Form 90.06

2021

C.A. No. 507668

Nova Scotia Court of Appeal

Between:

The Canadian Civil Liberties Association — Appellant

and

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 — Respondents

and

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

Book of Authorities

Nasha Nijhawan & Benjamin Perryman
Nijhawan McMillan Petrunia
5162 Duke Street, Suite 200
Halifax NS B3J 1N7
T: 902-407-3871 / 902-293-0479
F: 902-706-4058
E: nasha@nmbarristers.com / ben@benjaminperryman.com

Counsel for the Canadian Civil Liberties Association

Duane A. Eddy
Nova Scotia Department of Justice
1690 Hollis St
Halifax NS B3J 3J9
T: 902-209-5986
F: 902-424-1730
E: Duane.Eddy@novascotia.ca

Counsel for the Attorney General of Nova Scotia

Tab	Authority
1.	*BCGEU v British Columbia (Attorney General),* [1988] 2 SCR 214
2.	*Beaudoin v British Columbia,* 2021 BCSC 248
3.	*Cambie Surgeries Corp. v. British Columbia (Medical Services Commission) (a.k.a. Schooff),* 2010 BCCA 396
4.	*Farrell v. Casavant,* 2010 NSCA 71
5.	*Health Protection Act,* SNS 2004, c 4
6.	*Judicature Act,* SNS 1989
7.	*London Borough of Islington v Elliott & Anor* [2012] EWCA Civ 56
8.	*Nova Scotia v. Freedom Nova Scotia,* 2021 NSSC 170
9.	*Nova Scotia v. Freedom Nova Scotia,* 2021 NSSC 217
10.	*Pratt v Nova Scotia (Attorney General),* 2020 NSCA 39
11.	*R v Canadian Broadcasting Corp,* 2018 SCC 5
12.	*Shupe v. Beaver Enviro Depot,* 2021 NSCA 46
13.	*White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 2 SCR 182

British Columbia Government Employees' Union v. British Columbia (Attorney General)

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Estey *, McIntyre, Lamer, Wilson, La Forest and L'Heureux-Dubé JJ.

1988: March 3 / 1988: October 20.

File No.: 19518.

[1988] 2 S.C.R. 214 | *[1988] 2 R.C.S. 214* | *[1988] S.C.J. No. 76* | *[1988] A.C.S. no 76*

The British Columbia Government Employees' Union, appellant; v. The Attorney General of British Columbia, respondent; and The Attorney General of Canada, intervener.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

* Estey J. took no part in the judgment.

Case Summary

Courts — Jurisdiction — Criminal contempt — Law courts being picketed in course of legal strike — Superior court enjoining picketing — Whether or not picketing constituting criminal contempt.

Constitutional law — Charter of Rights — Law courts being picketed in course of legal strike — Superior court enjoining picketing — Whether or not injunction denying picketers' s. 7 right to liberty — Whether or not picketers' rights to be informed of specific offence and to be presumed innocent under s. 11(a) and (d) infringed — Whether or not picketers' right to freedom of expression under s. 2 infringed — Canadian Charter of Rights and Freedoms, ss. 2(b), 7, 11(a), (d).

Constitutional law — Division of powers — Criminal law and labour law — Law courts being picketed in course of legal strike — Superior court enjoining picketing — Whether or not legality of picketing placed beyond criminal law because strike lawful and picketing permitted by Labour Code — Constitution Act, 1867, s. 91(27).

Appellant union picketed all law courts in British Columbia in the course of a legal strike and hoped to reduce court activity to matters of urgency. All persons who crossed the picket line, however, were considered to [page215] have honoured it if they first obtained a pass from the union. McEachern C.J.S.C. perceived a constitutional duty on his part to keep the law courts open and, on his own motion and ex parte, issued an injunction restraining picketing and other activities calculated to interfere with the operations of any court. The union moved, pursuant to the terms of the concluding paragraph of the order, to have the injunction set aside. McEachern C.J.S.C. dismissed the motion and the British Columbia Court of Appeal unanimously upheld that judgment. The constitutional questions before this Court queried: (1) whether a provincial superior court judge could constitutionally enjoin picketing of court-houses by a Union representing court employees engaged in a lawful strike; (2) whether an enactment by a provincial legislature or by Parliament could validly deprive a judge of a Supreme Court

of his inherent authority to protect the functions and processes of his and other courts without an amendment to the Constitution of Canada; (3) whether the order restraining picketing and other activities within the precincts of all court-houses in British Columbia infringed or denied the rights and freedoms guaranteed by ss. 2(b), (c), 7, 11(a), (c) and (d) of the Canadian Charter of Rights and Freedoms; (4) if so, whether the order was justified by s. 1 of the Charter.

Held: The appeal should be dismissed; the first constitutional question should be answered in the affirmative; the second constitutional question needed not be answered; the third constitutional question should be answered in the affirmative with respect to s. 2(b) of the Charter but in the negative with respect to ss. 7, 11(a) and (d); and the fourth constitutional question should be answered in the affirmative. McIntyre J. would answer the third constitutional question in the negative and find it unnecessary to answer the fourth.

Per Dickson C.J. and Lamer, Wilson, La Forest and L'Heureux-Dubé JJ.: The rule of law is the very foundation of the Charter and the courts are directed to provide a remedy in the event of infringement of the rights guaranteed by the Charter. Those rights would become merely illusory and the entire Charter undermined if access to the courts were to be impeded or denied. The picketing, notwithstanding the picketers' policy of issuing a pass, would inevitably have had the effect of impeding and restricting de facto access to the courts; it could only lead to a massive interference with [page216] the legal and constitutional rights of the citizens of British Columbia.

The picketing of the court-houses of British Columbia constituted a criminal contempt. It fell within a category of contempt offences which included, amongst others, obstructing persons officially connected with the court or its process and preventing access by the public to courts of law.

The Chief Justice had jurisdiction to enjoin picketing on his own motion and ex parte. The act of picketing, while it did not take place strictly within the court room itself, constituted contempt in the face of the court. Although the motion was made ex parte, careful account was taken of the procedural rights at stake. The appellant Union was expressly given the right to move to have the order set aside and was accorded full rights to present evidence and argument. The Chief Justice did act upon his own observations but the case did not involve contested facts.

While the Labour Relations Board has jurisdiction in relation to what might be described as the labour relations aspect of picketing, the courts retain full authority to deal with violations of civil and criminal law arising from picketing. The order was issued in relation to a criminal contempt and therefore fell within the federal criminal law power and the inherent (or common law) jurisdiction of the courts to punish for contempt. Striking court employees must obey the law in relation to criminal contempt. The legality of all aspects of picketing was not put beyond the reach of the criminal law or criminal contempt simply because the strike was lawful and the Labour Code permitted picketing in the course of a lawful strike.

Even if the effect of the injunction were to deny the Union members' right to liberty protected by s. 7, the denial of that right was fully in accordance with the principles of fundamental justice. An injunction does not violate s. 7 of the Charter solely because it was granted ex parte: circumstances can exist where the delay necessary to give notice might result in an immediate and serious violation of rights. Here, the order constituted a minimal interference with the procedural rights of those whose course of action could only result in a massive disruption of the courts' activities and consequent interference with the legal and constitutional rights of all citizens of British Columbia.

The claims arising under s. 11(a) and (d) failed because no one was charged with an offence and no penal sanction was imposed upon any offender. There was no need to notify of an offence when no one was charged with a specific offence. Similarly, the right to be presumed innocent until proven guilty was not violated as no finding of guilt had been made. The proceedings were fair and the requirement of an independent and impartial tribunal was met for the very purpose of the order was to protect that right.

Peaceful picketing in the context of a labour dispute contains an element of expression protected by s. 2(b). Apart from the Charter, however, the picketing was unlawful. The issue of whether the law of criminal contempt and the injunction to enforce the law pass scrutiny under the Charter must be dealt with pursuant to s. 1.

Assuring unimpeded access to the courts is plainly an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and relates to a concern which is "pressing and substantial in a free and democratic society". The means taken to accomplish that objective satisfied the three-step proportionality test. First, there was a rational connection between the injunction and the objective of ensuring unimpeded access to the courts. Second, the injunction accomplished this objective by impairing as little as possible the s. 2(b) rights of the members of the Union for the Union and its members were free to express themselves in other places and in other ways so long as they did not interfere with the right of access to the courts. Finally, there was a proportionality between the effects of the injunction on the protected right and the objective of maintaining access to the courts. The injunction was to maintain access to the courts and to ensure that the courts remained in operation in order that the legal and Charter rights of all citizens of the province would be respected.

Per McIntyre J.: What was enjoined by the court order was conduct calculated to interfere with court processes and to restrict or limit access to the courts, conduct clearly unlawful and calculated to interfere with and restrict the constitutionally protected rights of others. The making of the injunction therefore involved no infringement of any constitutionally protected right of the appellant. There was no need to balance conflicting rights here. Resort to s. 1, which can only have application where there has been an infringement of a Charter right, was unnecessary. [page218]

Cases Cited

By Dickson C.J.

Considered: RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; referred to: Re Johnson (1887), 20 Q.B.D. 68; Golder v. United Kingdom (1975), 1 E.H.R.R. 524; Harrison v. Carswell, *[1976] 2 S.C.R. 200*; Heather Hill Appliances Ltd. v. McCormack, *[1966] 1 O.R. 12*; Morris v. Crown Office, [1970] 1 All E.R. 1079; R. v. Hill *(1976), 73 D.L.R. (3d) 621*; R. v. Froese *(1980), 23 B.C.L.R. 181*; Ex parte Tubman; Re Lucas, [1970] 3 N.S.W.R. 41; Attorney-General v. Times Newspapers Ltd., [1974] A.C. 273; R. v. Davies, [1906] 1 K.B. 32; Poje v. Attorney General for British Columbia, *[1953] 1 S.C.R. 516*; Foothills Provincial General Hospital Board v. Broad *(1975), 57 D.L.R. (3d) 758*; Churchman v. Joint Shop Stewards' Committee of the Workers of the Port of London, [1972] 3 All E.R. 603; Con-Mech (Engineers) Ltd. v. Amalgamated Union of Engineering Workers, [1973] I.C.R. 620; R. v. United Fishermen and Allied Workers' Union *(1967), 63 D.L.R. (2d) 356*; Balogh v. Crown Court at St. Alban's, [1974] 3 All E.R. 283; McKeown v. The Queen, *[1971] S.C.R. 446*; Better Value Furniture (CHWK) Ltd. v. General Truck Drivers and Helpers Union, Local 31 *(1981), 26 B.C.L.R. 273* (B.C.C.A.) (leave to appeal to the Supreme Court of Canada refused, [1981] 2 S.C.R. viii); Attorney-General of Quebec v. Laurendeau *(1982), 145*

D.L.R. (3d) 526, 33 C.R. (3d) 40; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103.

By McIntyre J.

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, Preamble, ss. 1, 2(b), (c), 7, 11(a), (c), (d), 24(1). Constitution Act, 1867, s. 91(27). Constitution Act, 1982, s. 52(1). Criminal Code, R.S.C. 1970, c. C-34, s. 8, as am. Labour Code, R.S.B.C. 1979, c. 212.

Authors Cited

Borrie, Sir Gordon. Borrie and Lowe's Law of Contempt, 2nd ed. By Nigel Lowe; consultant editor, Sir Gordon Borrie. London: Butterworths, 1973. Jacob, I.H. "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23. Jowitt, William Allen, 1st Earl. Jowitt's Dictionary of English Law, 2nd ed., vol. 1. By Earl Jowitt and Clifford Walsh. Second edition by John Burke. London: Sweet and Maxwell, 1977. [page219] McRuer, Hon. J.C. "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1952), 30 Can. Bar Rev. 225. Miller, C.J. Contempt of Court. London: Paul Elek, 1976. Weiler, Paul. Reconcilable Differences. Toronto: Carswells, 1980.

APPEAL from a judgment of the British Columbia Court of Appeal (1985), 64 B.C.L.R. 113, 20 D.L.R. (4th) 399, [1985] 5 W.W.R. 421, dismissing an appeal from a judgment of McEachern C.J.B.C. (1983), 48 B.C.L.R. 1, 2 D.L.R. (4th) 705, [1984] 1 W.W.R. 399, 40 C.P.C. 116, dismissing a motion to set aside or vary an injunction made on his own motion and ex parte, [1983] 6 W.W.R. 640. Appeal dismissed; the first constitutional question should be answered in the affirmative; the second constitutional question needed not be answered; the third constitutional question should be answered in the affirmative with respect to s. 2(b) of the Charter but in the negative with respect to ss. 7, 11(a) and (d); and the fourth constitutional question should be answered in the affirmative.

McIntyre J. would answer the third constitutional question in the negative and find it unnecessary to answer the fourth.

David Blair, for the appellant. Jack Giles, Q.C., for the respondent. Graham Garton, Q.C., and David Stephens, for the intervener the Attorney General of Canada.

Solicitors for the appellant: Baigent, Jackson, Blair, Vancouver. Solicitors for the respondent: Farris, Vaughan, Wills & Murphy, Vancouver. Solicitor for the intervener: F. Iacobucci, Ottawa.

The judgment of Dickson C.J. and Lamer, Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

THE CHIEF JUSTICE

1 This case involves the fundamental right of every Canadian citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right.

I

Facts

2 On the morning of November 1, 1983, as a result of strike action by the appellant British Columbia Government Employees Union (the [page220] Union) pickets were posted at the entrances to and within the precincts of, the courts of justice in Vancouver and at all other courts of justice in the province of British Columbia. The strike came at a time of the year when all the courts of the province were in session. The situation, as McEachern C.J.S.C. observed, was indeed urgent with trials, appeals and chambers due to start that morning in many locations throughout the province. Some of these cases were criminal and civil jury trials, and persons were in custody. Counsel, witnesses and jurors were or should have been en route to the court-houses. The position of the appellant Union was clearly set out in an affidavit of its director of membership services: "The Union hopes that people will support the Union by honouring the picket line. Honouring the picket line in every instance involves people exercising their right and freedom not to cross it. The Union recognizes that persons who cross only upon obtaining a pass have nevertheless honoured the line and thereby supported the Union in the dispute." The appellant did issue "picket passes" whereby it purported to authorize people, including officers of the court, to pass through the picket lines.

3 The circumstances surrounding the passes were described in an affidavit of Ronald Fratkin, a member of the Law Society of British Columbia, which reads in part:

> 2. On or about Wednesday, October 19, 1983, I and several other members of an ad hoc committee of the Criminal Justice Section of the Canadian Bar Association met in Vancouver, British Columbia with Mr. Jack Adams, an officer of the British Columbia Government Employees' Union, to discuss the potential impact of a possible strike by this Union upon court services in the Province.
>
> 3. At the October 19, 1983 meeting Mr. Adams expressed the Union's concern about persons in custody and the impact of a strike upon such persons.
>
> 4. At the same meeting Mr. Adams indicated that if there were a strike followed by picketing of courthouses, passes would be issued by the Union to assist in providing lawyers to act in Court as duty counsel to deal with [page221] people in custody, including assistance at show cause hearings.
>
> 5. On Monday, October 31, 1983, when it became clear that a strike by the Union was indeed imminent, I telephoned Mr. Adams [sic] office. At 1:39 p.m. the same afternoon Mr. Adams' office left a message at my office confirming that two duty counsel passes would be issued for 222 Main Street, Vancouver. At approximately 2:15 p.m. that afternoon my office also received a telephone call from the picket captain (known to me as Becky) for 222 Main Street, Vancouver, requesting that Duty Counsel report to her on the morning of November 1, 1983 to receive the passes.

. . .

8. Accordingly, I discussed the problem with the picket captain at the Provincial Court at 222 Main Street, Vancouver. Shortly after, I was advised by the picket captain that she had communicated with Union headquarters and had received immediate approval to facilitate the appearance of two duty counsel at the Law Courts at 800 Smithe Street, Vancouver.

. . .

10. While outside the Courthouse at 222 Main Street, Vancouver, during the morning of November 1, 1983 I had occasion to observe that the British Columbia Government Employees' Union picket line was orderly and peaceful. Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers.

Leaflets were distributed by a group known as the B.C. Law Union urging members of the public who approached the court-house to respect the picket line and to encourage lawyers not to cross it except with the approval of the union upon the issuance of a picket pass. In a letter written to McEachern C.J.S.C., a member of the Law Union requested that the courts be closed, and that all civil and criminal procedures be adjourned "other than for clear emergency situations as may be agreed upon with the B.C.G.E.U. and Operation Solidarity". The Chief Justice in response said that he had a constitutional duty to keep the courts open, not to close them.

[page222]

4 The Chief Justice arrived at the Court-house at 8:00 a.m. and on his own motion and ex parte issued an injunction in the following terms:

> On the Court's own motion, ex parte, THIS COURT ORDERS that all persons having notice of this Order are restrained and an injunction is hereby granted restraining them until further Order from:
>
> (a) gathering, congregating or picketing at the entrances to the Law Courts of the Provincial, County, Supreme, or Appeal Courts of British Columbia or within the precincts of the said Courts; or
>
> (b) from engaging in any activities whatsoever which are calculated to interfere with the operations of any Court of Justice in the province or to restrict or limit access of all persons to the Courts and their precincts.
>
> For greater certainty IT IS FURTHER ORDERED that this injunction shall extend to and include all those locations within the province where Courts of Justice are situate in buildings where other activities are also carried on, but any persons affected by this Order may apply on 24 hours' notice in writing to the Registrar for directions with respect to such locations.
>
> IT IS FURTHER ORDERED that any person affected by this Order may apply on 24 hours' notice in writing to the Registrar of this Court at Vancouver for an Order setting aside or varying this Order.

