



May 15, 2020

The Honourable Dwight Ball  
The Office of the Premier  
Confederation Building, East Block  
P.O. Box 8700  
St. John's, NL A1B 4J6

Sent via Email

Dear Premier Ball,

**Re: Amendments to the *Public Health Protection and Promotion Act***

On behalf of the Canadian Bar Association – Newfoundland and Labrador Branch (CBA-NL), we wish to thank the Minister of Health and Community Services for indicating on May 5<sup>th</sup> that a submission from CBA-NL on the Standing Measures Order, amendment 11, and amendments to the *Public Health Protection and Promotion Act* (the “Act”), would be considered by government.

The Canadian Bar Association is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice.

As you are aware, the recent changes to the *Act* have drawn criticism from the legal community in Newfoundland and Labrador, and elsewhere. Following the passage of the amendments in Bill 38 on May 5<sup>th</sup>, CBA-NL consulted with our membership and received numerous responses identifying constitutionality concerns with the *Act* including:

- s. 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada;
- s. 6 (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province;
- s. 8. Everyone has the right to be secure against unreasonable search or seizure; and
- s. 9. Everyone has the right not to be arbitrarily detained or imprisoned

Further, our members have identified the following specific concerns with the amendments contained in Bill 38:

**1. Section 28.1**

*(1) Where a measure taken by the CMO under s28(1) is in effect this section permits the Minister of Justice upon the request of the Minister of Health and after consultation with him/her, to authorize a peace officer to do one or more of:*



- a) *Locate an individual who is in contravention of the measure;*
- b) *Detain an individual who is in contravention of the measure;*
- c) *Convey an individual who is in contravention of the measure to a specified location, including a point of entry to the province; or*
- d) *Provide the necessary assistance to ensure compliance with the measure.*

(2) *A peace officer who detains or conveys an individual under subsection (1) shall promptly inform the individual of:*

- a) *the reasons for the detention or conveyance;*
- b) *the right to counsel; and*
- c) *the location to which he/she is being taken.*

### **Issues Identified**

#### **- “Measures Taken”**

There is no definition of a “measure” in the *Act*, and its addition creates a new and separate concept from those already defined in the *Act*. Some of our members take the view that this addition is vague and overbroad, as it is unclear what this new provision is intended to add that would be distinct from the concepts already defined in the *Act*. The particular concern of the legal community is that the public does not know what is prohibited as a “measure” and what conduct could result in detention. Other terms used in the *Act*, such as “code of practice” and “orders” are clearly defined, and procedures for their enactment is prescribed. There is no such clarity for a “measure”, particularly relating to the broad ground of the Chief Medical Officer to “take any measure” she deems appropriate, at section 28(1)(k) of the *Act*.

#### **- “Authorization”**

It is unclear if authorization is on a case by case basis. As consultation is required this seems to suggest that a case by case exercise of this authority is contemplated. As “a peace officer” is specified, it seems to imply that the authority must be given on a case by case basis rather than general authority to all peace officers or to all RNC and RCMP officers.

#### **- “Contravention”**

It is unclear who determines that a contravention has occurred, how that determination is made, the standard against which contravention will be measured, and if there is any basis to challenge the determination.

#### **- “Detention”**

The authority to detain has no limits and it is unclear how long the detention can last. Is it necessary to have the individual brought before a court within 24 hours? Is there a charge necessary? Can a judge release the individual or end the detention? If someone is conveyed to a specified location, what happens next? Will the individual be released?



The amendments under section 28.1 appear to contravene the right not to be arbitrarily detained, go beyond investigative detention, do not seem to contemplate an investigation, and the requirement in s.28.1 (2) does not have any corresponding authority for the individual to challenge what has happened.

Further, the amendments may not be consistent with constitutional minimum standards. The amendments indicate that the Minister of Justice, in consultation with the Minister of Health, can direct an officer to detain someone and bring them to a point of entry, with no further process contemplated and no right to appeal or to plead one's case.

Section 495 of the *Criminal Code* indicates that an officer can arrest without a warrant if a person has committed an indictable offence or is found committing an indictable offence. Law enforcement cannot arrest a person without a warrant for committing a summary conviction offence. Breaches of the *Act* are summary offences. Pursuant to section 6 of the *Provincial Offences Act*, the provisions of the *Criminal Code* respecting summary offences are adopted for provincial offences.

Accordingly, arrest without warrant appears to violate the provisions of the *Provincial Offences Act*.

Furthermore, where there is detention of an individual by the state, section 10(c) of the *Charter* requires that a person "have the validity of the detention determined by way of Habeas Corpus and to be released if the detention is not lawful." There seems to be no recourse in the amendments and no opportunity for judicial oversight, which we note is unlike apprehension orders under section 34 of the *Act*.

