NOVA SCOTIA COURT OF APPEAL

Citation: *Grabher v. Nova Scotia (Registrar of Motor Vehicles)*, 2021 NSCA 63

Date: 20210824
Docket: CA 497266
Registry: Halifax

Between:

Lorne Wayne Grabher

Appellant

v.

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

Judge: The Honourable Justice Cindy A. Bourgeois;

Appeal Heard: January 19, 2021, in Halifax, Nova Scotia

Subject: *Canadian Charter of Rights and Freedoms*—ss. 2(b) and 15; *Personalized Number Plates Regulations*, N.S. Reg. 124/2005

Summary: The Province of Nova Scotia, under the authority of the Registrar of Motor Vehicles, gives persons registering certain types of vehicles the opportunity to apply for personalized license plates. The appellant took advantage of this opportunity.

For over 27 years, the appellant applied for, and was granted permission to display GRABHER on his government-issued license plate. In December 2016, the Registrar advised the appellant that his personalized license plate was to be recalled

as it may be misinterpreted as “a socially unacceptable slogan”.

The appellant brought an application in the Supreme Court of Nova Scotia. He asked the court to find the Registrar’s decision to recall his personalized license plate, and the regulation that permitted her to do so, contravened his freedom of expression (s. 2(b)) and equality rights (s. 15) guaranteed under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

Following a two-day hearing, the hearing judge concluded the revocation of the appellant’s personalized license plate did not contravene either s. 2(b) or s. 15 of the *Charter*. The appellant appeals to this Court and requests those findings be reversed. He also seeks an order compelling the Registrar to re-issue the GRABHER plate to him.

Issues:

1. Did the hearing judge err in concluding s. 2(b) rights do not apply to personalized license plates in Nova Scotia?

2. Did the hearing judge err in concluding the Registrar’s decision to recall the GRABHER plate did not infringe the appellant’s s. 15 equality rights?

3. Did the hearing judge err in her treatment of the expert evidence?

4. Did the hearing judge err in concluding the GRABHER plate could be interpreted as promoting sexualized or gendered violence?

5. Did the hearing judge err in the weight she afforded to the “List”?

Result:

Appeal dismissed.

The hearing judge was correct in concluding the appellant’s s. 2(b) rights were not infringed. Personalized license plates are not a location to which freedom of expression applies.

Further, the hearing judge was correct when she found the appellant had failed to establish a breach of his s. 15 equality rights.

The hearing judge made no demonstrable error in her treatment of the expert evidence or the "List".

Finally, the appellant failed to demonstrate the hearing judge erred in concluding the GRABHER license plate could be interpreted as promoting sexualized or gendered violence.

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Lorne Wayne Grabher

Appellant

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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

Judges:	Beveridge, Fichaud and Bourgeois JJ.A.
Appeal Heard:	January 19, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois J.A., Beveridge and Fichaud JJ.A. concurring
Counsel:	Jay Cameron and Lisa Bildy for the Appellant Jack Townsend for the Respondent Steven Sofer and Heather Fisher for the Intervenor

Reasons for judgment:

[1] The Province of Nova Scotia, under the authority of the Registrar of Motor Vehicles, gives persons registering certain types of vehicles the opportunity to apply for personalized license plates. The appellant, Lorne Wayne Grabher, took advantage of this opportunity.

[2] For over 27 years, Mr. Grabher applied for, and was granted permission to display GRABHER on his government-issued license plate. In December 2016, the Registrar advised Mr. Grabher that his personalized license plate was to be cancelled as it may be misinterpreted as "a socially unacceptable slogan".

[3] Mr. Grabher brought an application in the Supreme Court of Nova Scotia. He asked the court to find the Registrar's decision to recall his personalized license plate, and the regulation that permitted her to do so, contravened his freedom of expression (s. 2(b)) and equality rights (s. 15) guaranteed under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[4] The Honourable Justice Darlene Jamieson concluded the revocation of Mr. Grabher's personalized license plate did not contravene either s. 2(b) or s. 15 of the *Charter*. Mr. Grabher appeals to this Court and requests those findings be reversed. He also seeks an order compelling the Registrar to re-issue the GRABHER plate to him. For the reasons to follow, I would dismiss the appeal.

Background

[5] The hearing judge set out the factual background giving rise to the dispute in her written reasons (2020 NSSC 46):

> [10] Mr. Grabher's family is of Austrian-German heritage. His father's family immigrated to Canada in 1906. Mr. Grabher's father served in the Canadian Armed Forces and was stationed in Cape Breton, Nova Scotia where he met Mr. Grabher's mother. His parents subsequently raised their family there.
>
> [11] Mr. Grabher and his wife have lived in Dartmouth, Nova Scotia since 2007. Prior to his retirement, he worked for 26 years with the Nova Scotia Department of Corrections. Mr. Grabher is proud of his Austrian-German heritage and of the immigrant history of his family.
>
> [12] Approximately 27 years ago, Mr. Grabher's family applied to the Registrar of Motor Vehicles for a personalized license plate bearing his family surname. The plate was initially a gift for his father. Over the period of 27 years,

> the plate was renewed yearly until 2016 with no concerns being raised by the Registrar. When Mr. Grabher's son moved to Alberta for work, he also obtained a license plate with the family name, which is still in use on a motor vehicle in Alberta today.
>
> [13] In October 2016, the Registrar received a complaint concerning Mr. Grabher's personalized plate which indicated the plate should be rescinded because the wording was offensive. Mr. Hackett said on cross-examination that it was his understanding there was only one person who complained about Mr. Grabher's plate (cross-examination, page 72).
>
> [14] On December 9, 2016, the then Registrar, Ms. Janice Harland, sent a letter to Mr. Grabher advising of the cancellation of his personalized plate. The letter states:
>
> > Please be advised that the Office of the Registrar of Motor Vehicles has received a complaint about your Personalized Plate GRABHER. While 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. This letter is to inform you that the registration of Personalized Plate GRABHER will be cancelled as of January 13, 2017. Your current plate registration may be moved to a regular license plate, or, you may request another personalized plate slogan, provided it is available. Alternatively, should you not wish to obtain a new license plate, you may apply for a refund for the remainder of the registration fees paid for the current personal plate registration.
>
> [15] Mr. Grabher requested several times, in writing and by telephone, that the Registrar reconsider her decision. On December 20, 2016, the Registrar wrote to Mr. Grabher advising that the decision to cancel the plate would not change. On March 31, 2017, counsel for Mr. Grabher wrote to the Registrar seeking a reinstatement of the plate. On April 6, 2017, the new Registrar, Mr. Kevin Mitchell, wrote to counsel confirming the prior decision to cancel the plate.

[6] Having no success with his attempts to dissuade the Registrar from revoking his personalized license plate, Mr. Grabher turned to the courts. In May 2017, he filed a Notice of Application in Court, which was subsequently amended in September 2017. In the Amended Notice of Application in Court, Mr. Grabher requested:

- A declaration that the cancellation of his personalized license plate unjustifiably infringed his ss. 2(b) and 15 *Charter* rights;
- A declaration that ss. 5(c)(iv) and 8 of the *Personalized Number Plates Regulations*[1] (the provisions that permit the Registrar to decline a

[1] N.S. Reg. 124/2005

requested plate or recall an existing one) infringe s. 2(b) of the *Charter* and are therefore of no force or effect;

- An Order reissuing the GRABHER plate; and
- Costs against the Province.

