for the public to express themselves using names, occupations, hobbies, and other personal slogans which are intended to communicate something about the registered owner of the plate in question.[31]

40. In similar fashion to 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. The first personalized plate issued was for a name: ARLENE.[32]

41. Neither the location of the expression (on a personalized licence plate) nor 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 authorization of the Respondent.

42. 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 and ongoing use of that medium for advertising.[33] 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,

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[31] Registry of Motor Vehicles - Personalized Plates, [https://novascotia.ca/sns/rmv/registration/4u2read.asp]
[32] Registry of Motor Vehicles - Personalized Plates, [https://novascotia.ca/sns/rmv/registration/4u2read.asp]
[33] *Translink* at para. 46. **[BOA Tab 4]**

nor did it "undermine the values underlying freedom of expression."[34]

43. 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.[35]

44. In this case, the government collects a fee in exchange for displaying "personalized" expression on a licence plate. The historical and current 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, in particular self-fulfillment. 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.

45. 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. The Respondent in this case must be required to do the same.

46. Given the foregoing, it is respectfully submitted that the Learned Justice Jamieson failed to correctly apply the law in the following ways. First, she erred in concluding that, "Government license plates are not 'public places' with a history of free expression."[36] This is incorrect: the Respondent created its own history of expression by inviting the public to personalize vehicle

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[34] *Translink* at para. 42. **[BOA Tab 4]**
[35] *CBC v. Canada,* at para. 37. **[BOA Tab 1]**
[36] The Decision at para 60. **[AB Tab 2]**

plates with their own expression. The personalized number plate program has been in place for approximately 30 years and the government has been collecting a revenue stream from that expression for the duration of that time.

47. Second, the Honourable Lower Court Judge erred in concluding that, "Simply because the Respondent has allowed very limited expressive activity on a personalized license plate does not mean open access and protection under s. 2(b)."[37] Similarly, the Learned Justice Jamieson incorrectly found that license plates are by their "very nature…incompatible with open public expression."[38] In drawing these conclusions, Madam Justice Jamieson incorrectly applied the cases of *Vietnamese Association of Toronto v Toronto*[39] and *R v Breeden*[40].

48. These cases are not similar to the case at bar as *Breeden* involved a courthouse lobby, a place where the public had not been asked to come and express themselves, nor had the Minister of Justice passed a regulation governing public expression in the courthouse lobby. The *Vietnamese Association* case can be easily distinguished as the flag policy in question within that case did not create an entitlement in any group to use the courtesy flagpole.

49. By contrast, the Respondent specifically invited all citizens, including Mr. Grabher, to personalize their vehicle plates. The Respondent accepted Mr. Grabher's expression and renewed it each year for 27 years.

50. The Nova Scotia Government voluntarily created a secondary purpose for its vehicle plates—that of expression. This was the finding of the Court in *Troller v. Manitoba Public Insurance Corporation*,[41] another personalized plate case in Manitoba:

> The decision to issue PLPs, as admitted by MPI, was to permit forms of personal

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[37] The Decision at para 70. **[AB Tab 2]**
[38] The Decision at para 76. **[AB Tab 2]**
[39] [2007] O.J. No. 1510, 85 OR (3d) 656 ("*Vietnamese Association*") **[BOA Tab 23]**
[40] 2009 BCCA 463 ("*Breeden")* **[BOA Tab 14]**
[41] *Troller v. Manitoba Public Insurance Corporation, 2019 MBQB 157* [*Troller*], **[BOA Tab 22]**

> expression. This decision changed the historical function from solely registration and provincial mottos, to places where owners could create an individual message on a wide range of topics.[42]

51. The Court in *Troller* found that, as in *Translink*, section 2(b) applies to the expression on personalized plates.[43]

52. Third, Madam Justice Jamieson made a legal error by concluding that, since Mr. Grabher could hypothetically use an alternate mechanism to express himself, such as a bumper sticker of his name on his vehicle, it was unnecessary to extend section 2(b) protection to the Plate.[44] Respectfully, this conclusion misses the point. Mr. Grabher's expression—his surname—was already in the space that the Government of Nova Scotia had invited him to place it: on the Plate. If the state is permitted to avoid accountability for the censorship of citizen expression simply by saying citizens could hypothetically express themselves somewhere else, the protection against government censorship in the *Charter* is weakened and a dangerous precedent set. For this reason, this Honourable Court ought to find that the Registrar is bound by the *Charter* when making decisions regarding applications made under the *PNP Regulations*.

53. The third part of the three-prong test for freedom of expression is not in dispute. The question is, if the activity is found to be protected, whether an infringement of the protected right results from either the purpose or the effect of the government action. It is apparent that if the expression is within the protection of section 2(b), the Registrar's recall of the plate would constitute a limit of Mr. Grabher's freedom of expression.

54. In summary, the Honourable Lower Court Judge erred in concluding that license plates

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[42] *Troller*, at para. 61. **[BOA Tab 22]**
[43] *Troller*, paras. 75-77. **[BOA Tab 22]**
[44] The Decision at paras 73-74. **[AB Tab 2]**

do not attract section 2(b) protection, and therefore there could be no violation of Mr. Grabher's section 2(b) rights.[45] The Decision is in conflict with that of the Manitoba court in *Troller*, which correctly found that personalized plates are protected speech under s. 2(b) of the *Charter*. It is respectfully submitted the Decision ought to be overturned.