5 The order was served on the picketers at the Vancouver Court-house about 9:30 and 10:10 a.m. and at various later times that day at other court-houses. It was universally obeyed.

6 The Union moved, pursuant to the terms of the concluding paragraph of the Order, to have the

injunction set aside. The application was supported by the Law Union and was resisted by the Attorney General of British Columbia. McEachern C.J.S.C. dismissed the motion in written reasons delivered on November 10, 1983. The Union appealed to the British Columbia Court of Appeal and that appeal was dismissed by unanimous judgment on June 27, 1985.

7 The Union sought and obtained leave to appeal to this Court. The following constitutional questions were stated:

[page223]

1. Does a provincial superior court judge have the constitutional jurisdiction to make an order enjoining picketing of court-houses by or on behalf of a union representing court employees engaged in a lawful strike?
2. Can an enactment by a provincial legislature or by Parliament validly deprive a judge of a Supreme Court of his inherent authority to protect the functions and processes of his and other courts without an amendment to the Constitution of Canada?
3. Did the order by the Chief Justice of the Supreme Court of British Columbia dated November 1, 1983 restraining picketing and other activities within the precincts of all court-houses in British Columbia infringe or deny the rights and freedoms guaranteed by ss. 2(b), (c), 7, 11(a), (c) and (d) of the Canadian Charter of Rights and Freedoms?
4. If the order of the Chief Justice of the Supreme Court of British Columbia dated November 1, 1983 restraining picketing and other activities within the precincts of all court-houses in British Columbia infringes or denies the rights and freedoms guaranteed by ss. 2(b), (c), 7, 11(a), (c) and (d) of the Charter, is the order justified by s. 1 of the Charter and therefore not inconsistent with the Constitutional Act, 1982?

8 The Attorney General of Canada intervened before this Court with respect to questions 1 and 2, taking the position that question 1 should be answered in the affirmative, and that it was not necessary to answer question 2, but that if an answer were to be given, it should be affirmative.

II

Judgments of the British Columbia Courts

Ex parte injunction (reported at *[1983] 6 W.W.R. 640*)

9 McEachern C.J.S.C. framed the issue in the following terms (at p. 641):

> The question arises whether it is proper or permissible for anyone, individually or collectively, deliberately or accidentally, or directly or indirectly to interfere with the business of the courts of justice or to interfere with or impede the absolute right of access of all citizens to the Courts of justice.

[page224]

10 The Chief Justice answered that question emphatically in the negative. He noted that in the courts of British Columbia there were literally thousands of cases set for hearing and disposition on a daily basis.

Persons in custody had a right to apply for bail, persons awaiting trial were entitled to have their guilt or innocence determined without delay. The British Columbia Supreme Court's responsibility included the writ of habeas corpus, injunctions to prevent damage or loss of rights, the custody and protection of children, the right of occupation of matrimonial homes, the care and protection of disabled and infirm persons, the filing of documents to prevent the loss of a cause of action and a myriad of other matters vitally important to the ordinary citizen. McEachern C.J.S.C. noted as well the vital importance that the courts be open to the public and to the media: "Justice cannot be found behind closed doors or picket lines." He emphasized that the issue was not the personal importance or dignity of judges, but rather the protection and preservation of the institution of the courts of justice themselves. McEachern C.J.S.C. carefully distinguished picketing in connection with private commercial or industrial settings from picketing which interfered with the free and unrestricted access of all persons to the courts. Picketing which fell into the latter category, he held, constituted a contempt of court and, in his view, the court had not only the jurisdiction but, as well, the duty, to defend and protect its authority and the universal availability of its process. He quoted the words of Bowen J. in Re Johnson (1887), 20 Q.B.D. 68 (C.A.):

> "What is the principle which we have to apply? It seems to me to be this. The law has armed the High Court of Justice with power and imposed upon it the duty of preventing (by direct action) and by summary proceedings any attempt to interfere with the administration of justice."

He concluded with these words: "The rule of law has not been suspended in this province."

[page225]

Motion to set aside ex parte injunction (reported at *(1983), 2 D.L.R. (4th) 705*)

11 In his subsequent judgment, rendered on November 10, 1983, after affidavit material had been filed by the Union, McEachern C.J.S.C. upheld his original order and gave extensive reasons for doing so. The Chief Justice emphasized the centrality of the courts and the judiciary to our constitution and to the rule of law. He stressed as well the importance of the right of citizens to have unimpeded and uninterrupted access to the courts and the authority of the courts to protect and vindicate that right. McEachern C.J.S.C. said (at pp. 706-7):

> The powers entrusted to the judiciary by the constitution are essential to the proper organization of society because, while common law and the legislative branches of the constitution declare what the rights and obligations of the people are, the judiciary is the machinery which protects and enforces these rights and obligations. For this reason, free, unimpeded and uninterrupted access to the courts of justice of all parties, jurors, witnesses, counsel, court staff and the public is fundamental to the preservation and enforcement of every legal right, freedom and obligation which exists under the rule of law.

12 The Chief Justice carefully reviewed the authorities dealing with criminal contempt and concluded that "Any conduct which is calculated to interfere with the proper administration of justice is criminal contempt of court."

13 It was beyond question, he held, that picketing at a court-house would have the effect of deterring witnesses, jurors, lawyers and members of the public from entering the court-house to discharge their duties. While the Union had issued passes to individuals such as duty counsel, permitting them to cross the picket lines, McEachern C.J.S.C. held that neither the Union nor anyone else had the right to approve

who should or should not have access to the court and the very thought of licensing anyone to enter the court itself was an affront to freedom.

[page226]

14 McEachern C.J.S.C. held that the authority of the court to protect its process was in no way pre-empted by provincial legislation relating to labour disputes or essential services. Recognizing that the circumstances had to be unusual, McEachern C.J.S.C. held that where a criminal contempt threatened to disrupt court proceedings, the court had the authority to move ex mero motu in order to maintain the proper administration of justice. He held that as he had direct knowledge of the facts from observation upon entering the court-house and, in view of the urgency of the situation, he did have authority to issue the injunction in the manner in which he had.

15 The Chief Justice cited examples of important court matters which could not have been carried on behind a picket line (at pp. 713-14):

> In New Westminster Toy J. was able to continue a most difficult case and McKenzie J. was able to commence and complete the tragic case of R. v. Blackman where a young man was found not guilty by reason of insanity on a charge of murdering six members of his family; Trainor J. continued a difficult murder trial in Cranbrook; Davies J. held a criminal assize at Prince Rupert; Callaghan J. held a civil assize at Nanaimo; Lander, Finch and Wood JJ. were able to commence or continue jury trials in Vancouver; and all the other busy work of this court at Vancouver was carried on. The County Court of Vancouver was able to carry on its usual work as well as complete jury selections in criminal cases involving the attendance of upwards of 460 jurors; and, so far as I know, most of the work of all courts in most locations of the province was carried on.
>
> There are many other examples too numerous to mention which demonstrate beyond any rational possibility of doubt that a picket line at a court-house does in fact obstruct the proper administration of justice.

16 The Chief Justice noted that the order which he had made only precluded picketing. It did not purport to require the staff of the courts to resume the discharge of their duties. When the Union commenced the strike at midnight on October 31, [page227] 1983 against the Government of British Columbia the services of all government employees were withdrawn except certain excluded supervisory personnel and some who were required for the performance of essential services. Those withdrawn from service included all the staff (except supervisory personnel) of all the courts of justice within the province.

British Columbia Court of Appeal (reported at *(1985), 20 D.L.R. (4th) 399*)

17 The decision of McEachern C.J.S.C. was affirmed by a unanimous judgment of the British Columbia Court of Appeal. Nemetz C.J.B.C. characterized the issue as follows (at p. 401):

> ... the real issue before us is whether in a democratic society any person or bodies of persons can restrict the rights of its citizens to enjoy the benefits of the rule of law under the protection of an independent judiciary.

18 Nemetz C.J.B.C. emphasized the constitutional importance of the independence of the judiciary and of its right and duty to maintain the rule of law and the Constitution by guaranteeing unimpeded access to the courts. The Chief Justice had little doubt that the installation of a picket line surrounding the court-

house would impede access (at pp. 402-3):

> ... a picket line, in British Columbia, triggers in its citizens an almost universal and automatic response not to cross it. Whether caused by trade union ethic or fear of reprisal for crossing a picket line, the response of not crossing the picket line has been described by Dr. Weiler [in Reconcilable Differences (1980, Carswells Co. Ltd.) at p. 79] as Pavlovian in nature. Thus when a picket line is established at the entrance to a courthouse, access is effectively impaired.

19 The Chief Justice went on to hold that there was undoubted inherent jurisdiction to issue an injunction to prevent conduct clearly calculated to obstruct and interfere with the due course of justice. In his view, the very fact that the Union issued picket passes demonstrated its intention to impede entry to the courts of those persons who were not accorded such passes.

[page228]

20 Nemetz C.J.B.C. noted that nowhere in McEachern C.J.S.C.'s order was there any suggestion of contempt on the part of those members of the court-house staff who, being on a legal strike, withdrew their services. The injunction was directed to the picketing. The dispute had nothing to do with the courts. It was a dispute that the Union had with the provincial government.

21 While the Charter issue was apparently not raised before McEachern C.J.S.C., reference to s. 2(b) and (c) was made in argument before the British Columbia Court of Appeal. Nemetz C.J.B.C. noted that the matter was not fully argued, but held that even assuming that the injunction had infringed Charter rights, such infringement could be demonstrably justified under s. 1, as the Charter itself would become an illusion if the public were to be denied access to the courts.

22 Section 2(b) and (c) of the Charter read:

> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; ...

23 Before considering picketing and its effects and the law of contempt, I must advert to the Canadian Charter of Rights and Freedoms which plays a role of superordinate importance in this appeal.

III

The Canadian Charter of Rights and Freedoms

24 The Union is advancing certain Charter arguments in the present proceedings. I will deal with those arguments shortly. For the moment I wish to highlight certain sections of the Charter which, it seems to me, are a complete answer to anyone seeking to delay or deny or hinder access to the courts of justice in this country. Let us look first at the preamble to the Charter. It reads: "Whereas [page229] Canada is founded upon principles that recognize the supremacy of God and the rule of law". So we see that the

rule of law is the very foundation of the Charter. Let us turn then to s. 52(1) of the Constitution Act, 1982 which states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Earlier sections of the Charter assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. And what happens if those rights or freedoms are infringed or denied? Section 24(1) provides the answer -- anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedoms are guaranteed by the Charter and the courts are directed to provide a remedy in the event of infringement. To paraphrase the European Court of Human Rights in Golder v. United Kingdom (1975), 1 E.H.R.R. 524, at p. 536, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings". And so it is in the present case. Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined.

[page230]

25 There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice. Counsel for the Attorney General of British Columbia posed this question:

> By what authority and on what criteria were the Union leaders deciding who were to be given passes and who were to be denied them?

I cannot believe that the Charter was ever intended to be so easily thwarted.

26 I would adopt the following passage from the judgment of the British Columbia Court of Appeal (at p. 406):

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.

IV

Picketing and its Effects

27 Picketing is a crucial form of collective action in the arena of labour relations. A picket line is designed to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal. It is an essential component of a labour relations regime founded

on the right to bargain collectively and to take collective action. It represents a highly important and now constitutionally recognized form of expression in all contemporary labour disputes. All of that is beyond dispute. In Harrison v. Carswell, *[1976] 2 S.C.R. 200*, a majority of this Court stated at p. 219:

> Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others ....

[page231]

28 On the other hand, and this is crucial, both courts below have found that the picketing would inevitably have had the effect of impeding and restricting access to the courts. There surely can be little doubt as to the correctness of that conclusion. The very purpose and intent of the picket line in a labour dispute is to discourage and dissuade individuals from entering the premises which are being picketed. This is clear from the affidavit material filed by the appellant Union. One of the great strengths of the trade union movement is the spirit of solidarity. By standing together as a collective whole, trade unionists are able to aspire to improved wages and working conditions unattainable if each individual member were left to his or her own devices. Solidarity is made manifest when one group of workers is on strike. Fellow unionists and other sympathetic members of the public are made aware of the strike by the presence of picketers. Picketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle; this time we ask you to help us by not doing business with our employer; next time, when you are on strike, we will respect your picket line and refuse to conduct business with your employer.

29 A picket line ipso facto impedes public access to justice. It interferes with such access and is intended to do so. A picket line has great powers of influence as a form of coercion. As Stewart J. said in Heather Hill Appliances v. McCormack, *[1966] 1 O.R. 12* (Ont. H.C.), at p. 13:

> The picket line has become the sign and symbol of trade union solidarity and gradually became a barrier -- intangible but none the less real. It has now become a matter of faith and morals and an obligation of conscience not to breach the picket line and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed.

30 Both judgments below refer to Paul Weiler's book, Reconcilable Differences, which summarizes the purpose and effect of a picket line in the [page232] province of British Columbia. At page 79, Dr. Weiler notes:

> The crucial variable determining the impact of peaceful picketing is whether it is addressed to unionized workers. That kind of picket line operates as a signal, telling union members not to cross. Certainly in British Columbia the response is automatic, almost Pavlovian. That response is triggered by a number of factors: the sense of solidarity among members of the general trade-union movement; an appreciation that it is in the self-interest of each to honour the other fellow's picket line because in their own dispute they will want the same reaction from other workers; a concern for the social pressures and ostracism of other workers if they do not conform to the trade union ethic; the likelihood that they will face serious discipline from their own trade union. It might even cost them their jobs, if they defy that ethic and cross a picket line approved by the trade union movement. In the final analysis, the legal treatment of picketing must rest upon a realistic appraisal of its industrial relations role. The picket line is much more than the simple

> exercise of a worker's freedom of expression. In a heavily unionized community it is an effective trigger to a work stoppage by a group of employees.

31 Picketing of a commercial enterprise in the context of an ordinary labour dispute is one thin. The picketing of a court-house is entirely another. A picket line both in intention and in effect, is a barrier. By picketing the court-houses of British Columbia, the appellant Union in effect, set up a barricade which impeded access to the courts by litigants, lawyers, witnesses, and the public at large. It is not difficult to imagine the inevitable effects upon the administration of justice. As the judgments of McEachern C.J.S.C. and of Nemetz C.J.B.C. point out, on a daily basis the courts dispose of hundreds of cases in which fundamental rights are at stake. At the very least, the picketing was bound to cause delays in the administration of justice and, as has been often and truly said, justice delayed is justice denied. The picketing would undoubtedly make it difficult, if not impossible, for the courts to process criminal cases with despatch. Any person charged with an offence has [page233] the right not to be denied reasonable bail yet potential sureties could have been discouraged from entering the court-house to satisfy the requirements of a judicial interim release order. An accused has the right to a public trial yet the members of the public not issued passes by the Union might have been deterred from entering the court-house. Accused persons have a Charter right to a fair trial and a statutory right to make full answer and defence. Witnesses crucial to the defence could well have been deterred from even requesting a pass to enter the court-house to give vital evidence. It is perhaps unnecessary to multiply the examples. The point is clear. Picketing a court-house to urge the public not to enter except by permission of the picketers could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia.

V

Contempt of Court

32 The first issue to be addressed, apart from the constitutional aspects of the case, is whether Chief Justice McEachern and the British Columbia Court of Appeal were correct in concluding that the picketing of the court-houses of British Columbia constitutes a criminal contempt.

33 Chief Justice McRuer of the High Court of Justice of Ontario, in an address to the Lawyers Club, Toronto, entitled "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual", published (1952), 30 Can. Bar Rev. 225, at p. 226, said:

> A contempt may be either a criminal contempt or a civil contempt. The difference between contempts criminal and contempts civil seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of [page234] justice, are criminal in nature, but a contempt in disregarding the orders of a judge of a civil court is not criminal in nature. It is the obstruction or interference with the fair administration of justice within which the law of criminal contempt is concerned, and it has nothing to do with the personal feelings of the judges; it is not a power to be used for the vindication of the judge as a person, and no judge should allow his personal feelings to have any weight in the matter.

34 In Morris v. Crown Office, [1970] 1 All E.R. 1079 (C.A.), Lord Denning noted at p. 1081:

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it

> strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power -- a power instantly to imprison a person without trial -- but it is a necessary power. So necessary indeed that until recently the judges exercised it without any appeal.

35 In some instances the phrase "contempt of court" may be thought to be unfortunate because, as in the present case, it does not posit any particular aversion, abhorrence or disdain of the judicial system. In a legal context the phrase is much broader than the common meaning of "contempt" might suggest and embraces "where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority", "interfering with the business of the court on the part of a person who has no right to do so", "obstructing or attempting to obstruct the officers of the Court on their way to their duties" -- See Jowitt's Dictionary of English Law, vol. 1, 2nd ed., at p. 441.

