C.A. No. 497266

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 INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

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FACTUM OF THE INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

PART I – CONCISE OVERVIEW OF THE APPEAL

1. CCLA takes no position on the ultimate outcome of this appeal. It sought leave to intervene because of its concern that the freedom of expression protection is significantly weakened if the courts narrowly construe the application of s. 2(b) of the Canadian Charter of Rights and Freedoms (the "***Charter***")[1] and widely interpret what constitutes a reasonable limitation prescribed by law pursuant to s. 1 of the *Charter*. CCLA makes

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

these submissions to assist the Court in its interpretation of the *Charter* and its consideration of the decision and reasoning of the Court below.

2. CCLA is not advocating that s. 2(b) applies to all government spaces nor that, where s. 2(b) does apply, the content of the expression must be unrestricted. Rather, CCLA submits that, at the very least, where a government invites citizens to express themselves in a government owned or controlled space, the invited expression is protected by s. 2(b) as long as: the expression is not inconsistent with the underlying values that the *Charter* protects; expression in that space will not generally be reasonably perceived to be the expression of government; and the expression does not significantly interfere with the primary purpose of the government space.

3. A restriction on the content of invited expression that is protected by s. 2(b) is not "prescribed by law" or does not minimally impair the protected expression as required by s. 1 where the restriction is vague or overly broad. CCLA will make submissions concerning the vagueness or overbreadth of the restriction of expression applicable in this case, which is based upon:

(a) the opinion of a single government official;

(b) that the expression implies;

(c) content that may be;[2]

(d) considered;

(e) in poor taste.[3]

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[2] S. 5(c)(iv) actually prohibits content that *is or may be* offensive or in bad taste. CCLA's submissions focus on the aspects of this section which, in its view, are the most vague. Accordingly, this factum does not address the prohibition on content that *is* offensive or in bad taste.

[3] For the reason set out in footnote 2, CCLA does not address the prohibition on "offensive" content. CCLA submits that the term "offensive" may also be impermissibly vague.

PART II – CONCISE STATEMENT OF FACTS

4. CCLA is an independent, national, non-governmental organization dedicated to promoting, defending, and fostering recognition of fundamental human rights and civil liberties. In particular, the organization is actively engaged in promoting freedom of expression.

5. CCLA has provided Canadian courts with assistance on numerous occasions regarding the scope of protection for freedom of expression, including its application to expression conveyed in public and publicly accessible spaces.[4]

6. CCLA committed to this Court to attempt to minimize duplication of the submissions of the parties. As this factum is being filed at the same time as the factum of the appellant, CCLA will assume that the appellant's factum will more than adequately summarize Nova Scotia's personalized license plate program, as set out in the *Personalized Number Plate Regulations*, N.S. Reg. 124/2005 (the "**PNP Regulations**"), the history of the appellant's personalized license plate, and the decision of the Court below.

7. CCLA wishes, however, to highlight the following:

(a) Nova Scotia's personalized license plate program has been in place for more than 30 years;

[4] For example, *R. v. Breeden*, 2009 BCCA 463, *Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Div Ct), *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, and *Genex Communications inc. v. Attorney General of Canada*, 2005 FCA 283, *CCLA v Attorney General of Ontario*, 2020 ONSC 4838.

(b) The appellant's personal license plate was approved in Nova Scotia for 27 years. His son continues to use the same contented plate in Alberta today;[5]

(c) The Registrar who cancelled the plate advised the appellant "[w]hile I recognize this plate was issued as your last name the public cannot be expected to know this *and can misinterpret it as a socially unacceptable slogan*."[6] (Emphasis added);

(d) All parties and the Court below accepted that the content of the license plate at issue is expressive content [7] which advances the underlying value of self-fulfilment;[8] and

(e) The Court below determined that the invitation by the government for the public to express themselves on a personalized license plate did not bring with it the protection of s. 2(b).[9]

PART III – LIST OF ISSUES

8. CCLA will address two issues:

(a) The application of s. 2(b) to the content of a personalized license plate; and

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[5] Appeal Book, Vol II, Tab 22, Affidavit of Lorne Wayne Grabher, sworn November 1, 2017, para 5. *Alberta Personalised Licence Plate Rules*, published pursuant to s 63.1(4) of the *Operating Licensing and Vehicle Control Regulation*, online, < https://www.alberta.ca/licence-plates.aspx>. The personalized license plate requirements and prohibitions in Alberta are similar to the requirements in Nova Scotia, including a prohibition on offensive language or similar plates to an existing license plate. However, the Alberta rules provide a more detailed list of what expression will be prohibited and the proposed license plate application is sent to Alberta's Motor Vehicles Branch for a decision.
[6] Appeal Book, Vol II, Tab 22, Affidavit of Lorne Wayne Grabher, sworn November 1, 2017, Exhibit "B".
[7] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at para 49.
[8] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at para 103.
[9] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at para 80.