Issue #2 - A Statutory Purpose was Providing a Platform for Expression

55. As discussed in the preceding section regarding freedom of expression, the personalized plate program, which is created under the statutory framework of the *PNP Regulations*, is intended for the use of the public to express themselves using names, occupations, hobbies, and other personal slogans which are intended to communicate something about the registered owner of the plate in question.[46] By implementing the *PNP Regulations*, the Nova Scotia Government, though the Registrar, intentionally created a platform for individuals to express themselves.

56. Despite this, Madam Justice Jamieson makes no reference to this purpose within her decision. Whether she entirely ignored this purpose, or simply failed to take notice of it, the failure to recognize this purpose was an error in law or in mixed law and fact, and it is respectfully submitted that doing so was incorrect and a palpable and overriding error.

Issue #3 - Creating an Offensive Phrase by Anglicizing a Surname Infringes Section 15

57. Section 15(1) of the *Charter* states:

> 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.

58. According to section 27 of the *Charter,* both section 2(b) and 15 must "be interpreted in

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[45] The Decision at paras 75, 76, 80. **[AB Tab 2]**
[46] Registry of Motor Vehicles - Personalized Plates, [https://novascotia.ca/sns/rmv/registration/4u2read.asp]

a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

59. In *Kindler v. Canada (Minister of Justice),*[47] 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."[48]

60. 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 recognized at law as human beings equally deserving of concern, respect and consideration."[49]

61. 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."[50]

The Test For An Infringement Of Section 15(1) Of The *Charter*

62. 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?"[51] Section 15(1) applies to government actions and decisions as it does to laws.[52]

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[47] [1991] 2 SCR 779 *("Kindler").* **[BOA Tab 8]**
[48] *Kindler* at para. 76 , citing *R. v. Oakes.* **[BOA Tab 8]**
[49] *Kindler* at para. 78, citing *Andrews v. law Society of British Columbia,* [I989] 1 S.C. R. 143. **[BOA Tab 8]**
[50] *Law v. Canada (Minister of Employment & immigration),* [1999] 1 SCR 497 at para. 83. **[BOA Tab 9]**
[51] *Withler v. Canada (Attorney General),* 2011 SCC 12 at para 30. **[BOA Tab 25]**
[52] *Little Sisters Book and Art Emporium v Canada (Minister of' Justice)*, 2000 SCC 69 ("L*ittle Sisters*") at para. 110. In this case, the Court phrased the consideration as whether "the law, program or **activity** imposes differential treatment." [emphasis added] **[BOA Tab 10]**

Distinction Based On Race Or Ethnic Origin

63. 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.[53] 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.

64. The Nova Scotia *Multiculturalism Act*[54] states that the "recognition and acceptance of multiculturalism" is "an inherent feature of a pluralistic society."[55] 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."[56]

65. The association of Mr. Grabher's surname with the words on the Banned List is offensive to the Appellant, and an affront to his dignity. As the Supreme Court noted, a surname "symbolizes, for many, familial bonds across generations."[57]

66. The first part of the test is met, as 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.[58]

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[53] December 9, 2016 Letter of the Registrar to Lorne Grabher, Amended Affidavit of Lorne Grabher, Exhibit "B". **[AB Tab 18]**
[54] RSNS 1989, c 294. **[BOA Tab 27]**
[55] *Multiculturalism Act*, s. 3(a). **[BOA Tab 27]**
[56] Excerpts of *Multiculturalism Act* [Emphasis added] **[BOA Tab 27]**
[57] *Trociuk v. British Columbia (Attorney General),* 2003 SCC 34 at para. 17 **[BOA Tab 21]**
[58] Dr. Rentschler conceded during cross-examination that in order to make words out of Mr. Grabher's last name one would have to first anglicize it. See Grabher Hearing Transcript starting at Line 4 of Page 180. **[AB Tab 24]**

Distinction Or Disadvantage Based On Prejudice

67. The second stage of the section 15 test asks whether or not the distinction creates a disadvantage by perpetuating prejudice or stereotyping. 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.[59]

68. The Respondent's continued legal opposition to the Appellant's claim is well known. The significant public resources spent fighting against the Appellant's claim communicates to the public that the state believes that it is suddenly a matter of serious public import to keep the Grabher name off of a personalized licence plate, despite nearly three decades of use with no demonstrable harm or issues with renewal.

69. 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.[60] On cross examination, these insinuations have been shown to be groundless. There is no proof that the Plate ever hurt tourism in Nova Scotia, or that it would hurt tourism if reinstated. Frankly, the very proposition is absurd.

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

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[59] 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" buzzsaw. 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://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-157/hansard]

[60] Affidavit of Peter Cameron Hackett affirmed December 14, 2017, pages 4-5. **[AB Tab 14]**

the Appellant.

71. According to the Court, the inquiry of whether there has been discrimination must be conducted from the subjective perspective of the Appellant, and from no other perspective.[61] The Court also must determine whether the Appellant is being objective about his assertions of discrimination.[62]

72. 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.[63] The Appellant notes the long history of the Plate, without issue. He notes the existence of government place names,[64] which each could be viewed as more offensive than his surname, yet are legal and in common use.

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

74. 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.