[7] At this point it may be helpful to the parties, and others who read these reasons, to highlight the way in which Mr. Grabher chose to frame his legal dispute with the Province. The hearing judge noted in her reasons that Mr. Grabher did not bring his challenge in the form of a judicial review, rather he challenged the constitutionality of the Registrar's decision and the regulatory provisions. A judicial review is a proceeding that enables an aggrieved party to challenge a decision made by an administrative decision maker and seek to have it set aside or varied. Judicial reviews often involve complaints such as: the decision maker did not have the jurisdiction to make the challenged decision, the decision maker misapplied the law, the decision was arbitrary or unreasonable, or the reasons given for the decision were not clear and understandable.

[8] Here, Mr. Grabher chose a different route to challenge the Registrar's decision. He argued the Registrar's decision to revoke his plate, and the provincial regulations that permitted her to do so, infringed his rights under the *Charter*. Mr. Grabher's choice to base his challenge on constitutional grounds required the hearing judge (and this Court on appeal) to assess his complaint based on the legal principles applicable thereto. I turn now to the provisions Mr. Grabher says infringe his *Charter* rights.

[9] Although other provisions contained in the *Personalized Number Plates Regulations* will be discussed in further detail later in these reasons, it is helpful as part of the background to set out the sections Mr. Grabher alleges are unconstitutional. Section 5(c)(iv) provides:

> 5 The Registrar may refuse to issue personalized number plates to an applicant in any of the following circumstances:
>
> …
>
> (c) the plate designation selected by the applicant
>
> …
>
> (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 considered offensive or not in good taste;

[10] Section 8 is brief:

> 8 The Registrar may recall a personalized number plate for any reason set out in clause 5(c).

[11] In response to Mr. Grabher's allegation the Registrar's decision and the above regulations infringed his freedom of expression, the Province countered that provincial license plates, including personalized ones, are not the type of government-owned property to which s. 2(b) rights apply. Therefore, Mr. Grabher could not establish a breach.

[12] With respect to Mr. Grabher's assertion the Registrar's decision to recall his plates infringed his equality rights under s. 15 of the *Charter*, the Province submitted no such breach could be established. It argued Mr. Grabher could not meet the test established in the Supreme Court of Canada jurisprudence (to be discussed later herein) for demonstrating an infringement of his equality rights and, as such, his application should be dismissed.

[13] In the alternative, the Province argued if a breach of either right was made out by Mr. Grabher, it could be justified as a reasonable limitation under s. 1 of the *Charter*.

[14] The matter was heard over two days. Mr. Grabher filed three affidavits in support of the application. He was not cross-examined. He also filed the affidavit and proposed expert report of Dr. Debra Soh. She was called to give evidence at the hearing and was qualified as an expert in human sexuality, sexual violence, and the impact of language/media on potential violent offenders. She was cross-examined.

[15] The Province filed the affidavits of two employees, Peter Hackett, Chief Engineer in the Department of Transportation and Infrastructure Renewal and Brian Taylor, Media Relations Advisor for the Finance and Treasury Board. By agreement of the parties Mr. Hackett underwent out-of-court cross-examination by Mr. Grabher's legal counsel prior to the hearing. The transcript of his cross-examination was entered into evidence. Neither Mr. Hackett nor Mr. Taylor testified at the hearing.

[16] The Province also filed the affidavit and expert report of Dr. Carrie Rentschler. She was qualified as an expert in representations of gendered violence across media platforms, capable of giving opinion evidence in relation to the effect of social and cultural context on interpretation of expression, how language that

supports gendered violence plays a contributing role in promoting violence against women, and the impact of such expression. Dr. Rentschler was cross-examined at the hearing.

[17] I will examine the hearing judge's findings in further detail in the analysis of the issues raised on appeal. For now, it suffices to set out her conclusion:

> [150] I find there is no constitutionally-protected right to s. 2(b) freedom of expression in a government-owned, personalized license plate. I further find that Mr. Grabher has not established that the Registrar's decision limited his s. 15 equality rights. If I am incorrect and there is a s. 2(b) protection in the location of a personalized license plate, I find that the limitation of s. 5(c)(iv), including its use to recall a plate under s. 8, is justified under s. 1.

[18] Having found s. 2(b) had no application to personalized license plates, a subsequent analysis of whether the Province could justify an infringement of Mr. Grabher's freedom of expression was not obligatory. However, the hearing judge chose to undertake a s. 1 analysis in the event she was found to be mistaken regarding the application of s. 2(b).

Issues

[19] Mr. Grabher filed a Notice of Appeal on March 9, 2020, in which he set out eight grounds of appeal. These are repeated in his factum:

> 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.

[20] The above grounds fall in three categories. Issues a) and b) relate to Mr. Grabher's request for a declaration that the Registrar's decision and the challenged regulations infringe his s. 2(b) right of freedom of expression. Issue f) is relevant to Mr. Grabher's assertion that the Registrar's decision infringed his equality rights under s. 15 of the *Charter*. The remaining grounds arise from the hearing judge's s. 1 analysis and the evidentiary issues related thereto.

[21] The Canadian Civil Liberties Association was granted intervenor status on the appeal. In its written submissions, it sets out two issues for the Court's consideration, one squarely focused on s. 2(b) and the other on s.1:

8. CCLA will address two issues:

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

(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*.

[22] In its factum the Province submits the issues before the Court should be summarized as follows:

23. The Respondent submits that the Appellant's grounds of appeal can be condensed and refined into the following issues:

a. Did Justice Jamieson err in determining that there was no breach of the Applicant's s. 2(b) rights?

b. Did Justice Jamieson err in dismissing the Appellant's claim under s. 15?

c. Did Justice Jamieson err in giving little weight to the List?

d. Did Justice Jamieson err in her assessment of the expert evidence from Dr. Rentschler and Dr. Soh?

e. Did Justice Jamieson err in finding that the letters "GRABHER" could (without full contextual information) be interpreted as promoting sexualized or gendered violence?

f. Did Justice Jamieson err in determining that s. 5(c)(iv) of the *PNP Regulations* is sufficiently precise so as to be a limit "prescribed by law"?

g. Did Justice Jamieson err in finding that any limitation of the Appellant's *Charter* rights was justified under s. 1?

[23] For reasons that will become apparent, I do not find it necessary to fully address the hearing judge's s. 1 analysis. Although not required to determine the outcome of the appeal, I will address the evidentiary arguments raised by Mr. Grabher notwithstanding they relate primarily to the hearing judge's s. 1 analysis.

[24] Having considered the decision under appeal, and the submissions made to this Court, I re-frame the issues for determination as follows:

1. Did the hearing judge err in concluding s. 2(b) rights do not apply to personalized license plates in Nova Scotia?

2. Did the hearing judge err in concluding the Registrar's decision to recall the GRABHER license plate did not infringe Mr. Grabher's s. 15 equality rights?

3. Did the hearing judge err in her treatment of the expert evidence?

4. Did the hearing judge err in the weight she afforded to the "List"? and

5. Did the hearing judge err in concluding the GRABHER plate could be interpreted as promoting sexualized or gendered violence?

Standard of Review

[25] The standard of review is not controversial. In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders succinctly explained:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On

> questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

Analysis

> *Did the hearing judge err in concluding s. 2(b) rights do not apply to personalized license plates in Nova Scotia?*

[26] Whether a personalized license plate in Nova Scotia is a location to which s. 2(b) applies is a question of law. Accordingly, the hearing judge's determination must be assessed for correctness.