(b) Whether legislation that permits a government official to prohibit expressive content because in their subjective opinion the content may be considered to be in poor taste is a reasonable limitation prescribed by law for the purposes of section 1 of the *Charter*.

PART IV – STANDARD OF REVIEW FOR EACH ISSUE

9. CCLA takes no position on the Standard of Review in this factum.

PART V – ARGUMENT

A. Application of s. 2(b) to the content of a Personalized License Plate

10. The leading authorities on the framework for consideration on when s. 2(b) applies to expression in government owned or controlled places were considered by the Court below and undoubtedly will be cited and dealt with by the parties to this appeal.

11. To minimize duplication, and to assist this Court, CCLA provides the following synthesis setting out its submission on how the principles derived from those authorities should apply to the determination on whether s. 2(b) applies to the content of personalized license plates:

(a) **History of expression in that space:** CCLA recognizes that 50 years ago, there was no history of the content of license plates being used for self-expression by the public. In that era, an argument that the public should be able to express themselves on the plate would have received short shrift. However, for more than 30 years, Nova Scotia has specifically invited the public to use the space on license plates for self-expression and the public

accepted the invitation. This history supports the application of s. 2(b) to that space;[10]

(b) **Purpose of plates:** The primary purpose of license plates is not to be a space for public expression,[11] but rather to enable the government to regulate vehicle ownership and enable law enforcement to identify vehicles.[12] Nova Scotia's invitation to the public to use that space for self-expression, however, has now made self-expression one of the purposes of the plates. This new purpose supports the application of s. 2(b) to the content of personalized plates;[13]

(c) **Interference with government purpose:** If personalized license plates significantly interfered with the primary purpose of license plates, this would militate against the application of s. 2(b) to the content of the license plates. Nova Scotia's invitation to the public to use plates for self-expression, however, creates a presumption that no interference was anticipated. CCLA submits that the onus should be on the government to demonstrate significant interference, if it is alleging significant interference. Furthermore, the absence of any evidence of interference over the past 30 years the

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[10] *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 at para 49.
[11] In *Société Radio-Canada c Canada (Procureur général)*, 2011 SCC 2 at para 37, the Court held that the analysis of the expression to be permitted is not to be limited by the primary function of the government's space.
[12] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at paras 20-23, 61. The Court noted at paragraph 117 the evidence that the purpose of the restriction on the content of license plates at issue was to promote a safe and welcoming environment.
[13] *Troller v Manitoba Public Insurance Company*, 2019 MBQB 157 at paras 61-62.

program has been in place supports the application of s. 2(b) to the content of license plates;

(d) **Risk of expression in that space being generally and reasonably perceived as the government's message:** CCLA acknowledges that if the government can satisfy a court that the public generally and reasonably perceives that the content of most personalized license plates is the message of the government, then this would not only impact the level of restrictions that could be justified under s. 1, it might result in a finding that s. 2(b) did not protect the content of the plate.[14] However, the fact that the government invites citizens to place their own message on license plates creates a strong inference that the government had no concern over perception of general attribution and no evidence was called to suggest that the public misunderstands whose expression is on the plate. Moreover, common sense dictates that no one could reasonably consider a hypothetical personalized license plate such as "GOLEAFS" or "GR8TDAD" to be Nova Scotia's message;

(e) **Trivialization of s. 2(b):** To avoid trivializing a fundamental freedom, s. 2(b) has been found not to protect, for example, violent expression and threats of violence,[15] which are inconsistent with the values underlying s. 2(b),

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[14] *CCLA v Attorney General of Ontario*, 2020 ONSC 4838 at paras 71-73. *Vietnamese Association of Toronto v Toronto*, 85 OR (3d) 656 at para 19. CCLA submits that, assuming s. 2(b) applies to personalized plates, a reasonable limitation might preclude plates whose content is reasonably likely to be perceived as a message by government.

