SUPREME COURT OF NOVA SCOTIA

Citation: *Grabher v. Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46

Date: 20200131
Docket: Hfx No. 463399
Registry: Halifax

Between:

Lorne Wayne Grabher

Applicant

v.

Her Majesty the Queen in Right of the Province of Nova Scotia as represented by the Registrar of Motor Vehicles

Respondent

DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	April 24-25, 2019 in Halifax, Nova Scotia
Written Decision:	January 31, 2020
Counsel:	Jay Cameron, for the Applicant Edward Gores, Q.C. and Jack Townsend, for the Respondent

By the Court:

Introduction

[1] This is an Application in Court filed by the Applicant, Mr. Lorne Wayne Grabher ("Mr. Grabher" or "the Applicant"). Mr. Grabher filed a Notice of Application in Court on May 11, 2017, and an Amended Notice on September 22, 2017. He seeks the following declarations:

1. A declaration pursuant to s. 24 (1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) that the cancellation of the Applicant's license plate, which bears his surname (the "plate") infringes the s. 2(b) (freedom of expression) and s. 15 (equality) *Charter* rights of the Applicant;
2. A declaration pursuant to s. 52(1) of the *Constitution Act*, 1982, that ss. 5 (c)(iv) and 8 of the *Personalized Number Plates Regulations*, NS Reg 124/2005 (the "*PNP Regulations*") infringe s. 2(b) of the *Charter* and are therefore of no force or effect

[2] The Respondent, Her Majesty the Queen in Right of the Province of Nova Scotia as represented by the Registrar of Motor Vehicles ("the Respondent" or "the Registrar") filed a Notice of Contest on June 2, 2017 and an Amended Notice of Contest on October 6, 2017. The Registrar denies any *Charter* infringement and, in the alternative, states that if there is any infringement, it is minimal and saved under s. 1 of the *Charter*.

[3] In relation to the impugned s. 8 of the *PNP Regulations*, this section solely gives the Registrar the right to recall a personalized plate. Therefore, if I were to find s. 5(c)(iv) to be of no force or effect, this solves the issue Mr. Grabher has raised because, without s. 5 (c)(iv), the power to recall for language considered offensive or not in good taste would no longer be available to the Registrar. Section 8 is essential for the remaining provisions of s. 5 which are not challenged. While throughout my decision I refer to both sections, as did Mr. Grabher, it is really s. 5 (c)(iv) that is in issue.

[4] Mr. Grabher did not proceed by way of judicial review of the Registrar's administrative decision. Therefore, the usual Record found on a judicial review is not before the Court.

Evidence on the Application

[5] The following affidavits were placed in evidence:

- The affidavit of Mr. Grabher sworn on January 16, 2018;
- The amended affidavit of Mr. Grabher, sworn May 22, 2018;
- The affidavit of Mr. Grabher, sworn October 15, 2018, attaching the Response to Interrogatories of Mr. Peter Hackett, dated September 28, 2018;
- The affidavits of Mr. Peter Hackett, Chief Engineer in the Department of Transportation and Infrastructure Renewal, sworn on July 26, 2017 and December 14, 2017
- The affidavit of Mr. Brian Taylor, Media Relations Advisor for the Finance and Treasury Board, Province of Nova Scotia, sworn on January 23, 2018.

[6] Out-of-court cross-examination was conducted of the affiant, Mr. Hackett, and an agreed Book of Transcripts was filed with the Court on July 11, 2018. An affidavit of Ms. Megan Priestman, sworn on July 4, 2018, attaching the exhibits to the cross-examination of Mr. Hackett, being both a *Frank Magazine* article entitled "Words You Can't Say at DMV" (put forward simply for the fact it was published, not for the truth of its contents) and a photograph of a Nova Scotia license plate reading "COCKERS". Responses to Undertakings from Mr. Hackett's cross-examination on his affidavit were provided to the Court under the Nova Scotia Department of Justice letter dated June 11, 2018. These undertakings were not attached to an affidavit. The undertakings attach a list of words that were prohibited on personalized plates as of April 9, 2017. The list is approximately 67 pages in length.

[7] Mr. Grabher filed the affidavit of Dr. Debra Soh, sworn November 3, 2018. Dr. Soh was qualified as an expert in human sexuality, sexual violence, and the impact of language/media on potential violent sexual offenders. Dr. Soh was cross-examined.

[8] The Respondent filed the affidavit of Professor Carrie Rentschler, sworn on July 9, 2018. Professor Rentschler 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. Professor Rentschler was cross-examined.

[9] Eleven exhibits were entered during the course of the Application.

Factual Background

[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.

[16] Mr. Grabher stated in his affidavit, " I did not "intend" to 'offend' anybody by placing the plate on my vehicle nor was I trying to be provocative."

[17] Nova Scotia's personalized license plate program has existed for many years. An individual wishing to obtain a personalized plate for their vehicle must make an application to the Registrar of Motor Vehicles. The personalized plate must be renewed annually. If a personalized plate has been issued, s. 8 of the *PNP Regulations* provides that the Registrar "may recall a personalized number plate for any reason set out in clause 5(c)".

[18] There also exists, in Nova Scotia, specialty license plates which may feature special images such as the Acadian flag, the Piping Plover, being the provincial bird, the Select Nova Scotia (buy local) logo, etc. The specialty license plates are associated with government-endorsed groups or activities and the fees for obtaining these plates may be directed to that cause or group. Specialty license plates cannot be personalized.

[19] Every license plate for an automobile in Nova Scotia must meet the dimensions specified in the regulations. These standard license plate formats must also be used for personalized license plates. The standard plate uses blue lettering, and features a depiction of the Nova Scotia sailing ship, the *Bluenose*. Across the top of the plate are the words "Nova Scotia" and across the bottom of the plate is the phrase "Canada's Ocean Playground". The personalized license plate must also have a unique combination of letters and/or numbers, consisting of at least two but not more than seven characters, with or without spaces.

[20] Mr. Hackett stated in his affidavit that the primary purpose of a license plate is to provide 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 its owner(s). License plate identification is primarily used by law enforcement and the Office of the Registrar of Motor Vehicles. He indicated that display of the province or jurisdiction is needed so that vehicle registration can be correctly identified.

[21] Mr. Hackett also indicated that another function of license plates is the reflection and promotion of Nova Scotia's brand. Many decades ago license plates from different provinces looked similar and, as a result, provinces began using different colour combinations and images to visually distinguish the issuing jurisdictions. Nova Scotia chose blue lettering on its license plate, the famous *Bluenose* Schooner as the image, and the slogan "Canada's Ocean Playground" which has been used in tourism advertising by Nova Scotia since at least 1931.

[22] Mr. Hackett stated in his affidavit of December 14, 2017 that another prohibition in subsection five is that against issuing a personalized plate with a designation that has already been issued to somebody else (s. 5(c)(i)). He said this is to ensure that every set of characters on each license plate is unique and can fulfill its function of vehicle identification (para. 23).

[23] Mr. Hackett also gave evidence in his affidavit of December 2017 concerning the purpose of the impugned s. 5(c)(iv):

> The purpose of the prohibition against offensive subject matter, is to ensure a safe and welcoming environment on Nova Scotia's roads. The potential viewers of license plates encompass a wide variety of people in a wide variety of contexts. The viewers could be people in other vehicles, pedestrians or bystanders. (para. 25)

Statutory and Regulatory Regime

[24] The registration of motor vehicles in the province of Nova Scotia, including the issuance of number plates, is highly regulated under the *Motor Vehicle Act*, R.S.N.S. 1989, c 293 (the "*MVA*"). The relevant provisions of the *MVA* relating to number plates are as follows:

> **2(af)** 'number plate' includes any proof of registration issued by the Department and required to be affixed to a motor vehicle or trailer.
>
> **Classification of vehicles**
>
> **10 (1)** Subject to the approval of the Governor in Council, the Minister may make regulations dividing vehicles into various classes, prescribing conditions governing the registration and operation of each class, providing for the number

of number plates to be affixed to each vehicle in each class, providing for the location of the number plates to be affixed to each vehicle in each class and providing penalties for violation of such regulations.

Registration by owner

13(1) Every owner of a motor vehicle, trailer or semi-trailer intended to be operated upon a highway in the Province shall, before the same is so operated, apply to the Department for and obtain the registration thereof, except as provided in Sections 23(6), 26 and 30 or regulations made under Section 25.

