COVID-19: What Could The Taylor Decision Mean For Interprovincial Travel?

What You Need to Know

Talk of travel restrictions, at both the federal and provincial levels, is intensifying as COVID-19 infections continue to rise and new variants generate increasing concerns for Canadians. Last week, the federal government announced it would implement mandatory testing and hotel quarantine for international travellers returning to Canada. On the same day, Ontario's Premier announced the province would administer mandatory COVID-19 tests for international air travellers touching down in Ontario, at least until the federal program is rolled out.

In addition to these international travel restrictions, some provinces are considering restricting interprovincial travel. British Columbia's Premier, John Horgan, recently announced that he was reviewing the province's powers to impose travel restrictions, leading to speculation that a Maritime-style travel ban might be in the works. However, apparently after receipt of legal advice, Premier Horgan later pulled back, advising that while the province has no plans to deny entry to visitors, it will "impose stronger restrictions on non-essential travellers" if such travel leads to increased COVID-19 transmission. He noted that much of the interprovincial travel in the British Columbia appeared to be for work purposes, and that work-related travel "cannot be restricted". Manitoba saw new restrictions announced last week, with domestic travellers entering the province now required to submit to a 14-day period of self-isolation.

Questions abound as to the kinds of interprovincial restrictions provinces might seek to impose and with respect to the constitutional validity of such restrictions.

The 2020 decision in *Taylor v Newfoundland and Labrador*("***Taylor***") provides a useful starting point as to what is possible and as to the constitutional underpinnings of such restrictions. The Newfoundland and Labrador Supreme Court held in *Taylor* held that in appropriate circumstances the provinces can lawfully impose restrictions on interprovincial travel, including a complete entry ban for certain non-essential travellers from other provinces. This decision provides useful guidance as to how such restrictions may be construed by the courts and provides an instructive analytical framework for reviewing the

constitutionality of such laws. Provinces intent on pursuing COVID-19 travel restrictions will no doubt look to the *Taylor* decision for guidance.

Newfoundland and Labrador's Non-Essential Travel Restriction

One of the most significant interprovincial travel restrictions imposed in Canada to date—and the only to have received judicial consideration—was imposed by Newfoundland and Labrador in May 2020 by orders of the Newfoundland and Labrador Chief Medical Officer of Health (the "**Chief Medical Officer**"). The orders were issued under s. 28(1)(h) of the *Public Health Protection and Promotion Act* (the "***PHPPA***"), which empowers the Chief Medical Officer to impose provincial travel restrictions while a public health emergency declaration is in effect.

On May 4, 2020 Special Measures Order (Amendment No. 11) (the "**Travel Restriction Order**") came into effect, preventing all individuals from entering Newfoundland and Labrador, except for (1) residents, (2) asymptomatic workers and individuals receiving an exemption who were subject to a 14-day quarantine, and (3) individuals permitted by the Chief Medical Officer to enter under extenuating circumstances.

On May 5, 2020 Special Measures Order (Travel Exemption Order) (the "**Exemption**") came into effect, exempting certain persons from the Travel Restriction Order, including individuals who were visiting to care for relatives, persons permanently relocating to the province, unemployed persons living with family, and persons fulfilling short-term contracts or educational placements. Together, the Travel Restriction Order and Exemption were designed to prevent non-essential travellers from entering the province.

In *Taylor*, the Supreme Court of Newfoundland and Labrador upheld s. 28 of the *PHPPA* as being within the province's legislative competence and dismissed a constitutional challenge that the Travel Restriction Order violated mobility and liberty rights under ss. 6 and 7 of the *Canadian Charter of Rights and Freedoms.*

The challenge in *Taylor* was brought by Ms. Kimberley Taylor after she was fleetingly denied the opportunity to enter the province to attend her mother's funeral. Ms. Taylor was a Canadian citizen who resided in Nova Scotia and who was prepared to quarantine for 14 days upon arrival in Newfoundland. The exemption was initially denied, however, it was granted 8 days later, when Ms. Taylor submitted a reconsideration request. Ms. Taylor challenged s. 28(1)(h) of the *PHPPA* as being outside the province's legislative competence. She also brought a constitutional challenge in respect of the 8 day period for which she was denied entry, arguing that the Travel Restriction Order violated her rights ss. 6 and 7 of the Charter (rights to mobility and liberty, respectively). The Canadian Civil Liberties Association ("**CCLA**") joined her challenge as a public interest litigant (together, Ms. Taylor and the CCLA are the "**Applicants**"). The Applicants have announced their intention to appeal the decision.