If authorities have grounds to believe that a person was in contravention of the *Act*, the police powers are clearly articulated in the *Criminal Code* and clearly defined in case law. We are concerned that these amendments are unconstitutional and exceed the existing scope of provincial authority.

## 2. Subsection 50(1):

*(1) An inspector may, at all reasonable times and without a warrant, for the purpose of administering or determining compliance with this Act or the regulations, a code of practice or a measure taken or an order made under this Act or the regulations or to investigate a communicable disease or health hazard, do one or more of the following:*

- a) inspect or examine premises, processes, books and records the inspector may consider relevant;*
- (b) enter any premises;*
- (c) take samples, conduct tests and make copies, extracts, photographs or videos the inspector considers necessary; or*
- (d) require a person to*
  - (i) give the inspector all reasonable assistance, including the production of books and records as requested by the inspector and to answer all questions relating to the administration or enforcement of this Act or the regulations, a code of practice or a measure taken or an order made under this Act or the regulations and, for that purpose, require a person to stop a motor vehicle or attend at a premises with the inspector, and*



*(ii) make available the means to generate and manipulate books and records that are in machine readable or electronic form and any other means or information necessary for the inspector to assess the books and records.*

### **Issues Identified**

- Case law is clear that a warrantless search is unconstitutional unless justified by the party conducting the search. This would require, at the very least, reasonable grounds to believe an offence has taken place, or else there must be exigent circumstances justifying the failure to comply with judicial authorization. We are concerned again about the lack of oversight in the exercise of these powers.

- **“Premises”**

The amendments contemplate searches of “premises” without a warrant. It has been stated, and section 50(2) provides, that this warrantless right of entry does not include “dwelling houses”. However, “premises” may include a number of other places where individuals may have an expectation of privacy or otherwise may not be expected to be subject to search or detention without a warrant. Further explanation and justification of the scope of this provision is necessary.

- **“Inspectors”**

This section grants extreme powers to inspectors, who, under s.49(1), may include: The Chief Medical Officer, a regional medical officer, an environmental health officer, a person or class of persons designated by the minister. The powers included in s.50(1) are more broad than elsewhere in the *Act* and may not be proportionate to the purpose of the *Act*. While the inspectors identified under s.49(1) are trained in their respective fields, they may not be trained in exercising the type of authority contemplated in the *Act* and thus no assurance that the individual will do so in accordance with the Charter.

### **3. Further General Commentary**

While this submission does not provide detailed commentary on the Special Measures Order, amendment no 11, this should not be interpreted to mean CBA-NL members do not have concerns about the constitutionality of a ban restricting entry into the province, which have also been publicly raised by other groups and parties.

We understand that the amendments to the *Act* are in relation to the current COVID-19 pandemic and in particular the travel ban imposed by special measure on May 4<sup>th</sup>, 2020. However, the statutory amendments ultimately stand on their own, and are broader in application and scope.

These amendments extend well beyond the stated purpose for which they were said to be passed. For instance, it suggests that anyone who contravenes the *Act* can be detained or taken to a point of entry, regardless of the nature of the offending conduct, and without regard to whether the “offender” is



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normally a resident of Newfoundland and Labrador. The amendments extend well beyond the limited purpose of enforcing the entry ban.

While section 6(3)(a) of the Charter appears to be a general limiting provision that permits the province to pass laws of general application that may limit mobility, that section is still subject to scrutiny under section 1 of the Charter. The question is whether the law itself is constitutional, and if so, whether the limitation on the Charter right is reasonable and demonstrably justified.

Since the Charter's inception courts have been clear about the purposive approach to Charter interpretation:

*Such a post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.*

*- Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc, [1984] 2 SCR 145*

## **Conclusion**

We realize that this is a challenging time and that during the province's public health emergency the safety of residents of Newfoundland and Labrador is of the utmost importance. However, we must also recognize the rights extended under the Charter and ensure that during this unprecedented time the appropriate balance is achieved between public health and the constitutional rights of all Canadian citizens (as well as non-citizens).

We ask that you immediately review the amendments to the Act to address the challenges as outlined above.

We trust that our comments will be helpful and would be pleased to offer further clarification or comment as required.

Respectfully submitted,

*Original copy signed by:*

Christian Hurley, President

Greg J. French, Vice President

On behalf of the Canadian Bar Association – Newfoundland and Labrador Branch



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cc      The Honourable Dr. John Haggie, Minister of Health and Community Services  
Sent via email

The Honourable Andrew Parsons, Q.C., Minister of Justice and Public Safety, Attorney General  
Sent via email

Mr. Ches Crosbie, Q.C, Leader of the Official Opposition  
Sent via email

Ms. Alison Coffin, Third Party House Leader  
Sent via email

Dr. Janice Fitzgerald, Public Health/Chief Medical Officer of Health  
Sent via mail