2021 Hfx. No. 506040

Supreme Court of Nova Scotia

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health

Applicant

and

Freedom Nova Scotia, John Doe(s), Jane Doe(s), Amy Brown, Tasha Everett, and Dena Churchill

Respondent

and

The Canadian Civil Liberties Association

Respondent

Brief of the Canadian Civil Liberties Association

(Rehearing of the Application in Chambers for an injunction
The Law Courts, June 30, 2021, at 0930)

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OVERVIEW

1. The *ex parte* Injunction Order obtained by the Province of Nova Scotia on an expedited basis raises serious concerns about the exercise of government authority and its impact on the *Charter*-protected rights of Nova Scotians. The Canadian Civil Liberties Association (**"CCLA"**) was added as a party with public interest standing to pursue a rehearing of the Injunction Order on behalf of all persons in Nova Scotia who are affected by its broad scope.

2. The Province is not entitled to receive injunctive relief against all individuals in Nova Scotia, simply because it asks. The Court must treat the Province as any other litigant, and only grant an order that restrains the actions of others if there is legal authority to do so. This is true even during a public health emergency, and even if the objectives of the Province are in the public interest.

3. In this case, there is no legal authority under statute or in equity for the Province's injunction application, for the following reasons:

    a. The *Health Protection Act* does not provide for injunctive relief as an enforcement tool and no statutory injunction is available;

    b. The Province has not asserted that the statutory remedies available under the *Health Protection Act* are inadequate; and

    c. The Province has not made any civil claim or initiated any other proceeding against the respondents and cannot obtain interlocutory relief without an underlying cause of action.

4. Even if the injunction application was properly conceived or legally authorized, the Province has not adduced a sufficient evidentiary record to discharge its burden to establish that the Court should exercise its discretion as requested, and has not identified or met the correct test for injunctive relief.

5. The Injunction Order sought by the Province extends far beyond the circumstances contemplated by the evidentiary record before the Court, or the argument it advances in its brief. The Injunction Order applies to all Nova Scotians for an indefinite period, until varied

or set aside by the Court. It enhances police enforcement powers for prohibited activities that carry no or low risk of COVID-19 transmission, including online expression. It relies on prohibited activities that are poorly defined, internally inconsistent, and frequently changing.

6. Finally, even where there is jurisdiction and a basis to grant injunctive relief, the Court must not do so in a manner which would offend *Charter*-protected rights, without first determining that such infringement is justified.

7. Instead of targeting a group of individuals alleged to be at risk of causing public harm, the Injunction Order interferes with the *Charter*-protected rights of all Nova Scotians, including the rights to freedom of expression, freedom of assembly, and liberty. It is arbitrary, overbroad, and grossly disproportionate. It cannot be justified in a free and democratic society, even in the context the COVID-19 pandemic.

PART I–STATEMENT OF FACTS

The Province of Nova Scotia's Application for Ex Parte *Injunctive Relief*

8. On May 14, 2021, the Attorney General of Nova Scotia (the "Province") sought a *quia timet* injunction on an expedited basis, in anticipation of an imminent protest against COVID-19 public health restrictions where it was anticipated that participants would not respect social distancing or masking requirements.

9. The Respondents to the Application included three named individuals who were alleged to associate with a collective known as "Freedom Nova Scotia", as well as every Jane Doe and John Doe in the province.

10. The Application was heard in Chambers *ex parte,* with none of the Respondents appearing and no cross-examination on the Province's evidence.

11. In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, this Court granted the Application and issued a permanent *quia timet* injunction (the **"Injunction Order"**).[1]

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[1] *Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 170.

12. The injunctive relief obtained is not limited to the anticipated rally which was the focus of the Province's materials, or to known or unknown associates of Freedom Nova Scotia. It includes those acting in concert with them and also applies to those acting "independently to like effect".[2]

13. The Injunction Order prohibits any person with notice of the Injunction Order from organizing or attending outdoor gatherings that contravene public health restrictions, including political protests that respect social distancing and masking.[3]

14. The Injunction Order also prohibits "promoting" such protests, including through online expression, though no definition of "promoting" is included in the Injunction Order.[4]

15. People who violate the Injunction Order, deliberately or accidentally, face a risk of arrest and detention until such time as they can be brought before a Justice of this Court.[5]

16. The Injunction Order does not have a time limit, expiring condition or comeback provision, continues in effect indefinitely until varied or discharged by a further Order of the Court.[6]

The Health Protection Act and Public Health Order

17. The mischief which the Province seeks to enjoin is public gathering in contravention of an order made by the Chief Medical Officer of Health ("CMOH") under the authority of s. 32 of the *Health Protection Act* (a "Public Health Order").[7] The Province has not provided any statutory context to the Court for its request.