36 An intent to bring a court or judge into contempt is not an essential element of the offence of contempt of court. That was decided in R. v. Hill *(1976), 73 D.L.R. (3d) 621* (B.C.C.A.) McIntyre [page235] J.A., speaking for a unanimous court said at p. 629:

> Even, however, if the cases could not be distinguished on their facts, it is my opinion that an intent to bring a Court or Judge into contempt is not an essential ingredient of this office. In Canada the proposition stated in R. v. Gray, [1900] 2 Q.B. 36 at p. 40, by Lord Russell of Killowen has been accepted. He said:
>
> > Any act done of writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.
>
> These words have received the approval of the Supreme Court of Canada in Poje et al. v. A-G. B.C. *(1953), 105 C.C.C. 311*, *[1953] 2 D.L.R. 785*, *[1953] 1 S.C.R. 516*, and in Re Duncan *(1957), 11 D.L.R. (2d) 616*, *[1958] S.C.R. 41*. In my view, they express the law as it now stands in this country.
>
> The word "calculated" as used here is not synonymous with the word "intended". The meaning it bears in this context is found in the Shorter Oxford English dictionary as fitted, suited, apt: see Glanville Williams Criminal Law: General Part, 2d ed. (1961), p. 66.

See also R. v. Froese *(1980), 23 B.C.L.R. 181* (B.C.C.A.)

37 C.J. Miller, Contempt of Court (1976), lists the principal heads of criminal contempt as follows:

1. contempt in the face of the court which involves disruptive or disrespectful behaviour in the courtroom;
2. contempt through infringing the sub judice rule which involves conduct likely to influence the outcome of a trial;
3. scandalizing a court or a justice;
4. victimizing jurors, witnesses and other persons after the conclusion of the proceedings; and
5. publicizing judicial proceedings.

In addition, Miller includes a residual category of contempt offences in which he lumps the following: obstructing persons officially connected with [page236] the court or its process, interference with persons under the special protective jurisdiction of the court, breach of duty by persons officially connected with the court or its process, forging, altering or abusing the process of the court, divulging the confidences of the jury room, preventing access by the public to courts of law, service of process in the precinct of the court, and disclosing the identity of witnesses.

38 The branch of contempt that comes close to resembling the problem posed by picketing is the prevention of public access to the courts, which falls within Miller's residual category. Although the Australian case Ex parte Tubman; Re Lucas, [1970] 3 N.S.W.R. 41 (N.S.W.C.A.), Miller cites in support of this category bears no factual similarity to picketing, Aspey J.A. in that case made the following comments (at p. 51):

> I have no doubt that, when the proceedings of a court are to be administered as a forum open to the public, any person who, without lawful authority or justification, prevents or attempts to prevent not only parties, their legal representatives or witnesses but also members of the public who are desirous of being present at those proceedings from entering the court or its precincts could be adjudged guilty of contempt of court....

39 Acts which interfere with persons having duties to discharge in a court of justice, including parties, witnesses, jurors and officers of the court, constitute a contempt, see e.g. Borrie and Lowe's Law of Contempt (2nd ed. 1983), pp. 205 et seq; Miller, Contempt of Court (1976), at p. 229. In Attorney-General v. Times Newspapers Ltd., [1974] A.C. 273 (H.L.) at p. 310, Lord Diplock observed that contempt included "conduct that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law ...." Such conduct affects not only the particular interests of the parties to the case but also the public interest in the due administration of Justice.

Similarly, in Golder v. United Kingdom, supra, at pp. 535-36, the European Court of Human Rights upheld the right of access [page237] to the courts as a fundamental and universally recognized principle.

40 Wills J. in R. v. Davies, [1906] 1 K.B. 32, at p.41, referred to the "great principle" that courts or the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorized interference, and that the law provides effective means by which this end can be secured.

41 Conduct designed to interfere with the proper administration of justice constitutes contempt of court which is said to be "criminal" in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole: Poje v. Attorney General for British Columbia, *[1953] 1 S.C.R. 516*. It follows that McEachern C.J.S.C. and the British Columbia Court of Appeal correctly concluded that the picketing of the court-houses of British Columbia constituted a criminal contempt.

Procedural Questions

42 The Union contends that McEachern C.J.S.C. lacked jurisdiction to enjoin picketing on his own motion and ex parte. The action taken by the Chief Justice was admittedly unusual, but so was the situation which confronted him. The case law does hold that the court may in certain instances act ex

mero motu. In Poje, supra, an injunction had been issued in a labour dispute. The injunction was disobeyed but the dispute between the immediate parties had been settled and they accordingly had no interest in taking contempt proceedings. This Court held that in certain circumstances, a breach of a court order undermined a court's authority, and that even though the immediate parties chose not to proceed, the court could act on its own. There are many other instances where this authority has been upheld and acted upon:

Foothills Provincial General Hospital Board v. Broad *(1975), 57 D.L.R. (3d) 758* (Alta. S.C.); Churchman v. Joint Shop Stewards' Committee of the Workers of the Port of London, [page238] [1972] 3 All E.R. 603 (C.A.); Con-Mech (Engineers) Ltd. v. Amalgamated Union of Engineering Workers, [1973] I.C.R. 620; R. v. United Fishermen and Allied Workers' Union *(1967), 63 D.L.R. (2d) 356* (B.C.C.A.)

43 The English authorities were reviewed and summarized in Balogh v. Crown Court at St. Alban's, [1974] 3 All E.R. 283 (C.A.), at p. 287 and p. 288, by Lord Denning MR:

> Gathering together the experience of the past, then whatever expression is used, a judge of one of the superior courts or a judge of assize could always punish summarily of his own motion for contempt of court whenever there was a gross interference with the court of justice in a case that was being tried, or about to be tried, or just over -- no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others -- whenever it was urgent and imperative to act at once.
>
> . . .
>
> This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately -- so as to maintain the authority of the court -- to prevent disorder -- to enable witnesses to be free from fear -- and jurors from being improperly influenced -- and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt. ... But properly exercised, it is a power of the utmost value and importance which should not be curtailed.

44 Similarly, there is ample authority for the issuance of ex parte injunctions in those situations where the delay necessary to give notice to the party sought to be enjoined will entail the irreparable loss of rights. McEachern C.J.S.C. faced such a situation on the morning of November 1, 1983. It was, as I have said, a normal working day for the courts and if the courts were to carry on with important matters, immediate and decisive [page239] action was called for. It was, in the words of Lord Denning "urgent and imperative to act at once".

45 Although the act of picketing did not take place strictly within the court room itself, the courts of British Columbia found, correctly in my view, that it constituted contempt in the face of the court. The picketing was within the immediate precincts of the court-houses, obvious to all who approached the courts, including the Chief Justice as he entered the Vancouver court-house that day, and it was directed against the immediate activity taking place in the courts. In the Balogh case, supra, the English Court of Appeal confirmed that the summary power to deal with contempt could be exercised even though the activity in question did not take place immediately within the court room. See also McKeown v. The Queen, [1971] S.C.R. 466.

46 McEachern C.J.S.C. acted ex parte, but it should also be noted that he took careful account of the

procedural rights at stake. The appellant Union was expressly given the right to move to have the order set aside and this, of course, happened within two days of the original order. At that time, full rights to present evidence and argument were accorded to the Union. While the Chief Justice acted upon his own observations, the case did not involve contested facts. The argument on the motion to set aside centred upon applicable legal principles. No one was convicted of contempt and no penalty was imposed. The effect of the order was really to put the Union and its members on notice that their conduct constituted a contempt and that if it continued, penalties would be imposed in the future. If the injunction had been disobeyed, and if charges of contempt had been brought, it would have been necessary to invoke the usual procedures and to respect the safeguards available to anyone charged with a criminal contempt. But that was not the situation confronting McEachern C.J.S.C. on the morning the picket lines were set up. As Chief Justice, he had the legal constitutional right and duty to ensure that the courts of the province would continue to function. His action went no further than that which [page240] was necessary to ensure respect for that most important principle.

VI

Labour Legislation

47 The Union contends that the Labour Code, R.S.B.C. 1979, c. 212, confers exclusive jurisdiction to enjoin any picketing in connection with a labour dispute upon the Labour Relations Board of British Columbia.

48 As the judgments already delivered in this matter point out, both the Labour Relations Board and the courts of British Columbia have held that while the Board does have jurisdiction in relation to what might be described as the labour relations aspect of picketing, the courts retain full authority to deal with violations of civil and criminal law arising from picketing.

49 It is well established that the courts have the jurisdiction to defend their own authority. This jurisdiction is inherent in the very idea of a court. It is admirably summarized by I.H. Jacob in "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23, at pp. 27-28:

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[page241]

50 In Better Value Furniture (CHWK) Ltd. v. General Truck Drivers and Helpers Union, Local 31 *(1981), 26 B.C.L.R. 273* (B.C.C.A.), (leave to appeal to the Supreme Court of Canada refused [1981] 2 S.C.R. viii), Nemetz C.J.B.C., speaking for the majority, said at p. 276:

> "A difficult question of law is thus raised, which can only be answered by examining the apposite sections of the Labour Code. It is to be remembered that the Code came into being in 1973, and had the effect, inter alia, of transferring from the courts to the labour board the jurisdiction to deal

with provincial labour disputes. As a consequence of this enactment, it was inevitable that litigation would ensue in order to delineate the borders of jurisdiction of the courts vis-a-vis the board. One of the first suits had to do with the jurisdiction of the board to prohibit picketing which forcibly cut off an employer from its mine property. The board found that it had no jurisdiction to restrain this forcible aspect of picketing. The board concluded that it had exclusive jurisdiction over the industrial relations regulation of picketing, such as its object, timing, and location, while the courts retained jurisdiction over violations of the general law, both civil and criminal, occurring in the course of picketing (Anex Placer Ltd. v. C.A.I. M.A.W.K. *[1975] 1 C.L.R.B.R. 269*). This position has been adopted, correctly, in my opinion, by the Supreme Court of British Columbia in several decisions: All-town Const. Ltd. v. United Brotherhood of Carpenters and Joiners of Amer., Loc. 1598, McKay, J., 1976 (unreported); Central Native Fishermen's Co-op. v. B.C. Prov. Council, *[1975] 6 W.W.R. 699*, *76 C.L.L.C. 14,040*, *61 D.L.R. (3d) 677* (B.C.) (per Toy J.); Alcan Smelters & Chemicals Ltd. v. Can. Assn. of Smelter & Allied Wkrs., Loc. 1 *(1977), 3 B.C.L.R. 163* (S.C.) (per MacFarlane J.); Miko & Sons Logging Ltd. v. Penner, *[1976] 4 W.W.R. 756*, *77 C.L.L.C. 14,063* (per McKay J.); and Pitura v. Lincoln Motors *(1978), 9 B.C.L.R. 77*, *94 D.L.R. (3d) 421* (sub nom, Pitura v. Lincoln Manor Ltd.) (S.C.) (Per Munroe J.).

51 Then, after referring to Labour Code, s. 28, Nemetz, C.J.B.C. said at page 278-79:

À propos s. 28, it is manifest that a "matter" cannot be the subject of a complaint unless it contravenes the Labour Code, a collective agreement or the regulations. In respect of s. 31 the same situation obtains: "...the board has and shall exercise exclusive jurisdiction to [page242] hear and determine an application or complaint under this Act" (the italics are mine). This clearly shows that the board's jurisdiction is confined to hearing applications or complaints coming under the Labour Code. Conversely, it follows that there is jurisdiction in the court to consider any matter that does not involve contraventions of the Labour Code, a collective agreement or the regulations. This interpretation is supported by the general scheme of the Act which establishes limits to the extent of the board's jurisdiction, e.g., s. 32(4), which provides that the board's consent to an action for damages is required only in a case where the injury or losses arise as a consequence of conduct contravening the Code. Even s. 33, granting the board jurisdiction to determine the extent of its own jurisdiction, is limited to its jurisdiction "under this Act, a collective agreement or the regulations". This action for damages is brought against the union for inducing breach of contract by interfering with the contractual relations between the non-allied distributor and Better Value. It is an action in tort, the merits of which can be determined independently of finding a breach of the Code, its regulations or a collective agreement.

52 Counsel for the Attorney General of Canada submitted:

(7) The fact the order was issued in relation to a criminal contempt brings it within the federal jurisdiction under head 91(27) of the Constitution Act, 1867, relating to criminal law and procedure.

. . .

(8) The inherent (or common law) jurisdiction of the courts to punish for contempt is preserved by s. 8 of the Criminal Code, R.S.C. 1970, c. 34, [sic] as amended.

. . .

(9) Control of labour relations of provincial court employees is prima facie within provincial legislative jurisdiction...

53 I agree with counsel's three submissions. Striking court employees, as anyone else, must obey the law in relation to criminal contempt, just as they are subject to the legislated offences in the Criminal Code. To argue, as the Union does, that striking court employees are not controllable by the federal criminal power in this sense is to suggest [page243] that they can ignore the criminal law with impunity, simply because their labour relations are governed by provincial labour legislation.

54 The Union also contends that as the strike was lawful, and as the Labour Code permits picketing in the course of a lawful strike, the legality of all aspects of picketing is put beyond the reach of the criminal law or criminal contempt. This sweeping proposition cannot be accepted. The Labour Code covers picketing from the aspect of labour relations only. It does not confer a blanket immunity upon picketers, whatever laws they break. Although lawful for labour relations purposes, picketing which restricts access to the courts is not relieved of being classified as criminal under the law of contempt.

VII

The Charter Claims of the Union

55 The Charter arguments advanced by the Union apparently did not figure large in the courts below. As I have indicated, they are not referred to in the reasons of McEachern C.J.S.C. and although brief mention is made of the Charter in the reasons of Nemetz C.J.B.C., only s. 2(b) and (c) are alluded to. Before this Court, constitutional questions were stated and reliance was placed on ss. 7, 11(a), (c) and (d), as well as s. 2(b) and (c). The Union, however, expressly abandoned any reliance on s. 11(c) and made no submissions on s. 2(c). It remains therefore to consider ss. 2(b), 7, 11(a) and (d).

56 As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to Charter scrutiny. RWDSU v. Dolphin Delivery, *[1986] 2 S.C.R. 573*, holds that the Charter does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. [page244] The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the Charter.

Section 2(b) -- Freedom of Expression

57 This Court has held that picketing in the context of a labour dispute contains an element of expression which attracts the protection of s. 2(b): Dolphin Delivery, supra, at p. 586 and p. 588:

> The question now arises: Is freedom of expression involved in this case? In seeking an answer to this question, it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective

> customers from doing business with the respondent. The question then arises. Does this expression in the circumstances of this case have Charter protection under the provisions of s. 2(b), and if it does, then does the injunction abridge or infringe such freedom?
>
> . . .
>
> The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

[page245]

58 The picketing in the circumstances of the case at bar was peaceful and there were no threats of violence or acts of violence, nor was there any destruction of property. What is at issue is the right of the Union and its members to urge members of the public not to enter the court-house. It is true that apart from the Charter, for the reasons just given, the picketing was unlawful. In Dolphin Delivery, the picketing was also unlawful in that it constituted the tort of inducing breach of contract. The Court held that the constitutional validity of an injunction to restrain commission of that tort had to be determined pursuant to the analysis required under s. 1 of the Charter. The issue here is whether the law of criminal contempt and the injunction to enforce the law pass scrutiny under the Charter, and it follows from Dolphin Delivery that this issue must be dealt with pursuant to s. 1.

59 Before considering this issue, I will canvass the other Charter rights alleged to have been infringed.

Section 7

60 Section 7 of the Charter provides:

> 7. 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.

61 Assuming for the purposes of the argument that the effect of the injunction was to deny the Union members' right to liberty protected by s. 7, the denial of that right was fully in accordance with the principles of fundamental jus plainly does not violate s. 7 of the Charter solely because it was granted ex parte. Where the circumstances are such that the delay necessary to give notice might result in an immediate and serious violation of rights, an ex parte injunction may be issued. The effect of the injunction was to put the appellants on notice that their conduct was unlawful and that [page246] it would be sanctioned if it continued. In the circumstances, the order of McEachern C.J.S.C. constituted a minimal interference with the procedural rights of those who had set out on a deliberate course of action which could only result in a massive disruption of the activities of the courts and consequent interference with the legal and constitutional rights of all citizens of British Columbia. Given that context, it can hardly be said that the order violated fundamental justice.

Section 11(a) and (d)

62 Section 11(a) and (d) provide as follows:

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

63 At no stage in the entire history of this matter has there been anyone charged with an offence nor has any penal sanction been imposed upon any offender. In Attorney-General of Quebec v. Laurendeau *(1982), 145 D.L.R. (3d) 526*, *33 C.R. (3d) 40* (Que. S.C.), at p. 528, Rothman J. said:

> (TRANSLATION) I am not convinced, however, that the summary motion for contempt presented by the Crown in the case at bar constitutes a charge or that the contempt referred to in the motion constitutes an offence within the meaning of s. 11(f) of the Charter.
>
> The exercise by a superior court of criminal jurisdiction of contempt of court powers is merely an aspect of the exercise of inherent powers essential to the administration of justice in any criminal case.
>
> In exercising these inherent powers the court is not accusing a person of having committed an offence within the ordinary meaning of that word.

64 Had the injunction been disobeyed and had proceedings been taken against an individual for such disobedience, then obviously at that stage, the ordinary procedural guarantees would apply. However, [page247] the matter never reached that position and no charges were ever made. On this aspect alone, the claims arising under s. 11(a) and (d) fail.