[15] *R v Khawaja*, 2012 SCC 69 at para 70; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 28.

namely: truth-seeking, democratic discourse, and self-fulfilment.[16] The Supreme Court of Canada has also recognized that applying s. 2(b) to every minor restriction or requirement on expression in government places might also trivialize the freedom.[17] Personalized license plates may appear to be trivial, but they present a rare opportunity for personal expression to a wide audience. CCLA submits that where invited expression is not only consistent with the values underlying s. 2(b) but advances those values, its protection does not trivialize the freedom;[18]

(f) **Limited and highly regulated space:** CCLA recognizes that the ability to express oneself on a license plate, for purposes of self-fulfillment, is by necessity limited by both space and the requirement that the content be able to serve the primary purpose of the license plate. The fact that a space is highly regulated may impact the type of restrictions on expression which can be justified under s. 1, but it provides, CCLA submits, no justification for why s. 2(b) should not apply to the limited expression that is permitted and, in the case of personalized license plates, has been specifically invited;[19]

(g) **Adjacent property:** as is often the case, where a person is prohibited from expressing themselves in one place, they are free to do so in another,

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[16] *Montreal (City) v 2952-1366 Québec inc*, [2005] 3 SCR 141.
[17] *J.T.I. MacDonald Corp. c Canada (Procureur général)*, 2007 SCC 30 at para 132; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at para 230.
[18] *CCLA v Attorney General of Ontario*, 2020 ONSC 4838.
[19] *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2 at para 83, where the Supreme Court recognized that court houses, which are heavily regulated public spaces, are spaces where freedom of expression is protected. Significantly, in *Société Radio-Canada*, the fact that court houses are highly regulated was not raised in the s. 2(b) analysis, but as part of the government's argument for why a limit on expression should be justified.

sometimes on adjacent property.[20] While CCLA submits that adjacent property availability should be a factor to be considered only in the s. 1 determination as to whether a restriction on expression is reasonable,[21] some courts have pointed to the availability of an adjacent location to engage in the expression as a contextual factor that informs whether s. 2(b) is even applicable.[22] CCLA submits that, in the consideration as to whether s. 2(b) is even applicable, the adjacent property consideration is of little assistance to the Court as it should only arise where the expression in the prohibited space would interfere with the purpose of that space and/or where the expression would generally and reasonably be perceived to be that of the government in the prohibited place, but not in the adjacent place. In both of those instances, s. 2(b) may not be applicable regardless of whether expression is permitted on adjacent property;

(h) **Truly public viewership:** CCLA submits that where the government does not control where or when the expression can be viewed by the public, as is the case with license plates, that this supports the application of s.2(b) to that expression;[23]

(i) **Jurisprudential trend:** CCLA submits that the jurisprudential trend is to find that where the government permits or invites expression in a place, be

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[20] *R v Breeden*, 2009 BCCA 463 at paras 25-28.
[21] *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2006 BCCA 529 at para 130, aff'd 2009 SCC 31 (appealed on different grounds); *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at para 139.
[22] *R v Breeden*, 2009 BCCA 463 at para 28, *Grabher v Nova Scotia (Registrar of Motor Vehicles),* 2020 NSSC 46 (CanLII) at paras 72-74.
[23] *Troller v Manitoba Public Insurance Corporation,* 2019 MBQB 157 at paras 67.

it buses, airports, hydro poles, city streets, parks, etc.,[24] the result is usually that s. 2(b) applies to the expression in that space even though the expressive activity at issue was not the primary purpose of the location.[25] CCLA further submits that where expression is invited, the onus should shift to the government to establish why s. 2(b) should not apply. The very few government spaces or places where s. 2(b) has been found not to apply is where the court was satisfied that: there has been no invitation or history of expression and that expression would interfere with the purpose of the space and/or the expression would generally be perceived to be the expression of the government;[26] and

(j) **Other decisions on license plates:** There have been a number of license plate decisions in the US and one other in Canada.[27] While none of these decisions are binding on this Court, and Canadian courts have recognized the different constitutional frameworks applied in Canada and the US to freedom of expression, these decisions can still be of assistance to the Court. The leading authority in the US was a 5 to 4 decision of the US

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[24] *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31, *Montréal (City) v 2952-1366 Québec inc*, 2005 SCC 62, *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139.

[25] *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2 at para 37.

