

OPTION 3 | WORDCOUNT: 999

Moving On and Around Amidst a Pandemic

The case involves Jo who was denied entry into Canadian Province X because of mobility restrictions the province passed “to protect the health of its residents” in response to the COVID-19 pandemic. While the province makes exceptions for “extenuating circumstances and for people permanently moving [into] the province”, Jo could not attend their mother’s funeral. In defence, the province argued that the closure was necessary because should an outbreak occur, its “health-care services would be quickly overburdened”. The question at hand is whether the law fairly balances the competing interests of the majority versus the individual. In my opinion, the violations of the rights of Jo under s.6 subs.2(a) and s.7, and to a lesser extent, the fundamental freedoms under s.2(a) are not justified under sec. 1 of the *Canadian Charter of Rights and Freedoms (CCRF)*.

Subs.2(a) of s.6 grants Canadians and permanent residents the right “to move and take up residence in any province”. The wording of the section suggests that the right pertains to a permanent relocation, which Province X’s law did not restrict. However, the section can be extended to include inter-provincial travel because as argued by Rand J. in *Winner v. S.M.T. (Eastern) Ltd* “The essential attributes of citizenship including the right to enter a province that cannot be denied by the provincial legislatures.” Moreover, the right to liberty under s.7 is at stake because choosing to travel across provinces is a “concern about autonomy and quality of life” (Carter, para. 62). Furthermore, the enacted law prevented the applicant from attending the funeral of their mother, which can be protected by the freedom of religion where the funeral is religious and by freedom of consciousness when it is not, both under s.2(a). Consequently, due to the nature of funerals, the security of an individual protected under s.7 can be threatened by the

inability to get closure from the loss of a mother. Conversely, while Jo is entitled to all the above, s.1 of the *CCRF* limits them by “reasonable limits.” Thus, to determine whether the enacted law violated the rights in a manner unjustified under s.1 an analysis as prescribed by *R v. Oakes*, known as the *Oake’s Test* will be conducted.

The first question is whether the provision of the law is sufficiently important to override a constitutionally protected right? Province X passed the law in response to the COVID-19 pandemic, a disease that has caused the death of 16,369 Canadians (*Tracking Cases of COVID*). Moreover, given that the health facilities of the province cannot support residents if an outbreak in the province occurs; it can be concluded that while individuals such as Jo are entitled to certain rights, legislation that protects many more lives is of societal concern.

The next question is a *Proportionality Test* which comprises three parts: rational connection, minimal impairments and the effects of limitations in proportion to the objective. Firstly, it is important to mention that the rights to mobility are considered so fundamental that they cannot be violated by invoking s.33 of the *CCRF*. Thus, the question becomes whether the law is unfair or arbitrary. While there are many ways to go on about this, one approach is to acknowledge the fact that COVID-19 is a communicable disease with an exponential rate. In the case of *Winner v. S.M.T (Eastern) Ltd*, Rand J. argued that “a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health.” Since health appears to be at stake, limiting the travel of non-residents per the conditions outlined by the province is not an arbitrary decision.

The next two parts are considered simultaneously through an examination of the relationship between the pith and substance of the law and its broader effects. In the highly identical case of *Taylor v. Newfoundland and Labrador*, the applicant was denied the right to

enter Newfoundland because of travel restrictions imposed in response to the COVID-19 pandemic. Burrage J. found that the underlying purpose was the “protection and promotion of the health of those in Newfoundland and Labrador” (Taylor, para.215). While Province X has an obligation to protect the right to life and security of its residents protected by s.7, the law it passed does more than just protect the life and security of society’s vulnerable members.

Due to the power divisions of Canada, “Health officials in the provinces and territories have extensive powers under various “health acts” to protect the public against pandemics and public health emergencies” (Ahmad). In response to the COVID-19, many provinces in Canada, likely including Province X, exercised this by asking residents to socially distance, mandate wearing masks, and 14-day quarantine orders, etc.. If daily-life restrictions are scientifically justified, then an individual who enters the province and adheres to the regulations should not theoretically, pose any more danger to the residents of the province than the residents themselves. Restricting non-essential travel while mandating the other regulations implies that either the regulations are ineffective, or that the law itself does not minimally impair rights. This means that the effect such as denying Jo closure is not proportionally balanced with the objective simply because other regulations have been claimed to aid in limiting the transmission of COVID-19.

In conclusion, while the law passes the first step of the *Oake’s Test* as well as the first part of the Proportionality test, it fails the second and third parts. This renders the limitations of the rights of Jo as unjustifiable by s.1. While the law might theoretically protect the rights of the majority, it fails to find the balance in the trade off with individual interests. Disease and illness are no strangers to humans. For the better or worse, life has and will always move on. To handle

a pandemic like the COVID-19, a more sophisticated health care system is called into place. To stop inter-provincial travel is to kill the life of those who live.

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