Provinces Competent to Implement Public Health-Focused Travel Restrictions

The first challenge addressed by the Court was the Applicants' argument that s. 28(1)(h) of the *PHPPA* fell outside the province's legislative competence and intruded into federal legislative jurisdiction. The Applicants argued that the

impugned legislation was an attempt by the province to legislate in respect of interprovincial works and undertakings, naturalization and aliens, or the power to make emergency laws concerning the peace, order and good government of Canada, all of which fell within the exclusive domain of the federal government. The Court, however, found that the purpose of s. 28 of the *PHPPA* was in pith and substance the protection and promotion of the health of those in Newfoundland and Labrador. Accordingly, it fell validly within the province's power to legislate in respect of matters of a local and private nature, or alternatively, its power to regulate property and civil rights. In Justice Burrage's words, s. 28(1)(h) of the *PHPPA* was "[a]t its core… a public health measure" and "health is 'an amorphous topic, which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question'". The Court also held that the federal government had not attempted to regulate interprovincial travel and had left the provinces to "devise their own solutions, in response to local conditions and on the advice of their respective health experts".

Interprovincial Mobility and the *Charter*

Section 6(1): The Right to "Remain" in Canada Includes a Right to Interprovincial Travel

Section 6(1) of the *Charter* guarantees Canadian citizens the right to "enter, remain in and leave Canada". Section 6(2)(a) and (b), which extend to both citizens and permanent residents, guarantee the rights to "move and take up residence in any province" and to "pursue the gaining of a livelihood in any province". Since Ms. Taylor was neither seeking to travel for relocation nor seeking to earn a livelihood in the province, s. 6(2) was not implicated and the Court's decision hinged on s. 6(1). The Court rejected the Applicants' argument that s(6)(2)(a) encompassed two distinct rights, the first being "the right 'to move to' any province, which the Applicants would interpret as synonymous with 'to travel to' any province, and the second being the right to 'take up residence' in any province". Justice Burrage found instead that a right to travel across provincial and territorial boundaries logically follows from the right to "remain in" Canada, using a simple analogy: "In common parlance, we would regard the right to come and go from one's home, and to remain in it, as surely including the right to wander freely from room to room". The Court accepted that Ms. Taylor's s. 6(1) right to remain in Canada was infringed by her fleeting denial of entry into Newfoundland, but found s. 6(2) was not engaged on the facts.

Section 7: The Right to Make Fundamental Personal Choices Not Engaged

Section 7 of the *Charter,* which extends to "everyone", guarantees the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 7 liberty rights extend to protect "the right to make fundamental personal choices free from state interference". The Court found that s. 7 was not engaged in the circumstances because mobility rights are expressly provided for by s. 6 of the *Charter* and to adjudicate the same rights under both ss. 6 and 7 risked introducing incoherence by creating "parallel rights with different tests and standards". It noted in the alternative that Ms. Taylor's liberty rights were not infringed, as her reason for visiting—to attend a funeral—did not engage the type of fundamental personal choice protected by s. 7 (*e.g.*,

choices related to physician-assisted suicide, abortion, and medical care). The choice to attend a funeral was qualitatively different from any such choices. However, Justice Burrage left open the possibility that other choices related to interprovincial mobility—such as the right to live or work where one chooses—could amount to a fundamental personal choice under s. 7.

Section 1: Interprovincial Travel Restrictions are Justified Infringements of Mobility Rights

Section 1 of the *Charter* guarantees that the rights and freedoms set out in the *Charter* will only be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". An infringement will be justified where the party seeking to uphold the infringement (*i.e.*, the state actor) demonstrates that (1) the objective of the impugned legislation is of sufficient importance to warrant limiting the right or freedom in question and (2) the means chosen to limit the right or freedom are reasonable and demonstrably justified. The latter assessment requires the state actor to demonstrate that the means in question are rationally connected to the objective, that they impair the right or freedom as minimally as possible, and that the effects of the chosen measure are proportionate to the objective in question. The rights contained in s. 6 of the *Charter* are not subject to the s. 33 "notwithstanding clause" that permits the government to declare a law to operate notwithstanding s. 2 or ss. 7-15 of the *Charter* – thus, governments may only infringe s. 6 where its actions are justified in accordance with s. 1, and do not have an option to proceed "notwithstanding" citizens' s. 6 rights where the infringement cannot be justified.