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

76. Despite the foregoing, the Learned Justice Jamieson found “that Mr. Grabher is unable

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[61] *Law v. Canada (Minister of Employment and Immigration)*, [I999] 1 SCR 497 ("*Law*") at para. 59. **[BOA Tab 9]**
[62] *Law* at para. 59. **[BOA Tab 9]**
[63] Amended Affidavit of Lorne Grabher, paras. 9- 15. **[AB Tab 18]**
[64] Amended Affidavit of Lorne Grabher, paras. 16-18. **[AB Tab 18]**

to meet the first part of the test,"[65] concluding that "ss. 5(c)(iv) and 8, neither on their face nor in their impact, create a distinction on the basis of an enumerated or analogous ground."[66] Further, Madam Justice Jamieson incorrectly found that there was no factual record showing that the Appellant had met the second part of the test.[67] These conclusions by the Honourable Lower Court Judge are errors in law and are palpable and overriding errors in fact.

Issue #4 – *PNP Regs* s. 5(c)(iv) is Unconstitutional for Vagueness and Arbitrariness

77. According to the Supreme Court of Canada, the "prescribed by law" requirement of *Charter* section 1 exists to protect "the public against arbitrary state limits on *Charter* rights."[68] While this issue will be more comprehensively examined in the analysis dealing with section 1 of the *Charter* below, it should be noted that the Registrar does not have, and cannot have been delegated, "untrammelled discretion"[69] under the Regulation.

78. The Court quoted Professor Hogg regarding the protection against arbitrary state action:

> 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.

79. Enabling the public to be certain about the law is one of the primary purposes and benefits of the rule of law. Legislation and associated regulations are established so that the public and the government will know what the law is. The Constitution, including the *Charter*, requires that government respect the fundamental freedoms of Canadians. Public officials,

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[65] The Decision at para 90. **[AB Tab 2]**
[66] The Decision at para 92. **[AB Tab 2]**
[67] The Decision at para 90. **[AB Tab 2]**
[68] *Translink* *at* para. 51 citing *R. v. Therens,* [1985] 1 S.C.R. 613. **[BOA Tab 4]**
[69] *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at para. 41. **[BOA Tab 19]**

such as the Registrar cannot whimsically determine day-by-day what the law is.

80. This case shows that the opinion of the Registrar is an arbitrary moving target. The Respondent can point to no system or standard for scrutinizing the Plate except the Registrar's opinion. According to section 5 of the *PNP Regulations*, the Registrar is the sole person granted authority to determine whether or not personal plates are offensive, or "may be offensive" in her subjective opinion.

81. 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 *PNP Regulations* do neither. This type of unknowable subjectivity fails to conform to the objective standards established by the Supreme Court of Canada in *Translink*.

82. The Appellant 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 *PNP Regulations*, but also on his right of expression as protected by the *Charter*. Neither the *Charter* nor the *PNP Regulations* has changed. But the Plate has still been revoked.

83. This result is an enigma from the standpoint of public policy and the rule of law as the exact same law which repeatedly authorized the Plate's use is relied on by the Respondent for its revocation.

84. Worse, the same bureaucratic official (the Registrar) who repeatedly approved the Plate has now revoked it. When the Registrar wrote to advise the Appellant 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 as is required by the *PNP Regulations*, but rather to the opinion of the unidentified caller who complained.[70] The Registrar provided no further details.

85. 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.[71]

86. 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 principle of public law that the person bestowed with discretion must exercise it,[72] not cede it to another.

87. The Registrar could not properly form the opinion contemplated by the Regulation based on a single unspecified anonymous complaint. If the intent of the *PNP Regulations* 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 *PNP Regulations*.

88. Despite this, the Learned Justice Jamieson incorrectly concluded that section 5(c)(iv) of the *PNP Regulations* "contains sufficient specificity to indicate to the public what is and is not allowed"[73] and that "s. 5(c)(iv) is formulated with sufficient precision to enable people to regulate

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[70] Amended Affidavit of Lorne Grabher, Exhibit "B". **[AB Tab 18]**
[71] Amended Affidavit of Lorne Grabher, Exhibit "B". **[AB Tab 18]**
[72] *Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 24, para. 35. **[BOA Tab 5]**
[73] The Decision at para 111. **[AB Tab 2]**

their conduct."[74] To the contrary, the Registrar relies on a vague provision which has been shown to result in arbitrary decisions due to the inherently subjective nature of the test, if it can even be called such.

89. It is respectfully submitted that the Honourable Lower Judge's determination on this matter was an error in law and fails to meet the correctness standard of review due to the above analysis.

Issue #5 - The Arbitrary List of Banned Words is Relevant Under the *Oakes* Test

90. A key factor in this matter is the Registrar's arbitrary designation of certain words as offensive, when objectively that is not so. 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.

91. The relevant legislation does not minimally impair freedom of expression. Due to the lack of a discernible standard or oversight, the Registrar can place harmless words, which are not unlawful but are arbitrarily censored, on the Banned List. The exercise of the Registrar's discretion to ban such expression is not a minimal impairment.

92. The Banned List is not only relevant but necessary to evidence the arbitrary nature of the designations and is therefore relevant and necessary when considering the rational connection and minimal impairment stages of the *Oakes* test.

93. Nevertheless, Madam Justice Jamieson concluded that she was "unable to make any determination as to whether this list represents arbitrary decision making on its face."[75] She

[74] The Decision at para 112. **[AB Tab 2]**
[75] The Decision at para 134. **[AB Tab 2]**

further stated that the Banned List "is not helpful to my analysis and I give it very little weight".[76]

94. It is respectfully submitted that the Banned List is directly relevant to considerations under section 1 of the *Charter* and therefore, the Lower Court Judge made a palpable and overriding error in failing to adequately consider the list.