Registration and appeal from refusal

15 Subject to this Act, the Department when satisfied as to the genuineness and regularity of an application, and that the Applicant is entitled thereto, shall register the vehicle therein described and the owner thereof in suitable records under a distinctive registration number hereinafter referred to as the "registration number", provided, however, that the Registrar may refuse or withhold registration of any vehicle and in case of such refusal or withholding an appeal may be taken to the Minister whose decision shall be final. R.S., c. 293, s. 15.

Permit

16(1) Subject to this Act, the Department upon registering a vehicle shall issue to the owner a permit which shall contain the registration number assigned to the owner, the name and address of the owner, a description of the registered vehicle including the serial number thereof, such other particulars as may be required by the Department, and a statement that the operation of the vehicle is thereby authorized under this Act, and if the permit is subject to any special conditions authorized under this Act or under any regulations made pursuant to this Act, the permit shall also contain a brief statement of the conditions, and no person shall operate such a vehicle in violation of or contrary to any such special conditions.

Number plate

19(1) The Department shall also furnish to every owner whose vehicle is registered the number of number plates assigned to the owner in the regulations.

(2) Every number plate shall have displayed upon it the registration number assigned to the owner and such other matter as the Minister may determine.

(3) The Registrar shall have authority to require the return to the Department by the owner, of all number plates and permits upon the termination of the lawful use thereof, under this Act, and the owner shall return the same forthwith to the Department when so requested. R.S., c. 293, s. 19.

Display of number plate

20(1) Number plates assigned to an owner and required to be attached to a vehicle shall be attached thereto and displayed as prescribed by the regulations.

(2) Every number plate assigned to an owner and required to be attached to a vehicle shall at all times be securely fastened to the vehicle so as to prevent the

plate from swinging and at a height not less than 300 millimetres from the ground, measuring from the bottom of the plate, in a place and position to be clearly visible, and shall be maintained free from foreign materials and in a condition to be clearly legible. R.S., c. 293, s. 20.

Expiry and renewal of registration

21(1) Every vehicle registration under this Act expires on the date specified or determined by regulation.

(2) A vehicle registration under the staggered system of registration expires on the date specified when the vehicle is registered.

(3) A vehicle registration shall be renewed by the owner upon application and payment of the required fees. R.S., c. 293, s. 21; 1995-96, c. 22, s. 1.

Effect of vehicle transfer

23(1) Whenever a vehicle as registered under the foregoing provisions of this Act is sold or disposed of any permit issued respecting the vehicle shall thereupon terminate and the registration of the vehicle shall be deemed to be suspended from the date of the sale or disposal until the transferee has obtained a permit as provided by subsection (5).

(2) Notwithstanding subsection (1), whenever a vehicle is sold or disposed of the vehicle shall be deemed to be registered under the name of the new purchaser or transferee providing there is displayed valid plates assigned to that person for a period not exceeding thirty days from the time of the sale or the disposition.

(3) Notwithstanding any sale, disposal or transfer of a vehicle, the number plates originally assigned to the seller are to be removed by him and maintained until the expiry date of those number plates for re-assignment to a new vehicle he may purchase unless returned to or required to be returned by the Department.

Responsibility respecting errors, custody, loss or damage

34(1) Any owner or dealer who discovers an error in his permit or number plates shall return the permit or number plates to the Department within twenty-four hours of the discovery.

(2) Every owner or dealer shall be responsible for the custody of the number plates issued to him for the current year and it shall be an offence for him to fail to immediately notify the Department when such number plates are no longer in his possession.

(3) In the event that any number plate or permit issued hereunder is lost, mutilated or has become illegible, the person who is entitled thereto shall make immediate application for and obtain a duplicate or substitute therefor upon furnishing information of such fact satisfactory to the Department and upon payment of the required fees. R.S., c. 293, s. 34.

Finding or removal of number plate

35(1) Any person who finds any number plate or number plates of any motor vehicle of the current year not issued to him shall immediately deliver them to the Registrar or to a peace officer and the peace officer may deliver the number plate or number plates to any person who he is satisfied is the owner of the motor vehicle for which the number plate or number plates were issued or shall, within twenty-four hours, notify the Registrar that he holds the number plate or number plates.

(2) Any peace officer may remove any number plate or number plates from any motor vehicle when the motor vehicle is apparently abandoned or when the number plate or number plates have been or are being used illegally and shall forward them to the Registrar with a statement of the reason for the removal. R.S., c. 293, s. 35.

Offences respecting registration

37(1) It shall be an offence against this Act for any person to commit any of the following acts:

(a) to operate or for the owner thereof to permit the operation upon a highway of any motor vehicle, trailer or semi-trailer which is not registered or which does not have attached thereto and displayed thereon the number plate or plates assigned to the owner by the Department for the current registration year, subject to Sections 26 and 30 and any regulation made under Section 25;

(b) to display or cause or permit to be displayed or to have in possession any permit or registration number plate knowing same to have been cancelled, revoked or suspended;

(c) subject to subsection (2) of Section 23, to display or cause or permit to be displayed upon a vehicle any registration number plate issued in respect of another vehicle or not issued in respect of the vehicle upon which it is so displayed;

(d) to lend or permit the use of, by one not entitled thereto, any permit or registration number plate issued to the person so lending or permitting the use thereof;

(e) to fail or refuse to surrender to the Department, upon demand, any permit or registration number plate which has been suspended, cancelled or revoked as in this Act provided;

(f) to use a false or fictitious name or address in any application for the registration of any vehicle or for any renewal or duplicate thereof, or to make a false statement or to conceal a material fact in any such application;

(g) to operate or have under his control or in his charge any motor vehicle on which motor vehicle there is displayed any fictitious number

> plate, or any number plate that is defaced or altered or any number plate other than as provided in this Act or in any regulations.
>
> (2) In this Section, 'number plate' and 'permit' include a number plate or permit issued in respect of a vehicle registered in another province of Canada or in a state. R.S., c. 293, s. 37; 2004, c. 6, s. 22.
>
> **Identification or registration**
>
> 38(1) Notwithstanding any other provision of this Act, the Minister may, subject to the approval of the Governor in Council, make regulations prescribing
>
> (a) the means of identification or proof of registration to be attached to motor vehicles or trailers; and
>
> (b) the method by which and the manner in which the means of identification or proof of registration shall be attached to motor vehicles or trailers.
>
> (2) Every motor vehicle and every trailer while being driven on any highway shall have attached thereto such means of identification or proof of registration thereof as the Minister may prescribe.
>
> **Return of plates, etc. upon request**
>
> 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 so to do by a letter sent in the manner prescribed by the Registrar.

[25] The *Personalized Number Plate Regulations*, N.S. Reg. 124/2005 (the "*PNP Regulations")*, issued pursuant to ss. 10 and 38 of the *MVA*, allow the owner of a vehicle to make an application for a personalized registration number to be placed on the standard form plate. The relevant provisions are as follows:

> **Definitions**
>
> 2 In these regulations,
>
> (a) 'Act' means the *Motor Vehicle Act*;
>
> …
>
> (f) 'passenger vehicle' means a Passenger Class 1, 2 or 3 passenger motor vehicle as defined in Section 1 of the regulations respecting registration fees for passenger motor vehicles;
>
> (g) 'personalized number plate' means a number plate as described in Section 7.

Types of motor vehicles

3 Personalized plates may be used for all of the following types of motor vehicles:

...

(e) a passenger vehicle.

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.

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.

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.

Recalling personalized number plate

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

Registration expiry dates for vehicles bearing personalized number plates

9(2) The registration for a bus, camper, commercial motor vehicle or passenger vehicle that is registered with a personalized number plate expires

(a) if the initial registration is made with a personalized number plate, in the following calendar year at 11:59 p.m. on the last day of the month in which payment for the initial registration occurred;

(b) if an existing number plate is replaced with a personalized number plate, at 11:59 p.m. on the date on which the current validation sticker attached to the existing number plate expires.

Issues

[26] The issues on this Application are as follows:

1. Has the Applicant, Mr. Grabher, established that ss. 5(c)(iv) and 8 of the *PNP Regulations*, and the Registrar's decision thereunder, violated his s. 2(b) right to freedom of expression? This will turn on the question - Is there a constitutionally protected right to freedom of expression in a government-owned personalized number plate?
2. Has the Applicant established that the Registrar's decision violated his s.15 equality rights?
3. If a violation of the Applicant's *Charter* rights is made out, is that limitation justified under s. 1?