The Applicants argued that since other public health measures had already effectively minimized COVID-19 transmission in the province, the Travel Restriction Order did not serve a valid public health objective, and rather, merely aimed to exclude non-residents from the province. The Court rejected this argument, finding that the Travel Restriction Order had the pressing and substantial objective of protecting those in Newfoundland and Labrador from COVID-19 importation by travellers. It went on to find, based on medical evidence, that the Travel Restriction Order was rationally connected to its objective and minimally-impairing, noting that significant deference was necessary as "the courts do not have the specialized expertise to second guess the decisions of public health officials". Justice Burrage observed that in public health contexts where serious illness or death could result, the margin for error was small and public health guidance requires erring on the side of caution. Thus while other measures—such as requiring individuals to self-isolate, mandating social distancing, and providing enhanced COVID-19 testing—might also assist in combatting the spread of COVID-19, none of these measures, alone or in combination, were an effective substitute for the travel restriction. The deleterious effects of the Travel Restrictions Order were proportionate to the mental anguish it caused for Ms. Taylor, as "the collective benefit to the population as a whole must prevail" and the "right to mobility must give way to the common good". The Travel Restriction Order's infringement of Ms. Taylor's s. 6(1) mobility rights was thus justified in accordance with s. 1.

What Could *Taylor* Mean for Future Interprovincial Travel

Restrictions?

What is clear from *Taylor* is that the provinces can validly enact health-based travel restrictions to prevent Canadians from entering for non-essential purposes (particularly for travel or vacation purposes), and that such restrictions are likely to be justified under s. 1, especially in view of courts' general unwillingness to second-guess public health decisions. Although the *Taylor* decision does not bind the courts of other provinces, its reasoning—including the deference it accords to government decision-makers and its focus on promoting the common good—will be persuasive, absent compelling factual differences or a successful appeal. Much like Newfoundland and Labrador's aging population and rural medical system, many communities across Canada are at a high risk for COVID-19, including remote Indigenous communities with limited access to healthcare and medical resources, and rural areas whose medical systems have limited capacity. As Justice Burrage remarked in *Taylor,* "the margin for error is small" and "the public health response is to err on the side of caution until further confirmatory evidence becomes available".

Although the restrictions in *Taylor* only implicated s. 6(1) of the *Charter,* it is possible that future travel restrictions or bans could implicate ss. 6(2) and 7 as well, and it remains to be seen whether such infringements could be justified under s. 1 of the *Charter.* While a decision to attend a funeral was found in *Taylor* to not engage the type of "fundamental personal choice" protected by s. 7 liberty rights, it is possible that a decision to pursue residence or livelihood in another province might rise to this level, in addition to engaging s. 6(2) protections. Likewise, myriad personal circumstances may push up against the "fundamental personal choices" jurisprudence to engage the s. 7 right to liberty, or the rights to life or security of the person protected by s. 7. Although s. 7 of the *Charter* is subject to legislative override by s. 33, this section confers a broader right that extends to "everyone" rather than just citizens (s. 6(1)) or citizens and permanent residents (s. 6(2)). Section 7 is "not easily overridden by societal interests" – thus, governments bear a heavy onus of justification in circumstances where it is engaged.

Whether any particular infringement of ss. 6 or 7 will be justified according to s. 1 is a fact-driven inquiry requiring balancing of the particular rights infringement(s) against the objective of the law or state action. Where government-imposed travel restrictions or bans are in breach of several *Charter* rights, or cause serious infringements of ss. 6 or 7, this may assist in tipping the scales towards the applicant and invalidating the law or state action. However, the reasoning in *Taylor* that the "collective benefit to the population as a whole must prevail" and that the "*Charter* right to mobility must give way to the common good" may pave the way for even serious *Charter* infringements to be justified in view of provincial governments' attempts to manage a potentially fatal disease. Additionally, if provinces do not ban travel and merely place restrictions on entry (such as quarantine or testing requirements), such restrictions are likely to either not infringe ss. 6 and 7 in the first place, or to be justified under s. 1, given their limited nature.

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