[27] The hearing judge determined a guaranteed freedom of expression does not apply to personalized license plates and, as a result, Mr. Grabher's claim that his s. 2(b) rights were infringed failed. In my view, she was correct in doing so. In explaining why, I will first review the legal principles relied upon by the parties. I will then set out the hearing judge's conclusions as well as Mr. Grabher's challenges to them. I will also explain why the hearing judge's analysis, with one omission, is consistent with the direction from the Supreme Court of Canada.

[28] As they did before the hearing judge, the parties on appeal rely upon the same legal principles and Supreme Court of Canada authorities. Section 2(b) of the *Charter* provides:

> 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;

[29] Like the other rights and freedoms guaranteed by the *Charter*, a generous and purposive approach must be taken to the interpretation of s. 2 freedoms (*Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927). The meaning of "freedom" as contemplated in s. 2 is broad and encompasses the absence of constraint. It was described by Chief Justice Dickson in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 as follows:

> 95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. **One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint.** Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. **Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.** Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[2]
>
> (Emphasis added)

[30] With respect to s. 2(b) specifically, in *Ford*, *supra*, the Supreme Court noted that freedom of expression included the right to express oneself in their language of choice:

> 40. … Language is so intimately related to the form and content of expression that **there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice**. Language is not merely a means or medium of expression; it colours the content and meaning of expression. … [T]hat "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.
>
> (Emphasis added)

[31] Freedom of expression has also been interpreted to include the right to express oneself in "certain public locations" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62).

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[2] Although the matter before the Court involved freedom of religion, the description of freedom is applicable to all the fundamental freedoms enshrined in s. 2. This quotation was specifically referenced in *Ford*, *supra*, at para. 44 in relation to the freedom of expression.

[32] The parties both rely upon *Montréal (City)* as confirming a three-part test to determine whether there has been an infringement of s. 2(b). That test requires consideration of:

- whether the activity in question has expressive content;
- whether the activity is excluded from s. 2(b) protection as a result of either the location or the method of expression; and
- if the activity is found to be protected, whether s. 2(b) is infringed by either the purpose or the effect of the government action.

[33] It is the second prong of the above test that is at the centre of this appeal and, in particular, how it should be applied to government-owned property. As noted in *Montréal (City)*, there is no automatic application of the freedom of expression in public spaces:

> 71 We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(*b*) protection.
>
> (Emphasis in original)

[34] Writing for the majority, McLachlin C.J. and Deschamps J. then articulated how to determine whether public property attracts s. 2(b) protection:

> 73 We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada.* The onus of satisfying this test rests on the claimant.
>
> 74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[35] They described the relevance of the historical and actual functioning of the space as follows:

> 75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(*b*). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> 76 Actual function is also important. **Is the space in fact essentially private, despite being government-owned, or is it public?** Is the function of the space -- the activity going on there -- **compatible with open public expression**? Or is the activity one that requires privacy and **limited access**? **Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?** Many government functions, from cabinet meetings to minor clerical functions, require privacy. **To extend a right of free expression to such venues might well undermine democracy and efficient governance.**
>
> 77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. **The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote.** Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.
>
> (Emphasis added)

[36] McLachlin C.J. and Deschamps J. explained although the protections afforded in s. 2(b) are broad, the above test recognizes the appropriateness of excluding some places from *Charter* scrutiny:

> 79 Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(*b*) stage, on the understanding that governments can limit that protection if they can justify the limits under s. 1 of the *Canadian Charter*. The proposed test reflects this. **However, it also reflects the reality that some places must remain outside the protected sphere of s. 2(*b*). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this**

> **Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process.** Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. **Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.**
>
> (Emphasis added)

[37] The Supreme Court of Canada returned to the application of s. 2(b) to public spaces in *Greater Vancouver v. Canadian Federation of Students*, *supra*. There, the question was whether policies precluding political advertising on the sides of city buses violated the guarantee of freedom of expression. The Court adopted the reasoning and test outlined in *Montréal (City)*. In considering the historical or actual functioning of the space, Justice Deschamps noted:

> [42] The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal*, where the Court found the expressive activities in question to be protected by s. 2(b). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

[38] Deschamps J. further concluded there was nothing about the public venue, the side of a city bus, that would result in undermining the purposes of s. 2(b):

> [43] The second factor from *City of Montréal* is whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection. TransLink submits that its buses should be characterized as *private* publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private, space. **Unlike the activities which occur in certain**

> **government buildings or offices, those which occur on a public bus do not require privacy and limited access**. The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. **Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings.** Thus, rather than undermining the purposes of s. 2(b), expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.
>
> (Italics in original; bolding added)

[39] In *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, the three-part test was again reiterated. In that instance, a prohibition against journalists undertaking recordings in certain areas of a courthouse was challenged as being contrary to the s. 2(b) guarantees of freedom of the press and freedom of expression. Writing for the Court, Justice Deschamps also re-stated the view that there are limits to the application of s. 2(b):

> [32] **This Court has noted on numerous occasions that the protection of s. 2(*b*) of the *Charter* is not without limits and that governments should not be required to justify every exclusion or regulation of a form of expression — whether it concerns the location or the means of employing that form of expression — under s. 1** (*City of Montréal*, at para. 79; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 20; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 28; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 30). This is just as true in the context of freedom of the press. Therefore, what must be determined in the case at bar is whether the activities the media organizations want to engage in are protected by s. 2(*b*) and, if so, whether the limits on engaging in those activities that are imposed by the impugned provisions are justified.
>
> (Emphasis added)

[40] With respect to considering whether a location should be excluded from s. 2(b) protections, Justice Deschamps observed:

> [37] **For either the method or the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding** (*City of Montréal*, at para. 72). The following factors are relevant in this respect: (a) the historical or actual function of the

> location of the activity or the method of expression; and (b) whether other aspects of the location of the activity or the method of expression suggest that expression at that location or using that method would undermine the values underlying free expression (*City of Montréal*, at para. 74). However, the analysis must not be limited to the primary function of the method of expression or the location of the activity. For example, in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, *City of Montréal* and *Greater Vancouver*, this Court found that airports, hydro poles, city streets and buses are locations where engaging in certain expressive activities is not inconsistent with the other values s. 2(b) is meant to foster even though their primary function is not expression. Although conveying messages was not of course the primary purpose of these locations, the fact that they were historically used for expression showed that neither aspects of them nor their functions made them unsuitable for exercising the right to freedom of expression.
>
> (Emphasis added)

[41] I will now turn to the hearing judge's decision. Early in her reasons, the hearing judge reviewed the statutory and regulatory regime governing the registration of motor vehicles and the issuance of license plates, including personalized ones. She took note of several provisions in the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, including s. 290(1), which states:

> 290(1) Every permit, license, certificate, registration number plate and dealer's number plate **shall be and remain the property of the Crown and shall be returned to the Minister whenever required by him** and it shall be an offence to fail or refuse to return to the Department such permit, license, certificate, registration number plate or dealer's number plate when required to do so by a letter sent in the manner prescribed by the Registrar.
>
> (Emphasis added)

[42] There is no dispute that all license plates issued in the Province, including personalized license plates, are government property.

[43] The hearing judge then reviewed a number of provisions contained in the *Personalized Number Plate Regulations*, issued under the authority of ss. 10 and 38 of the *Motor Vehicle Act*. I will set out several of those she considered.