4. If the limitation cannot be justified, what is the appropriate remedy?

Positions of the Parties

Mr. Grabher's Position

[27] Mr. Grabher argues the cancellation of his plate has infringed his freedom of expression and equality rights protected by ss. 2(b) and 15 of the *Charter*. Mr. Grabher also challenges the constitutionality of ss. 5(c)(iv) and 8 of the *PNP Regulations.* He says the sections generate arbitrary and inconsistent decisions and do not establish sufficient parameters for the Registrar or for the public to know the limits of state authority to restrict personalized license plates. He says the *PNP Regulations* cannot give the Registrar untrammeled discretion to restrict freedom of expression.

Section 2(b)

[28] Mr. Grabher says that the three-part test for infringement of s. 2(b) from the Supreme Court of Canada decision in ***Canadian Broadcasting Corp. v. Canada Attorney General,*** 2011 SCC 2, is met in the present case. He says the plate bears expressive content, as the Minister of Transportation has created a space on license plates for persons to express themselves, engaging the *Charter* rights of persons who choose to express themselves by purchasing such plates. He says his use of the plate is an expression of his family's identity and their immigrant history. Second, he says the expression is not disqualified from protection by s.2(b) by virtue of either location or method of expression. Mr. Grabher argues that personalized plates, like the sides of city buses, are the property of the government. He says that, like the side of a bus, the primary purpose of a personalized plate is not expression, but this does not mean that expression is not permitted, or, once permitted, protected. He says the government specifically created the personalized plate program to facilitate expression, and that he used this venue to express himself for many consecutive years, evidencing the historical and actual use of personalized plates for public expression. He argues that the use of the personalized license plate does not undermine the values underlying freedom of expression. Mr. Grabher says that the third part of the test is met because, if his expression on a personalized plate is protected by s. 2(b), then the cancellation of the plate infringes his freedom of expression.

Section 15

[29] Mr. Grabher says that s. 15 must be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians as set out in s. 27 of the *Charter*. He says there has been a violation of s. 15(1) because the law creates a distinction based on race or ethnic origin and that distinction creates a disadvantage by perpetuating prejudice. He says the Registrar is aware that the plate is his surname and is, or ought to be, aware that many immigrant families form the cultural mosaic of Canada. He, therefore, says that the first part of the test is met, because the Regulation has resulted in the creation of a distinction based on nationality, race, or ethnic origin by treating an ethnically German name as an English phrase and attaching an idiosyncratic and demeaning reading to it.

[30] Mr. Grabher says the second stage of the s. 15 test which asks whether or not the distinction creates a disadvantage by perpetuating prejudice or stereotyping is also met. The revocation of the plate has become highly publicized and he says the Registrar's actions convey a message to the public that there is something objectionable about the Grabher surname and, therefore, about the Grabhers themselves.

[31] In order to justify an infringement of ss. 2(b) or 15, the Registrar must show that the limitation is in accordance with "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under s. 1 of the *Charter*. Mr. Grabher says the Registrar is unable to do so because there is no system or standard for scrutinizing plates other than the Registrar's opinion. He says it is fundamental to the rule of law and constitutionalism that citizens know what the law is. He says further that the Registrar answers to no one in the exercise of her discretion, that there is no oversight and no standard, and that the limitation on *Charter* rights resulting from such an arbitrary action fails the "prescribed by law" requirement in s. 1.

[32] Mr. Grabher concedes that the Respondent is justified in limiting some expression on personalized plates provided there is a discernible, testable standard to govern the limitations, which he says there is not.

[33] Mr. Grabher states that in relation to the first part of the proportionality test set out by the Supreme Court of Canada in ***R. v. Oakes***, [1986] 1 S.C.R. 103, requiring an analysis of whether the measures taken to achieve the objective are rationally connected to that goal, the Respondent has created an unknowable and shifting standard of measurement: the opinion of the Registrar. He maintains that the measures (ss. 5(c)(iv) and 8 of the *PNP Regulations)* are not rationally

connected to the goal because they are arbitrary, unfair, or based on irrational considerations.

[34] Mr. Grabher points to what he describes as widespread public usage of words by government -- both municipal and provincial -- which might be considered far more objectionable than the surname of the Applicant on the plate. He refers to "Dildo, Newfoundland", "Crotch Lake, Ontario," and others.

[35] Mr. Grabher refers to the expert report of Dr. Rentschler and the rebuttal report of Dr. Soh. He says that the Respondent has never claimed that the revocation of the plate was in any way related to the comments of Mr. Donald Trump in 2005 prior to becoming President.

[36] Mr. Grabher points to Dr. Soh's evidence that there is no discernible connection between media coverage of sexual assault cases and whether or not a license plate increases violence against women; that there is no empirical evidence or research suggesting that exposure to cultural slogans normalizes sexual violence against women or leads an individual who would not otherwise behave in this way to commit sexual offences; that there is no evidence that Mr. Grabher's plate creates an elevated risk of rape; that there is no evidence Canada is a "rape culture" or a culture supportive of violence, and that instances of sexual violence are decreasing, not increasing; and that the suggestion that Mr. Grabher's surname is a statement in support of physical violence against women is completely unfounded. Mr. Grabher says Professor Rentschler's evidence is speculation and conjecture, cloaked in the guise of authority, and should be rejected.

[37] With regard to the question of minimal impairment, Mr. Grabher says the lack of minimal impairment is evidenced by the list of banned words that has been compiled by the Registrar, which he says indicates that completely inoffensive words have been banned such as the word "safe". He submits that the Regulations do not minimally impair freedom of expression due to the lack of a discernible standard or oversight. Mr. Grabher also says the revocation of his plate is not a minimal impairment because the plate contains an expression which is the identity of his family. He says he cannot simply apply for another personalized plate, because no other expression would communicate the same identity.

[38] Mr. Grabher says there is no evident proportionality between the impact of the revocation of the plate and the objective of the Respondent.

The Respondent's Position

[39] The Respondent submits that there is no right to free expression within a personalized number plate, and that Mr. Grabher has failed to establish that s. 5(c)(iv), and the Registrar's decision to recall his personalized plate, limit his s. 2(b) rights. The Registrar says the function of a number plate is not compatible with open public expression, that personalized number plates are not akin to public forums, that the message could be seen as government speech, that individuals denied personalized plates can express themselves on adjacent property, and that the phrase "GRABHER" without the benefit of additional context could be viewed as supporting violence against women and girls.

[40] The Respondent says that Mr. Grabher cannot satisfy the first prong of the s. 15 equality analysis because the decision was not premised upon his ethnic or national origin and does not draw a distinction on that basis. Rather, the decision was based upon the unfortunate fact that the letters, GRABHER, when seen on a number plate, without additional context to clarify its intended meaning, can be interpreted as a socially-offensive statement. Further, the Respondent says that Mr. Grabher cannot meet the second stage of the analysis, being whether a denial of the benefit in question has the effect of reinforcing, perpetuating, or exacerbating pre-existing disadvantage or stereotyping. The Respondent says Mr. Grabher has not adduced any evidence to suggest that persons of Austrian-German heritage suffer from pre-existing disadvantage or stereotyping in Canadian society. Even if he had, the Respondent says he has not adduced any evidence that denial of a personalized number plate bearing his surname would reinforce, perpetuate or exacerbate that pre-existing disadvantage or stereotyping. The Respondent says the Registrar's decision to recall the plate does not result in severe consequences for all Canadians of Austrian-German heritage. It says that while there are some consequences for the Applicant personally, these are limited because he has not been denied any form of number plate, nor has he been denied the ability to register or drive his vehicle, nor is there any evidence to suggest the Registrar's decision has harmed his economic interests.

[41] In the event a *Charter* violation is established, the Registrar says that, alternatively, it is justified under s. 1. The Respondent says the limitation is prescribed by law. It says the provisions are sufficiently precise and accessible. The Respondent says that the objectives of the Registrar's decision and s. 5(c)(iv) of the *PNP Regulations* – to ensure a safe and welcoming environment on Nova Scotia roads, and to protect individuals in society from the effects of harmful or offensive expression, and protect the province's proprietary and economic interests, - are pressing and substantial. It further says both measures are rationally

connected to these objectives and that there are no more minimally impairing ways by which to effectively achieve these objectives. Finally, the Registrar says there is proportionality between the salutary and deleterious effects of the measures, in light of the harms to be prevented, the limited connection between the expression at issue and the core values underlying s. 2(b), and the fact that people in the Applicant's position can freely express themselves in other areas of their vehicles.

Law and Analysis

[42] This decision is not about whether Mr. Grabher's surname is offensive – it is not. Surnames carry with them, from generation to generation, the history of our ancestors. They are our link to the past and to the future. Surnames are important to our personal identity, as is clear from the evidence of Mr. Grabher in this matter. This decision is not intended in any way to diminish the importance of Mr. Grabher's surname or the pride that Mr. Grabher and his family take and should take in their name and heritage.