18. The *Health Protection Act* affords a medical officer the power to "by written order require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease", including to:

> (i) require the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection.

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[2] Injunction Order, Supreme Court of Nova Scotia, Hfx. No. 506040 (14-May-2021), para 3
[3] Injunction Order, para 3
[4] Injunction Order, para 3
[5] Injunction Order, paras 4-5
[6] Injunction Order, para 8
[7] *Health Protection Act*, SNS 2004, c 4, s 37

19. The *Health Protection Act* also provides particularly broad powers for the medical officer to ensure compliance with a Public Health Order, in s. 37:

> **Power to ensure compliance**
>
> 37 (1) Where a medical officer has grounds to issue an order pursuant to subsection 32(1) and has reasonable and probable grounds to believe that the person to whom an order is or would be directed under subsection 33(2)
>
> (a) has refused to or is not complying with the order;
> (b) is not likely to comply with the order promptly;
> (c) cannot be readily identified or located and as a result the order would not be carried out promptly; or
> (d) has requested the assistance of the medical officer in eliminating or decreasing the risk to health presented by the communicable disease,
>
> the medical officer may take whatever action the medical officer considers necessary, including providing authority for such persons, materials and equipment to enter upon any premises and to use such force as the medical officer considers necessary to carry out the terms of the order, and the Chief Medical Officer may order a person who fails to comply to pay the costs of taking any actions necessary to comply with clauses 32(3)(a), (b), (e) or (f).
>
> (2) Where a person requests assistance from a medical officer in complying with an order made by a medical officer, the officer to whom the request is made shall render such reasonable assistance as is practicable in the circumstances.
>
> (3) Where a medical officer authorizes persons to enter upon premises pursuant to subsection (1), such persons have the authority to act to the same extent as if the act were carried out by the medical officer.
>
> (4) Without limiting generality of subsection (1), actions under this Section may include
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> (a) the displaying of signage on premises to give notice of the existence of a communicable disease or of an order made pursuant to this Part;
> (b) the delivery of notice to the public through any communications media the medical officer considers appropriate indicating the risk of the communicable disease;
> (c) the cleaning or disinfecting, of any thing or any premises;
> (d) the destruction of any thing found on the premises or the environs of the premises; and
> (e) closing the premises or part of the premises or restricting access to the premises.

20. In addition to the powers available to the medical officer to ensure compliance with a Public Health Order, breach of such an Order is a summary conviction offence under the *Health Protection Act*, s. 71:

> **Offences and penalties**
>
> 71 (1) Every person who fails to comply with this Part or the regulations or with an order made pursuant to this Part or the regulations is guilty of an offence and is liable on summary conviction to
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> > (a) in the case of a corporation, a fine not exceeding ten thousand dollars; or
> > (b) in the case of an individual, a fine not exceeding two thousand dollars or to imprisonment for a term of not more than six months, or both.
>
> (2) Where an offence under this Part or the regulations is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued.
>
> (3) Notwithstanding subsection (1), a person who is guilty of a second or subsequent offence, other than by virtue of subsection (2), is liable to
>
> > (a) in the case of a corporation, a fine of not exceeding fifty thousand dollars; or
> > (b) in the case of an individual, a fine not exceeding ten thousand dollars or to imprisonment for a period of not more than one year, or both.

21. The Province has not made any reference to the compliance or enforcement provisions of the *Health Protection Act* in the injunction materials before the Court. These provisions already provide the Province with the ability to prosecute those who offend a Public Health Order, and include escalating penalties against repeat offenders.

PART II–ISSUES

22. The rehearing of the Attorney General's Application raises the following issues:

    a. Is there legal authority for the Province's application for injunctive relief?

    b. Does the Injunction Order offend the *Charter*?

PART III–LAW & ARGUMENT

ISSUE I – Legal authority for the injunction application

23. The Province has not identified in its materials what legal authority it relies upon in its Application in Chambers. CCLA submits that there is no authority in statute, common law or equity for the injunctive relief that is sought by the Province. The Application in Chambers is ill-conceived and fatally flawed, such that it cannot be granted by the Court.

Statutory injunctive relief

24. First, there is no authority under statute for the Injunction Order. The *Health Protection Act* does not provide authority for the Province or the CMOH to obtain injunctive relief against any person subject to a Public Health Order. This is not a case where there is a statutory right for a public authority to seek injunctive relief to enjoin the breach of a statute or by-law.[8]

25. The absence of a statutory injunction power in the *Health Protection Act* can be distinguished from the remedies available in the province of Ontario, where s. 9 of that province's *Reopening Ontario (A Flexible Response to COVID-19) Act* includes authorization for the Court to grant a restraining order sought by the Crown.[9] The Legislature in Nova Scotia has not created a similar legal authorization, in fact, the government of the day chose prorogue the Legislature throughout much of the first three waves of the COVID-19 pandemic.