65 It is true, as stated, that McEachern C.J.S.C.'s original order was ex parte and that no notice was given to the picketers, nor were they afforded an opportunity to be heard. Had McEachern C.J.S.C. imposed immediate fines or jail sentences at that stage, a s. 11(a) claim might well have arisen. However, there can be no violation of s. 11(a) when no person was charged with a specific offence and, hence, there was no one to notify of such offence.

66 With reference to s. 11(d), there was no violation of the right to be presumed innocent until proven guilty as no finding of guilt has been made against any individual. For the reasons given under s. 7, the proceedings were fair within the meaning of s. 11(d). As for the requirement of an independent and impartial tribunal, the very purpose of McEachern C.J.S.C.'s order was to protect that important right. It would be strange indeed if the Charter claims of the members of the appellant Union, all standing outside the court-house, not charged with any offence and not facing any threat of immediate imprisonment, were to prevail to the detriment of the Charter rights of those within the court-house awaiting bail hearings and trials.

Section 1

67 It follows from the foregoing that the section 2(b) claim falls to be decided under s. 1. Freedom of expression protected by s. 2(b) of the Charter is obviously a highly valued right as is the individual liberty reflected in a modern democratic society by the right to strike and the right to picket. A balance must be sought to be attained between the individual values and the public or societal values. In the instant case, the task of striking a balance is not difficult because without the public right to [page248] have absolute, free and unrestricted access to the courts the individual and private right to freedom of expression would be lost. The greater public interest must be considered when determining the degree of protection to be accorded to individual interests.

68 As already indicated, the picketing constituted a deliberate course of conduct which could only result in massive disruption of the court process of British Columbia, and the consequential interference with the legal and constitutional rights of Canadian citizens. Assuring unimpeded access to the courts is plainly an objective "of sufficient importance to warrant over-riding the constitutionally protected right of freedom" (R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*, at p. 352) and relates to a concern which is "pressing and substantial in a free and democratic society" (R. v. Oakes, *[1986] 1 S.C.R. 103*, at pp. 138-139). The means taken by McEachern C.J.S.C. to accomplish that objective satisfy the three-step proportionality test established by this Court in Oakes.

69 First, there is a rational connection between the injunction and the objective of ensuring unimpeded access to the courts.

70 Second, the injunction accomplished this objective by impairing as little as possible the s. 2(b) rights of the members of the Union. The evidence indicated that if the picketing of court-houses continued, access would have been impeded. The injunction left the Union and its members free to express themselves in other places and in other ways so long as they did not interfere with the right of access to the courts.

71 Finally, there was a proportionality between the effects of the injunction on the protected right and the objective of maintaining access to the court. The injunction, it is important to recall at this stage, was not intended to vindicate the dignity of the court or the judges but rather to maintain [page249] access to the institution in our society directly charged with responsibility of ensuring respect for the Charter. A significant element therefore of the objective of the injunction order was to protect Charter rights. The Charter surely does not self-destruct in a dynamic of conflicting rights. The remarks of Salmon L.J. in Morris v. Crown Office, supra at pp. 1086-87, although not made with reference to an entrenched constitutional right, are still apposite. The appellants had been found in contempt for having disrupted a trial to which they were not parties by staging a protest, shouting slogans and scattering pamphlets:

> Everyone has the right publicly to protest against anything which displeases him and publicly to proclaim his views, whatever they may be. It does not matter whether there is any reasonable basis for his protest or whether his views are sensible or silly. He can say or write or indeed sing what he likes when he likes and where he likes, providing that in doing so he does not infringe the rights of others. Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty. The appellants, rightly or wrongly, think that they have a grievance. They are undoubtedly entitled to protest about it, but certainly not in the fashion they have chosen. In an attempt, and a fairly successful attempt, to gain publicity for their cause, they have chosen to disrupt the business of

> the courts and have scornfully trampled on the rights which everyone has in the due administration of justice; and for this they have been very properly punished, so that it may be made plain to all that such conduct will not be tolerated -- even by students. [Emphasis added.]

72 While the injunction limited the s. 2(b) Charter rights of the members of the Union, that limitation was wholly proportional to the objective of the order, namely, to maintain access to the courts and to ensure that the courts remained in operation in order that the legal and Charter rights of all citizens of the province would be respected.

[page250]

VIII

Conclusion

73 In the result, I would dismiss the appeal and answer the constitutional questions as follows:

Question 1:

Answer: A provincial superior court judge does have the constitutional jurisdiction to make an order enjoining picketing of court-houses by or on behalf of a union representing court employees engaged in a lawful strike.

Question 2:

Answer: It is not necessary to answer this question for the purposes of this appeal.

Question 3:

Answer: The order by the Chief Justice of the Supreme Court of British columbia dated November 1, 1983 restraining picketing and other activities within the precincts of all court-houses in British Columbia did infringe or deny the rights and freedoms guaranteed by s. 2(b), of the Canadian Charter of Rights and Freedoms but did not infringe or deny the rights guaranteed by ss. 7, 11(a) and (d).

Question 4:

Answer: The order was justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982.

The following are the reasons delivered by

McINTYRE J.

74 I have read the reasons for judgment prepared in this appeal by the Chief Justice. I agree with his result and with his reasons with one exception. I would not find any infringement of any Charter-protected right of the Union or its members in the judgments of the Trial Court or the Court of Appeal. Consequently, I would [page251] answer question 3 in the negative and it would be unnecessary to answer question 4.

75 The Chief Justice has said, and with this I am in full agreement, that the rule of law is the very foundation of the Charter and that free access to the courts is essential to the maintenance of the rule of law. He has considered it inconceivable that:

> ... Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.

In my view, the right of such free access is Charter-protected, and I agree with the Chief Justice where he said:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice. Counsel for the Attorney General of British Columbia posed this question:
>
> > By what authority and on what criteria were the Union leaders deciding who were to be given passes and who were to be denied them?
>
> I cannot believe that the Charter was ever intended to be so easily thwarted.

76 The injunction granted at first instance enjoined conduct which was calculated to interfere with the operations of the courts of the Province or to restrict or limit access to the courts. In this, it is clear that it enjoined the Union and its members from engaging in conduct which was aimed at the infringement or limitation of the Charter-protected rights of others. In so doing, I am unable to find that any Charter right of the Union or its members was affected or limited and, therefore, there is no occasion to resort to s. 1 of the Charter.

77 I see no parallel here with the Dolphin Delivery case, RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*. I agree, as said there, that any picketing involves some element of expression and, further, that it is not every action accompanying the expression which will alter the transaction and remove Charter protection. It was also said, however, [page252] that protection would not be accorded to clearly unlawful conduct. The conduct here enjoined was clearly unlawful and calculated to infringe the Charter rights of those seeking access to the courts. This cannot be said of Dolphin Delivery where the illegality of the conduct concerned only an interference with contractual rights, a tort, the acceptability of which as a limitation imposed by law might or might not have been supported under s. 1, whereas the effect of the picketing in issue here was described by the Chief Justice in these words:

> Accused persons have a Charter right to a fair trial and a statutory right to make full answer and defence. Witnesses crucial to the defence could well have been deterred from even requesting a pass to enter the courthouse to give vital evidence. It is perhaps unnecessary to multiply the

> examples. The point is clear. Picketing a courthouse to urge the public not to enter except by permission of the picketers could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia.

This is not a case such as Dolphin Delivery which required a balancing of conflicting rights. What is in issue here is the question of whether any person or group may have a Charter right to engage deliberately in conduct calculated to abridge the Charter rights of others. In my view, no such right can exist and resort to s. 1, which can only have application where there has been an infringement of a Charter right, was therefore unnecessary.

78 In all other respects, I agree with the Chief Justice.

Beaudoin v. British Columbia

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.E. Hinkson C.J.S.C.

Heard: February 12, 2021.

Judgment: February 17, 2021.

Docket: S210209

Registry: Vancouver

[2021] B.C.J. No. 272 | 2021 BCSC 248

Between Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack, Petitioners, and Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia, Respondents

(71 paras.)

Case Summary

Constitutional law — Constitutional proceedings — Practice and procedure — Injunctions — Application by respondents for injunction to prohibit petitioners from breaching Ministerial order and public health orders made in response to COVID-19 pandemic that prohibited gatherings, including religious gatherings, dismissed — Petitioners, church parishioners and pastors, were seeking to quash impugned orders on basis of Charter violations — Ability of Government to make orders that affected Charter rights of petitioners was fair question to be tried — Both sides could suffer irreparable harm — Given alternate remedies available, balance of convenience did not favour granting injunction.

Government law — Crown — Practice and procedure — Injunctions — Application by respondents for injunction to prohibit petitioners from breaching Ministerial order and public health orders made in response to COVID-19 pandemic that prohibited gatherings, including religious gatherings, dismissed — Petitioners, church parishioners and pastors, were seeking to quash impugned orders on basis of Charter violations — Ability of Government to make orders that affected Charter rights of petitioners was fair question to be tried — Both sides could suffer irreparable harm — Given alternate remedies available, balance of convenience did not favour granting injunction.

Health law — Public health — Health emergency management — Provincial powers — Powers to take measures to protect public health and safety — Practice and procedure — Injunctions — Application by respondents for injunction to prohibit petitioners from breaching Ministerial order and public health orders made in response to COVID-19 pandemic that prohibited gatherings,

including religious gatherings, dismissed — Petitioners, church parishioners and pastors, were seeking to quash impugned orders on basis of Charter violations — Ability of Government to make orders that affected Charter rights of petitioners was fair question to be tried — Both sides could suffer irreparable harm — Given alternate remedies available, balance of convenience did not favour granting injunction.

Application by the respondents for an injunction to prohibit the petitioners from breaching a Ministerial order and public health orders that prohibited gatherings, including religious gatherings. The impugned orders were made in response to the COVID-19 pandemic. The petitioners, church parishioners and pastors, were seeking to quash the impugned orders and certain violation tickets issued pursuant to the impugned orders. The petitioners' churches had held in-person services since the orders were made. They alleged the impugned orders breached their rights under the Charter.

HELD: Application dismissed.

The ability of the Government to make orders that affected the Charter rights of the petitioners was a fair question to be tried. Failure to enforce the law could have the effect of depriving the public of the benefit of orders that had been duly enacted and which might be held valid. That deprivation was irreparable harm. The harm that would arising from granting an injunction might deprive the petitioners of constitutional rights, even if they were ultimately successful, which amounted to irreparable harm to them. There were alternate remedies available to the respondents to enforce the impugned orders. The balance of convenience did not favour granting the injunction.

Statutes, Regulations and Rules Cited:

Canada Act, 1982, c. 11

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2, s. 2(a), s. 2(b), s. 2(c), s. 2(d), s. 7, s. 15(1)

Constitution Act, 1982

COVID-19 Related Measures Act, *SBC 2020, c. 8*

Land Act, *R.S.B.C. 1996, c. 245*

Law and Equity Act, *R.S.B.C. 1996, c. 253, s. 39*

Public Health Act, *S.B.C. 2008, c. 28, s. 30*, s. 31, s. 32, s. 38, s. 39(3), s. 43, s. 47, s. 48, s. 99, s. 100, s. 108

Supreme Court Civil Rules, *B.C. Reg. 168/2009*

Counsel

Counsel for the Petitioners: P. Jaffe, M. Moore.

Counsel for the Respondents: G. Morley, E. Lapper.

Reasons for Judgment

C.E. HINKSON C.J.S.C.

Introduction

1 We are in the midst of a terrible pandemic. Our provincial government, under the guidance of the respondent Dr. Bonnie Henry, is doing its best to protect us from the ravages of the pandemic.

2 Many are finding solace and comfort in these troubled times in their religious views and practices, and gathering together with others who share their views and practices.

3 The petitioners protest a Ministerial Order and certain orders made by the respondent Dr. Henry in response to the COVID-19 pandemic. The orders restrict gatherings and events, including religious gatherings. The petitioners seek to have them declared to be of no force and effect as unjustifiable infringements of their, or their parishioners' *Charter* rights. They seek to have the orders quashed, and interim and final injunctions granted to enjoin the respondents from further enforcement action that would interfere with religious services, as well as an order quashing certain violation tickets issued pursuant to the impugned orders.

The Parties

4 The petitioner Alain Beaudoin was born and resides in British Columbia. He has worked here as a residential care worker, an animal control officer and as a medic in the oil and gas industry. He has involved himself in advocacy for both what he sees as his own rights and those of others.

5 The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner Mr. Van Muyen is the Chair of the Council of Immanuel Covenant Reformed Church. They seek the same relief as Mr. Beaudoin, as do the other petitioners, which are churches whose members are or may be affected by the impugned orders.

6 The respondents are Her Majesty the Queen in Right of the Province of British Columbia, and Dr. Bonnie Henry, the Provincial Health Officer. I was advised by counsel for the respondents that Her Majesty the Queen in Right of the Province of British Columbia is represented by the Attorney General of British Columbia, and that the style of cause should be amended to reflect that representation. I will allow such an amendment.

7 Notwithstanding the orders impugned by the petitioners, the respondents seek an injunction from this Court to force compliance with those orders.

Orders Sought

8 The petition is scheduled to be heard beginning March 1, 2021. It is at that time that the merits of the parties' respective positions will be heard. For now, the respondents seek an injunction in the following

terms:

1. A prohibitory interlocutory injunction that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. must not permit the following premises of the petitioner churches:

a. 8-20178 96 Avenue, Langley, British Columbia;

b. 35063 Page Road, Abbotsford, British Columbia; or

c. 45471 Yale Road West, Chilliwack, British Columbia;

or any other premises to be used for an in-person worship or other religious service, ceremony or celebration, or other "event" as defined in the January 8, 2021 Order of the Provincial Health Officer, Gatherings and Events ("the PHO Order), as amended or as repealed and replaced except:

d. in accordance with the PHO Order;

e. as permitted by further order of this Court; or

f. as permitted by an agreement under s. 38 of the *Public Health Act.*

g. A prohibitory interlocutory injunction ordering that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. (collectively, "the Religious Petitioners") must not organize, host or in any way facilitate or participate in an in-person worship or other religious service, ceremony or celebration, wedding, baptism, funeral or other "event" as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

d. A prohibitory interlocutory injunction ordering that Brent Smith, John Koopman, John Van Muyen must not be present at an in-person worship or other religious service, ceremony or celebration, wedding, baptism, funeral or other "event" as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

d. An order authorizing any police officer with the appropriate authority in the jurisdiction in question ("the Police") to, in their discretion, detain a person who has knowledge of this Order and of whom the Police have reasonable and probable grounds to believe that the person is intending to attend a worship or other religious service, ceremony or celebration prohibited by this Order in order to prevent the person from attending the worship or other religious service, ceremony or celebration.

e. An order that the parties to this proceeding and any other persons affected by this Order may apply to this Court for a variation of the Order and that, unless the court otherwise orders, any application to vary must be brought on notice to the parties in accordance with the *Supreme Court Civil Rules*. *B.C. Reg. 168/2009*.

f. The order is to remain in force until varied or until final determination of the Petition on the merits and expiry of all applicable appeal periods.

The Impugned Orders

9 The Ministerial Order that is challenged by the petitioners was made under the *COVID-19 Related Measures Act, SBC 2020, c. 8*.

10 The orders that are challenged by the petitioners have been made pursuant to ss. 30, 31, 32 and 39(3) of the *Public Health Act*, *S.B.C. 2008, c. 28*. Those sections provide that:

> **30** (1) A health officer may issue an order under this Division only if the health officer reasonably believes that
>
> (a) a health hazard exists,
>
> (b) a condition, a thing or an activity presents a significant risk of causing a health hazard,
>
> (c) a person has contravened a provision of the Act or a regulation made under it, or
>
> (d) a person has contravened a term or condition of a licence or permit held by the person under this Act.
>
> (e) For greater certainty, subsection (1) (a) to (c) applies even if the person subject to the order is complying with all terms and conditions of a licence, a permit, an approval or another authorization issued under this or any other enactment.
>
> **31** (1) If the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:
>
> (a) to determine whether a health hazard exists;
>
> (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;
>
> (c) to bring the person into compliance with the Act or a regulation made under it;
>
> (d) to bring the person into compliance with a term or condition of a licence or permit held by that person under this Act.
>
> (e) A health officer may issue an order under subsection (1) to any of the following persons:
>
> (a) a person whose action or omission
>
> (i) is causing or has caused a health hazard, or
>
> (ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;
>
> (b) a person who has custody or control of a thing, or control of a condition, that
>
> (i) is a health hazard or is causing or has caused a health hazard, or

(ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;

(c) the owner or occupier of a place where

(i) a health hazard is located, or

(ii) an activity is occurring that is not in compliance with the Act or a regulation made under it, or a term or condition of the licence or permit of the person doing the activity.

32 (1) An order may be made under this section only

(a) if the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, and

(b) for the purposes set out in section 31 (1) *[general powers respecting health hazards and contraventions]*.