[43] The issue at the heart of this matter is whether a license plate is a location where s. 2(b) freedom of expression applies, and, if so, whether the provisions of s. 5 (c)(iv) and 8 violate s. 2(*b*) of the *Canadian Charter*. If they do, I must then consider whether the violation is justified under s.1 of the *Canadian Charter*.

[44] First of all, there is no question that the provisions in issue are government legislation to which the *Charter* applies.

Section 2 (b) Freedom of Expression

[45] The Supreme Court of Canada has long instructed that courts are to take a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*. The Court stated in ***Canadian Federation of Students v. Greater Vancouver Transportation Authority***, 2009 SCC 31:

> 27 This Court has long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*... It has not departed from this general principle in the context of s. 2(*b*)... An activity by which one conveys or attempts to convey meaning will *prima facie* be protected by s. 2(*b*). Furthermore, the Court has recognized that s. 2(*b*) protects an individual's right to express him or herself in certain public places (*Comité pour la République du Canada- Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) (airports); *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (S.C.C.) (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity *prima facie* protected,

> but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).
>
> [Emphasis added]

[46] Does the Registrar's authority under ss. 5 (c)(iv) and 8 to reject or recall a personalized license plate, which may be considered offensive or not in good taste, infringe s. 2(b) of the *Charter*?

[47] The answer to this question depends on the answers to three other questions:

1. Do the two to seven spaces have expressive content bringing them within the s. 2(b) protection?
2. Does the method or location of this expression remove it from the s. 2(b) protection?
3. If the expression is protected by s. 2(b) do ss. 5(c)(iv) and 8 infringe that protection, either in purpose or effect? (***Montreal (Ville) v. 2952-1366 Québec Inc.,*** 2005 SCC 62***,*** at para 56, referencing ***Irwin Toy Ltd. c. Québec (Procureur Général)***, [1989] 1 S.C.R. 927 (S.C.C.)).

Finally, if there is an infringement of s. 2(*b*) of the *Charter*, the analysis then shifts to determining whether the infringement is justified under s. 1 of the *Charter*.

[48] As the majority said in ***Montreal (Ville), supra,*** the first two questions relate to whether the expression at issue falls within the protection of s. 2 (b). The Court said expressive content is always protected but form or location may not be protected. In the present case location is central to a determination as to whether the expression (two to seven letters or numerals, with or without spaces) is protected by s. 2(b) :

> 57 The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(*b*). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred (see, e.g. *Irwin Toy*, p. 968; *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.), at p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

[49] In relation to the first question, of whether personalized license plates contain expressive content, the answer is yes. This is not in issue. The message in the two to seven spaces (of letters and/or numerals, with or without spaces), can be

expressive activity. The seven letters "GRABHER" on the personalized plate issued to Mr. Grabher represents an expressive activity. This is not disputed by the Respondent. The question is whether the expression is excluded from s. 2(b) protection, due to its form or location, despite the presumptive protection, as the Court noted in ***Montreal (Ville), supra,***:

> 58 … The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(*b*) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(*b*): see *Irwin Toy*, at p. 969; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 729.

Location

[50] In ***Montreal (Ville), supra,*** the Supreme Court discussed the decision in the prior Supreme Court of Canada case of ***Committee for the Commonwealth of Canada v. Canada,*** [1991] 1 S.C.R. 139, commenting that it contained two countervailing arguments regarding expression on public property. It then noted that a majority of judges supported the general approach that some government-owned property has never been viewed as available space for public expression and that it cannot have been the intention of the drafters of the *Charter* to confer a *prima facie* right of free expression in these essentially private spaces:

> 64 The argument against s. 2(*b*) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. <u>But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.</u>
>
> 65 In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a

> test based on whether the primary function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(*b*) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly to s. 1.
>
> [Emphasis added]

[51] While unnecessary to determine the outcome of the merits of the case in ***Montreal (Ville), supra,*** the Court agreed with the majority in ***Committee for the Commonwealth of Canada, supra,*** and stated that the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question but that there must be a further enquiry to determine if this is a type of property that attracts s. 2(b) protection (para. 71). The majority took a broad categorical approach, focusing on the character of the location or place and its suitability for expression. The Court adopted a principled basis for *method* or *location*-based exclusion from s. 2(b) protection, noting that the onus is 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.

[52] In ***Canadian Federation of Students v. Greater Vancouver Transportation Authority***, 2009 SCC 31, the Court again adopted the analytical framework developed in ***City of Montréal, supra,*** for determining whether the expression should be denied s. 2(*b*) protection on the basis of location.

[53] Mr. Grabher says that if either the method or the location of the conveyance of a message is to be excluded from *Charter* protection, the Court must find that it conflicts with the values protected by 2(b), being self-fulfillment, democratic discourse and truth-finding, relying on ***CBC v. Canada,*** 2011 SCC 2. He says the use of a personalized license plate does not undermine the values underlying freedom of expression but, to the contrary, advances those values because the plate program creates a space where the uniqueness of the individual can be expressed.

[54] However, in assessing whether a method or location conflicts with the values protected by 2(b), being self-fulfillment, democratic discourse and truth-finding, the majority in ***CBC v. Canada, supra,*** went on to state that in deciding whether a location is excluded from *Charter* protection, in keeping with the analytical framework from ***Montréal (Ville),*** and ***Canadian Federation of Students,*** the Court must consider the historical or actual function of the location of the activity or the method of expression, and whether other aspects of the location or the method suggest that expression at that location or using that method would undermine the values underlying free expression (para. 37).

[55] Therefore, I now turn to the analytical framework set out by the Supreme Court of Canada. I will first address the historical or actual function of the place and then whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

Historical or Actual Function and Other Aspects of the Space

[56] The majority in ***Montréal (Ville), supra,*** highlighted the importance of addressing the historical or actual function of the place:

> 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.
>
> 78 The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g. R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq*. This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.
>
> [Emphasis added]

[57] There are a number of cases that address the question of whether the location in question has been historically used as an arena or forum for public discussion or political debate. The British Columbia Court of Appeal in ***R. v. Breeden***, 2009 BCCA 463, considered whether s. 2(b) was applicable to protest signs at a fire station, a courthouse, and a municipal hall. The majority noted that the relevant considerations include the historic use of the area where the activity is occurring and whether the activity in question interferes with the proper functioning of the facility (para 19). In concluding that these were not locations protected by s. 2(b), the Court said:

> 20 What appears to me a key feature of the present case is that there is no evidence in the record suggestive of the use of the locations in question as forums for advertising (commercial speech) or places of debate (political speech). Accordingly, unlike *Canadian Federation of Students*, here this Court must decide whether to afford access for expressive activities in locations where a government entity has never previously recognized such a right. See *Canadian Federation of Students*, para. 45. The Fire Station premises are clearly not amenable to or suitable for such activities and if the appellant does not acknowledge this in argument, he but faintly submits anything to the contrary.
>
> 21 That leaves for consideration the other two venues, the courthouse and the municipal hall. While it is clear that council chambers in municipal halls are utilized from time to time for public hearings and debate, the evidence in this case does not furnish support for the proposition that the foyer area of the West Vancouver municipal hall has been utilized for purposes of discussion and debate. It was open to the trial judge on the evidence to conclude that the sort of activity sought to be engaged in by the appellant was out of accord with the historic use of the space and that the continuance of such activity would tend to undermine the

> use of the premises by staff and members of the public for the orderly conduct of public business.
>
> 22 Courthouses have a vital role to play in the operation and furtherance of the rule of law: see *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 (S.C.C.); and *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910, 62 C.R. (6th) 99 (Que. C.A.), leave to appeal to S.C.C. granted, (S.C.C.). As was the case concerning the municipal hall, the evidence before the trial judge did not afford support for the proposition that advertising or political debate has historically occurred in the public areas of courthouses. I should say that there is debate and discussion in the courtrooms of courthouses but such location is a very structured and specialized forum to allow courts to perform their historic function of deciding legal controversies. The activities of the appellant were out of accord with the historical use of courthouse premises and, as the trial judge found, would interfere with the effective functioning of the courts as an institution. At bottom, the appellant seeks to engage in a polemical or political type of protest to further his aims or objects. That is wholly at odds with the historic function and operation of court premises which are dedicated to the resolution of disputes between parties by legal process.
>
> [Emphasis added]

[58] The majority in ***Breeden, supra,*** placed considerable significance on the historical function of the locations and particularly whether they had previously been used as open forums for public discussion and debate. A similar conclusion was reached by the Québec Court of Appeal in ***Société de transport de la Communauté urbaine de Montréal v. Robichaud***, 1997 CarswellQue 186, where Justice Fish (as he then was) for the majority expressed serious doubts whether freedom of expression is constitutionally protected in the corridors and transit areas of a subway station:

> 28 These subway facilities can in my view not be assimilated, either by analogy or extension, to the 'arenas' or 'forums' traditionally open to private petition or public debate. They are built and maintained for the exclusive benefit of those who have paid a fare to secure a service. Their purpose is to provide a pedestrian passageway for travelers only. These defining characteristics are in my view sufficient to exclude them from the ambit of public property upon which freedom of expression is constitutionally protected.