[44] "Personalized number plate" is defined in s. 2(g) as "a number plate as described in Section 7". The process for making application for a personalized license plate is set out as follows:

Application for personalized number plates

4(1) An application for personalized number plates must be made on the form prescribed by the Registrar and must be submitted to the Registrar with the application fee prescribed for personalized number plates in the regulations respecting documents and services fees made under the Act.

(2) A person may apply for personalized number plates without registering a motor vehicle, but personalized number plates that are not used for vehicle registration must not be attached to a motor vehicle.

[45] Mr. Grabher challenged the constitutionality of s. 5(c)(iv) of the *Personalized Number Plate Regulations*, saying it infringed his freedom of expression. The hearing judge set out s. 5 in its entirety. It provides:

Refusal to issue personalized number plates

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

(a) the application is not in accordance with Section 4;

(b) the application contains a false statement or false information;

(c) the plate designation selected by the applicant

(i) has been previously issued,

(ii) contains characters other than numerals, letters and spaces,

(iii) contains a combination of characters assigned to other types of number plates,

(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 considered offensive or not in good taste, or

(v) in the opinion of the Registrar, contains a combination of characters that states or suggests an official authority or is otherwise potentially misleading;

(d) the plate designation selected by the applicant is composed of a sequence that contains more or less numerals, letters and spaces than required by

(i) for a motorcycle, subclause 7(1)(d), or

(ii) for a bus, camper, commercial motor vehicle or passenger vehicle, subclause 7(2)(e);

(e) the Registrar is not satisfied that the personalized number plates as applied for should be issued to the Applicant.

[46] The hearing judge also set out s. 7(2):

> **Description of personalized number plates**
>
> 7(2) A personalized number plate for a bus, camper, commercial motor vehicle or passenger vehicle must meet all of the following requirements:
>
> (a) measure 15.24 cm in width by 30.48 cm in length;
>
> (b) bear a depiction of the Bluenose on a silver-white field;
>
> (c) bear the words "NOVA SCOTIA" at the top, in blue lettering;
>
> (d) bear the words "CANADA'S OCEAN PLAYGROUND" at the bottom, in blue lettering;
>
> (e) bear a plate designation, selected by the applicant and approved by the Registrar, composed of a sequence of at least 2 and no more than 7 numerals and letters, in blue lettering, with or without spaces between the numerals and letters.

[47] The Registrar's ability to recall an already issued personalized license plate is found in s. 8, which states:

> **Recalling personalized number plate**
>
> 8 The Registrar may recall a personalized number plate for any reason set out in clause 5(c).

[48] The hearing judge cited the three-part test noted above, and readily concluded a personalized license plate contains expressive content. She then turned to the second element—whether the method or location of the expression should remove it from s. 2(b) protection. As directed by the above authorities, to answer this second element, the hearing judge turned her mind to the historical and actual function of personalized license plates, as well as other aspects of the space.

[49] With respect to the historical use of personalized license plates, the hearing judge concluded:

> [60] Government license plates are not "public places" with a history of free expression. They have not been used traditionally as forums for public expression or debate. The primary function of a license plate is not expression but is identification and regulation of vehicle ownership. A license plate provides each vehicle registered for use or operation in the province with a unique set of characters that can be used to identify the vehicle and the vehicle owner(s). The license plate identification is primarily used by law enforcement and government agencies. A license plate, by its very nature, is a private government space.

[50] With respect to the actual function of personalized license plates, the hearing judge considered not only the physically restricted nature of the space, but the regulatory restrictions in place:

> [63] Personalized license plates are provided for under the *PNP Regulations*. The government, while allowing limited access, has maintained direct control over the space by strict regulation. All aspects of the plates, with the exception of the maximum seven-character spacing, are government-set, standard format. The Regulations (s. 7) define width and length, require a depiction of the *Bluenose* on a silver-white field, bear the words "Nova Scotia" at the top in blue lettering and the words "Canada's Ocean Playground" at the bottom in blue lettering. Even within the seven spaces there are specific legislative requirements -- a sequence of a minimum of two and a maximum of seven alphanumeric characters, in blue lettering, with or without spaces. The letters or numbers must also be unique, not held by anyone else in the province, and must not suggest an official authority, etc. (s. 5). In short, there is very limited access to, and very limited expression available on, a personalized license plate.
>
> [64] The location here, being a license plate, is different -- both in historical use and from a functional perspective -- than a street, or a park or a town square or even a public bus. License plates are not inherently public spaces. They are more comparable to a government identification card or other government document. The nature of a license plate is not compatible with free expression in the sense contemplated by s.2(b).
>
> [65] Unlike a city street, park or a city bus, I do not think the general public expects unlimited access to free expression on a license plate. A reading of the legislation and regulations indicates access to personalized plates is very limited. There is a process, involving an application, to gain access to the seven spaces -- it is not automatic. Other limitations in s. 5 on the use of the seven spaces include that the designation selected cannot have been previously issued; it cannot contain characters other than numerals, letters and spaces; it cannot contain a combination of characters assigned to other types of number plates; it cannot contain a combination of characters that states or suggests an official authority, etc. Given the limitations placed on access, there can be no expectation by the general public that this is an unlimited access point for expression. The fact that the government has allowed limited access to this governmental space does not make it a public space.
>
> [66] Mr. Grabher acknowledges there must be some limitation on expression in this location of a license plate.

[51] After considering several cases presented by the parties, the hearing judge concluded:

> [75] The reasoning of the Supreme Court of Canada in ***Commonwealth of Canada,* supra, *Montréal (Ville),* supra**, and ***Canadian Federation of Students, supra***, lead me to conclude that this location, a license plate, does not attract s. 2(b) protection. The Court in ***Montréal Ville,* supra**, confirmed that the basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression and referred to factors to be considered including historical or actual function of the place. As the Court said, at para. 76: "Is the function of the space - the activity going on there - compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?"
>
> [76] A license plate is not a place for the public to have unimpeded access. A license plate is a highly-regulated space that is used as a government ID to regulate vehicle ownership and to identify the vehicle and its owner(s) for law enforcement and other government agencies. By its very nature it is incompatible with open public expression. Similarly, by its very nature it can allow only limited access to the space.

[52] On appeal, Mr. Grabher argues the hearing judge failed to correctly apply the law in three ways:

- First, she erred in finding that "Government license plates are not 'public places' with a history of free expression". Mr. Grabher says the Province created a history by virtue of inviting citizens to express themselves on personalized license plates;
- Second, she erred in concluding that "Simply because the Respondent has allowed very limited expressive activity on a personalized plate does not mean open access and protection under s. 2(b)" and that license plates are by their "very nature … incompatible with open public expression"; and
- Third, she erred by concluding that, since Mr. Grabher could use an alternative method to express himself, such as a bumper sticker of his name on his vehicle, it was unnecessary to extend s. 2(b) protection to his plate.

[53] Before addressing Mr. Grabher's specific complaints of error, it is useful to comment upon the hearing judge's consideration of the broader statutory and regulatory scheme relevant to personalized license plates. As noted earlier, in reaching her conclusion that personalized license plates was not a venue that attracted s. 2(b) protections, the hearing judge considered a number of provisions other than the two Mr. Grabher alleged were unconstitutional.

[54] In my view, it was appropriate for the hearing judge to not only consider the particular provisions being challenged but the entirety of the scheme in which they operate. The hearing judge was alive to the necessity of considering the historical and actual function of the space and other aspects of it. To fully understand how a government-owned venue has and does function, it is entirely proper, if not necessary, to consider what happens and cannot happen in the space.