[26] For example, in *R v Breeden*, the British Columbia Court of Appeal held that a Fire Hall was inherently not amenable to or suitable for free expression. See *R v Breeden*, 2009 BCCA 463 at para 20. See also *Vietnamese Association of Toronto v Toronto*, in which the Ontario Divisional Court held that the flying of a flag on government property would be "perceived, right of wrongly, as the expression of the City's perspective and approval." See also *Vietnamese Association of Toronto v Toronto*, 85 OR (3d) 656 at para 19.

[27] *Troller v Manitoba Public Insurance Corporation,* 2019 MBQB 157, *Walker v Texas Division, Sons of Confederate Veterans inc*, 576 US 200*, Mitchell v Motor Vehicle Administration*, 450 MD 282 (Md Ct App 2016), *Carroll v Craddock*, 2020 WL 5880181 (D RI 2020), *Hart v Thomas*, 422 F Supp 3d 1227 (ED Ky 2019), *Commissioner of Indiana Bureau of Motor Vehicles v Vawter*, 45 NE 3d 1200 (Ind Sup Ct 2015).

Supreme Court where the majority held that a controversial license plate design[28] was government speech as opposed to private speech primarily because the Court found that the expression therein would be perceived to be either government speech or expression endorsed by government, and thus the First Amendment protections to private speech did not apply.[29] The minority rejected the conclusion that the plate design would be so perceived.[30] The overwhelming number of American decisions and the other Canadian case have held that the content on a speciality licence plate, unlike a custom design, is not reasonably likely to be perceived as government speech and accordingly engages constitutional protections of freedom of expression.[31]

12. Accordingly, be it on busses, stamps,[32] trademarks,[33] or license plates, CCLA submits that once government invites the public to express its views on a space, this significantly influences the calculus regarding whether the protection of s. 2(b) is

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[28] *Walker v Texas Division, Sons of Confederate Veterans inc*, 576 US 200 at 207-209 211 (8-9 of linked majority judgement). It is noteworthy that provinces often have unique license plate designs with a slogan or catchphrase. CCLA submits that currently it may be more likely that someone may perceive the license plate design and/or branded catchphrase as being a government message in contrast to the content of a personalized plate.

[29] *Walker v Texas Division, Sons of Confederate Veterans inc*, 576 US 200 at 210-211 (6-7 of linked majority decision).

[30] *Walker v Texas Division, Sons of Confederate Veterans inc*, 576 US 200 at 221-223 (1-4 of linked dissent).

[31] *Mitchell v Motor Vehicle Administration*, 450 MD 282 (Md Ct App 2016), *Carroll v Craddock*, 2020 WL 5880181 (D RI 2020), *Hart v Thomas*, 422 F Supp 3d 1227 (ED Ky 2019), *Commissioner of Indiana Bureau of Motor Vehicles v Vawter*, 45 NE 3d 1200 (Ind Sup Ct 2015). In *Vawter* the Indiana Supreme Court held that *Walker* governed and that a personalised license plate was government speech to which First Amendment protection did not attach, but this reasoning was rejected in *Hart*, *Mitchell* and *Carroll*.

[32] "Canada Post Terms and Conditions for Personalised Stamps" <https://www.picturepostage.ca/webapp/wcs/stores/servlet/XTermsView?catalogId=10051&urlLangId=-1&langId=-1&storeId=10154>.

[33] *Trademarks Act*, RSC 1985, C T-13, s 9(1); *Iancu v Brunetti*, 139 S Ct 2294 at 2298-2302 (3-10 of linked copy).

applicable. If it is applicable, such protection need not be without restrictions. Indeed, in every space or place there may well be a need to restrict content.[34] CCLA submits that such restrictions are only valid, however, if they meet the requirements of s. 1 of the *Charter*.

B. Whether legislation that permits a government official to prohibit expressive content because in their subjective opinion the content may be considered to be in poor taste is a reasonable limitation prescribed by law for the purposes of section 1 of the *Charter*

13. As noted above, CCLA is concerned with a narrow application of s. 2(b) and a wide interpretation of s. 1 of the *Charter*. CCLA will not address all aspects of s. 1, but will limit its submissions to the aspects of s. 1 that arise when a restriction of expression is vague and/or overly broad, namely: "prescribed by law" and "minimal impairment".[35]