[59] The Ontario Divisional Court in ***Vietnamese Association of Toronto v. Toronto***, [2007] O.J. No. 1510, reached a similar conclusion in finding that a flagpole in Nathan Phillips Square was not public property to which the public historically had access, even though the City's Flag Policy allowed use of the flagpole by community and non-profit groups to mark important events.

> 19 The flagpole is not like an airport or a public street to which the public has unimpeded access as in *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) or the *Montreal* case above. The flagpole is of a different nature, and its use is regulated, because the flags flown can and without question are perceived, rightly or wrongly, as the expression of the City's perspective and approval.
>
> [Emphasis added]

[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.

Regulation of Vehicle Plates

[61] The purpose of vehicle license plates is governmental. The governmental nature of the plate is clear from the plate itself, bearing "Nova Scotia" along the top of the plate along with an iconic symbol and slogan. Their primary purpose is for registration and identification purposes. A review of the *MVA* and *PNP Regulations* illustrates the highly regulated nature of vehicle plates. The *MVA* includes the following:

- Every number plate must have displayed on it the registration number assigned to the owner (s. 19(2)).
- They must be returned on termination of lawful use (s. 19(3)).
- The plate must be attached and displayed as prescribed by the *Regulations.* (s. 20).
- On sale of the vehicle, etc., the plate must be removed for re-assignment to a new vehicle unless returned or required to be returned by the Department. (s. 23(3)).
- The plate must be in the owner's possession or they must notify the Department immediately. It is an offence not to do so (s. 34(2)).
- A peace officer can remove the plate if the vehicle is apparently abandoned or the plate has been or is being used illegally (s. 35(2).

- Every registration number plate remains the property of the Crown and it is an offence to fail or refuse to return the plate when required. (s. 290(1)).

[62] The *MVA* also provides for various offences associated with improper use of vehicle plates. For example, s. 37(1)(a) makes it an offence to operate a vehicle on the highway without attached/displayed plates or (b) to display a plate that is cancelled or revoked. Section 37(1)(g) makes it an offence to operate a motor vehicle on which there is displayed a fictitious plate, a defaced plate, etc.

[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.

Other Aspects of the Place

[67] The Court in ***Canadian Federation of Students, supra***, in considering whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection, specifically noted that buses were, by their very nature, public and that they were unlike some government spaces that required privacy and limited access:

> 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.
>
> [Emphasis added]

[68] It is noteworthy that bus advertising does not have the indicia of government that is found on the face of a license plate. A license plate, by its very nature, is a private government space. The purpose of the activities that occur on a license plate do require limited access. The government identification function of the plate is essential for identification by law enforcement and other government agencies.

Unlike a bus, a street, or a park, this government ID is not a space where the public freely interacts with each other.

[69] Mr. Grabher says license plates are like the sides of buses, a location the Supreme Court found to be subject to s. 2(b), in part due to its historic use for advertising. It is important to remember that the Supreme Court of Canada's concern in ***Canadian Federation of Students, supra,*** was a limit on political speech. In that case widespread advertising was appearing on the sides of buses; however, the transit authorities prohibited any ads that were political in nature. The Court said:

> 80 In sum, advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities have failed to minimize the impairment of political speech, which is at the core of s. 2(*b*) protection. I conclude that, to the extent that articles 2, 7 and 9 prohibit political advertising on the sides of buses, they place an unjustifiable limit on the Respondents' right under s. 2(*b*) of the *Charter* to freedom of expression.

[70] Inherently, some places are not meant to be public and should remain outside the protected sphere of s. 2(b). 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). Justice Deschamps, writing for the majority, said in ***Montreal (Ville), supra,*** that s. 2(b) is not without its limits, and governments will not be required to justify every restriction on expression under s. 1. She said that the method or location of the expressive activity may exclude it from protection.

[71] The majority in ***Montreal (Ville), supra,*** while noting that the "method or location" test reflects the fact that our jurisprudence requires broad protection at the s. 2(b) stage, said it also reflects the fact that some places must remain outside of the protection of s. 2(b). The Court noted that restricted access to many government-owned venues is part of our history and our constitutional tradition and that the Charter was not intended to turn this state of affairs on its head:

> 79 … 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]

[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.

[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.

[77] I was directed to the United States Supreme Court decision in ***Walker v. Texas Div., Sons of Confederate Veterans Inc.***, 135 S. Ct. 2239 (2015), where the Court considered whether the rejection of a proposal for a specialty plate design featuring a Confederate battle flag violated the applicant's rights to freedom of speech. The Court noted that the Texas statute said the Board "may refuse to create a new specialty plate" for a number of reasons, for example, "if the design might be offensive to any member of the public … or for any other reason established by rule".

[78] While there are significant differences between our approach and the U.S. approach to freedom of expression under our respective constitutions, the U.S. Court similarly looked at whether the public had been given freedom of speech on the property in the past and the government purpose for the property. The Court concluded that the Texas statutory license plate regime conveyed government speech and was entitled to refuse to issue the plates. It concluded that states, including Texas, had long used government license plates to convey government speech, that plate designs are often closely identified in the public mind with the

State, that Texas maintained direct control over the messages conveyed on its plates, that specialty plates are not a traditional public forum and that Texas did not intend its specialty plates to serve as a designated public forum. Interestingly, it also distinguished advertising on buses from expression on license plates, saying that the messages on buses were located on a space traditionally available for private speech and that the advertising space, in contrast to a license plate, bore no indicia that the speech was owned or conveyed by government.

[79] After conclusion of argument in the present matter, I was directed by counsel to the recent decision of the Honourable Justice Lanchbery of the Manitoba Court of Queens Bench in ***Troller v. Manitoba Public Insurance Corporation***, 2019 MBQB 157. That case also involved cancellation of a personalized license plate. The plate read "ASIMIL8". I have reviewed the case and respectfully disagree with Justice Lanchbery's finding that, by permitting limited expression on a personalized license plate, the regulator has authorized a new location where free expression is entitled to s. 2(b) protection.

[80] In conclusion, I find no violation of s. 2(b).

Section 15

[81] Section 15 (1) 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.

[82] Justice McIntyre for the majority in ***Andrews*** defined discrimination as follows:

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [pp. 174-75]

[83] As Mr. Grabher points out, s. 27 of the *Charter* indicates that the *Charter*, including s. 15, must "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

[84] The Supreme Court of Canada has established a two-part test for assessing a s. 15(1) claim. First, does the law create a distinction based on an enumerated or analogous ground? Second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See, for example, ***Withler v. Canada (Atty. Gen.)***, [2011] 1 S.C.R. 396, at para. 30)

[85] Justices McLachlin and Abella said in ***Withler, supra,*** that a person must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory:

> 31 The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter* (*Andrews*; *Law*; *Ermineskin Indian Band*, at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).
>
> [Emphasis added]

[86] In the case of ***Kahkewistahaw First Nation v. Taypotat,*** 2015 SCC 30, which post-dates ***Withler, supra,*** the Court emphasized that the proper approach to s. 15 was contextual. Here Justice Abella, writing for the majority, said that the focus of s. 15 is on laws that draw discriminatory distinctions:

> 18 The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions -- that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec (Attorney General) v. A.*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec (Attorney General) v. A.*, at para. 331.

[87] The majority decision then expanded upon the two-part analytical framework for assessing s. 15 claims:

> 19 The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which 'stand as constant markers of suspect decision making or potential discrimination', screens out those claims 'having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context': *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), at para. 8; Lynn Smith and William Black, 'The Equality Rights' (2013), 62 *S.C.L.R.* (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 37.
>
> 20 The second part of the analysis focuses on arbitrary -- or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage: The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]
>
> 21 To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but 'evidence that goes to establishing a claimant's historical position of disadvantage' will be relevant: *Withler*, at para. 38; *Quebec (Attorney General) v. A.*, at para. 327.
>
> [Emphasis added]

[88] Mr. Grabher must establish that the regulation at issue has a disproportionate effect on him based on his membership in an enumerated or analogous group. He says that the first part of the test is met because the regulation has resulted in the "creation of a distinction based on an enumerated ground, namely nationality, race or ethnic origin, by treating an ethnically German name as an English phrase and attaching an idiosyncratic and demeaning reading to it".