[55] In examining the historical and actual function of personalized license plates and the type of expression that occurs there, the hearing judge was correct to consider other aspects of the space including:

- The space for expression was limited to 15.24 cm by 30.48 cm;
- Each plate must be unique, therefore no two could convey an identical expression;
- The expression in the space must utilize no fewer than two and no more than seven numerals, letters (of the English alphabet) and spaces, in blue lettering; and
- The expression cannot utilize other characters, other than letters and numerals.

[56] If the three-part test articulated by the Supreme Court is intended to act as a tool for screening out s. 2(b) claims made in relation to governmental spaces, then the full functioning of that space should be considered. I will now return to Mr. Grabher's complaints.

[57] With respect to Mr. Grabher's first allegation of error, I do not agree the hearing judge erred in concluding there was no "history of free expression" in relation to personalized license plates. It is important to remember that free expression as protected by s. 2(b) is a broad concept. It has been described as "an open right to intrude and present one's message"[3] and to express oneself without constraint. This is contrasted to other forms of expression that may be "limited", "excluded" or "regulated".

[58] To answer whether there was a history of free expression the hearing judge looked at the nature of the expression the Province had invited in the space. By referencing how the space functioned as contemplated in the *Personalized Number Plates Regulations*, she also considered whether the invited expression had been

[3] *Montréal (City), supra*

open and permitting of a free opportunity for applicants to "intrude and present one's message". The regulatory provisions set out earlier demonstrate the Province has not invited open and free expression in this space but only limited and constrained access. Historically, all invited expression has had to comply with the restrictions compatible with the use of the space as operational license plates, including the physical size of the location, and the other requirements contained in s. 5(c) of the *Personalized Number Plates Regulations*. Expression on personalized license plates in Nova Scotia has always been limited. There has never been free and unfettered expression in this space. The hearing judge's conclusion was correct.

[59] I also do not agree with Mr. Grabher's contention that the hearing judge erred by concluding the Province had not invited s. 2(b) protection in allowing expressive activity on personalized license plates. Permitting a form of limited expression does not create a constitutional obligation to permit an open venue for unrestricted expression. Mr. Grabher has presented no authority that supports a contrary proposition. Such an approach would ignore the Supreme Court's recognition of certain government-owned spaces being suitable for limited expressive activity, but not for full, free and open expression.

[60] I now turn to Mr. Grabher's third complaint. In his factum, he devotes a single paragraph to this alleged error. He explains:

> 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. 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*.

[61] This complaint originates from the hearing judge's consideration of contextual factors that may assist in assessing "other aspects of the space" in which s. 2(b) rights are being asserted. She wrote:

> [72] Another contextual factor is the degree to which the expressive activity in question can be carried out on property adjacent to the public property. The Court of Appeal in ***Breeden, supra,*** said, at paras. 25 and 28:
>
> > **25** It must be noted that in the present case, it was always clearly open to the appellant to conduct his activity in public areas outside the respective locations but not within the building envelopes of these premises. His right to express himself in the near vicinity of the venues was in no way under threat and he was advised that he was permitted to convey his message to those who attended or passed by such locations. That was obviously not the situation in *Canadian Federation of Students* for if the respondents could not use the exteriors of buses for advertising, no alternate method existed for reaching the same audience.
> >
> > **28** This space immediately outside the building is where the appellant should reasonably have expected to have constitutional protection for freedom of expression. The availability of an adjacent location where a party can engage in expression does not necessarily mean that nearby government owned locations without historical use for expression could not also fall under s. 2(b)'s protection. However, this does provide context for the analysis, and tends to indicate that extending protection into a new area of a public building will not be necessary in order for the purposes of s. 2(b) to be fulfilled at such a location. Expressive activity can thus continue in a mode that does not impede the proper functioning of the facility. [Emphasis added]
>
> [73] Similarly the Ontario divisional court in ***Vietnamese Association of Toronto***, ***supra,*** noted that the Association members could use their flag on adjacent property. In addition, the British Colombia Court of Appeal in ***Canadian Newspapers Co. v. Victoria (City)***, 1989 CarswellBC 200 (C.A.), noted that there were alternative mechanisms by which the expression in that case could be achieved. Therefore, a further factor for consideration is whether the expressive activity can be carried out on another property, particularly an adjacent property.
>
> [74] In the present case, Mr. Grabher can easily express himself on adjacent property, that being anywhere on his vehicle, including immediately adjacent to his license plate, which he can use to express his pride in his surname and Austrian-German heritage. This could be accomplished, for instance, by use of a bumper sticker. Extending s. 2(b) protection to this location of a license plate is simply unnecessary when free expression can occur in the space adjacent to the license plate.

[62] With respect, Mr. Grabher has not demonstrated legal error on the part of the hearing judge. He has not explained how her reasoning was flawed. Further, this aspect of the hearing judge's reasoning was only one small aspect of the analysis undertaken regarding whether personalized license plates were a venue to which s. 2(b) rights ought to be afforded. Even if her consideration of this contextual

factor was erroneous (which I am not convinced it was), it was not dispositive. None of the three complaints raised by Mr. Grabher in challenging the hearing judge's rejection of his s. 2(b) arguments is persuasive.

[63] Notwithstanding agreeing with the hearing judge's ultimate conclusion regarding the applicability of s. 2(b), I am satisfied, however, there was one manner in which she erred. Specifically, although she properly cited the law and otherwise undertook a thorough analysis, her reasons do not demonstrate she considered whether "the method or the location of the conveyance of a message" in the space "conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding".[4] This is a necessary aspect of the s. 2(b) analysis.

[64] Expression in this governmental space does not conflict with Mr. Grabher's self-fulfillment. Clearly the opposite is true. Mr. Grabher's evidence, accepted by the hearing judge, was that having the message GRABHER displayed on his license plate was a personal expression of his pride in his family heritage and surname in particular. He said being able to do so had been self-fulfilling for many years.

[65] With respect, the issue of self-fulfillment, and whether expression in the space conflicts with it, is broader than just Mr. Grabher's sense of fulfillment. The proper focus is whether expression in the space, considering its actual function, conflicts with self-fulfillment generally. I believe it does and, in my view, Mr. Grabher's evidence is of assistance in reaching that conclusion. I will explain.

[66] From his evidence we know that being able to display his full surname on his license plate was extremely important to Mr. Grabher. Having it modified in some way was not acceptable to him. He is proud of his name—all of it. His feelings are understandable. But given the nature of the expression possible in the space, and the actual function of license plates, this type of self-fulfillment is not available to all who may seek it. For example, the actual function of personalized license plates would conflict with the self-fulfillment of others by prohibiting the use of their surnames if:

- The surname contains more than seven letters and cannot therefore fit in the space;

[4] *Canadian Broadcasting Corp. v. Canada (Attorney General), supra*, at para. 37.

- The surname is already in use as a personalized license plate (for example common surnames such as SMITH, JONES or LEBLANC) and is therefore not available;
- The surname contains symbols not available on personalized license plates (for example CÔTÉ); and
- They wish to express their surname in a language that utilizes other letters or symbols not available on personalized license plates.

[67] Although the function of personalized license plates and the means of expression on them do not conflict with the self-fulfillment of those applicants who can express themselves within the constraints of the space, the same cannot be said for everyone. This highlights the unsuitableness of this particular location for the application of s. 2(b)—a freedom guaranteed to all, not just some.