(c) Without limiting section 31, a health officer may order a person to do one or more of the following:

(d) have a thing examined, disinfected, decontaminated, altered or destroyed, including

(e) by a specified person, or under the supervision or instructions of a specified person,

(ii) moving the thing to a specified place, and

(iii) taking samples of the thing, or permitting samples of the thing to be taken;

(b) in respect of a place,

(i) leave the place,

(ii) not enter the place,

(iii) do specific work, including removing or altering things found in the place, and altering or locking the place to restrict or prevent entry to the place,

(iv) neither deal with a thing in or on the place nor dispose of a thing from the place, or deal with or dispose of the thing only in accordance with a specified procedure, and

(v) if the person has control of the place, assist in evacuating the place or examining persons found in the place, or taking preventive measures in respect of the place or persons found in the place;

(c) stop operating, or not operate, a thing;

(d) keep a thing in a specified place or in accordance with a specified procedure;

(e) prevent persons from accessing a thing;

(f) not dispose of, alter or destroy a thing, or dispose of, alter or destroy a thing only in accordance with a specified procedure;

(g) provide to the health officer or a specified person information, records, samples or other matters relevant to a thing's possible infection with an infectious agent or contamination with a hazardous agent, including information respecting persons who may have been exposed to an infectious agent or hazardous agent by the thing;

(h) wear a type of clothing or personal protective equipment, or change, remove or alter clothing or personal protective equipment, to protect the health and safety of persons;

(i) use a type of equipment or implement a process, or remove equipment or alter equipment or processes, to protect the health and safety of persons;

(j) provide evidence of complying with the order, including

(i) getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and

(ii) providing to a health officer any relevant record;

(k) take a prescribed action.

(3) If a health officer orders a thing to be destroyed, the health officer must give the person having custody or control of the thing reasonable time to request reconsideration and review of the order under sections 43 and 44 unless

(a) the person consents in writing to the destruction of the thing, or

(b) Part 5 *[Emergency Powers]* applies.

[...]

39 (3) An order may be made in respect of a class of persons.

11 Section 43 of the *Public Health Act* permits an affected party to apply for the reconsideration or variance of the order of a public health officer, and the petitioners began such an application with respect to the impugned orders on January 29, 2021, but that application remains unresolved.

12 The January 8, 2021 Order of the Provincial Health Officer, regarding Gatherings and Events is simply a renewal and reiteration of a verbal order made on November 7, 2020. That Order prohibits certain "events":

1. No person may permit a place to be used for an event except as provided for in this Order.

...

3. No person may organize or host an event except as provided for in this Order.
4. No person may be present at an event except as provided for in this Order.

13 In the Order, ""event" refers to an in-person of gathering of people in any place whether private or public, inside or outside... including... a worship or other religious service, ceremony or celebration".

14 Dr. Brian Emerson is the Acting Deputy Health Officer for the Province. In his affidavit sworn February 2, 2021, he summarized the order in these terms:

> The current January 8th Gathering and Events order maintains the prohibition on in-person religious services, but does permit drive-in events with more than 50 patrons present as long as people only attend in a vehicle, no more than 50 vehicles are present, people stay in their vehicles except to use washroom facilities, when outside their vehicles they must maintain a distance of two metres from any other attendees, and no food or drink is sold. The January 8th order also provides exceptions for weddings, baptisms, and funerals (to a maximum of 10 people) and permits private prayer/reflection in religious settings.

The Petitioner's Concerns

15 Although phrased in various ways, the concerns of the petitioners are fairly summarized in a letter dated November 28, 2020 from the respondent Immanuel Covenant Reformed Church, which states, in part:

> The default position of the Christian church concerning civil government is to submit to its lawful authority in all civil matters. Throughout Scripture, but most directly in Romans 13:1-7 and 1 Peter 2:13-17, God commands Christians to be subject to the civil government as the civil government is appointed by God and exists for the good of all. We are called to submit to civil authority in all civil matters regardless of whether we personally agree or disagree with their directives or judgements.
>
> However, this duty to obey our civil authorities ends when they command that we engage in behavior contrary to God's Word or when they prohibit what God commands us to do. Ultimately, we must obey God rather than men (Acts 5:29).
>
> We firmly believe that this public health order violates God's Word for two biblical reasons. First, all Christians are called to assemble, in-person, for regular corporate worship services. Christians not only gather together for worship out of love toward God, but also because it is *essential* to our spiritual health and because we are *commanded* to do so (Psalm 65:4; Psalm 84:1; Psalm 95:1, 2; Psalm 111:1; Psalm 122:1; Acts 2:46; Ephesians 5:19; Colossians 3:16; 1 Timothy 4:13; Hebrews 10:23-25). We are called to worship God in the way that He has commanded in Scripture including, though not limited to, hearing the preaching of the Word, partaking of the sacraments of baptism and communion, singing His praises, praying together, confessing His name, exercising church discipline, and fellowship with other Christians. Although some of these aspects of worship can be performed online, many of them cannot.
>
> [Emphasis in the original]

16 Cameron Pollard is the treasurer of the Valley Heights Community Church in Chilliwack, British Columbia. Although that church is not one of the petitioners, it is one of the objects of this injunction application. It is apparent from Mr. Pollard's affidavit of December 21, 2020, sworn in support of the petition, that his church has held in-person services since the November 7, 2020 order.

Background

17 The respondents produced evidence that religious settings can lead to elevated risk of COVID-19 transmission because they:

(a) Generally occur in indoor settings;

(b) Often involve the assembly of a large number of people from different households;

(c) Usually last for an extended duration (defined as longer than 15 minutes) which results in greater duration of exposure and therefore a higher risk of infection and chance of viral spread;

(d) Often include individuals within high risk groups, including older adults and those with comorbidities; and

(e) Often involve loud talking and singing, which may represent greater risk for viral transmission.

18 The petitioners contend that they have not ignored the risks of the transmission of COVID-19. Their responses are varied, but for the most part appear to be consistent with the practice followed at the Valley Heights Community Church in Chilliwack. Timothy Champ is the pastor of that church. In his affidavit sworn December 21, 2021 Pastor Champ stated:

> We were eager to meet in-person, but also eager to make sure those who attended would be kept as safe as possible. In light of this, we established and communicated the following protocols:
>
> * We encourage our members to give non-family members adequate space when arriving, during their time at the service and after the service.
>
> * Upon entry, hand sanitizer and masks are provided to members.
>
> * Every pew in the facility is separated at least 6 ft. from the next pew.
>
> * Physical distancing is required between each person or family group.
>
> * Members are asked to limit the use of the washroom, and parents were urged to accompany their children. Sanitation wipes were provided in the bathroom for cleaning after each use.
>
> * Families are asked to enter, stay together, and exit the building together.
>
> * No childcare or Sunday school for children is provided.
>
> * Those with any symptoms associated with Covid-19, are asked to remain home and join the service online.

19 The petitioner, Robert Smith described the precautions instituted at the Riverside Calvary Chapel in his affidavit sworn December 5, 2020 as:

> * Holding three services on Sunday mornings capped at 50 people;
>
> * Maintaining a reservation link on our website in order for people to reserve a seat and provide contact information;
>
> * Having hand sanitizer stations were [sic] set up throughout the Church buildings;
>
> * Cleaning and wiping down the sanctuary between each service;
>
> * Ensuring that attendees were provided with clean masks;
>
> * Having elders direct orderly and socially distanced entry of persons to the sanctuary and also constantly sanitizing the entry door;
>
> * Keeping our services to an hour so as to maintain a timely flow of people in and out of the building.

20 Notwithstanding similar precautions instituted by the respondent Chilliwack Free Reformed Church, Dr. Henry wrote to the Church on December 18, 2020, advising in part:

> I recognize the importance of religious freedom, and in particular the need for individuals to access the support within faith-based communities during this difficult time. I have had many discussions with religious leaders across the province about the current situation we face in BC and I am appreciative of the support I have received from most religious leaders for helping to

> achieve compliance with public health measures to reduce the spread of COVID-19 in our communities.
>
> In making the most recent orders, I have weighed the needs of persons to attend in-person religious services with the need to protect the health of the public. The limitations on in-person attendance at worship services in the Orders is precautionary and is based on current and projected epidemiological evidence. It is my opinion that prohibiting in-person gatherings and worship services is necessary to protect people from transmission of the virus in these settings.
>
> ...
>
> I am aware that some people do not agree with my decision to prohibit in-person religious services, since other types of activities such as people visiting restaurants or other commercial establishments are permitted with restrictions. In my view, unlike attending a restaurant or other commercial or retail operation (all of which are subject to Worksafe COVID-19 Safety Plans) experience has shown it is particularly difficult to achieve compliance with infection-control measures when members of a close community come together indoors at places of worship.
>
> Unlike dining with one's household members in a restaurant, or visiting an establishment for short-term commercial purposes, it is extremely difficult to ensure that attendees keep appropriate distance from each other in the intimate setting of gatherings for religious purposes attended by persons outside of each attendee's own household. Additionally, singing, chanting, and speaking loudly are proven to increase the risk of infection when indoors.

21 The Ministerial Order that is impugned by the petitioners in this case was granted on November 13, 2020, and an attempt to enforce it was apparently first made on November 29, 2020, now almost seven weeks ago.

Injunctive Relief

22 Jurisdiction to grant relief by way of injunction is conferred on this Court by s. 39 of the *Law and Equity Act, R.S.B.C. 1996, c. 253*. Various other statutes, including s. 48 the *Public Health Act* provide for injunctions in particular cases.

23 In *British Columbia Practice*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2006), the authors state that "injunctions may be granted in a variety of different situations, the basic principle being that an injunction will be granted to enforce or maintain a legal right: *Birmingham (Corp.) v. Allen* (1877), 6 Ch. D. 284 (Ch.); *Ballard v. Tomlinson* (1884), 26 Ch. D. 194 (Ch.); *Sports and General Press Agency Ltd. v. Our Dogs Publishing Co. Ltd.*, [1917] 2 K.B. 125 (C.A.); *Duplain v. Cameron (No. 2)*, *[1960] S.J. No. 62*, *33 W.W.R. 38* (Q.B.); and *Fluorescent Sales and Service Ltd. v. Bastien*, *[1959] A.J. No. 32*, 39 W.W.R. 659 (C.A.)."

24 In *JTT Electronics Ltd. v. Farmer*, *2014 BCSC 2413* at para. 63, Mr. Justice Voith referred to the description by Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2013) at para. 2.10, of an interlocutory injunction as a "drastic" remedy.

The Test for Injunctive Relief

25 The test to be applied when an injunction is sought is set out in the well-known case of *RJR-MacDonald Inc. v. Canada (Attorney-General)*, *[1994] 1 S.C.R. 311* [*RJR-MacDonald*]. It requires the court to consider three factors:

1. Has the applicant demonstrated there is a fair question to be tried?

2. Will the applicant suffer irreparable harm if an injunction is not granted?

3. Does the balance of convenience favour the granting of an injunction?

26 These factors were the subject of discussion by Mr. Justice Beetz, writing for the Court, in the earlier decision of the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores Ltd*., *[1987] 1 S.C.R. 110* [*Metropolitan Stores*]. There the Court established the three-part test that was referred to in determining whether to grant an interlocutory injunction in *RJR-MacDonald*.

(a) Fair Question to be Tried

27 Section 2(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*") protects freedom of conscience and religion. Section 2(b) protects freedom of thought, belief, opinion and expression. Section 2(c) protects freedom of peaceful assembly, and section 2(d) protects freedom of association.

28 Section 7 of the *Charter* protects the life, liberty and security of person.

29 Section 15(1) of the *Charter* protects individuals from discrimination based on religion, among other grounds.

30 The petitioners assert that each of these *Charter* rights are breached by the impugned orders.

31 The respondents concede that at least the s. 2(a) rights of the individual petitioners, and those attending the petitioner churches are breached by the impugned orders, but maintain that the impugned legislation is saved by s. 1 of the *Charter.*

32 The ability of members or delegates of the Legislative Branch of Government to make the orders that affect the *Charter* rights of the individual petitioners and those who wish to attend the petitioner churches is a fair question to be tried.

(b) Irreparable Harm

33 At this stage the only issue to be decided is whether refusal to grant the injunction could so adversely affect the respondents' own interests that the harm could not be remedied even if the eventual decision on the merits does not accord with the result of the interlocutory application: *RJR-MacDonald* at 341.

34 The definition of irreparable harm was set out by the Supreme Court of Canada in *RJR-MacDonald* at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other...

35 If an injunction is not granted, the public, as represented by their elected officials and informed by the advice of Dr. Henry, will likely face what may be greater exposure to the virus.

36 I am satisfied that members of the public could well suffer from the transmission of the virus by persons unsafely attending gatherings, and suffer from the effects of COVID-19, including death.

37 I find that the enforcement of a validly enacted, but challenged law is an obligation of the Executive Branch of the provincial government. Failure to enforce the law could have the effect of depriving the public of the benefit of orders which have been duly enacted and which may in the end be held valid. That deprivation is, in my view, irreparable harm.

38 But the harm that will arise from granting an injunction may deprive the petitioners of constitutional rights that may prove them to entitlement of the relief they seek in their petition, amounting to irreparable harm to them.

(c) The Balance of Convenience

39 As the damages alleged by the respondents satisfy the criterion of irreparable harm, I must consider whether the balance of convenience favours granting the remedy that the respondents seek.

40 In *Metropolitan Stores*, Mr. Justice Beetz discussed the balance of convenience at 129:

> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

41 In *Harper v. Canada (Attorney General)*, *2000 SCC 57*, the majority of the Court commented that:

> 5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.

42 The majority added:

> 9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public

> interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

43 However, the Supreme Court of Canada cautioned in *RJR-Macdonald* at 333-334:

> ... the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

44 If an injunction is granted, the petitioners' s. 2 *Charter* rights will be sacrificed, for a time, even if they are ultimately successful with their petition.

45 The petitioners liken the risk of such exposure to the virus during their religious activities to other activities permitted by Dr. Henry. The petitioners assert that the risks created by their continued religious activities can be reasonably addressed with the safety measures imposed on other activities that create comparable risks without safety measures.

46 The respondents correctly point out that this step in the *RJR-MacDonald* analysis presumes that duly enacted laws are operable. At 346, the majority wrote:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

47 Yet the respondents seek to invoke the authority of the Court to enforce the impugned orders.

48 Both *Harper* and *RJR-Macdonald* are cases where applicants for a stay of the effect of legislation sought stays of the enforcement of that legislation pending the resolution of their claims that the legislation was *ultra vires* the enacting body. The applicants in those cases sought to delay the legal effect of regulations which had already been enacted and to prevent public authorities from enforcing them. Here, it is the enacting body that seeks injunctive relief to enforce its legislation. In the result, the lens through which the application before me is to be viewed commands the exercise of caution to the extent that the reasoning in those decisions are to be employed.

49 The respondents also rely upon the decision of Madam Justice Kimmel in *Her Majesty the Queen in*

Right of Ontario v. Adamson Barbeque Limited, 2020 ONSC 7679 [*Anderson Barbeque*] as support for their submission that injunctive relief should be granted in this case.

50 In that case, the respondents were in breach of provincial legislation passed in response to the COVID-19 pandemic. That legislation specifically contemplated the granting of a restraining order by the Court for the breach of legislation, and Kimmel J. said that she had "no hesitation" in granting injunctive relief to the province.

51 But in *Anderson Barbeque*, there was no *Charter* right engaged, nor was Kimmel J. apprised of the reasoning discussed in *British Columbia (Attorney General) v. Sager et al*, 2004 BCSC 720 [*Sager*], which I will address below.

52 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.

53 When asked if the Attorney General is not more constrained than other litigants seeking injunctive relief, counsel for the respondents asserted that government actors are as entitled to such relief as non-government litigants.

54 While a municipality was granted injunctive relief in *Vancouver (City) v. Zhang*, 2009 BCSC 84, that is not necessarily the case when such relief is sought by the Attorney General.

55 In *Sager,* Madam Justice Quijano considered the extent of the Attorney General's entitlement to injunctive relief at common law where alternative statutory remedies were available. At paras. 21-23, Quijano J. summarized the Attorney General's ability to obtain injunctive relief:

> [21] ... [I]n *British Columbia (Attorney General) v. Perry Ridge Waters Users Assn.*, [1997] B.C.J. No. 2348 (S.C.) ... McEwan J. stated, in *obiter*, at paragraph 9:
>
> > I summarize a great deal of case law in saying that there appears to be considerable authority for the proposition that the Attorney General's resort to the courts for injunctive relief ought to be a final step and not merely a convenient alternative to the application of criminal or other available sanctions.
>
> [22] A number of cases follow in the footsteps of *Perry Ridge* and express concern regarding the use of an injunction as a first choice remedy. These cases are well summarized in *Alliford Bay Logging* by Williamson J. starting at paragraph 4:
>
> > [4] Mr. Ward, for one of the defendants, in a compelling submission argues that it is wrong to resort to court injunctions in these circumstances when the simple course is for the police to act to protect the plaintiff's legal rights by advising protesters that they will be charged pursuant to the *Criminal Code* if they do not cease to impede the way, and by arresting the protesters if they do not accede to that warning.
> >
> > [5] The police in this province, I understand with the knowledge of the Attorney General, do not adopt that course. This is evident from a review of three recent decisions of this court. I am going to refer to those decisions. The first is a decision of Mr. Justice Vickers in *International Forest Products Limited v. Kern*, 2000 BCSC 888, a decision handed down on

June 6, 2000, *[2000] B.C.J. No. 1129*. That learned judge dealt with the issue of whether the police should be enforcing the law. He said in paragraph 29:

In the circumstances that were then ongoing the court concluded that a bubble zone of 500 metres was required in order to preserve peace and order. All three orders are also a result of a political decision by law enforcement officials that a criminal law will not be enforced in this type of dispute, rather it is considered to be a dispute that need only be responded to if the court grants an injunction. Thus it is the order of the court that becomes the subject of criticism and not the decision of law enforcement officials. In the discharge of its duty the court is drawn into a controversy that could have been resolved by more traditional and less costly law enforcement strategies.