[89] Comparison is relevant to this analysis. The Supreme Court of Canada in ***Withler, supra,*** called for a less formal comparator analysis than in the past but stated clearly that comparison is still a relevant consideration in the s. 15 analysis:

> 61 The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (i) Does the law create a distinction based on an enumerated or analogous ground? and (ii) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.
>
> 62 The role of comparison at the first step is to establish a 'distinction'. Inherent in the word 'distinction' is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> 63 It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis …
>
> [Emphasis added]

[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.

[92] I conclude that ss. 5(c)(iv) and 8, neither on their face nor in their impact, create a distinction on the basis of an enumerated or analogous ground.

[93] Although not necessary in light of my finding above, I will move on to consider the second part of the test. In relation to step two, substantive inequality, the question is whether, having regard to the relevant context, the impugned law perpetuates disadvantage or prejudice, or stereotypes the claimant group (***Withler, supra,*** at para 70).

[94] Mr. Grabher says that the second stage of the s. 15 test, which asks whether or not the distinction creates a disadvantage by perpetuating prejudice or stereotyping, is also met. He says the revocation of the plate has become highly publicized, having been mentioned in numerous news articles and even the House of Commons. He says that the Registrar's cancellation of the plate and the ongoing public dispute resulting from it convey a message to the public that there is something objectionable about the Grabher surname, which he says is deeply hurtful. He says that the inquiry into whether there has been discrimination must be conducted from the subjective perspective of the Applicant and that the Court must also determine whether the Applicant is being objective about his assertions of discrimination.

[95] Mr. Grabher says the subjective element is satisfied, because of the continued impact of the revocation of the plate and the alleged insult to his family's name, family immigrant status, and foreign ancestry. He says the subjective element is also satisfied because, not only has the plate been revoked, but the standard of measurement for revocation is demonstrably arbitrary and capricious, with the only standard being the Registrar's opinion.

[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".

[99] I fail to see any basis at law for Mr. Grabher's s. 15 claim. It is dismissed.

[100] I note again that Mr. Grabher did not bring an application for judicial review of the administrative decision of the Registrar. My decision solely addresses his claim that the cancellation of his personalized plate infringes his ss. 2(b) and 15 *Charter* rights, as do the *PNP Regulations* (ss. 5(c)(iv) and 8).

Alternative Analysis to My Section 2(b) Finding

[101] If I were to be incorrect in relation to my finding that this location, a government license plate, is not a location that attracts s. 2(b) protection, it would be necessary to continue with the remainder of the test for s. 2(b) infringement. For thoroughness purposes I have decided to do so. For the following analysis, I assume that expression on a personalized plate is protected by s. 2(b).

[102] Based on my assumption that expression on a personalized plate falls within the protection of s. 2(b), does s. 5(c)(iv) infringe upon this protected expression either in purpose or effect? In other words, does the government measure place a limit on expression? In the present case, the very purpose of the impugned section 5(c)(iv) is to restrict the content of expression in the allotted seven spaces provided on personalized plates. The wording of s. 5(c)(iv) clearly limits content. Section 8

simply allows the Registrar to recall a plate on the basis of a s. 5(c)(iv) finding (or a finding under the other s. 5 subsections).

[103] The effect of s. 5 (c)(iv) is to limit expression on personalized plates. The majority in ***Montreal (Ville), supra,*** at para 83, said: "Where the effect of a provision is to limit expression, a breach of s. 2(*b*) will be made out, provided the claimant shows that the expression at issue promotes one of the values underlying the freedom of expression: ***Irwin Toy*** at p. 976". It could be said that the expression at issue, Mr. Grabher's surname on a personalized plate, promotes his self-fulfillment. Therefore, the Registrar's recall of the plate does constitute a limit on free expression under s. 2(b).

Section 1 Analysis

[104] Given my assumption (for the purposes of the following analysis) that s. 2(b) applies to this location, and the resulting conclusion that s. 5(c)(iv) and the recall of the plate amount to limiting freedom of expression under s. 2(b), I must now determine if such a limit is justified under s. 1 of the *Charter* which provides:

> 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.

[105] Section 1 requires that the limit be "prescribed by law". If this is established, then the Respondent must meet two central criteria for the limit on the s. 2 (b) *Charter* right to be justified under s. 1:

1. The objective of the measure must be pressing and substantial. This is a threshold requirement.
2. The means by which the objective is furthered must be proportionate. The proportionality inquiry has three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective (***Frank v. Canada (Atty. Gen.),*** 2019 SCC 1 at para 38; ***Oakes***, **supra**, at pp 138-39; ***Mounted Police Association of Ontario v. Canada (Atty. Gen.),*** 2015 SCC 3, at para 139; ***R. v. J(K.R.),*** 2016 SCC 31, at para 58).

[106] The onus in the s. 1 inquiry is on the Respondent who seeks to uphold the limit. The standard of proof is on a balance of probabilities.

Prescribed by Law

[107] The Supreme Court of Canada in ***Canadian Federation of Students, supra,*** at para 50, said the following concerning the "prescribed by law" requirement:

> … to find that the limit is 'prescribed' by law, it must be determined whether the policies are sufficiently precise and accessible. Professor Peter W. Hogg describes the rationale behind the 'prescribed by law' requirement in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 122: The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfills two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.
>
> [Emphasis added]

[108] The "prescribed by law" threshold analysis includes consideration of whether the provision in question is a law and, if so, whether it is sufficiently precise and accessible. Here there is no question ss. 5(c)(iv) and 8 are law, as they are part of the *PNP Regulations* made under the authority of the *MVA.* These regulations are accessible to the public.

[109] With reference to precision, the majority in ***Canadian Federation of Students, supra,*** said that a liberal approach is required and that the standard here is not onerous. The majority said that a provision will satisfy the requirement as long as it provides for an intelligible standard that is not "so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools" and does not simply provide for a "plenary discretion to do whatever seems best in a wide set of circumstances" (para 54). The Court concluded that this inclusive approach is based on a recognition that a narrow interpretation would lead to excessive rigidity:

> 56 This inclusive approach is based on a recognition that a narrow interpretation would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers. McLachlin J. (as she then was) commented on this as follows in *Committee for the Commonwealth* (at p. 245):

> From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. In my view, such a technical approach does not accord with the spirit of the *Charter* and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary.
>
> [Emphasis added]

[110] Here I will once again reproduce the text of the provisions in issue:

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

[111] While s. 5(c)(iv) of the *PNP Regulations* confers broad discretionary powers on the Registrar in determining whether to issue a personalized number plate, it contains sufficient specificity to indicate to the public what is and is not allowed. Could it be clearer? Yes. However, simply because the Registrar has discretion to interpret the phrases "offensive" or "not in good taste" in determining whether to grant a personalized license plate does not equate to insufficient precision. I find that it is sufficiently clear to anyone reading the Regulation that, on receipt of an

application for a personalized plate, the Registrar applies s. 5, including s. 5(c)(iv), and, as part of the s. 5 inquiry, the Registrar has discretion to refuse any application which it finds may be considered offensive or not in good taste.

[112] I find in keeping with the majority comments in ***Canadian Federation of Students, supra***, that s. 5 (c)(iv) is formulated with sufficient precision to enable people to regulate their conduct. While the general public may not have an understanding of each and every word or slogan that could be considered offensive, they have a general understanding of what is meant in the language of the section. It would be impossible for the government to define all terms that may be considered today and in the future to be "offensive or not in good taste." Language is not stagnant; it is constantly changing. Words that have a singularly-understood meaning, can develop a completely different meaning in a very short period of time. Words or phrases may have multiple definitions -- some benign, others offensive. One need only reference the development of the Urban Dictionary to understand that language is constantly evolving.