Issue #6 - "Grabher" Does Not Promote Sexualized Violence or Risk Harming the Community

95. The Respondent, through their expert, claims that the Appellant, by having his name on the Plate, has committed an act of gendered violence.[77] However, there is no evidence that the Plate is an expression of violence, nor that it has ever contributed to the perpetration of a violent act of any nature. There is no evidence that any roadway, motorist or citizen, female or male, was ever endangered by the Plate. The Respondent's claims of public danger from the Plate are completely unsubstantiated by evidence.

96. Despite the outright absence of any evidence supporting such a claim, the Learned Justice Jamieson found that the Plate could be interpreted as promoting sexualized violence.[78] Madam Justice Jamieson's misapprehension of the evidence, or lack of evidence, on this point and her finding that "GRABHER" promotes sexualized violence and is potentially harmful to the community was a palpable and overriding error in fact and law.

Issue #7 - The Legislative Objective of Section 5(c)(iv) Does Not Satisfy the *Oakes* Test

97. Section 1 of the *Charter*, which is analysed through the *Oakes* test, guarantees the rights and freedoms of Canadians "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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[76] The Decision at para 135. **[AB Tab 2]**
[77] Grabher Hearing Transcript starting at Line 17 of Page 193. **[AB Tab 24]**
[78] The Decision at paras 119, 120 and 131. **[AB Tab 2]**

98. 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.

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

a) 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;

b) 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;

c) 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".[79]

Pressing and Substantial Objective

100. 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.

101. However, for the purposes of this matter, the Appellant 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.

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[79] *R v. Oakes*, [1986] 1 SCR 103 at paras. 73-75. **[BOA Tab 17]**

Proportionality

102. 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".[80]

103. The Appellant submits that the evidence in this case illustrates that the "measures" (namely ss. 5(c)(iv) and 8 of the *PNP Regulations*) are arbitrary, unfair and based on irrational considerations. 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 determines "what is or may be considered offensive or not in good taste".[81]

104. As a result, the Registrar can do whatever she wants, as in this case. She is accountable to no one. 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.[82]

105. 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

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[80] *R v. Oakes*, [1986] 1 SCR 103 at para 74. **[BOA Tab 17]**

[81] 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. See Transcript of cross exam of Peter Hackett, pp. 48, 34. **[AB Tab 20]**

[82] Another example of the arbitrariness of the Registrar is seen in the approval of the word “COCKERS” – see Undertakings of Peter Hackett. Affidavit of Lorne Grabher, sworn October 15, 2018, Exhibit “A” [**AB Tab 21**]

Appellant on the Plate.

106. For example, there is a "Dildo, Newfoundland", a "Swastika, Ontario", and a "Red Indian Lake, Newfoundland". There is a "Crotch Lake, Ontario", and an "Old Squaw Islands, Nunavut". There is a "Blow Me Down Provincial Park, Newfoundland". There is a "Come By Chance, Newfoundland". There is an "Ass Rock, Newfoundland".[83] Here in Nova Scotia, there is a "Cape Negro."[84] These place names are on maps and city signs. They could be construed as vulgar, sexist, racist and/or misogynistic. But they are officially the names of established Canadian locations.[85] Justice Muise, in rejecting the Crown's motion to redact such place names from Mr. Grabher's Affidavit, noted that such place names help to establish a benchmark for legal speech in the context of this case.[86] In other words, they raise an obvious double standard: why can provinces have such official place names on signs and maps but Mr. Grabher must have his name censored on the Plate?

107. Further, the Halifax Water Board has bus ad campaigns on the backs of city busses with phrases such as "Powerful sh*t", "Be proud of your Dingle" and "Our minds are in the gutter".[87] These phrases and their public display are deemed suitable and appropriate for city use, but the Appellant's surname is claimed to be a risk to society and offensive in order to defend the arbitrary opinion of the Registrar.

108. While the Respondent relies heavily on the expert report of Dr. Rentschler in showing an alleged rational connection, Dr. Rentschler's report will be discussed in detail below, rather than at this juncture, due to space limitations. Suffice to say, it is respectfully submitted that

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[83] Grabher Hearing Transcript p. 346. **[AB Tab 24]**
[84] Nova Scotia Archives: Place-Names, [https://archives.novascotia.ca/places/page/?ID=107]
[85] Amended Affidavit of Lorne Grabher filed May 22, 2018, paras. 16 - 18; Exhibits J - 0. **[AB Tab 18]**
[86] Oral Decision of the Honourable Justice Muise given February 2, 2018; See also the Order of the Honourable Justice Pierre L. Muise (Motion to Strike Affidavit of Lorne Grabher) **[AB Tab 8]**
[87] Affidavit of Lorne Grabher, para. 13. **[AB Tab 20]**

there is no rational connection between the arbitrary *PNP Regulation*s, the Registrar's revocation of the Plate and the infringement of Mr. Grabher's *Charter* rights.

Minimal Impairment

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

110. 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.

111. The "measures" (the *PNP Regulation*s) do not minimally impair freedom of expression. Because of the lack of a discernible standard or oversight, the Registrar can arbitrarily place harmless words which are not unlawful 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.

112. 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.

113. The Respondent claims that the Appellant 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 Appellant replace the expression of his name with some other article that does not mean the same thing.

Proportionality Between Effects and Objective

114. 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 Appellant.

115. 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.[88] 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 complainant, has suffered any harm as a result of the Plate.