[68] I am also of the view that other aspects of the space give rise to conflicts with the underlying values of democratic discourse and truth-telling. At its simplest, being unable to express the identical message as previously expressed by another person conflicts with democratic discourse. Yet that is how expression must function in this space to serve its primary function (providing a unique identifier for every registered vehicle). Permitting free expression on personalized license plates would mean an applicant could insist on intruding and presenting their message, even if it were identical to another's. This again demonstrates that free, open and unconstrained expression is incompatible with this location and its actual function.

[69] Finally, Mr. Grabher's own circumstances highlight why the actual function of the space, and how expression occurs in it, conflicts with truth-telling. His "truth" was an expression of his surname; however, the evidence before the hearing judge was that it could be interpreted as conveying a very different meaning.[5]

[70] Expression in this location requires "speakers" to convey messages confined to seven spaces. Although some combinations of letters, numbers and spaces may produce a message that is clear and capable of expressing the conveyor's "truth", again, the same cannot be said for all. Being confined by this aspect of the space necessitates the conveyance of "truth" that can fit within the permitted parameters. Not all expressions of truth can be adapted to the space or expressed with clarity.

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[5] I will explain later why that evidence was properly before the court and the hearing judge was entitled to accept it.

Again, s. 2(b) protection cannot be established where some expressions of "truth" can fit within the space when not all are able to.

[71] For the reasons above, I would decline to interfere with the hearing judge's conclusion that personalized license plates in Nova Scotia do not attract s. 2(b) protection. She was correct in concluding the nature of personalized license plates make the location incompatible with the guarantee of open, free and unconstrained expression.

> *Did the hearing judge err in concluding the Registrar's decision to recall the GRABHER license plate did not infringe Mr. Grabher's s. 15 equality rights?*

[72] Section 15 of the *Charter* states:

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

[73] In the court below, Mr. Grabher argued the Registrar's decision to recall his personalized license plate discriminated against him due to his Austrian-German heritage. He asserted s. 27 of the *Charter* was relevant to considering his allegation of discrimination under s. 15, as that provision requires all rights and freedoms to "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

[74] Before considering Mr. Grabher's allegations of error, it is helpful to set out the principles relevant to claims under s. 15 of the *Charter*. There is no shortage of authorities from the Supreme Court of Canada. Most recently, in *Fraser v. Canada (Attorney General)*, 2020 SCC 28, Justice Abella writing for the majority re-affirmed the two-step test for establishing a *prima facie* breach of s. 15. She wrote:

> [27] Section 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups (*Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at para. 332; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at paras. 19-20). To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> - on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and

- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

(*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464, at para. 25; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018] 1 S.C.R. 522, at para. 22.)

[75] Applying the above test to the case at hand, to establish a breach of s. 15, Mr. Grabher must first show the Registrar's decision to recall his GRABHER license plate was based on his Austrian-German heritage. Secondly, he would need to show the Registrar's decision imposed a burden or withheld a benefit that served to reinforce, perpetuate or exacerbate disadvantages experienced by citizens of Austrian-German descent.

[76] The hearing judge identified the above test[6] and found Mr. Grabher did not meet the first element. She reasoned:

> [90] I find that Mr. Grabher is unable to meet the first part of the test. The provision in s. 5(c)(iv) does not create a distinction based on an enumerated or analogous ground. Further, the Registrar did not recall Mr. Grabher's personalized plate because he is of German-Austrian heritage. The plate was recalled because the seven letters "GRABHER" could be interpreted as a socially unacceptable statement (GRAB HER), without the benefit of further context indicating this was Mr. Grabher's surname. Given the limitation of up to seven numbers or letters, with or without spaces, in combination with the government-mandated, standard plate, there is no potential for context to be provided on the personalized plate. For example, it is not possible for the personalized license plate to state what Mr. Grabher clearly intended to portray which is: "My surname is Grabher."
>
> [91] The Registrar's actions indicate that anyone with the personalized plate "GRABHER", regardless of their national or ethnic origin, would be denied such a plate. She indicated this in her letter of December 9, 2016 to Mr. Grabher where she states:
>
> > … Please be advised that the Office of the Registrar of Motor Vehicles has received a complaint about your personalized plate GRABHER. While 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] *Fraser*, *supra*, had not been decided when the hearing judge issued her reasons. She relied on earlier authority citing the same test, *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 in particular.

[77] The hearing judge reached a similar conclusion with respect to the second element required to establish an infringement of s. 15:

> [96] The Supreme Court in ***Taypotat, supra,*** said that this second part of the test focuses on arbitrary -- or discriminatory -- disadvantage, where the law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. As the Respondent pointed out, Mr. Grabher has adduced no evidence to suggest that persons of Austrian-German heritage suffer from any pre-existing disadvantage or stereotyping in Canadian society. In addition, he has not adduced any evidence establishing how the denial of a personalized number plate bearing his surname would reinforce, perpetuate or exacerbate a pre-existing disadvantage or stereotyping. There is simply no factual record supporting this argument.
>
> [97] It is not sufficient to establish a s. 15 violation for Mr. Grabher to say that, as a result of this matter, his surname has become highly publicized and that he is hurt by the recall of his personalized plate bearing his surname. While the sentiments are understandable, they do not establish discriminatory disadvantage.
>
> [98] I have great difficulty seeing how ss. 5(c)(iv) and 8, which allow the Registrar to refuse an application or recall a plate, if the maximum allowance of seven letters is offensive or not in good taste, has the effect of perpetuating arbitrary or discriminatory disadvantage against individuals of Austrian-German heritage. I do not see any discriminatory conduct or impact. The Registrar's decision does not result in consequences for Canadians of Austrian-German heritage. While it has consequences for Mr. Grabher personally, I find they are limited. Mr. Grabher is not denied access to personalized plates, but simply access to a plate bearing the seven letters, "GRABHER".

[78] In oral argument before this Court, Mr. Grabher's counsel noted his challenge to the hearing judge's s. 15 conclusion was not his "strongest argument on appeal". It was submitted, however, that notwithstanding the hearing judge identifying the correct legal principles, she failed to recognize the Registrar's decision was based upon two missteps. Firstly, the Registrar anglicized Mr. Grabher's name to create the words "grab her". Secondly, she then added words that did not exist to create an offensive meaning—"grab her in the pussy". Mr. Grabher submits both of these give rise to a breach of his s. 15 rights. He further argues his name subsequently being added to the list of offensive terms previously rejected by the Registrar impacted his personal dignity.

[79] Mr. Grabher's submissions before this Court are substantially a repetition of those advanced before the hearing judge and which she rejected. It is not this Court's function to reconsider and re-weigh these arguments. Mr. Grabher must demonstrate error by the hearing judge in reaching her conclusions. After

considering the entirety of the record, the hearing judge's reasons and the arguments on appeal, I can find no error justifying appellate intervention. Mr. Grabher did not establish either element required to demonstrate a breach of s. 15. He did not demonstrate the decision to revoke his license plate arose due to his ethnicity. Nor did he establish the Registrar's action served to perpetuate disadvantages suffered by persons of Austrian-German heritage. I am satisfied the hearing judge's conclusion was correct.

[80] Based on the above, the appeal should be dismissed. However, I will address the three evidentiary issues raised by Mr. Grabher.

Did the hearing judge err in her treatment of the expert evidence?