[113] In ***Canadian Federation of Students, supra***, the policy at issue provided in part:

> No advertisement will be accepted which is likely, in light of prevailing community standards, to cause offence to any persons or groups of persons or create controversy.
>
> [Emphasis added]

[114] The majority found this policy to be sufficiently clear to be prescribed by law. The Court held that the policies clearly outlined the types of advertisements that would or would not be accepted:

> 73 In my view, the transit authorities' advertising policies are both accessible and precise. They are made available to members of the general public who wish to advertise on the transit authorities' buses, and they clearly outline the types of advertisements that will or will not be accepted. Thus, the limits on expression are accessible and are worded precisely enough to enable potential advertisers to understand what is prohibited. The limits resulting from the policies are therefore legislative in nature and are 'limits prescribed by law' within the meaning of s. 1 of the *Charter.*
>
> [Emphasis added]

[115] In my view, the discretion set out in the above policy is very similar to that in the present provision (s. 5(c)(iv)). I similarly find the Regulations to be adequately accessible to the public, and formulated with sufficient precision.

Pressing and Substantial Objective

[116] Next the Respondent must establish that the limitation on Mr. Grabher's freedom of expression is directed at a pressing and substantial objective.

[117] The Respondent says one objective of s. 5(c)(iv) is to ensure a safe and welcoming environment on Nova Scotia's roads. It says a key purpose of the measures is to prevent harms that could flow from the presence of potentially offensive messages on personalized license plates (or, in the case of the present plate, messages that could be interpreted as being offensive, irrespective of their actual intention). The Respondent says a further objective underlying s. 5(c)(iv) is to promote Nova Scotia's brand and further the province's overarching marketing efforts, particularly with respect to tourism. It says number plates are Crown property and bear the name of the province, a phrase long associated with Nova Scotia tourism "Canada's Ocean Playground", and a symbol frequently associated with Nova Scotia, being the *Bluenose*. It says s. 5(c)(iv) also has the objective to prevent harm to Nova Scotia's brand.

[118] Harm that can flow from expression by words or writing was discussed in ***R. v. Keegstra*** [1990] 3 SCR 697, at para. 64:

> … It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this court has found that words can in themselves constitute harassment (*Janzen v. Platy Ent. Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39, 25 C.C.E.L. 1, 10 C.H.R.R. D/6205, 59 D.L.R. (4th) 352, 47 C.R.R. 274, 89 C.L.L.C. 17,011, 58 Man. R. (2d) 1, *(*sub nom. *Janzen v. Pharos Restaurant)* 95 N.R. 81). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded (p. 214)
>
> [Emphasis added]

[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 …

[120] Canadians are concerned about sexualized violence. Our legislators, law enforcement personnel and the courts are all keenly aware of the issues of sexualized violence in Canadian Society and the need to do more to address it. I note that recently the Supreme Court of Canada in ***R. v. Barton,*** 2019 SCC 33, spoke to the issue of sexualized violence against women saying:

> 1 We live in a time where myths, stereotypes, and sexual violence against women — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and *must*— do better.

The seven letters ("GRABHER") on a government-owned license plate can be interpreted as promoting sexualized violence (without full contextual information). Preventing harm that could flow from such a message on a government plate must be seen as pressing and substantial**.**

[121] In the context of advertising on the sides of a buses, and a policy adopted with a purpose of providing "a safe, welcoming public transit system", the Supreme Court of Canada envisioned offensive content undermining that objective of providing a safe and welcoming transit system. I am of the opinion that, in the present context of limited access on a government-owned license plate, these comments are even more applicable. The majority in ***Canadian Federation of Students, supra,*** said at para. 76:

> … I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism — regardless of whether it is commercial or political in nature -- that the objective of providing a safe and welcoming transit system will be undermined.
>
> [Emphasis added]

[122] I find s. 5(c)(iv) is directed at a pressing and substantial objective. It is meant to prevent harm resulting from expression, similar to the limitations which were held to be sufficiently pressing and substantial objectives in both ***R. v. Keegstra***, ***supra***, (hate speech) and ***R. v. Butler,*** [1992] 1 SCR 452 (pornography). Location matters, as does the audience. Here the location is a government license plate -- in essence an ID -- and the audience is all those people in Nova Scotia (including children) who may see the plate on streets, in parking lots and on highways, as well as those in other provinces and countries where the vehicle may travel. Here the limit on expression is not overly broad in the context of a license plate that bears the Nova Scotia brand and expression that could be seen as endorsed by the issuing government.

[123] The majority in ***Canadian Federation of Students, supra,*** confirmed the importance of location and audience saying:

> 78 … It is clear from this Court's s. 1 jurisprudence on freedom of expression that location matters, as does the audience. Thus, a limit which is not justified in one place may be justified in another. And the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place.
>
> [Emphasis added]

[124] Clearly the provincial government cannot sanction having vehicles with government-owned plates travelling the highways of this province and country bearing messages that could be considered “offensive or not in good taste”. Provincial plates, including personalized plates, are connected in the public’s mind to the Province. We can instantly recognize plates from other provinces, particularly those of our neighbouring provinces. The messages on personalized plates can be seen as having been endorsed by the government, the issuing authority. Preventing harm to Nova Scotia’s brand is also a sufficiently important objective.

[125] I find that the Respondent has established that its objective is to provide a safe and welcoming environment on Nova Scotia roads and to protect Nova Scotia's brand. I further find the Respondent has met the burden of showing that this is a sufficiently important objective to warrant placing a limit on freedom of expression on a government-owned license plate, and, in particular, in the present case involving Mr. Grabher's freedom of expression. I accept that the objectives are pressing and substantial. The government, on its government-owned, personalized license plates that allow only limited access, should not be required to publish words with which it does not wish the province to be associated.

[126] I now turn to whether the limit is proportionate. Here I will look at the questions of rational connection, minimal impairment and overall proportionality between the deleterious and salutary effects of the provisions.

Rational Connection

[127] The first question is whether the limit on expression is rationally connected to the Province's objective of ensuring a safe and welcoming environment on Nova Scotia roads and to protect its brand. There needs to be a rational connection between the objective of the legislative measure and the means used in pursuit of the objective. Here I find that there is a link between the objective of preventing harm and the legislative provision to prevent content that could be considered "offensive or not in good taste" on personalized license plates. In my opinion, there can be no doubt that a restriction on content on a license plate, which can be considered offensive or in bad taste to members of the community and negatively reflect on the province, is rationally connected to the objective of providing a safe, welcoming environment on Nova Scotia roads. Common sense alone leads to a conclusion that the Regulation promotes the end sought by the government, i.e., preventing harm so as to ensure a safe and welcoming environment on Nova Scotia roads and protect Nova Scotia's brand.

[128] Sections 5(c)(iv) and 8 meet the standard of rational connection. The government, through the legislation and regulations, has maintained control over the messages conveyed. It has broad discretion because it must choose how it wishes to present the province on this government license plate. The provisions allow the Registrar to either refuse an application or recall a previously-issued plate where "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". These provisions allow the Registrar to refuse to issue and to recall a personalized plate containing a message that might be racist, xenophobic, homophobic, sexist, etc.

Incidental to this are the Registrar's concerns that a plate bearing content that is offensive or in bad taste could be distracting to drivers, contribute to road rage, or be seen as endorsed by the Province, thereby harming Nova Scotia's brand. The Province has a genuine concern about the content of its government-owned license plates (plates that must include "Nova Scotia", "Canadas Ocean Playground" and which contain the *Bluenose* image) containing content that is offensive or in bad taste that could be seen by all who encounter a Nova Scotia registered vehicle as it makes its way across the province or country, or even continent, and that could be interpreted as being government-sanctioned language.

[129] Mr. Grabher says there is no rational connection because the measures are arbitrary, unfair, or based on irrational considerations. He says the Respondent has created an unknowing and shifting standard of measurement, being the opinion of the Registrar. Mr. Grabher says the arbitrariness and irrationality of the Respondent's measures is apparent when one considers the widespread public usage of words by government -- both municipal and provincial -- which might be considered far more objectionable than the surname of Mr. Grabher. He points to place names such as "Dildo, Newfoundland." He also points to a recent Halifax Water Board's bus ad campaign that included the phrases: "Powerful Sh*t" and "Be proud of your Dingle". Just because a particular place name could be considered in bad taste or offensive does not prohibit government from legislating against offensive language on its license plates. I do not see the similarity between a place name and a government-initiated program allowing limited expression on a government-owned license plate. This argument is also unconvincing if it is saying that governments cannot limit language that is offensive or in bad taste on a license plate while there exist place names in the Canada that could be considered in bad taste or offensive. Changing long-established place names is often community driven and occurs over time, given the implication for services to the community including postal, fire, police, etc. With respect to the Halifax Water Board's bus ad campaign, I refer to my prior comments that advertising on a public bus is not the same as expression on a government-issued license plate. Advertisements on the side of a bus are inherently different than the limited expression allowed on the governmental space of a license plate.