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[8] See for example, the following cases involving the granting of a statutory injunction: *Saskatchewan (Minister of Environment and Resource Management) v Kelvington Super Swine Inc*, 1997 CanLII 11380 (SKQB) **[TAB 29]**, in which an injunction was obtained to prevent a development under s. 18 of the *Environmental Assessment Act*, SS 1979-80, c E-10.1; *North Pender Island Local Trust Committee v Conconi*, 2009 BCSC 328 **[TAB 14]** aff'd 2010 BCCA 494 **[TAB 15]**; *Township of King v 2424155 Ontario Inc*, 2018 ONSC 1415 **[TAB 31]**, where injunctive relief was available under s. 440 of the Ontario *Municipal Act 2001*, SO 2001, c 25, to enjoin the contravention of a by-law; *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647, **[TAB 32]** in which an injunction was ordered pursuant to s. 334(1) of the *Vancouver Charter*, SBC 1953, c. 55, to enforce a by-law

[9] See *Ontario v. Adamson Barbecue Limited*, 2020 ONSC 7679 at para 10-11 **[TAB 17]**

Inherent authority to enforce statutory obligations

26. The Court does have jurisdiction to grant injunctions to enforce statutory obligations, even in the absence of an explicit statutory power to do so, where it is necessary to do so. The Province has not explicitly argued that it relies upon this power as the legal authority for its request.

27. The Court's power to enjoin activity which is otherwise already prohibited by statute is sparingly exercised. As recently noted by the British Columbia Court of Appeal, "the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect".[10]

28. In determining whether the statutory provision is inadequate, the Court may have regard to the following considerations:[11]

    a. Whether the penalty for breach of the statute is so limited that a party chooses to treat it as a cost of doing business, and therefore flouts the law;

    b. Whether a party who suffers harm as a result of the breach is unable to invoke the provision; or

    c. Where serious danger or harm would result from the delay inherent in invoking the statutory remedy.

29. The CCLA respectfully submits that the Province has not asserted that the statutory remedy available under s. 71 of the *Health Protection Act* is insufficient in any way, nor has it adduced any evidence that its attempts to enforce the *Act* have been unsuccessful.

30. To the contrary, with respect to the "Freedom Nova Scotia" respondents, there is no evidence at all that any past enforcement steps have been taken, though the Province asserts that it is aware of three such rallies haven occurred in the past.[12]

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[10] *Schooff v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para 33-34 **[TAB 30]** [*Schooff*]
[11] *Schooff* at para 35-36
[12] Affidavit of Hayley Crichton, sworn May 12, 2021, para 11-23.

31. This lack of evidence or argument about the sufficiency of existing enforcement avenues is fatal to an application for an injunction under this power of the Court.

32. Where the police have declined to take the enforcement action available to them under a statute, the imposition of a civil injunction may in some cases operate as "a kind of officially induced abuse of process".[13] As explained by McEwan J. of the British Columbia Supreme Court, when faced with a similar type of application:[14]

> The stark question is whether the police refusal to act on what is apparently criminal activity should automatically lead the Supreme Court to bend its processes out of shape to craft a substitute. I am of the view that to do so in the present case unnecessarily puts the authority of the court at risk.

33. The British Columbia Supreme Court was recently faced with a similar request for injunctive relief by the Attorney General of British Columbia to enforce a COVID-19 related public health order in February 2021. There, the provincial government's request for injunctive relief was brought as an interlocutory motion in the context of a *Charter* challenge to the underlying public health order commenced by religious groups.[15]

34. The Court considered the question of existing statutory remedies as part of the "balance of convenience" stage of the *RJR MacDonald* analysis, applicable to interlocutory injunction applications. Chief Justice Hinkson held:

> The respondents differ from many litigants who seek injunctive relief. In particular, they do not necessarily require the assistance of the Court to enforce their legislation. The alternate remedies available to the respondents are a factor to be considered in the exercise of my discretion. The challenged orders remain extant unless and until set aside or overturned by this Court.[16]

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[13] *Regional District of Central Kootenay v Doe*, 2003 BCSC 836 at para 9 **[TAB 28]**; See also *British Columbia (Attorney General) v Sager et al*, 2004 BCSC 720 at para 21-23 [*Sager*] **[TAB 6]**

[14] *Sager* at para 14

[15] *Beaudoin v British Columbia*, 2021 BCSC 248 [*Beaudoin*] **[TAB 5]**

[16] *Beaudoin* at para 52 **[TAB 5]**

35. The injunction sought by the province of British Columbia was denied, based in part on the fact that the police and public prosecution service had, to date, not sought to enforce or prosecute the existing statutory offences.[17]

36. In the instant case, the activity which the Province seeks to enjoin is already expressly prohibited by the Public Health Order made under authority of the *Health Protection Act*, and punishable by both fine and imprisonment. There is no reason offered in the evidence or argument tendered by the Province for the lack of enforcement activities against the named respondents, to date. In such circumstances, the CCLA argues that this request for injunctive relief, too, is a kind of officially induced abuse of process. It should not have been entertained by the Supreme Court of Nova Scotia and should be dismissed in its entirety.