[6] The second decision is that of Mr. Justice McEwan in *Slocan Forest Products Limited v. Doe*, a decision dated July 21, 2000, *[2000] B.C.J. No. 1592* [which stated]:

In sum, having had the benefit of explanations offered by the Attorney General and the police for the policies now in place, I am simply not convinced that the rule of law is enhanced by the present process which (a) forces innocent bystanders to seek their own protection by manufacturing ill-fitting civil suits; (b) places the court in a position where it must fashion some remedy at the expense of repeatedly putting its authority in issue; and (c) arguably deprives demonstrators of due process.

[7] The third decision handed down only about a week later which deals with this issue is *International Forest Products Limited v. Kern*, Mr. Justice Pitfield, *2000 BCSC 1141*, *[2000] B.C.J. No. 1533*, so all of these decisions are just this past summer. Mr. Justice Pitfield, in a strongly worded judgment, was critical of the policies in place that the police do not enforce the law in these particular sorts of circumstances. Starting at paragraph 57 he said the following:

Whatever decision has been made the result is regrettable. The court is placed in the unenviable position of being asked to respond in order to preserve the rule of law. It is the duty of the Attorney General to ensure respect for and the benefit of laws enacted by the legislature. In this case the law in question is the right to harvest timber from Crown land. There appear to be adequate provisions in the *Criminal Code* to permit the Attorney General to ensure the required protection. If the Attorney General doubts the adequacy of the criminal law then the legislature should search for other means to ensure that rights it has lawfully created are not abrogated by actions taken by members of the public. The responsibility to devise a means of ensuring that protection should not be delegated to the courts.

[23] Also of significance in the *Alliford Bay* decision is Williamson J.'s analysis of the obiter comments of Esson J.A. of the British Columbia Court of Appeal in *International Forest Products Ltd. v. Kern* *(2000), 144 B.C.A.C. 141*, *2000 BCCA 500*, which provided some support for the government policy of seeking injunctions to restrain public protest where an alternate criminal law remedy was available. Williamson J. determined that the origin of the court's concern regarding this sort of injunctive relief was valid and based upon earlier case law including *Everywoman's Health Centre v. Bridges* *(1990), 54 B.C.L.R. (2d) 273* (C.A.) in which Southin J.A. said at page 285:

There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*.

56 In *Sager*, the province sought an injunction to prevent protestors from blocking construction of a parking lot on Crown land. Madam Justice Quijano observed that there was a statutory remedy that the Attorney General had chosen not to invoke. The *Land Act, R.S.B.C. 1996, c. 245* contained a statutory penalty for trespass where notice is given. Notice could be given by posting it on the Crown land if the identity of the trespasser was unknown. The maximum penalty for non-compliance with the no trespassing notice was $1,000 and could be imposed multiple times. In addition, a public officer could initiate legal action against a trespasser, and under the *Land Act* penalties included fines of up to $20,000 and jail terms of up to six months. Instead of proceeding in that manner, the provincial Crown had not provided notice in the form set out in the *Land Act* and had not utilized the enforcement provisions of the *Land Act*.

57 Madam Justice Quijano held that while it was clear that the Attorney General, as the representative of the public, had the right to seek redress in the courts whenever a public right is infringed or threatened with infringement, the injunction application raised the issue of whether, in the circumstances of the case, the equitable jurisdiction of the court ought to be invoked to restrict the rights of members of the public to enter on Crown land through the use of a Jane/John Doe injunction where the Attorney General had chosen not to utilize the offence provisions of the *Land Act*. She concluded, on a consideration of *Ontario (Attorney General) v. Ontario Teachers' Federation*, *[1997] O.J. No. 4361*, *36 O.R. (3d) 367* (Gen. Div.), that the injunction should be refused.

58 As counsel for the petitioners pointed out, there are means to enforce the impugned orders other than by way of injunctive relief. Section 47 of the *Public Health Act* provides:

> **47** (1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a justice of the peace for an order under this section.
>
> (2) A justice of the peace may issue a warrant in the prescribed form authorizing a health officer, or a person acting on behalf of a health officer, to enter and search a place, including a private dwelling, and take any necessary action if satisfied by evidence on oath or affirmation that it is necessary for the purposes of
>
> (a) taking an action authorized under this Act, or
>
> (b) determining whether an action authorized under this Act should be taken.

59 Sections 99, 100 and 108 of the *Public Health Act* provide, in part:

> **99** (1) A person who contravenes any of the following provisions commits an offence:
>
> [...]
>
> (e) section 14 (3) *[failure to provide information]*;
>
> (f) section 16 *[failure to take or provide preventive measures, or being in a place or doing a thing without having taken preventive measures]*;
>
> (g) section 17 (2) *[failure to take steps to avoid transmission, seek advice or comply with instructions]*;
>
> [...]
>
> (i) section 40 (4) *[failure to comply with instructions]*;
>
> [...]

(k) section 42 *[failure to comply with an order of a health officer]*, except in respect of an order made under section 29 (2) (e) to (g) *[orders respecting examinations, diagnostic examinations or preventive measures]*;

(l) section 56 (2) or (3) *[failure to take emergency preventive measures or comply with instructions]*, except in respect of an order to do a thing described in section 29 (2) (e) to (g);

(2) A person who contravenes any of the following commits an offence:

(a) section 18 *[failure to prevent or respond to health hazards, train or equip employees, or comply with a requirement or duty]*;

[...]

(3) A person who contravenes either of the following commits an offence:

(4) section 15 *[causes a health hazard]*; [...]

(5) A person who does either of the following commits an offence:

[...]

(b) wilfully interferes with, or obstructs, a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person.

(c) A person who commits an offence under this Act may be liable for the offence whether or not an order is made under this Act in respect of the matter.

[...]

100 (1) If a corporation commits an offence under this Act, an employee, an officer, a director or an agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted.

(2) If an employee commits an offence under this Act, an employer who authorized, permitted or acquiesced in the offence commits the offence whether or not the employee is identified or convicted.

[...]

108 (1) In addition to a penalty imposed under section 107 *[alternative penalties]*, a person who commits an offence listed in

(a) section 99 (1) *[offences]* is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,

(b) section 99 (2) or (4) is liable on conviction to a fine not exceeding $200 000 or to imprisonment for a term not exceeding 6 months, or to both, or

(c) section 99 (3) is liable on conviction to a fine not exceeding $3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

60 In his affidavit, Mr. Pollard described the attendance of two members of the RCMP to his church on November 29, 2020 and says that one of the officers, Officer Peters, threatened those in attendance that day "with up to 6 months in jail and massive fines, upwards of $50,000".

61 According to a statement attributed to the Chilliwack RCMP on December 12, 2020, a report of three churches holding in-person services "was actively investigated by the RCMP and the evidence gathered

has resulted in the Chilliwack RCMP forwarding a report to the B.C. Prosecution Service for charge assessment of these violations".

62 In *Vancouver Fraser Port Authority v. John Doe, Jane Doe et al,* 2020 BCSC 244, Mr. Justice Tammen issued an injunction to enjoin an organized protest activity in the form of a blockade attempting to prevent access to the Port of Vancouver.

63 In his reasons for judgment, Tammen J. found:

> 15 Moreover, the current blockade is designed to be a direct attack on the rule of law. It amounts to organized, unlawful activity as a means of voicing disapproval of a court order. Obviously such conduct cannot be countenanced by the court. A police enforcement clause is clearly appropriate.

64 When six individuals were arrested for their alleged refusal to comply with Tammen J.'s injunction, the matter was referred to the B.C. Prosecution Service for the consideration of criminal charges for contempt of court. The B.C. Prosecution Service acknowledged that "there have been other incidents" at the location that was the subject of the injunction order of Tammen J., but observed that those had not led to arrests.

65 The B.C. Prosecution Service considered Tammen J.'s referral and concluded that the evidentiary standard for such prosecutions had been met, and that there was a substantial likelihood of conviction if such charges were initiated. Notwithstanding these conclusions, the B.C. Prosecution Service declined to initiate criminal prosecutions on the basis that it was not required in the public interest "given the nature of the offences and the passage of time during the COVID pandemic".

66 Despite the finding of Tammen J. that the blockade he had dealt with constituted a direct attack on the rule of law by an organized group voicing disapproval of a court order, the reputation of administration of justice was brought into disrepute because no consequences were pursued.

67 If the statement attributed to the Chilliwack RCMP that they forwarded a report to the B.C. Prosecution Service for charge assessment of the violations alleged against three churches is correct, the B.C. Prosecution Service has already been made aware of the conduct of, or similar to that of the petitioners.

68 I am left to wonder what would be achieved by the issuance of an injunction in this case. If it were granted and not adhered to, would the administration of justice yet again be brought into disrepute because the B.C. Prosecution Service considers that it would not be in the public interest to prosecute those who refused to adhere to the orders sought from this Court?

69 When asked, counsel for the respondents said that the respondents accept that the petitioners' beliefs are deeply held, but in response to my question as to why an injunction was sought, responded that while the petitioners and others like them are not dissuaded from their beliefs and practices by the impugned orders, an order from this Court is more likely to accomplish their compliance.

70 Given the other remedies available to the respondents, I have reservations that an injunction alone, without enforcement by the B.C. Prosecution Service, would overcome the deeply held beliefs of the petitioners and their devotees. Taking into account the decision in *Sager*, and the other means of enforcement open to the respondents, I find that the balance of convenience does not favour the respondents in this case, and dismiss their application for an injunction.

Conclusion

71 To be clear, I am not condoning the petitioners' conduct in contravention of the orders that they challenge, but find that the injunctive relief sought by the respondents should not be granted.

C.E. HINKSON C.J.S.C.

Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

M.E. Saunders, S.D. Frankel and H. Groberman JJ.A.

Heard: June 24, 2010.

Judgment: September 9, 2010.

Dockets: CA037741 and CA037747

[2010] B.C.J. No. 1766 | 2010 BCCA 396 | 292 B.C.A.C. 8 | 323 D.L.R. (4th) 680 | 9 B.C.L.R. (5th) 299 | 2010 CarswellBC 2365 | 192 A.C.W.S. (3d) 947

Between Cambie Surgeries Corporation, Appellant (Plaintiff), and Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia, Respondents (Defendants), and Specialist Referral Clinic (Vancouver) Inc., Respondents (Defendant by Counterclaim) And between Cambie Surgeries Corporation, Respondent (Plaintiff), and Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia, Respondents (Defendants), and Specialist Referral Clinic (Vancouver) Inc., Appellant (Defendant by Counterclaim)

(47 paras.)

Case Summary

Civil litigation — Civil procedure — Appeals — Injunctions — Procedure — Appeal by medical clinics from injunction requiring them to allow inspectors from Commission access to premises and records to perform audits allowed — Clinics brought claim for declaration that legislation which prohibited them from directly billing and extra billing patients was unconstitutional — Commission counterclaimed for injunctions and warrants authorizing audit of clinics — Judge incorrectly set out test for granting injunction — Manner in which application came before court was irregular and ought not to have been granted — As legislation made adequate provision for orders facilitating audits, extraordinary powers of court to grant injunction ought not to have been engaged.

Appeal by medical clinics from an injunction requiring them to allow inspectors from the Medical Services Commission access to their premises and records in order to perform audits under s. 36 of the Medicare Protection Act. The clinics admitted that they engaged in practices whereby they directly billed patients for services covered by the province's medical services plan and/or charged patients more than the amount that the plan would pay for a medical service. Some patients signed acknowledgement forms which confirmed their understanding that they were being billed for amounts in excess of those provided for under the plan. The clinics contended that certain provisions of the Act were unconstitutional as they had the effect of preventing patients from using their own resources to obtain desired medical care in a timely manner and they commenced an action for a declaration that the impugned provisions were unconstitutional. The Commission filed a counterclaim for interim and permanent injunctions prohibiting the clinics from violating certain sections of the Medicare Protection Act and it sought warrants under s.

36 of the Act authorizing its inspectors to enter the clinics and inspect medical records in their premises and an injunction restraining the clinics from interfering with the inspectors. The Minister of Health Services also filed a counterclaim seeking various relief. The judge found that while she had jurisdiction to issue the warrant under the Medicare Protection Act, it was preferable to proceed under the court's inherent jurisdiction. In addition, she found that the application for an injunction presented an appropriate basis for the exercise of the court's jurisdiction to grant injunctions as it was sought for the purpose of enforcing a public right and the legislation itself did not provide for a penalty for refusing to cooperate in an audit. In applying the test for a final injunction, the judge found that the test was satisfied as the statutory conditions for an audit were satisfied and the clinics refused to allow an audit to proceed, the clinics would still be able to pursue their constitutional challenge and while they would suffer some inconvenience, it was outweighed by the public interest. The clinics appealed the order on the basis that the judge erred in not considering the constitutionality of the impugned legislation at the first stage of the test because the audits were sought for the purpose of determining a violation of the legislation.

HELD: Appeal allowed.

The judge incorrectly set out the test for granting an injunction as she determined the Commission's application was for a final order, but she applied the test for an interlocutory injunction. Furthermore, the manner in which the application for an injunction came before the court was irregular and it ought not to have been granted. As the Medicate Protection Act made adequate provision for orders facilitating audits where required, the extraordinary powers of the court to grant an injunction ought not to have been engaged. In addition, the procedure that was followed in this case obscured the legal issues surrounding the making of the order and created unnecessary difficulties.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7

Federal-Provincial Fiscal Arrangements Act, *R.S.C. 1985, c. F-8*,

Interpretation Act, *RSBC 1996, CHAPTER 238, s. 29*

Medicare Protection Act, *RSBC 1996, CHAPTER 286, s. 1*, s. 13, s. 14, s. 17, s. 18, s. 26(1)(a), s. 36, s. 36(7), s. 36(10), s. 45.1, s. 46(4)

Provincial Court Act, *RSBC 1996, CHAPTER 379, s. 30*(3)

Appeal From:

On appeal from the Supreme Court of British Columbia, November 20, 2009 (*Schooff v. Medical Services Commission*, *2009 BCSC 1596*, Vancouver Registry Nos. S088484 and S090663)

Counsel

Counsel for the Appellants: Irwin G. Nathanson, Q.C., Marvin R.V. Storrow, Q.C.

Counsel for the Respondents (Defendants): George H. Copley, Q.C., Jonathan G. Penner.

Reasons for Judgment

The judgment of the Court was delivered by

H. GROBERMAN J.A.

1 This is an appeal, with leave, from the granting, *2009 BCSC 1596*, of an injunction requiring the appellant medical clinics to allow inspectors from the Medical Services Commission (the "Commission") access to their premises and records in order to perform audits under s. 36 of the *Medicare Protection Act*, *R.S.B.C. 1996, c. 286*.

2 The clinics contend that certain provisions of the *Act* are unconstitutional. As the proposed audits may be aimed at documenting violations of those provisions, the clinics say that the chambers judge was required to consider the constitutionality of the impugned provisions before granting an injunction. The Commission, on the other hand, argues that its right to audit the clinics is not dependent on the impugned provisions, and that the injunction was, therefore, validly granted.

3 In my view, for reasons that follow, the manner in which the application for an injunction came before the Supreme Court was irregular, and the chambers judge ought not, in the circumstances, to have granted the injunction. The *Medicare Protection Act* makes adequate provision for orders facilitating audits where such orders are needed. The extraordinary powers of the Supreme Court to grant an injunction need not have been engaged in this case. Further, the procedure that was followed in this case obscured the legal issues surrounding the making of the order, and created unnecessary difficulties.

The Legislation and the Underlying Action

4 The *Medicare Protection Act* governs the administration of British Columbia's Medical Services Plan (the "Plan"), the primary public health insurance scheme in the province. Most residents of B.C. are enrolled as beneficiaries and most physicians are enrolled as practitioners entitled to payment for their services under the Plan. A number of the provisions of the *Act* are relevant to the appeal. Rather than setting them out in the body of these reasons, I have appended the relevant portions of the statute.

5 In the normal course, practitioners bill the Commission for services performed for beneficiaries, and the Commission pays the practitioners in accordance with its established payment schedules. Section 14 of the *Act* allows enrolled practitioners to opt out of the normal payment arrangements and to bill patients directly.

6 Unless a physician has opted out or is not enrolled in the Plan, s. 17 prohibits him or her from charging a beneficiary for the provision of a service covered by the Plan. Where a physician has opted out or is not enrolled, s. 18 prohibits him or her from charging a patient more than the amount that the Plan would pay for a medical service.

7 Together, ss. 17 and 18 greatly restrict the scope for medical practitioners to bill patients directly for their services. Section 18 also prohibits "extra billing" - i.e., billing a patient for an amount beyond that which the Plan pays for a service.

8 The clinics admit that they have engaged in practices that would violate the statutory prohibitions against direct and extra billing if those prohibitions are constitutional. Some patients have signed "acknowledgement forms" confirming their understanding that they are being billed for amounts in excess of those provided for under the Plan.