14. While some authorities refer to a low bar for the government to hurdle for a restriction to be considered "prescribed by law",[36] it still remains the onus of government to demonstrate that the law (a) provides adequate guidance to those who are expected to abide by it and (b) limits the discretion of the government officials responsible for the enforcement or implementation of the law.[37] Otherwise the law is open to the attendant dangers of arbitrary and discriminatory application.[38] Put another way, the restriction must

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[34] Some restrictions on license plates are likely to pass constitutional scrutiny. As an example, restrictions necessary to accomplish the primary purposes of registration and identification, such as prohibiting individuals from obtaining a personalized license plate that duplicates an existing license plate, will likely constitute a reasonable limit on free expression.
[35] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 1991 CarswellNat 348 at para 46.
[36] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 1991 CarswellNat 348 at para 47
[37] *JTI MacDonald Corp c Canada (Procureur général)*, 2007 SCC 30 at para 79.
[38] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General),* [2004] 1 SCR 76. This case addressed vagueness in the context of an alleged section 7 violation, but in *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, Justice Gonthier confirmed that the vagueness principle also applies to the "prescribed by law" and minimal impairment analyses.

be sufficiently detailed to provide a basis for reasoned analysis of its meaning and the type of behaviour that would be at risk of being held impermissible under the law.[39]

15. Jurisprudence provides some useful illustrations of these principles. In one decision, the Federal Court of Appeal held that a prohibition against the import of "immoral or indecent material" was not "prescribed by law".[40] The Federal Court of Appeal noted there was no definition for "immoral" and "indecent" in the legislation and the words "immoral" and "indecent" are highly subjective and emotional in their content.[41] As such, opinions honestly held by reasonable people with respect to what is immoral and indecent vary widely.[42] The Federal Court of Appeal held that in order for a reasonable limit on expression to be prescribed by law, it must be sufficiently clear to understand where the limit is, noting "[i]f a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited."[43]

16. In a contrasting decision, the Ontario Court of Appeal found that the prohibition on "abusive or insulting language" was prescribed by law on the basis that it was implicitly qualified by the language in the legislation: "in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons".[44] That same Court held that a law that simply permitted the Board of Censors to approve or prohibit the showing of any film

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[39] *Bracken v Niagara Parks Police*, 2018 ONCA 261 at paras 66-67.
[40] *Luscher v Dep. Minister, Revenue Canada*, [1985] 1 FC 85 (FCA).
[41] *Luscher v Dep. Minister, Revenue Canada*, [1985] 1 FC 85 (FCA) at paras 19 - 20.
[42] *Luscher v Dep. Minister, Revenue Canada*, [1985] 1 FC 85 (FCA) at para 20.
[43] *Luscher v Dep. Minister, Revenue Canada*, [1985] 1 FC 85 (FCA) at para 11.
[44] *Bracken v Niagara Parks Police*, 2018 ONCA 261 at paras 27-32.

it did not approve of was not prescribed by law because there was no qualification to limit the Board's ability to deny or prohibit free expression.[45]

17. Vagueness as an aspect of overbreadth also comes into play when a court considers minimal impairment.[46] Here the standard is that the prohibition must not go farther than necessary to accomplish the government's purpose.[47] If the language of the prohibition is too vague and unclear, the violation of s. 2(b) will not have been confined within reasonable limits.[48]

18. CCLA submits that the restriction at issue contains multiple elements of ambiguity and subjectivity and is devoid of any reasonableness or community standard.

19. To assist the Court, CCLA breaks down the restriction into parts:

(a) **"In the opinion of the registrar"**: the ability to restrict expression rests in the subjective opinion of a single government official. Accordingly, it is not surprising that registrars in different provinces arrived at different conclusions, or that the same registrar arrived at different conclusions in different years, as was the case here;

(b) **"the expression implies"**: the prohibited expression need not actually be in poor taste, it is sufficient that it implies content that is so;

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[45] *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 5 DLR (4th) 766, 1984 CarswellOnt 38 at para 5 (Ont CA), aff'g (1983), 147 DLR (3d) 58 (Ont Div Ct). The Court held that the prohibition "clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words of s. 1 of the Charter — "subject only to such reasonable limits prescribed by law"."

[46] *JTI MacDonald Corp c Canada (Procureur général)*, 2007 SCC 30 at paras 78-79, 92-93.

[47] *JTI MacDonald Corp c Canada (Procureur général)*, 2007 SCC 30 at paras 92-93.

[48] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at para 46.