No civil action or proceeding commenced against respondents

37. Finally, the Attorney General may exercise its *parens patriae* jurisdiction to enjoin a public nuisance or may make another civil claim against the respondents and seek interlocutory relief. However, no action for public nuisance or any other civil wrong has been commenced to provide authority for the relief sought by the Province.

38. This poses both a substantive and a procedural problem for the Province's injunction application. First, there is no legal authority advanced for the relief sought. Second, there is no underlying proceeding in which to frame the demand for interlocutory relief.

(i) No civil wrong alleged against the respondents

39. The Province has characterized its request for relief as a *quia timet* injunction, on the basis that it seeks to enjoin anticipated harm, in advance of that harm occurring. A *quia timet* injunction is not a separate type of relief from an interim, interlocutory or permanent injunction. It is a *type* of injunctive relief, which can be granted on an interim, interlocutory or permanent basis.

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[17] *Beaudoin* at paras 58-61, 67-70 **[TAB 5]**

40. The fact that the Province seeks injunctive relief on a *quia timet* basis does not obviate the need for an underlying cause of action.[18] No civil wrong has been alleged or pleaded against the respondent, including public nuisance, other than the anticipated or potential breach of the Public Health Order.

41. In the instant case, the Province brought an Application in Chambers for an injunction in order to aid in enforcement of the Public Health Order. Other than the possible future breach of the Public Health Order, no civil cause of action is asserted, and no ongoing proceeding remains. The injunctive relief sought by the Province is the totality of the relief sought against the Respondents.

42. In *R. v. Canadian Broadcasting Corporation*, the Crown sought a mandatory interlocutory injunction against the publication of information subject to a publication ban.[19] The Crown brought an application for criminal contempt at the same time as it applied to the court for interlocutory injunctive relief.

43. The Supreme Court of Canada reversed the majority of the Alberta Court of Appeal, who had considered the injunctive relief to relate to a request to remove the objectionable publication, but not to the allegation of criminal contempt. In doing so, the Court emphasized the "fundamental nature of an injunction and its relation to a cause of action," as explained in the earlier decision of *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*:[20]

> While quia timet injunctions are granted by the courts, that is done only if the applicant establishes that some threatened action by the defendant will constitute

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[18] See for example, the cases relied upon by the Province, including: *526901 BC Ltd v Dairy Queen Canada Inc*, 2018 BCSC 1092, in which quia timet relief was sought on a interlocutory basis, within an action seeking declaratory relief on a contract, as well as relief against forfeiture (para 6-7); *Robinson v Canada (Attorney General)*, 2019 FC 876, in which a quia timet relief was sought pending the conclusion of an application for judicial review (para 122-129); and *Ingram v Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806 in which the applicants sought interim and interlocutory relief until the hearing of their challenge to the validity of various public health orders in Alberta (para 5-7)

[19] *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 25 [*CBC*] **[TAB 21]**

[20] *Amchem Products Inc v British Columbia (Worker's Compensation Board)*, [1993] 1 SCR 897 at para 51 **[TAB 2]**

> an actionable civil wrong. In general, an injunction is a remedy ancillary to a cause of action.

44. The Province may not come before this Court to seek an injunction as a matter of course, in mere anticipation that any Nova Scotian may commit a provincial offence. As the Court held in *CBC*, "an injunction is not a cause of action, in the sense of containing its own force. It is, I repeat, a remedy."[21]

45. In any event, the CCLA submits the same considerations regarding the appropriateness of injunctive relief given the availability of other remedies would have militated against an injunction if the Province had sought to enforce the Public Health Order under the guise of a public nuisance or other civil action against the named or Jane Doe and John Doe respondents.

46. In *Nova Scotia (Attorney General) v. Beaver*, the Nova Scotia Attorney General commenced an action against a number of individuals for public nuisance, arising from activities associated with sex work in downtown Halifax. The remedy sought on the public nuisance action was permanent injunctive relief. The Attorney General also sought an interlocutory injunction enjoining the same behaviour.

47. On hearing the Attorney General's application for an interlocutory injunction, the trial judge considered whether he should exercise his discretion where there were other means, including criminal, provincial and by-law offences, for the government to address the problem.