9 The clinics contend, however, that ss. 14, 17 and 18 of the *Act* are unconstitutional. They allege that those provisions have the effect of preventing patients from using their own resources to obtain desired medical care in a timely manner. Relying primarily on *Chaoulli v. Quebec (Attorney General)*, *[2005] 1 S.C.R. 791*, the clinics argue that the impugned provisions of the *Medicare Protection Act* violate the rights of patients to life, liberty, and security of the person in a manner that is not in accordance with principles of fundamental justice, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. They have commenced an action seeking a declaration that the impugned provisions are unconstitutional.

10 The Minister of Health Services has filed a counterclaim, seeking a declaration that the acknowledgement forms signed by patients are of no effect. He also seeks damages from the clinics for economic losses that the Province claims to have suffered as a result of the clinics' extra billing practices and of actions taken by the Federal Government under the *Federal-Provincial Fiscal Arrangements Act*, *R.S.C. 1985, c. F-8*.

11 The Medical Services Commission has also filed a counterclaim, seeking interim and permanent injunctions under s. 45.1 of the *Medicare Protection Act* prohibiting the clinics from violating ss. 17 and 18 of the *Act*. In addition, the Commission's counterclaim seeks a warrant under s. 36 of the *Act* authorizing its inspectors to enter the clinics and inspect medical records in their premises. It also seeks an injunction in similar terms. Finally, the counterclaim seeks an injunction restraining the clinics from "hindering, molesting or interfering with its inspectors".

12 The current appeal arises out of an interlocutory application by the Medical Services Commission seeking a warrant under s. 36, or, alternatively, injunctive relief allowing its inspectors to enter the premises of the clinics and inspect their records for the purpose of conducting an audit. The Commission also sought ancillary injunctive relief requiring the clinics to allow the inspectors access to their premises and records, and prohibiting them from interfering with the audit process.

The Reasons of the Chambers Judge

13 The chambers judge began by considering whether she had jurisdiction to issue a warrant authorizing the Commission's inspectors to enter the clinics under s. 36(7) of the *Act*. Such a warrant may be issued by a "justice", a term which by virtue of s. 29 of the *Interpretation Act*, *R.S.B.C. 1996, c. 238*, means a justice of the peace.

14 The judge found that she had authority to issue a warrant because under s. 30(3) of the *Provincial Court Act*, judges of the Supreme Court are justices of the peace. She declined to act under s. 36, however, finding that it was preferable to proceed under the inherent jurisdiction of the Supreme Court. She did so for two reasons - first, she considered that her ability to consider equitable considerations was clearer when exercising inherent jurisdiction. She also thought it preferable that her decision not be subject to judicial review by another member of the Supreme Court, as it would be if she made it in her role as a justice of the peace.

15 The judge considered that the application presented an appropriate basis for the exercise of the

court's jurisdiction to grant injunctions. She noted that the injunction was sought for the purpose of enforcing a public right, with the support of the Attorney General, and also noted that the statute itself did not provide for any penal sanction for refusing to cooperate in an audit, apart from a penalty for obstructing an inspector.

16 The judge then set out to determine the appropriate test for the granting of the injunction:

> [107] A threshold issue is whether the order sought is interlocutory or final. The underlying premise of an interlocutory injunction is that the Plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial (see Robert J. Sharpe, *Injunctions and Specific Performance*, loose leaf (Aurora: Canada Law Book, 1992) at para. 2.550). That is not the underlying premise of this application. Instead, the Commission seeks to enforce its previous decision to audit. The Commission could have brought the application whether or not the Action existed, and I do not believe that the fact the Commission has brought the application as part of its counterclaim necessarily makes it an interlocutory application.
>
> [108] It is true that the Commission in its counterclaim seeks declarations that Cambie and SRC have contravened and will contravene ss. 17 and 18 of the *MPA*, and interim and permanent injunctions restraining such contraventions. However, this application is not for interlocutory restraining orders with respect to alleged contraventions of ss. 17 and 18 of the *MPA*. Instead, it is to compel Cambie and SRC to permit the audit to be done under s. 36 of the *MPA*.
>
> [109] As Mr. Nathanson for Cambie observed, once the audit is done, it is done. The Commission is not seeking an order that records be preserved until the audit is completed or some other interim form of relief. Counsel for the Commission, Mr. Copley, conceded that the application is in some respects for a final order.
>
> [110] I conclude that the Commission is seeking a final order with respect to the audit and I will assess the application on that basis.

17 Having concluded that what was being sought was a final order, the judge referred to *RJR-MacDonald v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*. She accepted that the normal test for the granting of an interlocutory injunction requires a three-stage analysis: first, the applicant must demonstrate that there is a serious question to be tried; second, the applicant must show that it may suffer irreparable harm if the relief is not granted; finally, the court must determine whether the balance of convenience favours the applicant or the respondent.

18 The judge then said:

> [114] If the injunction sought is a final order, as in this case, the first stage of the test is altered, in that the Court should go beyond a preliminary investigation and perform instead a more extensive review of the merits, with the anticipated results on the merits also being kept in mind at the second and third stages of the test. [Citation omitted.]
>
> [115] Thus, in these circumstances, it is not sufficient for the Commission to show a triable issue regarding its assertion that it is entitled to an audit, but instead it must establish on the balance of probabilities that the Commission is entitled under the legislation to perform the audit and that the audit has been refused.

19 The judge proceeded to consider whether the *Medicare Protection Act* authorized an audit and

whether the clinics had refused to allow one to proceed. Having found "on the balance of probabilities" that the statutory preconditions for an audit were satisfied, and that the clinics had refused to allow one, she concluded that the applicant had passed the first stage of the injunction test. She then proceeded to consider the questions of irreparable harm and balance of convenience, and concluded that an injunction ought to issue:

> [138] ... The public interest supports the enforcement of duly enacted legislation such as the *MPA*. There was no evidence that the audit will interfere with the ability of the Plaintiffs to pursue their constitutional challenge, especially if appropriate conditions are imposed. I am satisfied that the audit may cause the Clinics some inconvenience and possibly some expense (in the form of staff time), and that the private interests of the Clinics may thereby be affected. However there is nothing to suggest a countervailing public interest that would outweigh the public interest relied upon by the Commission. While the Clinics' challenge to the constitutionality of the legislation is a serious one, so is the defence to it as described by the Commission in its submissions. No conclusion can be reached as to the likely outcome of the challenge to the legislation, and I am satisfied that the balance of inconvenience favours granting the order sought, although not with immediate effect ....
>
> [148] I have concluded that the fair and just order in this case is that the injunction will be stayed for some months. During that time, counsel will attempt to reach agreement on the terms on which the audit will be conducted, and on the related issue of the scope of discovery (because to allow both full discovery and an audit could be unnecessary and possibly oppressive).
>
> [149] Absent further order, or agreement, the injunction ... will be effective on March 1, 2010.

20 The Commission subsequently agreed not to take any steps to carry out the audit or to enforce the injunction pending the determination of these appeals.

Positions of the Parties on the Appeal

21 The appellants contend that the judge correctly set out the test for the granting of the injunction, but say that she erred in not considering the constitutionality of the impugned legislation at the first stage of the *RJR-MacDonald* test. They say that because the audits are sought for the purpose of determining the extent of violations of ss. 17 and 18 of the *Medicare Protection Act*, the judge was required, at the first stage of the test, to reach a conclusion as to whether, on the balance of probabilities, those statutory provisions are constitutional. As the judge found that "[n]o conclusion can be reached as to the likely outcome of the challenge to the legislation", she ought not to have granted the injunction.

22 The Commission also agrees that the judge correctly set out the test for the granting of the injunction. It says, however, that the judge was not required to reach any conclusion on the constitutionality of the impugned sections because the Commission's right to perform an audit does not depend on there being any violation (or even suspicion of a violation) of ss. 17 and 18 of the *Act*. In its submission, those sections are simply irrelevant to the issue of whether the Commission has the right to an audit.

The Test for an Injunction

23 Unfortunately, despite the agreement of the parties that the trial judge correctly set out the test for the granting of an injunction in this case, it is my view that the test enunciated was incorrect.

24 *RJR-MacDonald* sets out the test for the granting of an interlocutory injunction. The normal test for

such an injunction is the familiar three-part test discussed by the chambers judge. The test is designed to address situations in which a court does not have the ability to finally determine the merits of the case, but must nevertheless decide whether an interim order should be made to protect the applicant's interests.

25 *RJR-MacDonald* describes an exceptional category of cases where the court must undertake a more probing analysis of the strength of the applicant's case at the first stage of the analysis at 338-39:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
>
> > Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.
>
> Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.
>
> ...
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

26 It is important to appreciate that the Court was not, in describing this special category of cases, purporting to redefine the tests for the granting of a final, as opposed to interlocutory, injunction. Rather, it was describing a test that is applicable to a narrow class of interlocutory injunctions, where the granting or withholding of the injunction will have the practical effect of bringing the litigation to an end. In this category of cases, circumstances require that courts do their best to do justice between the parties, recognizing that a full hearing to finally determine the merits of the action will never take place.

27 Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.

28 In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence

that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

29 In the case before us, the chambers trial judge concluded that the application should be treated as one for a final order, because the claim for an injunction could have been brought as an independent action. Having made that determination, however, the judge proceeded to apply the test for the granting of an interlocutory injunction. She fell into error in that regard.

30 I agree with the chambers judge's conclusion that the application by the Commission for a warrant or injunction to facilitate an audit was an application for final relief. The application was not genuinely interlocutory - it was not an application for interim relief pending final determination of the litigation. Rather, it was an application for summary determination of one aspect of the Commission's counterclaim.

31 That aspect of the counterclaim was not closely connected with the balance of the litigation. As the Commission pointed out in argument, its statutory right to conduct an audit does not depend on it having suspicion that the impugned provisions of the statute are being violated, nor does it depend on it succeeding on the rest of the claim or counterclaim. It was, therefore, possible for the court to consider the Commission's application for injunctive relief on a summary basis, separately from the balance of the claim and counterclaims.

32 In considering the Commission's application, however, the chambers judge was required to determine whether a final order should be granted, and should not have applied the interlocutory injunction test.

Should an Injunction Have Been Granted?

33 On the face of it, the Commission established that it was legally entitled to conduct an audit under s. 36 of the *Act*. The first part of the test for the granting of a final injunction was, therefore, made out. Nonetheless, it is my view that, for reasons that follow, the court ought not to have granted injunctive relief in this case.

34 While courts have jurisdiction to grant injunctions to enforce statutory obligations, the jurisdiction must be exercised carefully. Where, as here, there is a clear method of enforcement set out in the statute, the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect.

35 There are a number of respects in which a statutory regime may be inadequate. For example, the penalty for breach of the statute may be so limited that a party chooses to treat it as a cost of doing business, and therefore flout the law (see Robert J. Sharpe, *Injunctions and Specific Performance* (Looseleaf Edition, Toronto: Canada Law Book, 1998-2009) s. 3.210; *A.G. v. Harris*, [1961] 1 Q.B. 74 (C.A.); *Alberta (Attorney General) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741 (Alta. C.A.), rev'd on other grounds [1985] 1 S.C.R. 366; *Attorney-General for Ontario v. Grabarchuk* (1976), 67 D.L.R. (3d) 31 (Ont. Div. Ct.).

36 A statutory provision may also prove inadequate where a party who suffers harm is unable to invoke the provision (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048), or where serious danger or harm would result from the delay inherent in invoking a statutory remedy. There are, undoubtedly, other situations in which deficiencies in a statutory remedy militate in favour of the granting of an injunction.

37 In the case before us, there is no basis on which the statutory provisions can be said to be deficient. They provide for inspections and audits, and allow the Commission to seek a warrant when it is necessary to enter a building in order to obtain information. The provisions specifically deal with audits, and are carefully tailored to ensure that they can be carried out. There is no basis, in this case, to expect that the clinics would refuse to allow inspectors access to documents if a warrant were issued. In the circumstances, it was unnecessary to resort to the injunction procedure.

The Scope of an Injunction

38 While I would set aside the injunction on the basis that the statutory remedies were entirely adequate, I believe that some comment is also appropriate with respect to the scope of the injunction granted in this case. The injunction requires the clinics to permit inspectors to enter the clinics and to inspect records and make copies of them. If the statute had been deficient in this case, an injunction including those provisions might well have been appropriate.

39 The injunction goes on, however, to prohibit the clinics from "hindering, molesting or interfering with the inspectors". The language appears to have been taken from s. 36(10) of the *Medicare Protection Act*. Unfortunately, it is common practice for parties to seek injunctions and similar orders in very broad terms, often parroting the language of a statute. A court should be cautious in adopting statutory language in an injunction. The purpose of a statute is to govern a wide variety of circumstances. Statutes are therefore often cast in broad terms, designed to cover all foreseeable eventualities. An injunction, on the other hand, should be tailored to an individual case. It is an extraordinary remedy, and anyone who infringes an injunction is subject to the possibility of being found in contempt of court. Injunctions must, of course, be drawn broadly enough to ensure that they will be effective. They should not, however, go beyond what is reasonably necessary to effect compliance.

40 In the case before us, there is no reason to suspect that the clinics will hinder, molest or interfere with inspectors if a court requires that they submit to inspections. The injunction did not need to include a provision prohibiting such activities, and it should not have done so.

Should the Chambers Judge have Granted a Warrant?

41 The Commission applied for a warrant under s. 36(7) of the *Medicare Protection Act* to allow its inspectors to enter the clinic premises. Given that the chambers judge should not have issued an injunction, ought she to have, instead, granted a warrant?

42 In my view, the inclusion of the claim for a warrant in the Commission's counterclaim was not appropriate. The statute contemplates a procedure for applying for a warrant before a justice of the peace. It does not contemplate such an application being by way of a statement of claim (or counterclaim) in a civil suit. I would not rule out the possibility that exceptional circumstances might justify an application for a warrant to be brought within a civil claim. There are, however, no such circumstances in this case. As I have already noted, there is no demonstrated connection between the litigation and the Commission's right to conduct an audit.

43 The application for a warrant became entangled in the litigation, leading to a great deal of confusion. The parties and the chambers judge seemed, at times, to suggest that an audit could be used for the purpose of discovery in the litigation. In my view, that would not be an appropriate basis for conducting an audit. The statutory provisions allowing for an audit are designed to allow for the orderly

administration and regulation of the Medical Services Plan, not as an adjunct to rights of discovery in litigation.

44 There was also confusion over how the constitutionality of the legislation impinged on a warrant application. Had the warrant application been brought as a stand-alone application, I think it would have been apparent that the appellants, as persons seeking to be relieved of a burden imposed by statute, would have had the onus of applying to suspend the operation of the audit provisions of the statute, as those provisions relate to them, pending the conclusion of their constitutional challenge. Such an application would have clearly fallen within the scope of *RJR-MacDonald*, and much of the confusion over the applicable test would have been avoided.

45 As matters now stand, the Commission is entitled, under the statute, to proceed with an audit. If it requires a warrant in order to enter premises so that it can conduct an audit, the *Medicare Protection Act* provides for an application to a justice of the peace for such a warrant. There is no reason that such an application should be part of the current litigation.

46 If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the *Medicare Protection Act* pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.

Conclusion

47 In the result, I would allow the appeal, and set aside the injunction, without prejudice to:

1) the Commission's right to apply for a warrant in properly constituted proceedings before a justice of the peace.
2) the appellants' rights to apply in the Supreme Court for a limited exemption from particular audit provisions of the *Medicare Protection Act* pending the resolution of the litigation.

H. GROBERMAN J.A.
M.E. SAUNDERS J.A.:— I agree.
S.D. FRANKEL J.A.:— I agree.

* * * * *

APPENDIX

Medicare Protection Act

R.S.B.C. 1996, c. 286

...

Definitions

1 In this Act:

...

"beneficiary" means a resident who is enrolled ...;

"benefits" means

(a) medically required services rendered by a medical practitioner who is enrolled under section 13, unless the services are determined ... by the commission not to be benefits, ...

(b) unless determined by the commission ... not to be benefits, medically required services performed

(i) in an approved diagnostic facility, and

(ii) by or under the supervision of an enrolled medical practitioner who is acting

(A) on order of a person in a prescribed category of persons, or

(B) in accordance with protocols approved by the commission;

...

"commission" means the Medical Services Commission ...;

...

"payment schedule" means a payment schedule established under section 26;

...

"plan" means the Medical Services Plan ...;

"practitioner" means

(a) a medical practitioner ...

who is enrolled under section 13;

....

Enrollment of practitioners

13(1) A medical practitioner or health care practitioner who wishes to be enrolled as a practitioner must apply to the commission in the manner required by the commission.

(2) On receiving an application under subsection (1), the commission must enroll the applicant if the commission is satisfied that the applicant is in good standing with the appropriate licensing body ....

(3) A practitioner who renders benefits to a beneficiary is, if this Act and the regulations made under it are complied with, eligible to be paid for his or her services in accordance with the appropriate payment schedule ....

Election

14 (1) A practitioner may elect to be paid for benefits directly from a beneficiary.

(2) An election under subsection (1) may be made by giving written notice to the commission in the manner required by the commission.

...

(7) If an election is in effect and the practitioner has complied with subsection (9),

(a) the beneficiary must make a request for

reimbursement directly to the commission, and

(b) the beneficiary is only entitled to be reimbursed for the lesser of

(i) the amount that is provided in the appropriate payment schedule for the benefit, ... and

(ii) the amount that was charged by the practitioner.

(8) If a practitioner makes an election under subsection (1), he or she must not submit a claim on his or her own behalf ... for services rendered to a beneficiary after the date the election becomes effective.