Conclusion on *Oakes*

116. Given the foregoing, it is respectfully submitted that the Honourable Lower Court Judge committed a palpable and overriding error by incorrectly concluding that s. 5(c)(iv) and 8 of the *PNP Regulation*s were directed at a pressing and substantial objective[89] and met the standard of rational connection.[90] Further it was a palpable and overriding error to conclude that the legislation minimally impaired Mr. Grabher's freedom of expression[91] and that the beneficial effect of *s. 5(c)(iv) and 8 of the PNP Regulations* outweigh the prejudicial effect on Mr.

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[88] Transcript of cross exam of Peter Hackett, line 25, page 86 - line 6, page 87. **[AB Tab 20]**
[89] The Decision at para 122. **[AB Tab 2]**
[90] The Decision at para 128. **[AB Tab 2]**
[91] The Decision at para 140. **[AB Tab 2]**

Grabher.[92] Ultimately, Madam Justice Jamieson erred in finding that the limit on the Appellant's freedoms was justified under section 1 of the *Charter,*[93] and her decision should be overturned.

Issue #8 - Error In Admitting and Relying on Professor Rentschler's Report

117. According to the Supreme Court of Canada, an expert report must be logically relevant to the matter being adjudicated, necessary to the adjudication of the litigation, given by an expert who is impartial, independent and unbiased and whose method of reasoning is reliable for the purpose of formulating an expert opinion. In addition, a second stage gatekeeper test assesses the benefit of admitting the evidence versus the potential risks.[94]

118. It is respectfully submitted that Professor Rentschler and her expert report do not pass the tests established by the Supreme Court of Canada as outlined below.

Not Logically Relevant

119. In order to satisfy the threshold test for admissibility, the evidence must be logically relevant. "Expert evidence is logically relevant if it relates to a fact in issue at trial and is so related to that fact in issue that it tends to prove it."[95] Professor Rentschler and her report, (the "***Rentschler Report***") fail to meet this requirement for three reasons.

120. First, the Registrar is the sole person granted authority to determine whether or not a personal plate is offensive, or "may be offensive or not in good taste". According to section 5 of the *PNP Regulations*:

> The Registrar may refuse to issue personalized number plates to an applicant in any of the following circumstances: (iv) in the opinion of the Registrar, contains a combination of characters that expresses or implies a word, phrase or idea that is or may be

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[92] The Decision at para 148. **[AB Tab 2]**
[93] The Decision at para 148. **[AB Tab 2]**
[94] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("*White Burgess")*. **[BOA Tab 24]**
[95] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 at para 20 quoting *R v K(A)*, [1999] O.J. No. 3280, 45 O.R. (3d) 641 at paras 77-78. **[BOA Tab 3]**

considered offensive or not in good taste. [Emphasis added]

121. Whether Professor Rentschler thinks that the Plate is offensive or not is irrelevant to these proceedings. Her opinion has no more legal authority and is no more relevant than any other layperson's opinion vis-à-vis the decision of the Registrar. Professor Rentschler was only proffered as an expert to improperly bootstrap the opinion of the Registrar.

122. Second, it is apparent from her cross examination that Professor Rentschler's expert opinion is based on speculative and shifting methodologies, is unsupported by any empirical evidence of any kind[96] and is not therefore any more relevant than any other unsupported subjective assertion from any other lay person:[97] in fact it is even more dangerous because it is cloaked in the guise of authority. The reliance the Lower Court placed on Professor Rentschler's opinion distorted the adjudicative process of the Lower Court.[98]

123. Regarding her methodologies, Professor Rentschler admits that the theory she relies on, speech act theory, does not have defined parameters of usage and is not precisely scientific in its scope.[99] She admits she disagrees with the founder of the theory, J. L. Austin, regarding the usage that the theory can be put to.[100]

124. Austin's theory proposes that, given the right context, when one speaks sometimes there is not just speech but also an action which takes place simultaneously.[101] He cites examples of ceremonies where a ship is named "I name this ship the Queen Elizabeth", or where the

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[96] For example, see Grabher Hearing Transcript at pp. 196-214. **[AB Tab 24]**
[97] See *R v Mohan,* [1994] 2 SCR 9 *("Mohan"),* quoting Justice Laforest in *R* c. *Beland,* [1987] 2 S.C.R. 398, at p. 434, "with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". **[BOA Tab 16]**
[98] See *Mohan,* at para. 23. **[BOA Tab 16];** The Decision at para. 119. **[AB Tab 2]**
[99] Grabher Hearing Transcript at pp 266-271. **[AB Tab 24]**
[100] Grabher Hearing Transcript p 207. **[AB Tab 24]** On Austin and Speech Act Theory generally see Exhibits 5, 9, 10A-10C to the cross examination of Professor Rentschler provided at pp. 913, 949, and 960 of the Appeal Book, respectively. **[AB Tab 25]**
[101] Grabher Hearing Transcript, p. 199. **[AB Tab 24]**

bride and groom in a marriage ceremony say "I do": given the context, when the words are spoken some action also occurs.[102]

125. Professor Rentschler admits that context is crucial to speech act theory – "I'd like some mashed potatoes" cannot be a speech act if there are no mashed potatoes at the table, or anyone to pass them; a ship cannot be christened if there is no ship present or if a person lacks the requisite authority to perform the ceremonial action.[103] But Professor Rentschler disagrees with Austin's restrictions on the use of speech act theory. Professor Rentschler's opinion rests on the premise that *she* can create the context of interpretation of the Plate based on *entirely external* factors of her own subjective choosing, such as media reports about Donald Trump's 2015 Access Hollywood comments.[104] She then uses sources she has unilaterally chosen and her own subjective analysis to ground her opinion on what supposed speech act has occurred.