[81] Mr. Grabher submits the hearing judge should not have admitted the evidence of Dr. Rentschler. If admitted, he says she should not have afforded it any weight. Mr. Grabher also says the hearing judge erred by failing to consider the evidence of Dr. Soh, particularly in light of the inconsistencies between her opinion and that of Dr. Rentschler.

The admissibility of Dr. Rentschler's evidence

[82] Some background is helpful to place Mr. Grabher's complaints in the proper context. The issue of Dr. Rentschler's qualification and the scope of her opinion was the subject of a pre-hearing motion brought by Mr. Grabher in 2018 before another judge of the Supreme Court of Nova Scotia, Justice Pierre Muise. Earlier in the proceedings the Province had filed an affidavit that attached the expert report from Dr. Rentschler. Mr. Grabher sought to have the affidavit and report struck, arguing it was not properly admissible expert opinion.

[83] Mr. Grabher's motion was successful in part. Justice Muise undertook a thorough analysis of the purpose of the proffered opinion, its relevance to the issues before the court, its necessity and whether its benefits outweighed its potential risks. In his written reasons (2018 NSSC 87) Justice Muise concluded Dr. Rentschler's opinion would be admissible provided she address four specific questions:

> [146] For the benefits of Dr. Rentschler's evidence to outweigh its potential risks, its format must be revised so that it answers the real questions for which it may be proffered, and, of course, provides reasons for the answers. Those questions are:

1. How, if at all, does social and cultural context affect the interpretation of the expression "GRABHER" on a government-issued licence plate?
2. If social and cultural context affects the interpretation of the expression "GRABHER" on a government-issued licence plate, has that context changed over time?
3. If so, how, if at all, has that change affected the manner in which the expression is interpreted?
4. What impact, if any, would the expression "GRABHER" on a government-issued licence plate have?

> [147] Dr. Rentschler is qualified as an "expert in representations of gendered violence across media platforms" to provide opinion evidence in relation to: the effect of social and cultural context on interpretation of expression; "how language that supports gendered violence plays a contributing role in promoting violence against women"; and, the impact of such expression.
>
> [148] Her revised opinion evidence must remain within the bounds of that nature and scope of opinion evidence.

[84] Mr. Grabher did not appeal Justice Muise's determination. Dr. Rentschler proceeded to swear a subsequent affidavit that attached a revised expert report in which she answered the four questions set out above. Mr. Grabher did not attempt to challenge by way of a further pre-hearing motion the scope or admissibility of Dr. Rentschler's revised report, nor her qualifications.

[85] The record discloses Mr. Grabher's counsel made a number of representations to the hearing judge relating to Dr. Rentschler's evidence at the outset of the hearing. I note the following:

- As a preliminary matter, the hearing judge asked the parties to identify the affidavits they would be seeking to rely upon in the matter. Appellant's counsel, Jay Cameron, advised:

> **I, of course, intend to rely on the revised affidavit of Dr. Rentschler**. I may, within cross-examination, have occasion to ask her about her initial opinion although I think that's unlikely. So there are two reports of Dr. Rentschler, one was filed January 24, 2018 and the other Rentschler report was filed in July 2018, July 30, 2018, I believe.

- Later in dealing with a preliminary concern regarding the admissibility of an affidavit attaching a transcript of an earlier motion decision of Justice Muise, Mr. Cameron tells the hearing judge:

> With all due respect, the Crown is going to rely on the decision of Mr. Justice Muise to say that Professor Rentschler is qualified as an expert in certain areas. They're going to rely on a prior decision of this Court in this matter. It was preliminary and **I'm not going to object to it**.

- Immediately before Dr. Rentschler was called to give evidence, the following exchange appears on the record:

> **MR. TOWNSEND**: And we have Professor Rentschler here. She's outside. She's ready to come in and be cross-examined. In terms of mechanics, My Lady, we had filed our statement of qualification on the … on July 23rd.
>
> **THE COURT**: Yes. I have a copy of the statement of qualification. Any issue, Mr. Cameron?
>
> **MR. CAMERON**: No, My Lady.

(Emphasis added)

[86] Mr. Grabher did not challenge Dr. Rentschler's qualifications, nor did he raise any admissibility concerns with respect to Dr. Rentschler's report as a preliminary matter. He did not complain that her report went beyond the confines of the questions Justice Muise directed her to address. He did not request Justice Muise's decision on admissibility be revisited. Given Mr. Cameron's representation that he intended to rely on her revised affidavit and report, it is implicit Mr. Grabher, at least prior to her cross-examination, viewed Dr. Rentschler's evidence as meeting the requirements of threshold admissibility.

[87] In his closing submissions, Mr. Grabher's counsel raised concerns with respect to the contents of Dr. Rentschler's revised report, specifically the differences with the original report considered by Justice Muise. Counsel submitted these differences on the face of the two reports gave rise to concerns about Dr. Rentschler's impartiality:

> And the report was made … was almost tripled in size and there's a number of things that have been altered. And I … you know, you could spend with … as Your Ladyship is aware, there are constraints of what you can do with a witness. You can't continue indefinitely with a witness. The fact is that there are significant differences that, in my respectful submission, go to the impartiality of Dr. Rentschler. Her willingness to change the core proposition of her expert report regarding the inference of what the plate means, what you can infer … an inference is what you can take from one proposition or one fact and move to a second fact with almost complete certainty. That's what an inference is. So she says that … in her first report, she says that the plate "infers" the words that she says. And then in her second report, she changed that.

[88] Dr. Rentschler's first report, although referred to by counsel in his cross-examination, was not entered into evidence at the hearing. It is not part of the record on appeal. In her evidence, Dr. Rentschler explained the three differences identified in cross-examination between the two reports had resulted from the requirement for the revised report to address the specific questions posed by Justice Muise.

[89] The only other concern raised by counsel before the hearing judge in relation to Dr. Rentschler's opinion was that it was based in "social science". He submitted:

> The other thing that I would say is that Professor Rentschler deals in an area of social science that is unsettled. It is theoretical. It is abstract. It is not … it has not been formulated succinctly. And while there is no doubt benefit … you know, I don't … I'm not casting dispersions at her profession, but in regard to the things that she is opining on as evidence before this Court, such as the idea that seeing a license plate like that in this case will legitimize sexual violence is different than interpreting it a certain way, that there is … I think this Court should be very careful about accepting her evidence at the gatekeeper stage of the **White Burgess Langille Inman** case from the Supreme Court of Canada in 2015. And that case is rigorously scrutinized by Justice Muise. There are criteria which have to be met at the gatekeeper stage of reliability and dependability.
>
> And in … according to the case in **Burgess**, the … if the Court is going to consider expert testimony in a contested ground of social science, it has to rigorously scrutinize that evidence to prevent a miscarriage of justice, because of the nature of expert opinions. Opinion evidence is inadmissible normally, but experts' is an exception. And that's why that evidence should be scrutinized very carefully before it is let in or considered, especially given the things that arose from cross-examination today, in my respectful submission.

[90] Counsel did not articulate for the hearing judge what "things" had arisen during Dr. Rentschler's cross-examination that would have impacted on her previously agreed qualification or the admissibility of her evidence.

[91] In his factum on appeal, Mr. Grabher now articulates why Dr. Rentschler's opinion was not logically relevant, not necessary and why she was not qualified to offer the opinion she did. His complaints have expanded from those expressed to the hearing judge to now encompass 30 paragraphs in his written submissions before this Court. Many of his arguments appear to be the same as those advanced before Justice Muise, who found Dr. Rentschler's opinion, provided it was confined to the questions he identified, to be logically relevant and necessary.