(c) **“content that may be”**: the PNP Regulations prohibit content that *is* or may be offensive or in bad taste. As a result, it is not even necessary that the content is something offensive or in bad taste in order to be prohibited, it is sufficient if it simply implies content that *may* be so;

(d) **“considered”**: it is not even necessary that the content may imply something in poor taste in the opinion of the registrar, it appears sufficient if the registrar is of the opinion that it may be considered by someone else that the content implies something that may be in poor taste. In this case, one person “misinterpreted” the intention of the plate and submitted a complaint. It is not apparent that misinterpretation need even be reasonable for the registrar to reject a plate; and

(e) **“in poor taste”**: the PNP Regulation actually prohibits content that may be offensive[49] *or* in poor taste. Accordingly, content which is not offensive but only considered to be in poor taste is sufficient to enable the Registrar to reject a plate. No guidance is provided in the legislation[50] as to what is in poor taste. Is it truly in the eye of the beholder? It is noteworthy that the Registrar advised the appellant that the plate could be misinterpreted as a

[49] CCLA does not address the prohibition on “offensive” content here but s. 5(c)(iv) also prohibits content that, in the opinion of the Registrar, contains content that is or may be considered offensive. No guidance is provided in the legislation for the term “offensive”.

[50] *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 (CanLII) at paras 6, 134-135. A list was maintained by the Registrar of words which were previously disallowed. This list was not available to the public and did not constrain what the Registrar could prohibit in the future. Accordingly, the list provides little useful guidance to either those who are applying for personalized plates or those who must approve or reject them.

> "socially unacceptable slogan". Is a socially unacceptable slogan necessarily in bad taste?

20. The restriction at issue can be contrasted with the restrictions in Alberta which are set out in a more precise and detailed list.[51] While Alberta also has a general prohibition on "offensive" content, the list also includes specific examples of prohibited content that can inform an applicant's understanding of the more general prohibition.[52] For example, the list sets out a prohibition on ethnic slurs, religious slurs, and foul language.

21. There are no standards to any aspect of the restriction at issue, such as reasonableness,[53] community standards,[54] or some other standard[55]. As a result, the restriction on its face does not merely permit the prohibition of content far beyond what would be considered to be "obscene",[56] "violent expression",[57] or defamation,[58] it appears

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[51] CCLA is not submitting that the restrictions in Alberta comply with the requirements of the *Charter,* only that they are less vague than the restriction in Nova Scotia by providing more specificity and thus more guidance on what is prohibited.
[52] *Re Warren and Chapman* (1985), 17 DLR (4th) 261, 1985 CarswellMan 179 at paras 8-9, 12 (MB CA).
[53] *Montenegro v New Hampshire Division of Motor Vehicles*, 166 NH 215 at 223 (NH Sup Ct 2014).
[54] *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31. where the transit authority's advertising policies stipulated that no advertisement would be accepted which *was likely* to cause offence to any person or create controversy based on the standard of 'prevailing community standards'. Based on this standard, the Court accepted the transit authority's advertising policies to be accessible and precise.
[55] *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 where the City prohibited advertising that the City found to be of "immoral or irreputable character, offensive to the moral standards of the community, or which it believed negatively reflected on the character, integrity or standing of any organization or individual" and it required that any bus advertisements comply with the Canadian Code of Advertising Standards, a well-publicized industry standard published by Advertising Standards Canada (at para 67). While the City ultimately prohibited the proposed ad under its statutory discretion on the basis that it was immoral or irreputable advertising, the Court held that the discretionary decision was in keeping with the standards set out in the Code (at paras 69-74; see especially para 71.)
[56] *R v Butler*, [1992] 1 SCR 452, 1992 CarswellMan 100 at paras 76-78.
[57] *R v Khawaja*, 2012 SCC 69 at para 70; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 28.
[58] *Hill v Church of Scientology*, [1995] 2 SCR 1130, 1995 CarswellOnt 396.

to permit the Registrar to reject almost any content the Registrar (and conceivably anyone else) does not like.