126. But Austin's theory posited, and Professor Rentschler agreed in cross examination, that *absent the requisite context there was no speech act*. In this case, no one has been "grabbed" as a result of the Plate, there is no apparent person who is being told to "grab" and there is no target to be grabbed. Moreover, Mr. Grabher is not instructing society to do anything, nor does he intend to instruct society, and he lacks the authority to order anyone in society to do anything in any event. Consequently, there is no speech act in this case. As Austin stated and Professor Rentschler agreed during cross examination, a lack of completion or a lack of context leads to what Austin termed *infelicitous-ness.*[105] There is no completion, and there is no act.

127. However, Professor Rentschler ignores the absence of the kind of context Austin posited and the resultant logical problems in her own methodology, and consequently there are no

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[102] Grabher Hearing Transcript at pp. 202 and 203. **[AB Tab 24]**
[103] Grabher Hearing Transcript, at pp. 205-208. **[AB Tab 24]**
[104] Affidavit of Professor Carrie Rentschler, Exhibit "A" at pp. 13, 15, 17. **[AB Tab 19]**
[105] Grabher Hearing Transcript, p. 227, lines 16-21, p. 228, lines 1-20. **[AB Tab 24]**

recognizable boundaries to inform her methods or her opinion. She proceeds from a flawed premise to a flawed conclusion and asserts that Mr. Grabher **actually** committed "an act of sexual violence, of gendered violence"[106] by having the Plate on his car. She asserts this is a fact[107] even though there is no evidence at all to support this contention. Aside from being ridiculous, such assertions are logically unhelpful to a Court's determination of the constitutionality of the Registrar's decision because they have no basis in reality. Even if speech act theory was a recognized methodology for the purposes of determining the constitutionality of speech (and it is not), Professor Rentschler's assertions are based on her misuse of the theory which underpins her entire expert report.[108]

128. While her musings may be interesting to academics in the abstract, they are entirely improper in a court of law. This is a constitutional case not a theoretical paper in an academic periodical. The fundamental constitutional rights and freedoms of the Appellant are at stake, and the decision in this matter will be precedent setting with broad implications for the fundamental rights of thought, belief, opinion, and expression in Canada.

129. Mr. Grabher deserves an adjudication of his *Charter* rights based on the knowable and discernible parameters of the rule of law, not the theoretical and speculative imaginings of a parameter-less methodology.

130. Third, the Respondent is reported to have publicly stated that the current President of the United States, Donald J. Trump, had nothing to do with the decision to cancel the Plate, which bore the Appellant's surname for 27 years.[109] Despite this, much of the initial report of Professor Rentschler concerns itself with Donald Trump.

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[106] Grabher Hearing Transcript, at p. 193, lines 15-21; p. 189, lines 2-4; and page 13. **[AB Tab 24]**
[107] *Ibid*, p. 196, line 17 to p. 198, line 10. **[AB Tab 24]**
[108] Grabher Hearing Transcript, see for example pp 196-214. **[AB Tab 24]**
[109] See Affidavit of Lorne Grabher, filed January 16, 2018, Exhibit "B". **[AB Tab 15]**

131. There is no evidence that the Registrar considered Donald Trump in her decision to cancel the Plate. There is no evidence that the individual who originally complained about Mr. Grabher's last name was concerned with Donald Trump. Further, apart from Professor Rentschler, none of the Crown's Affiants have mentioned Donald Trump.

132. In any event, as was noted in argument before the Lower Court, the comments of foreign dignitaries are not a lawful justification to infringe the constitutional rights of Canadians.[110]

Not Necessary

133. According to the Supreme Court of Canada, the purpose of expert witnesses is to "explain the effect of facts of which otherwise no coherent rendering could be given."[111] The Court has also held that "an expert's opinion must be necessary in the sense that it provides information that is likely to be outside the experience and knowledge of a judge or jury."[112] If, on proven facts, a judge or jury can form an opinion without help then the opinion of an expert is unnecessary.[113] Professor Rentschler's opinion is not necessary to adjudicate this proceeding. Rather, her methodologies and speculative theories which are not grounded in evidence are an impediment to an adjudication of the constitutionality of the Registrar's actions.

Not Qualified

134. Once a judge has determined that a report is logically relevant and necessary, the trial judge must still consider whether or not the expert is qualified to advance the opinions in the report.[114] A witness who is not properly qualified to provide specialized advice to the court should not be tendered. Experts are only permitted to offer opinions within the scope of their

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[110] Grabher Hearing Transcript, p. 345, lines 8-11. **[AB Tab 24]**
[111] *Kelliher (Village) v. Smith (1931),* [1931] S.C.R. 672 *("Kelliher"),* at para. 18. **[BOA Tab 7]**
[112] *R. v. Abbey,* [1982] 2 S.C.R. 24 ("*Abbey*"), at para. 44. **[BOA Tab 12]**
[113] *Abbey*, at para. 44. **[BOA Tab 12]**
[114] See *White Burgess*, at para. 16. **[BOA Tab 24]**

expertise.[115] According to the Supreme Court of Canada, expert witnesses "have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so."[116]

135. Professor Rentschler is not properly qualified to provide an expert opinion on this matter, and she has breached the expert's duty to the court by failing to provide evidence that is impartial, independent and unbiased.

136. These issues not only affect the relevance of the Rentschler Report, but also directly attack Professor Rentschler's qualification as an expert for this matter and establishes that she is, as a matter of fact and law, unqualified to give an expert opinion in the case at bar. These issues will be discussed individually below.