48. The Court of Appeal cautioned against the use of injunctive relief in circumstances such as this one:

> In my opinion, a judge when being asked by an attorney general to grant such an injunction must consider whether it is really necessary in the light of other procedures available to accomplish the same end. He should consider, as well, the dangers of eliminating criminal conduct without the usual safeguards of criminal procedure available to an accused. He should also consider whether the evil complained of should more properly be eliminated by a change in legislation. Only in very exceptional cases where by reason of lack of time or otherwise no

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[21] *CBC* at para 25 **[TAB 21]**

other suitable remedy is available should such an injunction be granted to prevent the commission of a crime.[22]

49. Accordingly, the CCLA submits that while the absence of a civil action or proceeding as legal authority for the injuctive relief sought is a fatal flaw in the Province's application, the Court would not be justified in exercising its discretion to grant an interlocutory injunction even if the Province re-framed its request in the context of an action for public nuisance.

(ii) No interlocutory relief without a final order sought

50. In the absence of an underlying proceeding, there is no basis for the Court to apply the test for interlocutory relief from *RJR-MacDonald*. In effect, the Province is seeking permanent injunctive relief against the respondents.

51. At common law, injunctive relief is available on either an interim, interlocutory or permanent basis, as a civil remedy. In *Adline v. Buckley Insurance Brokers*,[23] Gillese J.A. of the Court of Appeal for Ontario provided helpful clarity on these different remedies:

    a. Both interim and interlocutory injunctions are granted on a pre-trial basis, prior to the determination of the final issues between the parties in the main proceeding.[24]

        i. An interim injunction can be granted on an *ex parte* basis, and is usually granted on limited argument, for a brief, specified period of time, and can only be continued by further motion;

        ii. An interlocutory injunction is usually granted based on more thorough argument by both parties, and is usually for a longer duration than an interim injunction.

    b. Permanent injunctions are imposed only after a final adjudication of rights, and once it has been established that an injunction is an appropriate remedy.[25]

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[22] *Nova Scotia v Beaver* (1985), 67 NSR (2d) 281, [1985] NSJ No 485 at para 37 (CA) **[TAB 16]**
[23] *1711811 Ontario Ltd (AdLine) v Buckley Insurance Brokers Ltd*, 2014 ONCA 125 [*Adline*] **[TAB 1]**
[24] *Adline* at paras 50-52 **[TAB 1]**
[25] *Adline* at para 56 **[TAB 1]**; *Schooff* at para 28 **[TAB 30]**

52. The three-part test for an interim or interlocutory injunction was set out in *RJR-MacDonald*, and requires (a) a serious issue to be tried; (b) irreparable harm if the injunction was not granted; and (c) the balance of convenience to favour the injunctive relief.[26] The *RJR-MacDonald* test does not apply to permanent injunctions, and is designed instead for situations where the court does not have the ability to finally determine the merits of the case.[27]

53. When a party seeks interlocutory relief on a *quia timet* basis, they must establish the element of the *RJR-MacDonald* test for interlocutory injunctions, and establish "on a balance of probabilities, that there is clear, convincing and non-speculative evidence" that there is "a high degree of probability the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future".[28]

54. If the *quia timet* relief sought is permanent, the Court would have to finally determine the issues and rights of the parties before finding that a final injunction is an appropriate remedy in the circumstances.

55. The Province appears to submit that it seeks injunctive relief on an interlocutory basis, despite the absence of an underlying proceeding of any kind. However, the Province ignores the first branch of the *RJR-MacDonald* test (which it cannot meet, since there is no issue to be tried"), and instead has proposed the following, novel, three-part test for its injunction, as set out in its brief:[29]

> In order to grant a *quia timet* injunction, the Province submits that the court must find the following:
>
> 1. The harm that is anticipated is imminent.
> 2. The harm is irreparable.
> 3. Damages would not be an adequate remedy.

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[26] *RJR-MacDonald v. Canada* [1994] 1 SCR 311 at 348, Province's Book of Authorities, Tab 1
[27] *Adline* at paras 78-80 **[TAB 1]**
[28] *526901 BC Ltd v Dairy Queen Canada Inc*, 2018 BCSC 1092 at para 71, Province's Book of Authorities, Tab 2; *Robinson v Canada (Attorney General)*, 2019 FC 876 at para 88, Provinces Book of Authorities, Tab 3
[29] Province's Brief, para 72

56. The Province has also made reference to the "balance of convenience" in its argument, which "requires the court to consider which of the parties would suffer greater harm if the injunction was not granted".[30]

57. On this point, the Province asserts only that the balance of convenience does not favour permitting "the anti-mask rally to proceed on May 15, 2021" or "similar events to be held within the Province at any point in the future," because:[31]

> There is a greater public interest in maintaining integrity of the current Public Health Order and the restrictions set out within that Order than permitting the rally to be carried out as planned.