VI – RELIEF SOUGHT

22. CCLA does not seek any relief and requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2020.

Steven Sofer

Heather Fisher

Counsel for the Intervenor,
Canadian Civil Liberties Association

SCHEDULE "A"

LIST OF CITATIONS

1. *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555
2. *Bracken v Niagara Parks Police*, 2018 ONCA 261
3. *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2006 BCCA 529
4. *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31
5. *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General),* [2004] 1 SCR 76
6. *Carroll v Craddock*, 2020 WL 5880181
7. *CCLA v Attorney General of Ontario*, 2020 ONSC 4838
8. *Commissioner of Indiana Bureau of Motor Vehicles v Vawter*, 45 NE 3d 1200
9. *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139
10. *Grabher v Nova Scotia (Registrar of Motor Vehicles),* 2020 NSSC 46
11. *Genex Communications inc. v. Attorney General of Canada*, 2005 FCA 283
12. *Hart v Thomas*, 422 F Supp 3d 1227
13. *Irwin Toy v Québec (Attorney General),* [1989] 1 SCR 927
14. *JTI MacDonald Corp c Canada (Procureur général),* 2007 SCC 30
15. *Luscher v Dep. Minister, Revenue Canada,* [1985] 1 FC 85
16. *Mitchell v Motor Vehicle Administration*, 450 MD 282
17. *Montenegro v New Hampshire Division of Motor Vehicles*, 166 NH 215
18. *Montreal (City) v 2952-1366 Québec inc,* [2005] 3 SCR 141
19. *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 5 DLR (4th) 766
20. *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69
21. *Ramsden v Peterborough (City)* [1993] 2 SCR 1084
22. *Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489
23. *Re Warren and Chapman* (1985), 17 DLR (4th) 261

24. *R. v. Breeden*, 2009 BCCA 463
25. *R v Butler*, [1992] 1 SCR 452
26. *R v Keegstra*, [1990] 3 SCR 697
27. *R v Khawaja*, 2012 SCC 69
28. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606
29. *R v Sharpe*, 2001 SCC 2
30. *Société Radio-Canada c Canada (Procureur général)*, 2011 SCC 2
31. *Thomson Newspapers Co v Canada (A.G.)* [1998] 1 SCR 877
32. *Troller v Manitoba Public Insurance Corporation*, 2019 MBQB 157
33. *Vietnamese Association of Toronto v Toronto*, 85 OR (3d) 656
34. *Walker v Texas Division, Sons of Confederate Veterans inc*, 576 US 200,

SCHEDULE “B”

STATUTES, REGULATIONS AND RULES

Canadian Charter of Rights and Freedoms, s 2, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, C11

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.

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.

Personalized Number Plates Regulations, NS Reg 124/ 2005

Refusal to issue personalized number plates

5 The registrar may refuse to issue personalized number plates to any applicant in any of the following circumstances:

> (c) the plate designation selected by the applicant
>
> > (iv) in the opinion of the Registrar, contains a number of characters that expresses or implies a word, phrase or idea that is or may be considered offensive or not in good taste.

Operator Licensing and Vehicle Control Regulation, Alta Reg 320/2002

Speciality Licence Plates

63.1(4) The Registrar may set the criteria based on which specialty licence plates may be created, applied for, issued and retained and as to how they may cease to be issued or issuable, and the Registrar shall publish those criteria that are so set on the Registrar’s website maintained on the Government’s Department of Service Alberta website.

Alberta Personalized Licence Plate Rules

Your plate must follow these guidelines:

- must be letters and/or numbers – special characters are not permitted, including - (hyphen), ’ (apostrophe), ! (exclamation mark), ? (question mark)
- have a minimum of 1 character and/or a maximum of 7 characters for regular plates
- have a minimum of 1 character and/or a maximum of 5 characters for motorcycle plates
- have a minimum of 1 character and/or a maximum of 5 characters (for veteran plate (3-pass, 2-58 and ham radio operator plates)

Personalized plates are issued on a first come first served basis. Plate configurations cannot be reserved.

There are also restrictions on what you can have on your personalized plate:

- can’t be a look-alike or similar plate to one that already exists
- can’t use the letter O, only a 0 (zero) may be used
- no ethnic slurs
- no religious slurs
- no foul language
- no sexual connotations
- no political slurs
- no illegal acts
- no text that may cause identification problems, such as MLA, Mayor, Doctor, etc.
- no text message abbreviation that may be offensive.
- no words when translated are offensive.
- no reference to alcoholic beverages, controlled substances or paraphernalia used in the consumption of these
- must not be a configuration used by Motor Vehicles for regular licence plates