Failure to Stay Within the Bounds of Expertise

137. First, Professor Rentschler's testimony and the Rentschler Report fail to remain within the bounds of her scope of expertise. Justice Muise, in his decision regarding the Appellant's motion to strike Professor Rentschler's first expert report, stated that Professor Rentschler was qualified as an expert of a very narrow nature and scope and that she was only permitted to provide her opinion on those limited areas.[117] Professor Rentschler's first version of her expert report was struck precisely because its benefits were outweighed by the "prejudicial impact on the trial process, or the risk of dangers associated with the evidence materializing"[118] and failed

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[115] *R. v. K. (A.) (1999),* 45 O.R. (3d) 641 (Ont. C.A.), leave to appeal refused (2000), 2000 CarswellOnt 1818 (S.C.C.). **[BOA Tab 15]** See also, *R v Woods*, 1982 CanLII 3831 (ON CA), 65 CCC (2d) 554 **[BOA Tab 18]**
[116] *White Burgess,* at para. 2, see also para 10. **[BOA Tab 24]**
[117] See *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 at para 147. **[BOA Tab 3]**
[118] See *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 at para 144. **[BOA Tab 3]**

to answer “the real questions for which it may be proffered”.[119]

138. Despite this initial warning from Justice Muise, the Rentschler Report as well as the Professor’s testimony in cross-examination, frequently strayed outside her area of expertise by stating opinions on legal matters, which are entirely within the purview of the court, not outside experts.[120] Moreover, her second report is three times as long as the first, and contains a number of differences and changes from her original opinion, indicating an after-the-fact attempt to tone down her rhetoric about the supposed danger of the Plate in her second report.[121] This indicates a lack of impartiality.

139. Professor Rentschler also repeatedly offered opinions on psychological issues despite not being a psychologist or being qualified to make professional assessments in this field. Nonetheless, Professor Rentschler was undeterred in stating opinions and making allegations of how people might understand words or interpret phrases, and how people could feel as a result of those words or phrases.[122]

140. The Crown sought to admit Professor Rentschler's opinion on these areas for the purpose of establishing that the Registrar was correct in law to cancel the Plate, in response to a single anonymous complaint. According to the Supreme Court of Canada:

> ... expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. **The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle**.[123]

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[119] See *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87 at para 146. **[BOA Tab 3]**
[120] For examples of where Professor Rentschler made legal conclusions, see Rentschler Report at pp. 10, 11, 15, 17, 19. **[AB Tab 19]** See also Grabher Hearing Transcript at pp. 188, 191, 193, 286-289. **[AB Tab 24]**
[121] See Grabher Hearing Transcript, pp. 251 – 263. **[AB Tab 24]**
[122] For examples of where Professor Rentschler made psychological conclusions, see Rentschler Report at pp. 13-15, 23. **[AB Tab 19]** See also Grabher Hearing Transcript at pp. 189, 222-225, 240. **[AB Tab 24]**
[123] *Mohan*, at para. 32 [emphasis added] **[BOA Tab 16]**

141. The opinion evidence of Professor Rentschler goes to one of the "ultimate issues" in this case:. Her unqualified opinion should not be permitted to usurp the role of a judge.[124] Her methodology and qualifications should be subjected to the highest level of scrutiny when determining to accept the Rentschler Report or any part of it.

Impartiality, Independence and Unbiasedness

142. The qualification of an expert and their evidence includes the requirement that the expert provide evidence that is impartial, independent and unbiased.[125]

143. Professor Rentschler's Report and testimony on cross examination contains numerous contradictions and errors, and has an indication of bias.

144. For example, she admitted that Mr. Grabher's name must be anglicized to attribute the meaning she gives to the Plate, and *then denied that she was doing that very thing*.[126] She admitted that the Plate could be imagined to mean "grab her and keep her safe", or "grab her and keep her away from traffic".[127] But then she insisted that Nova Scotians will see the Plate and infer the same vulgar words ("by the pussy") that she does.

145. However, she admits she knows little or nothing about Nova Scotia society: in fact, Professor Rentschler did not even recognize the ship (the Blue Nose) emblazoned on the back of all Nova Scotia vehicle plates.[128] Under cross examination, Professor Rentschler admitted she is not qualified to opine as to what Nova Scotia society will think as she has no training as a psychologist.[129] The fact that the Plate was in use for 27 years without incident or complaint

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[124] *Mohan*, at para. 28. **[BOA Tab 16]**
[125] *R v Abbey*, 2017 ONCA 640 at para 48 quoting *White Burgess.* **[BOA Tab 13]**
[126] Grabher Hearing Transcript, p. 180, lines 4-8; p. 220, lines 11-17. **[AB Tab 24]**
[127] Grabher Hearing Transcript p. 214, lines 4-9. **[AB Tab 24]**
[128] Grabher Hearing Transcript p. 216 **[AB Tab 24]**
[129] Grabher Hearing Transcript, p. 225, lines 4-11. **[AB Tab 24]**

is a refutation of Professor Rentschler's theories of how Nova Scotians view the Plate.

146. The second stage of the admissibility test determines whether the potential benefits of the evidence outweigh the potential risks.[130] However, it is respectfully submitted that given all of the above analysis, Professor Rentschler and her report unquestionably fail to meet the threshold test of admissibility, and therefore there is no need to weigh the benefits against the risks. If it is determined that a gatekeeper role is still necessary, it is respectfully submitted that irrelevant, unnecessary, unreliable and unqualified evidence has no place in a court of law, especially one dealing with complex constitutional issues.