[92] The admissibility of expert opinion is a question of law, and therefore a hearing judge must be correct in their determination it should be admitted. Here, the admissibility of Dr. Rentschler's opinion had been determined, as were her qualifications, in advance of the hearing. Although it was open to the hearing judge to consider any new arguments raised with respect to these earlier determinations, she was also entitled to rely upon the lack of serious challenge to them. If a party contests the admissibility of an expert opinion, it is incumbent on them to articulate clearly and specifically to the hearing judge why the opinion is flawed. This was especially so in this instance given Justice Muise's earlier determination.

[93] In my view, the concerns raised by Mr. Grabher in his closing submissions to the hearing judge did not preclude her from finding Dr. Rentschler was qualified to offer the opinion contained in her revised report, or that her opinion was admissible. Further, the expanded arguments now presented on appeal as to why Dr. Rentschler was not qualified, and her opinion inadmissible, do not disclose an error justifying appellate intervention.

The consideration of Dr. Soh's evidence

[94] As noted earlier, Dr. Soh was called by Mr. Grabher to provide opinion evidence. It is important to note, however, the nature of her opinion was confined to rebutting that of Dr. Rentschler. As Mr. Cameron explained to the hearing judge, Dr. Soh was not intended to provide a new opinion or be "a stand-alone expert".

[95] On appeal, Mr. Grabher asserts the hearing judge "failed to analyze or consider any of Dr. Soh's conclusions or opinions, even though the evidence [as between the experts] was contradictory". The Province submits the hearing judge's treatment of the expert opinion does not disclose an appealable error. Specifically, the Province argues given her qualification was significantly different than that of Dr. Rentschler, Dr. Soh's evidence was of limited use for rebuttal purposes.

[96] I agree with the Province's submission. Justice Muise had found Dr. Rentschler to be qualified to address the four questions he directed to be answered. She was found to be an expert in gendered violence across media platforms, capable of giving opinion evidence in relation to the effect of social and cultural context on interpretation of expression, how language that supports gendered

violence plays a contributing role in promoting violence against women and the impact of such expression.

[97] Dr. Soh was put forward by Mr. Grabher as an expert in human sexuality, sexual violence and the impact of language/media on potential violent offenders. Although their areas of expertise may overlap, Dr. Rentschler's qualification was significantly broader and permitted her to fully respond to the questions directed by Justice Muise. The same cannot be said of Dr. Soh.

[98] From her reasons, it is apparent the hearing judge was alive to the differing qualifications of each expert. Given the disparity, and the fact Dr. Soh was only intended to rebut Dr. Rentschler's evidence, I am not concerned the hearing judge did not contrast their respective opinions in her reasons. She committed no error in how she dealt with this evidence.

Did the hearing judge err in the weight she afforded to the "List"?

[99] A word of explanation about the "List" is in order. Through the pre-hearing discovery process, Mr. Grabher requested and received from the Province a list of personalized license plates that had been rejected by the Registrar. The List, approximately 67 pages in length, was sent as an enclosure to a letter between counsel.

[100] The List was not made an exhibit to any of the affidavits filed by the parties. At the hearing Mr. Grabher asked that the List be entered into evidence. Over the objection of the Province, the hearing judge permitted its admission. However, in her reasons, she determined little weight could be placed on the List. She wrote:

> [134] … I allowed into evidence, at Mr. Grabher's request, a response to undertakings attaching a list of banned words to a letter of June 11, 2018, even though they were not put in by affidavit evidence. **No one spoke to the words on the list; no one said whether any of them were acronyms and, if so, what they meant. No one gave any evidence as to whether the words were slang**. While the reason for inclusion of many is obvious, others are not. For example, the following appear on the list: "SAMPLE", "GOLD", "GAB", "LOW". No one gave evidence as to whether these words had other than their face value meaning -- are they acronyms? If so, for what? Are they slang? **I cannot guess at the reasoning for all of the words included on the list. I am unable to make any determination as to whether this list represents arbitrary decision making on its face (as Mr. Grabher argues).** I note as well that the current *Regulations* that include the impugned s.5(c)(iv) came into force in 2005. I have no evidence as to

> whether any of the words on the list were included prior to the Regulation in issue.
>
> [135] Many of the words on the list have noted beside them the word "unavailable". Mr. Hackett, in his Response to Interrogatories, said he thought this meant "already in place". But, as pointed out in Mr. Grabher's submissions, Mr. Hackett must have been in error as there are several words with sexual connotations listed as "unavailable". Mr. Hackett's responses do not provide any assistance with this list. **In short, there was no evidence presented as to why these words and phrases were included on the list. The list was not the subject of sworn evidence or cross-examination. I am left with far too many unanswered questions. In this context, the list is not helpful to my analysis and I give it very little weight**.
>
> (Emphasis added)

[101] On appeal, Mr. Grabher says the hearing judge "made a palpable and overriding error in failing to adequately consider the list". He does not explain how she erred in the assessment of the weight she afforded to this document.

[102] Absent a demonstrable error, it is not the role of this Court to re-assess and re-weigh the evidence. Having reviewed the record, including the manner in which the List was admitted without supporting evidence, and the hearing judge's concerns outlined above, I see no reason to interfere with her assessment of weight.

> *Did the hearing judge err in concluding the GRABHER license plate could be interpreted as promoting sexualized or gendered violence?*

[103] In her reasons, the hearing judge found that without broader context, the license plate GRABHER could be interpreted as encouraging violence against women. On appeal, Mr. Grabher challenges this finding. He explains in his factum:

> 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. 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.

[104] This complaint can be readily dispensed with. There was evidence before the hearing judge that permitted her to make the above finding, as she clearly outlined in her reasons:

> [119] It is undisputed that Mr. Grabher did not mean to cause any harm or offence. However, without proper context, "GRABHER" can be interpreted as encouraging gendered violence (GRAB HER). Dr. Rentschler said, at page 13 of her report:
>
> > As an expression, the meaning of 'Grabher' could be understood to signify the support, condoning and encouragement of gendered physical violence against girls and women. 'Grabher' - read as 'Grab her'- is a speech act that can potentially contribute to the harms of gendered violence against girls and women, 'crossing over from expressive activity to threat'… As an injunction, recipients of the phrase may interpret it as encouragement to grab or grope female individuals without their consent. 'Grab *her*' can also be interpreted as a command that targets a particular class of people: girls, women and other female-identifying individuals. The speech act does not have to be made with the intention to cause harm or support violence against women in order for it to have these effects. Some of the people who belong to and identify with the class of people targeted by the phrase could reasonably be assumed to find this phrase not only upsetting, but also potentially harmful or threatening, as an extensive body of research on girls and women's fears of sexual victimization has found …
>
> (Emphasis in original)

[105] I have previously explained why Dr. Rentschler's evidence was properly before the court. The hearing judge was entitled to rely upon it in reaching her conclusion as to the possible interpretation of the GRABHER license plate. Mr. Grabher's assertion the hearing judge misapprehended the evidence or made a finding in the absence of evidence is without merit.

Disposition

[106] For the reasons above, I would dismiss the appeal. In the court below, the parties agreed to costs in the amount of $3,000.00. The Province seeks 40% of that amount on appeal. As such, I would further order Mr. Grabher pay costs to the Province in the amount of $1,200.00, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Beveridge J.A.

Fichaud J.A.