58. The CCLA submits that even if the Court could consider the test suggested by the Province in exercising its discretion to order an injunction, there is simply no evidence offered by the Province which could meet this test in relation to the Jane Doe or John Doe respondents who are contemplated to act independently of those who are said to be associated with "Freedom Nova Scotia". The named respondent, Amy Brown, is also not mentioned anywhere in the record.

59. The grounds for the Application in Chambers were, in summary:

    a. The restrictions contained in the Public Health Order are necessary to prevent or reduce the transmission of Covid-19;

    b. The Respondent, Freedom Nova Scotia, had organized a "public gathering" at or near Citadel Hill for the upcoming weekend; and

    c. Past public gatherings organized by Freedom Nova Scotia had failed to comply with the requirements of the Public Health Order.

60. None of these grounds disclose a serious issue to be tried or rights to be resolved on a final basis.

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[30] Province's Brief, para 75
[31] Province's Brief, para 76

ISSUE 2 – The Injunction Order infringes the *Charter* and cannot be justified

61. Even if an injunction was legally available in the circumstances, the Injunction Order sought by the Province and granted by the Court infringes the *Charter* and cannot be justified in a free and democratic society.

62. The *Charter* applies to all exercises of public authority, including judicial exercises of discretion under the common law. An injunction issued by a provincial superior court is subject to constitutional scrutiny and must comply with the fundamental standards established by the *Charter*.[32] This can take place at the balancing phase of the *RJR-MacDonald* analysis (where this is the proper test) or following a judicial determination that an injunction is warranted. But what cannot happen is the complete disregard for constitutionally-protected rights.

63. In this case, those constitutionally-protected rights were given short shrift by the Province and the Court in a closed-door proceeding. The resulting Injunction Order infringes the *Charter* rights of all Nova Scotians, including the rights to freedom of expression, freedom of assembly, and liberty. This infringement is not in accordance with principles of fundamental justice and cannot be justified in a free and democratic society, even in the context of the COVID-19 pandemic.

The Injunction Order bans political protest and infringes ss 2(b) and 2(c) of the Charter

64. The rights of people to freely discuss ideas and to assemble for peaceful protest form the very foundation of a democratic society.[33] Section 2 of the *Charter* protects that foundation and provides that everyone in Canada has:

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [and]
>
> (c) freedom of peaceful assembly.

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[32] *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 243-244 [*BCGEU*] **[TAB 4]**

[33] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 12 (per McLachlin CJC dissenting but not on this point) **[TAB 11]**; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 48 **[TAB 13]**

65. To establish that a prohibition infringes freedom of expression, a claimant must show that: (i) the prohibited activity involves expressive content, (ii) the method or location of that expressive conduct is not exempted, and (iii) the purpose or effect of the prohibition was to restrict their freedom of expression.[34]

66. Freedom of peaceful assembly has received limited appellate consideration. Trial courts have tended to treat this right as a derivative of freedom of expression and subject to the same test. But a close reading of freedom of assembly cases reveals that it independently protects the relational act of gathering in groups.

67. To establish that a prohibition infringes peaceful assembly, a claimant must show that: (i) the prohibited activity involves the physical gathering of people, (ii) in a peaceful manner, (iii) at a location that is not exempted, and (iv) the purpose or effect of the prohibition was to restrict their peaceful assembly.[35]

68. The following activities have been found to engage freedom of expression and freedom of assembly: picketing a courthouse,[36] picketing an abortion clinic,[37] demonstrating on roadways,[38] soliciting money on roadways,[39] and camping in a public park as a form of protest.[40]

69. The Injunction Order prohibits certain physical gatherings, including any outdoor gathering of more than 10 persons (now 25 as of June 16, 2021) that is not expressly exempted under

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[34] *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 56 **[TAB 12]**
[35] *Re Government Employee's Union* (1985), 20 DLR (4th) 399, 1985 CanLII 143, aff'd *BCGEU, supra* **[TAB 4]**; *Re Fraser and NS (Attorney General)* (1986), 30 DLR (4th) 340, 1986 CanLII 3977 at paras 30-35 (NSSC) **[TAB 27]**; *Ontario (Attorney General) v Dieleman* (1994), 117 DLR (4th) 449, 1994 CanLII 7509 at paras 700-702 (ONSC) [*Dieleman*] **[TAB 18]**; *R v Semple and Héroux*, 2004 ONCJ 55 **[TAB 23]**; *Batty v City of Toronto*, 2011 ONSC 6852 at para 70 [*Batty*] **[TAB 3]**; *Gammie v Town of South Bruce Peninsula*, 2014 ONSC 6209 at paras 77, 80, 105 **[TAB 9]**
[36] *BCGEU* at 243-244 **[TAB 4]**
[37] *Dieleman* at para 614 **[TAB 18]**
[38] *Garbeau c. Montréal (Ville de)*, 2015 QCCS 5246 at paras 171-173 [this case is available in French only] **[TAB 10]**
[39] *R v Banks*, 2007 ONCA 19 at paras 112-113 **[TAB 19]**
[40] *Batty* at para 75 **[TAB 3]**

the Restated Order of the CMOH.[41] While there are many exemptions for activities like drinking on a patio,[42] exercising in groups,[43] or shopping at the mall,[44] there is no exemption for political protest or peaceful assembly. Accordingly, the Injunction Order limits activity that involves expressive content as well as peaceful assembly.