[130] Mr. Grabher says the Respondent has never claimed that the revocation of the plate was related in any way to the comments of Donald Trump in 2005 that were released before becoming President in 2016. He says the supposed connection between the revocation of the plate and Donald Trump is a poorly-veiled afterthought relied on by the Respondent to justify an action that was not

justifiable. He says there is no evidence the plate is an expression of violence, or that it has ever contributed to the perpetration of a violent act, or that any roadway, motorist, citizen (female or male) was ever endangered by the plate. He says, therefore, there is no evidence the plate represents language that supports gendered violence or promotes violence against women.

[131] I see no need to establish a connection to Mr. Trump's comments. I am satisfied that the seven letters "GRABHER", without added context indicating this is a surname, could be interpreted as promoting sexualized violence against women and girls. As noted above, I find that the limit on expression is rationally connected to the Province's objectives.

Minimal Impairment

[132] The second question in the proportionality analysis is whether the measures in question impair the right in a reasonably minimal way. As the majority said in ***Montreal (Ville), supra***, where interests and rights conflict, elected officials must be accorded a measure of latitude:

> 94 First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive: *Canadian Pacific Ltd.*
>
> [Emphasis added]

[133] The Supreme Court further said in ***R v. Sharpe***, 2001 SCC 2, at para. 96:

> This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be *reasonably* tailored to its objectives; it must impair the right no more than *reasonably* necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account …
>
> [Emphasis added]

[134] Mr. Grabher says a lack of minimal impairment is evidenced by the list of banned words that have been compiled by the Registrar, which shows that

completely inoffensive words have been banned. 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.

[136] Mr. Grabher concedes that the Registrar is justified in limiting some expression on personalized plates but says that there must be a discernible, testable standard to govern such limitations. Simply because the Registrar has been given discretion within s. 5, including within the impugned s. 5(c)(iv), does not mean such grant of authority is unconstitutional. The Registrar must be guided by and informed by the legislation in her interpretation of the words "offensive or not in good taste". In addition, the Registrar's decisions are subject to oversight by this Court on judicial review on the full administrative record.

[137] Mr. Grabher also argues that the measure is not minimally intrusive because it completely prohibits the use of his surname. Due to the space constraints of the allowable seven letters and numbers, the Registrar had two options -- to continue to allow the "GRABHER" plate or to recall it. There was no option for the Registrar to, for example, allow the plate if there was sufficient context provided. There is no room on the plate for context. There is a seven-space maximum on a

personalized plate. The decision to recall the plate, in light of the potential to interpret Mr. Grabher's surname (although unintended) as encouraging gendered violence, is minimally intrusive.

[138] As the Respondent points out, at pages 41 through 43 of its brief, a narrower version of s. 5(c)(iv) would not satisfactorily achieve the objectives. The legal concept of hate speech, the legal definition of obscenity, and the civil law of defamation would not be sufficient to achieve the underlying objectives of the provisions as many instances of offensive language would not be caught by these prohibitions, requiring the Registrar to issue government-owned license plates containing offensive language.

[139] In addition, Mr. Grabher is free to display his surname elsewhere on his vehicle, including via a bumper sticker or decal in an area adjacent to the license plate. This is a relevant consideration in assessing minimal impairment (***British Columbia Government Employees Union v. Atty. Gen. of British Columbia and Atty. Gen. of Canada,*** [1988] 2 S.C.R. 214, at para. 80).

[140] In my opinion, the legislative prohibition on content on a license plate which could be considered offensive or in bad taste and could negatively reflect on the province, minimally impairs the s. 2(b) freedom of expression.

Overall Proportionality

[141] Do sections 5(c)(iv) and 8 strike a reasonable balance between freedom of expression and the other interests at play here? The focus here is on the effects of the limitation.

[142] Are the prejudicial effects on free expression proportionate to the beneficial effects of the legislation? The expression limited by s. 5(c)(iv) is confined to words that may be offensive or in bad taste. This section prevents harms that could flow from the presence of offensive language on a number plate. The Registrar's decision regarding the "GRABHER" plate (despite Mr. Grabher's good intentions) was to prevent harm which could flow from a statement that could be interpreted as promoting sexualized violence against women and girls.

[143] Without the s. 5(c)(iv) limitation, any word or slogan that fit the seven spaces, as long as it was unique, could appear on a Nova Scotia license plate. Vulgarity could prevail, making a mockery of the government's vehicle registration system and signalling to Nova Scotians that our government promotes such language and any harm accompanying such language.

[144] The deleterious effect created by the section is on freedom of expression (and, in the current case, Mr. Grabher's freedom of expression). Here a key consideration is the degree to which the expression in question is connected to the values underlying s. 2 (b), being democratic discourse, truth finding and self-fulfillment. It is important to be mindful that here we are dealing with the issuance of a special and unessential benefit -- the issuance of a personalized license plate. I agree with the Respondent's submission that there is a limited connection to the values underlying s. 2(b). The Registrar's decision denies "GRABHER" on the personalized plate. "GRABHER" is not connected to democratic discourse or truth finding. It can be said to have a connection to self-fulfillment, being the self-fulfillment Mr. Grabher experiences in having his surname on a personalized plate. This represents a limited connection to the values underlying s. 2(b).

[145] The deleterious effect of s. 5(c)(iv) is minimal. Those wishing to apply for a personalized plate to display up to seven letters or numbers, with or without spaces, are the only ones who might experience a restriction on freedom of expression in this context. Mr. Grabher is free to choose another personalized plate consisting of up to seven letters or numbers. He is not denied access to personalized plates, but solely access to the seven-letter, personalized plate, "GRABHER".

[146] The limitation here goes to the permitted forms of expression on a vehicle registration plate. It is reasonable for the government to place limitations on such forms of expression. Against this limitation is the government objective to promote safe and welcoming roads in the context of providing a system of identifying vehicles and their owners, and confirming that the owners have properly registered their motor vehicles in the province of Nova Scotia. They are used by law enforcement and government agencies for identification. When considering deleterious effects, the context of the government-owned license plate is important. There are strict limitations on personalized plates in addition to s. 5 (c)(iv). The ability to express oneself in the allotted seven spaces is already significantly limited. For example, s. 5 allows the Registrar to refuse an application for personalized plate where the plate has been previously issued, where it contains characters other than numerals, letters and spaces, where it contains a combination of characters assigned to other types of number plates, or where it contains a combination of characters that states or suggests an official authority or is otherwise potentially misleading. The ability to express oneself is also limited by the venue itself -- up to seven numbers or letters with or without spaces. The expression must also appear with the Nova Scotia brand which

includes blue lettering, the words, "Nova Scotia", the phrase "Canada's Ocean Playground" and the iconic image of the *Bluenose*.

[147] I note, once again, that the majority in ***Canadian Federation of Students, supra,*** recognized, at para. 76, that where an advertisement is offensive by, for example, advocating for violence or its content being discriminatory, the objective of the City to provide a safe and welcoming transit system is undermined. That statement is at least equally applicable to expression on a government license plate.

[148] I conclude that the beneficial effect of the legislation outweighs the prejudicial effect. The benefits of providing a safe and welcoming environment on Nova Scotia roads and protecting the Nova Scotia brand outweighs the deleterious effects of the s. 5(c)(iv) limit on expression on government-owned license plates. Although s. 5(c)(iv) limits the freedom of expression guaranteed by s. 2(b) of the *Charter*, including Mr. Grabher's freedom of expression to use the seven letters, "GRABHER", representing his surname, on a personalized license plate, I find the limit is reasonable and can be justified within the meaning of s. 1 of the *Charter*.

[149] While this matter did not proceed by way of judicial review, in both written and oral submission, counsel for Mr. Grabher encouraged the Court to apply the ***Dore Loyola*** test for administrative decisions in relation to Mr. Grabher's claim that his ss. 2(b) and 15 constitutional rights were infringed by the cancellation of his personalized plate (***Dore v. Quebec (Tribunal des professions***), 2012 SCC 12, ***Loyola high school v. Québec (Atty. Gen.***), 2015 SCC 12). As I have addressed this claim under the *Oakes* test above, I see no reason to do so again under ***Dore Loyola***. As the Supreme Court of Canada said in ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32, at paragraph 80: "the framework set out in ***Dore, supra,*** and confirmed in ***Loyola, supra,*** is not a weak or watered-down version of proportionality -- rather, it is a robust one". I have fully considered proportionality under the s. 1 analysis.

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.

[151] Mr. Grabher's application is dismissed.

[152] If the Respondent seeks costs, and the parties cannot agree on costs, I will receive written submissions within 30 days from the date of this decision.

Jamieson, J.