147. In the case at bar, 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 motorist or citizen, female or male, was ever once endangered by Plate. Professor Rentschler has strayed outside of her parameters and advanced irrelevant and prejudicial conclusions which are not supported by evidence. She has twisted the theoretical underpinnings of speech act theory and reached clearly absurd conclusions. Her report is premised on flawed methodology and conjecture cloaked in the guise of authority and it is respectfully submitted that the Honourable Lower Court Judge made an error in law or in mixed fact and law by admitting and relying on Professor Rentschler's expertise, given the above analysis.

Failure To Consider Dr. Soh's Expert Report

148. On November 20, 2019, the Appellant filed a Rebuttal Expert Report from Dr. Debra Soh. The Honourable Lower Court Judge found that Dr. Soh was "qualified as an expert in human sexuality, sexual violence, and the impact of language/media on potential violent sexual

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[130] *R v Abbey*, 2017 ONCA 640 at para 48 quoting *White Burgess.* **[BOA Tab 13]**

offenders…"[131]

149. Dr. Soh's report comprehensively refuted Professor Rentschler's claims by concluding that, among other things, there is no discernable connection between media coverage of sexual assault cases and whether or not a license plate increases violence against women,[132] there is no empirical evidence or research suggesting that exposure to cultural slogans normalizes sexual violence against women,[133] it is unlikely that members of the public would infer the words "by the pussy" after seeing the Plate based on comments made by Donald Trump[134] and the Plate does not encourage a culture of supporting sexual violence against women.[135]

150. This list is but a small sampling of the faults Dr. Soh found in Professor Rentschler's report. Despite this, the Learned Justice Jamieson, failed to analyze or consider any of Dr. Soh's conclusions or opinions, even though the evidence before her was contradictory. As such, it is respectfully submitted that the Honourable Lower Court Judge erred in law or erred in mix law and fact by failing to consider the evidence presented by Dr. Soh, and explain why she preferred Professor Rentschler's evidence to that of Dr. Soh.

PART 6 - RELIEF SOUGHT

151. The Appellant respectfully requests:

a) A Declaration pursuant to section 24(1) of the *Charter* that the cancellation of the Appellant's Plate unjustifiably infringes the section 2(b) and section 15 *Charter* rights of the Appellant;

b) A declaration pursuant to section 52(1) of the Constitution Act, 1982, that section

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[131] Grabher Hearing Transcript starting at Line 4 Page 77. **[AB Tab 24]**
[132] Affidavit of Debra Soh, at page 9. **[AB Tab 23]**
[133] Affidavit of Debra Soh, at page 13. **[AB Tab 23]**
[134] Affidavit of Debra Soh, at page 16. **[AB Tab 23]**
[135] Affidavit of Debra Soh, at page 15. **[AB Tab 23]**

5(c)(iv) of the Regulation infringes section 2(b) of the *Charter*, is not saved by section 1, and is therefore of no force or effect;

c) An order reissuing the Plate;

d) Costs to the Appellant both in the Court of Appeal and in the judgment appealed from in the Nova Scotia Supreme Court; and

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

All of which is respectfully submitted this 29th day of October, 2020

Jay Cameron
Counsel for the Appellant

Lisa Bildy
Counsel for the Appellant

APPENDIX A - LIST OF CITATIONS

1. *Canadian Broadcasting Corp. v. Canada Attorney General,* 2011 SCC 2
2. *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326
3. *Grabher v Nova Scotia (Registrar of Motor Vehicles),* 2018 NSSC 87
4. *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component,* 2009 SCC 31
5. *Homburg Canada Inc. v. Nova Scotia (Utility and Review Board),* 2010 NSCA 24
6. *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 SCR 235
7. *Kelliher (Village) v. Smith* (1931) S.C.R. 672
8. *Kindler v. Canada (Minister of Justice) [*1991] 2 SCR 779
9. *Law v. Canada (Minister of Employment & immigration),* [1999] 1 SCR 497
10. *Little Sisters Book and Art Emporium v Canada (Minister of' Justice),* 2000 SCC 69
11. *Mouvement laïque québécois v Saguenay (City),* 2015 SCC 16, [2015] 2 SCR 3
12. *R. v. Abbey,* [1982] 2 S.C.R. 24
13. *R v Abbey*, 2017 ONCA 640
14. *R v Breeden* 2009 BCCA 463
15. *R. v. K. (A.) (1999),* 45 O.R. (3d) 641 (Ont. C.A.),
16. *R v Mohan,* [1994] 2 SCR 9
17. *R* v. *Oakes,* [1986] 1 SCR 103
18. *R v Woods*,1982 CanLII 3831 (ON CA),
19. *Roncarelli v. Duplessis,* [I 959] S.C.R. 121
20. *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 4 1
21. *Trociuk v. British Columbia (Attorney General),* 2003 SCC 34
22. *Troller v. Manitoba Public Insurance Corporation, 2019 MBQB 157*
23. *Vietnamese Association of Toronto v Toronto* [2007] O.J. No. 1510
24. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23
25. *Withler v. Canada (Attorney General),* 2011 SCC 12

APPENDIX B - STATUTES AND REGULATIONS

1. *Motor Vehicle Act,* RSNS 1989, c 293, S.10,38
2. *Multiculturalism Act* RSNS 1989, c 294
3. *Personalized Number Plates Regulations,* NS Reg 124/2005