70. The Injunction Order applies everywhere in Nova Scotia. It is not limited to methods or places where the protections of ss 2(b) and 2(c) of the *Charter* do not apply. The purpose and effect of the Injunction Order is to limit freedom of expression and peaceful assembly in response to the COVID-19 pandemic.[45] This constitutes an infringement of freedom of expression and freedom of assembly contrary to ss 2(b) and 2(c) of the *Charter* respectively.

The Injunction Order creates a risk of detention and infringes s 7 of the Charter

71. In a constitutional democracy, a state's conduct while enforcing and securing compliance with law must accord with principles of fundamental justice. Section 7 of the *Charter* ensures this basic guarantee and provides:

> Everyone has 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.

72. To establish a violation of s 7 of the *Charter*, a claimant must demonstrate: (i) an infringement of life, liberty or security of the person, (ii) that is not in accordance with principles of fundamental justice.

73. Liberty is engaged where the administration of justice creates a threat of imprisonment or detention.[46] Liberty is also engaged where state compulsions or prohibitions affect a person's ability to move freely.[47] The Injunction Order infringes liberty because it exposes persons to

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[41] Restated Order #2 of the Chief Medical Officer of Health (4 June 2021), ss 13.2(c), 13.4 [Restated Order]
[42] Restated Order, s 24.2 (indoor dining is exempted as of June 16, 2021)
[43] Restated Order, s 28.2 (full resumption of exercise is permitted as of June 16, 2021)
[44] Restated Order, s. 31.2
[45] Supplemental Affidavit of Dr. Robert Strang, para 45
[46] *R v Vaillancourt*, [1987] 2 SCR 636 at 652; *R v Swain*, [1991] 1 SCR 933 **[TAB 26]**
[47] *R v Heywood*, [1994] 3 SCR 761 at 789 **[TAB 22]**

a threat of detention by law enforcement, and it affects a person's ability to move freely in a group.[48]

74. The principles of fundamental justice include the principles against arbitrariness, overbreadth, and gross disproportionality. A prohibition is arbitrary where it bears no connection to the law's purpose, overbroad where it captures some conduct that bears no connection to the law's purpose, and grossly disproportionate where its effects are excessive in comparison to the law's objective.[49]

75. The analysis of these principles of fundamental justice is qualitative not quantitative. A claimant need only show one person whose liberty is infringed in a manner that is inconsistent with one or more of the principles. Questions of how infringement is balanced against broader societal interests are left to the justification stage of the constitutional analysis enabled by s. 1 of the *Charter*.[50]

76. The Injunction Order adopts the definition of "illegal public gathering" in the Restated Order of the CMOH. In doing so, the purpose of the Injunction Order is the same: to prohibit indoor and outdoor activities where there is a COVID-19 transmission risk above a certain threshold identified by public health. The purpose is *not* to prevent all activities where there is *some* risk of COVID-19. If this were the true purpose of the Injunction Order, it would not permit gatherings in groups of 10 (not physically-distanced or masked), drinking on a patio in unlimited groups of 10 (not physically-distanced or masked), or physical exercise in unlimited groups of 10 (not physically-distanced or masked), because each of these activities carries some risk of COVID-19 transmission.

77. The Injunction Order is arbitrary and overbroad because it prohibits some activities with a lower transmission risk than comparable permitted activities. For example, consider the following four scenarios where the "prohibited" activity carries a lower transmission risk than the comparable activity that is "allowed":

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[48] Injunction Order, paras 2, 5
[49] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 97-123 [*Bedford*] **[TAB 7]**
[50] *Bedford* at paras 123-125 **[TAB 7]**

	Allowed	Prohibited
Scenario #1	An indoor classroom of 30 masked teenagers who are not physically distanced	An outdoor gathering of 30 masked teenagers who are physically distanced
Scenario #2	An indoor gym with 3 physically distanced groups of 10 people, all unmasked and participating in an intense workout	An outdoor gathering with 3 physically distanced groups of 10 people, all wearing masks and participating in a vocal protest
Scenario #3	An outdoor patio with 5 physically distanced groups of 10 people, all unmasked, and yelling to be heard above the background noise	An outdoor protest with 5 physically distanced groups of 10 people, all masked, and yelling to convey their message
Scenario #4	250 physically distanced and masked people walking through an indoor shopping mall to purchase clothing	250 physically distanced and masked people walking along an outdoor pathway to protest the violation of human rights or commemorate a historic injustice

78. The Injunction Order is also grossly disproportionate. At rehearing, the record is likely to establish that detention carries a non-trivial risk of COVID-19 infection.