***Trademarks Act*, RSC 1985, C T-13**

Prohibited marks

- **9 (1)** No person shall adopt in connection with a business, as a trademark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for,
    - **(a)** the Royal Arms, Crest or Standard;
    - **(b)** the arms or crest of any member of the Royal Family;
    - **(c)** the standard, arms or crest of His Excellency the Governor General;
    - **(d)** any word or symbol likely to lead to the belief that the goods or services in association with which it is used have received, or are produced, sold or performed under, royal, vice-regal or governmental patronage, approval or authority;
    - **(e)** the arms, crest or flag adopted and used at any time by Canada or by any province or municipal corporation in Canada in respect of which the Registrar has, at the request of the Government of Canada or of the province or municipal corporation concerned, given public notice of its adoption and use;
    - **(f)** the emblem of the Red Cross on a white ground, formed by reversing the federal colours of Switzerland and retained by the Geneva Convention for the Protection of War Victims of 1949 as the emblem and distinctive sign of the Medical Service of armed forces and used by the Canadian Red Cross Society, or the expression “Red Cross” or “Geneva Cross”;
    - **(g)** the emblem of the Red Crescent on a white ground adopted for the same purpose as specified in paragraph (f);
    - **(g.1)** the third Protocol emblem — commonly known as the “Red Crystal” — referred to in Article 2, paragraph 2 of Schedule VII to the *Geneva Conventions Act* and composed of a red frame in the shape of a square on edge on a white ground, adopted for the same purpose as specified in paragraph (f);
    - **(h)** the equivalent sign of the Red Lion and Sun used by Iran for the same purpose as specified in paragraph (f);
    - **(h.1)** the international distinctive sign of civil defence (equilateral blue triangle on an orange ground) referred to in Article 66, paragraph 4 of Schedule V to the *Geneva Conventions Act*;
    - **(i)** any territorial or civic flag or any national, territorial or civic arms, crest or emblem, of a country of the Union, if the flag, arms, crest or

emblem is on a list communicated under article 6ter of the Convention or pursuant to the obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the WTO Agreement stemming from that article, and the Registrar gives public notice of the communication;

- **(i.1)** any official sign or hallmark indicating control or warranty adopted by a country of the Union, if the sign or hallmark is on a list communicated under article 6ter of the Convention or pursuant to the obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the WTO Agreement stemming from that article, and the Registrar gives public notice of the communication;
- **(i.2)** any national flag of a country of the Union;
- **(i.3)** any armorial bearing, flag or other emblem, or the name or any abbreviation of the name, of an international intergovernmental organization, if the armorial bearing, flag, emblem, name or abbreviation is on a list communicated under article 6ter of the Convention or pursuant to the obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the WTO Agreement stemming from that article, and the Registrar gives public notice of the communication;
- **(j)** any scandalous, obscene or immoral word or device;
- **(k)** any matter that may falsely suggest a connection with any living individual;
- **(l)** the portrait or signature of any individual who is living or has died within the preceding thirty years;
- **(m)** the words “United Nations” or the official seal or emblem of the United Nations;
- **(n)** any badge, crest, emblem or mark
    - **(i)** adopted or used by any of Her Majesty’s Forces as defined in the *National Defence Act*,
    - **(ii)** of any university, or
    - **(iii)** adopted and used by any public authority, in Canada as an official mark for goods or services,

  in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use;

- **(n.1)** any armorial bearings granted, recorded or approved for use by a recipient pursuant to the prerogative powers of Her Majesty as exercised by the Governor General in respect of the granting of armorial bearings, if the Registrar has, at the request of the Governor General, given public notice of the grant, recording or approval; or
- **(o)** the name “Royal Canadian Mounted Police” or “R.C.M.P.” or any other combination of letters relating to the Royal Canadian Mounted Police, or any pictorial representation of a uniformed member thereof.

- **Excepted uses**

(2) Nothing in this section prevents the adoption, use or registration as a trademark or otherwise, in connection with a business, of any mark

- **(a)** described in subsection (1) with the consent of Her Majesty or such other person, society, authority or organization as may be considered to have been intended to be protected by this section; or
- **(b)** consisting of, or so nearly resembling as to be likely to be mistaken for
  - **(i)** an official sign or hallmark mentioned in paragraph (1)(i.1), except in respect of goods that are the same or similar to the goods in respect of which the official sign or hallmark has been adopted, or
  - **(ii)** an armorial bearing, flag, emblem, name or abbreviation mentioned in paragraph (1)(i.3), unless the use of the mark is likely to mislead the public as to a connection between the user and the organization.