79. A reasonable hypothetical created by the Injunction Order includes a situation where a person is detained for promoting a political protest on social media—an activity that carries no immediate risk of COVID-19 transmission—and is thereby exposed to a non-trivial risk of COVID-19 infection. This is totally out of sync with the objective of prohibiting activities that carry a certain risk of COVID-19 transmission. In this respect, the Injunction Order weaponizes a risk of COVID-19 to suppress activities that carry no immediate risk of COVID-19 transmission. Such suppression is extreme and grossly disproportionate.

The infringement of fundamental and legal rights is not demonstrably justified

80. The Province bears the onus of proving that the infringement of freedom of expression, freedom of assembly, and liberty are demonstrably justified in a free and democratic society.

81. To establish that the limits on these *Charter*-protected rights are reasonable, the Province must prove that the objective of the injunction it is requesting is pressing and substantial and that there is proportionality between the objective and the means used to achieve it.

Proportionality is assessed based on three factors: (i) rational connection, (ii) minimal impairment, and (iii) balancing.[51]

82. The CCLA acknowledges that the COVID-19 pandemic has created a public health emergency and that preventing a certain level of transmission risk of COVID-19 is a pressing and substantial objective. The CCLA does not agree that the means chosen by the Province are proportional to the objective. The Injunction Order fails all three factors.

83. For the reasons described in para 74, there is no rational connection between the objective of limiting COVID-19 transmission risk above a certain threshold and some of the activities prohibited by the Restated Order. As a result, the Injunction Order permits activities that carry a higher risk than other activities that are prohibited. If the objective is to prohibit activities that carry a certain risk, the distinction between allowed and prohibited activities is irrational.

84. The limitations on freedom of expression and freedom of assembly are not minimally impairing. Political expression lies at the core of the guarantee protected by freedom of expression, but all expressive content is protected by s. 2(b) of the *Charter*, including undesirable, unpopular, offensive, or contrary opinions. As a result, any attempt to restrict freedom of expression must be "subjected to the most careful scrutiny."[52]

85. The CCLA acknowledges that serious public policy issues warrant a serious response and that the Province is afforded a margin of appreciation in deciding how to respond to the COVID-19 pandemic. However, no deference is owed to prohibitions that preference patios over political protest or mall shopping over peaceful assembly. These prohibitions impact fundamental freedoms protected by the *Charter* and deserve strict scrutiny by the Court.

86. The record on rehearing cannot explain why Nova Scotians are permitted to drink on patios but not to protest outdoors or why they can congregate at indoor shopping malls but cannot peacefully assemble outdoors.

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[51] *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 35-36 [*JTI-MacDonald*] **[TAB 8]**
[52] *R v Sharpe*, 2001 SCC 2 at paras 22-23 **[TAB 24]**

87. Balancing "focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[53]

88. There is no balance between the benefits of the Injunction Order and its deleterious effects on freedom of expression and freedom of assembly. The record on rehearing does not reveal a single case of COVID-19 transmission attributable to outdoor political protest or peaceful assembly. The record on rehearing does not establish that outdoor gathering poses any substantial risk of COVID-19 transmission let alone a risk that is relatively higher than activities that are permitted. At the same time, the record on rehearing does reveal that the Injunction Order has been used to limit political protest, human rights advocacy, and peaceful assembly in response to hate crimes.

89. The Supreme Court of Canada has never found a violation of s. 7 of the *Charter* to be demonstrably justified. The Injunction Order is inconsistent with the principles of fundamental justice. Because of this inconsistency and the lack of justification discussed in the context of freedom of expression and freedom of assembly (paras 77 to 85), the infringement of liberty cannot be justified in a free and democratic society.

PART IV–ORDER SOUGHT

90. CCLA requests the following remedies:

    a. an Order setting aside the decision of the Honourable Justice Scott Norton, dated May 14, 2021; and

    b. an Order discharging the Injunction Order in its entirety without prejudice to the Attorney General of Nova Scotia filing a new application, if necessary.

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[53] *JTI-Macdonald, supra* at para 45 **[TAB 8]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated June 21, 2021, in Halifax, Nova Scotia.

Nasha Nijhawan

for

Benjamin Perryman

Counsel for the CCLA