(9) As soon as practicable after rendering a benefit, a practitioner who has made an election under subsection (1) must give the beneficiary a claim form that is completed by the practitioner in the manner required by the commission.

...

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge a beneficiary

(a) for a benefit, or

(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(2) Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;

(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;

(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), ...;

(d) if the service was rendered by a medical practitioner who is not enrolled.

Limits on direct or extra billing by a medical practitioner

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit if rendered by an enrolled medical practitioner, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner ....

...

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service ....

Payment schedules and benefit plans

26 (1) The commission

(a) must establish payment schedules that specify the amounts that may be paid to or on behalf of practitioners for rendering benefits under this Act ...

Audit and inspection - practitioners and employers

36 (1) In this Part:

...

"practitioner" includes

(a) a former practitioner, and

(b) a medical practitioner who is not enrolled and to whom section 18 (1) applies;

....

(2) The commission may appoint inspectors to audit

(a) claims for payment by practitioners and the patterns of practice or billing followed by practitioners under this Act,

(b) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and, in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, and

(c) the billing or business practices of persons who own, manage, control or carry on a business for profit or gain and who the commission on reasonable grounds believes

(i) in the course of the business, direct, authorize, cause, allow, assent to, assist in, acquiesce in or participate in the rendering of a benefit to beneficiaries by practitioners, or

(ii) have contravened section 17, 18, 18.1 or 19.

(2.1) If the commission, on behalf of a prescribed agency, pays a practitioner, an owner of a diagnostic facility or a representative of a professional corporation for services rendered, or claimed to have been rendered, this Part applies to the services as though these services were benefits.

(2.2) The claims and patterns of practice or billing concerning a prescribed agency

(a) need not be under this Act, and

(b) can have arisen at any time since July 24, 1992.

(3) Medical records may only be requested or inspected under this section or section 40 by an inspector who is a medical practitioner.

(4) An audit under subsection (2) (a) may be made in respect of claims and patterns of practice or billing followed by practitioners before this Act came into force.

(4.1) An audit under subsection (2) (b) or (c) may be made in respect of billing or business practices followed by persons before the coming into force of this subsection.

(5) An inspector may, at any reasonable time and for reasonable purposes of the audit, enter any premises and inspect

(a) records of a person described in subsection (2) (b) or (c) or of a practitioner, and

(b) records maintained in hospitals, health facilities and diagnostic facilities.

(6) The power to enter a place under subsection (5) or (12) must not be used to enter a dwelling house occupied as a residence without the consent of the occupier except under the authority of a warrant under subsection (7).

(7) On being satisfied on evidence on oath or affirmation that there are in a place records or other things for which there are reasonable grounds to believe that they are relevant to the matters referred to in subsection (5) or (12), a justice may issue a warrant authorizing an inspector named in the warrant to enter the place in accordance with the warrant in order to exercise the powers referred to in subsection (5) or (12).

(8) A person must, on the request of an inspector,

(a) produce and permit inspection of the records referred to in subsection (5) or (12),

(b) supply copies of or extracts from the records at the expense of the commission, and

(c) answer all questions of the inspector respecting the records referred to in subsection (5) or (12).

(9) If required by the inspector, a person must provide to the inspector all books of account and other records that the inspector considers necessary for the purposes of the audit.

(10) A person must not hinder, molest or interfere with an inspector doing anything that the inspector is authorized to do under this section or prevent or attempt to prevent the inspector doing any such thing.

(11) An inspector must make a report to the chair of the results of an audit made under subsection (2).

(12) An inspector may, at any reasonable time and for the purposes of the audit, enter any premises and inspect the payroll, financial and membership records of an employer or an association responsible for collecting and remitting premiums under this Act.

Injunctions

45.1 (1) The commission may apply to the Supreme Court for an injunction restraining a person from contravening section 17 (1), 18 (1) or (3) ....

(2) The court may grant an injunction sought under subsection (1) if the court is satisfied that there is reason to believe that there has been or will be a contravention of this Act or the regulations.

(3) The court may grant an interim injunction until the outcome of an action commenced under subsection (1).

Offences

46 ....

(4) A person who obstructs an inspector in the lawful performance of his or her duties under this Act commits an offence.

End of Document

Farrell v. Casavant

Nova Scotia Judgments

Nova Scotia Court of Appeal

D.R. Beveridge J.A. (In Chambers)

Heard: August 26, 2010.

Judgment: September 1, 2010.

Docket: CA 334399

Registry: Halifax

[2010] N.S.J. No. 471 | 2010 NSCA 71 | 294 N.S.R. (2d) 292

Between Bernard Farrell, Applicant, and Richard Casavant and Mary Casavant, Respondents

(33 paras.)

Case Summary

Civil litigation — Civil procedure — Appeals — Time to appeal — Extension of time — Grounds for review — Misapprehension of or failure to consider evidence — Motion by plaintiff in personal injury action for extension of time to appeal from dismissal of action dismissed — Plaintiff made decision not to appeal within allotted time and failed to show that his injuries prevented him from doing so — No excuse for eight-month delay in making motion to extend time to appeal — Grounds of appeal from judge's finding of no negligence on part of defendant driver lacked merit — Judge made reasonable findings of fact based on evidence showing accident resulted when defendant's car skidded on icy bridge while defendant operated it with due care in icy conditions — Nova Scotia Civil Procedure Rules, Rules 2.03, 90.37, 94.02.

Motion by Farrell for a time extension to appeal from the dismissal of his claim against Casavant. The claim arose from a motor vehicle accident in which Farrell sustained injuries. Casavant's car crossed a centre line of the highway and struck Farrell's vehicle. A judge found no liability on the part of Casavant, who had been safely driving a roadworthy vehicle at well below the speed limit in icy conditions before skidding on a bridge and colliding with Farrell's vehicle. Shortly before the decision was issued on September 28, 2009, Farrell made a settlement offer to Casavant, indicating his intention to appeal. Farrell knew he had to launch his appeal by November 4, 2009, but decided not to during this period because of the costs and because he was in too much pain from his injuries. Eight months later, shortly after being notified by Casavant that he might pursue enforcement proceedings to recover costs from Farrell, Farrell made his motion. His proposed grounds of appeal were errors on the judge's part in accepting Casavant's evidence in the absence of expert testimony to support his position, in failing to properly understand the legal significance of a warning sign posted in front of the bridge where the accident took place, and in finding Farrell's injuries were minor for the purpose of the Automobile Insurance Reform Act.

HELD: Motion dismissed.

Farrell provided no reasonable excuse for failing to launch his appeal within the specified time. There

was no medical evidence showing he was unable to pursue his appeal due to his injuries. He made a conscious decision not to pursue the appeal, then changed his mind. His appeal lacked merit. The judge made reasonable findings of fact about the lack of negligence on Casavant's part from the evidence before her, and was aware of the existence of the sign and its claimed significance. Her assessment of damages was not relevant because she had found no liability on Casavant's part.

Statutes, Regulations and Rules Cited:

Automobile Insurance Reform Act, 2003

Judicature Act, *R.S.N.S. 1989, c. 240*

Nova Scotia Civil Procedure Rules, Rule 2.03(2), Rule 90.37(12)(h), Rule 94.02

Counsel

Appellant in person.

Michael E. Dunphy, Q.C., for the respondents.

Held: Motion extending the time to file a notice of appeal is dismissed with costs to the respondents.

D.R. BEVERIDGE J.A.

INTRODUCTION

1 It cannot be gainsaid that Mr. Farrell's circumstances are unfortunate. He was injured in a motor vehicle accident that occurred on January 9, 2004. It is plain he was entirely without fault. A truck being driven by Richard Casavant crossed the center line of highway 101 and collided with Mr. Farrell's vehicle. Farrell suffered injuries and sued. Settlement negotiations failed. A trial was eventually held in January-February, 2009. The trial judge was Smith A.C.J.S.C. She released a lengthy written decision on July 31, 2009 (*2009 NSSC 233*). I will refer in more detail later to this decision. For now it is sufficient to say the trial judge concluded the accident occurred without negligence by either Mr. Farrell or Mr. Casavant -- it was an accident for which no one was legally liable.

2 An order dismissing the action was issued on September 28, 2009. The *Judicature Act*, *R.S.N.S. 1989, c. 240* gave to Mr. Farrell the right to appeal. By virtue of the *Nova Scotia Civil Procedure Rules*, such appeal must be commenced within 25 days from the date of the order. By application of how a period of days are calculated (*Nova Scotia Civil Procedure Rule* 94.02) the deadline to file an appeal by November 4, 2009. No appeal was filed.

3 Mr. Farrell now seeks an order extending the time to file a notice of appeal. For the reasons that follow, I must dismiss the application.

BACKGROUND FACTS

4 Mr. Farrell is self represented on this application. Nonetheless, he had the assistance of counsel in drafting his motion documents, including his affidavits of August 9, 2010 and August 18, 2010. To complete the record, the respondents rely on the affidavit of Ashley P. Dunn, of counsel for the respondents, sworn August 23, 2010. Mr. Farrell's application was heard August 26, 2010.

5 Mr. Farrell acknowledges in his affidavit of August 9, 2010 that he was advised by his then lawyer, Kevin A. MacDonald, an appeal had to be filed before November 5, 2009. He says that he formed the intention to pursue an appeal during the period of September 28, 2009 (the date of the final order of Smith A.C.J.S.C.) and November 5, 2009. He says that he was confused and dismayed by the decision and felt he did not have the resources to hire a lawyer to pursue an appeal. In addition, he was still enduring significant pain in his right wrist and did not feel he had the ability to pursue an appeal himself due to his emotional state. He says he had a further operation on his wrist in April 2010 and his hand is starting to recover. He asserts he is now better able to focus and has concluded that notwithstanding the expense he feels compelled to pursue an appeal "both for my own piece of mind and in the interest of justice".

6 The proposed grounds of appeal are set out in Mr. Farrell's supplementary affidavit of August 18, 2010. They are:

> (1) The learned Associate Chief Justice erred in law by accepting the uncorroborated evidence of the Defendant, Richard Casavant, without the benefit of any expert evidence corroborating his claim that the accident could not have been avoided, notwithstanding that he had crossed the centre line and the onus was on him to prove that the accident occurred through no fault of his.
>
> (2) That the learned Associate Chief Justice erred in law as to the legal effect of the warning sign that was posted just prior to the entry on the bridge where the Defendants' vehicle lost control and crossed the centre line, causing the accident.
>
> (3) That the learned Associate Chief Justice erred in law in determining that my injuries were minor injuries and therefore were captured by the provisions of the ***Automobile Insurance Reform Act (2003).***

7 Mr. Farrell, through his counsel, communicated a settlement offer to Mr. Casavant on September 15, 2009. Included in that settlement offer was a clear announcement that Mr. Farrell had instructed his counsel to appeal. The settlement offer was not accepted. Ultimately, the parties were not able to agree on the issue of costs.

8 The trial judge issued a written decision on February 4, 2010 (*2010 NSSC 46*) ordering costs to be paid to the respondents on or before May 4, 2010 in the total amount of $10,328.82.

9 On April 20, 2010 Mr. MacDonald, on behalf of Mr. Farrell, wrote and requested an extension of four months to pay the cost order. On June 4, 2010 the respondents agreed to forego proceeding with an execution order provided Mr. Farrell deliver a post dated cheque dated September 4, 2010, in the full amount of $10,328.82. Nothing further was heard from or on behalf of the applicant. The respondents then wrote on June 28, 2010 indicating that if they were not in receipt of a cheque by July 9, 2010 with confirmation of the terms of the extension, they would proceed with procedures to enforce collection.

10 Mr. Farrell acknowledges that on July 7, 2010 he discussed payment of the costs order with Mr.

MacDonald. During that discussion he advised Mr. MacDonald that he wished to pursue an appeal. Due to scheduling issues, the earliest the application could be heard was August 26, 2010.

PRINCIPLES

11 The motion for extension to file the notice of appeal is brought pursuant to *Nova Scotia Civil Procedure Rule* 90.37(12)(h). It provides:

> **90.37(12)** A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

12 To state the obvious, this Rule does not provide any particular guidance on how a judge is to exercise the broad discretion permitted by 90.37(2)(h). Neither does Rule 94.02 nor its reference to 2.03(2). However, the overall purpose of the *Civil Procedure Rules* are that they are enacted for "the just, speedy, and inexpensive determination of every proceeding".

13 It is apparent that there have been various formulations on how to approach the exercise of the court's discretion. The power to grant an extension of time has been described as one that should only be exercised if "exceptional" or "special" circumstances have been shown (*Crowell Bros. Ltd. v. Maritime Minerals Ltd.*, *[1940] 2 D.L.R. 403* (N.S.S.C. *en banc*). See also *Blundon et al v. Storm* *(1970), 1 N.S.R. (2d) 621* (A.D.)).

14 Cooper J.A. in *Scotia Chevrolet Oldsmobile Ltd. v. Whynot* *(1970), 1 N.S.R. (2d) 1041* (A.D.) accepted that the test was whether or not there were exceptional or special circumstances so that the interests of justice required the exercise of judicial discretion to grant the extension of time sought. However, he also referred, with apparent approval, to the decisions of *Smith v. Hunt* *(1902), 5 O.L.R. 97* and *Radclyffe et al. v. Rennie and McBeath* *(1964), 45 D.L.R. (2d) 697*, that in considering such an application, the applicant must show a bona fide intention to appeal, while the right to appeal existed; and a reasonable excuse for the delay in not having proceeded with the appeal within the prescribed time.

15 Macdonald J.A. in *Maritime Processing Co. v. Hogg* *(1979), 32 N.S.R. (2d) 71* accepted that one of the factors to be considered in an application to extend time to file a notice of appeal is a consideration of the merits of the proposed appeal. Various terms were referred to, including "it is at least arguable that the judgment is wrong" (para. 8) and "a strongly arguable case showing error" or "real grounds for interfering" (para. 10). This then became known as the three-part test. Pace J.A. in *Federal Business Development Bank v. Springhill Bowling Alleys Ltd.* *(1980), 40 N.S.R. (2d) 607* expressed the test as follows:

> 15 I glean from these cases that the applicant must show that there are compelling or exceptional circumstances present which would warrant an extension of time to file the notice of appeal and that one of those circumstances may be that there is a strongly arguable case that the trial judge erred and there exist real grounds for interfering with his decision. However, even if merit is shown, the applicant must in addition show that he had a bona fide intention to appeal while the right to appeal existed and that he has a reasonable excuse for the delay.

16 However, in *Tibbetts v. Tibbetts* *(1992), 112 N.S.R. (2d) 173*, Hallett J.A. emphasized the so called

three-part test may well be useful but is not the sole or ultimate consideration. He wrote:

> [14] There is nothing wrong with this three part test but it cannot be considered the only test for determining whether time for bringing an appeal should be extended. The basic rule of this court is as set out by Mr. Justice Cooper in the passage I have quoted from **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, supra. That rule is much more flexible. The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done. A review of the older cases which Mr. Justice Cooper referred to in **Scotia Chevrolet Oldsmobile Ltd. v. Whynot** and which Mr. Justice Coffin reviewed in **Blundon v. Storm** make it abundantly clear that the courts have consistently stated, for over 100 years, that this type of application cannot be bound up by rigid guidelines.
>
> ...
>
> [19] In summary it is clear from the case law extending back over 100 years that the test for determining whether an application to extend time for commencing an appeal should be granted must be a flexible one in which the court considers all the circumstances and determines what would be just.

17 Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* *(1997), 163 N.S.R. (2d) 278*; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, *1999 NSCA 107*.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

ANALYSIS

18 It is a fundamental principle that when a dispute between parties has been litigated, the decision rendered by the courts is a final one. This principle underlies the doctrine of *res judicata*. The decision by A.C.J.S.C. Smith was a final determination on the issues of liability and damages as between the parties, subject only to the right of the applicant to pursue an appeal. That right expired no later than November 4, 2009. To now have the ability to pursue an appeal requires the applicant to demonstrate that justice requires his application to be granted.

19 During the hearing of this application, Mr. Farrell conceded that between September 15, 2009 and November 4, 2009 he made a conscious decision not to pursue an appeal. He explained that the major reason was one of cost. He also said he was trying to straighten his life out and he was waiting for a subsequent surgical procedure on his wrist. It is therefore inescapable that while Mr. Farrell may well have had a bona fide intention to appeal when the right to appeal existed, at some point, while he was represented by counsel, he made a conscious decision not to appeal.

20 In terms of explanation for not pursuing his appeal within the prescribed time frame and within a reasonable time once the prescribed time frame passed, Mr. Farrell says he was "completely shocked

and confused" by the decision and that he was suffering significant pain and was emotionally distraught. No medical, or other evidence was submitted by Mr. Farrell to indicate that the shock, confusion or pain compromised his ability to properly consider his options and make informed decisions. If anything, the evidence is to the contrary. Mr. Farrell fairly conceded that he maintained full time employment throughout the relevant time periods. Furthermore, he acknowledged the major issue was simply one of cost when he made the conscious decision not to appeal. In terms of what has changed since then, he explained that really nothing had changed -- he would simply now have to borrow the money to pursue an appeal. This can hardly constitute a suitable reason for any delay, let alone the eight months from the expiration of the appeal period until he instructed Mr. MacDonald to communicate to the respondents his instructions to proceed with an application to extend the time to file an appeal.

21 If strong grounds of appeal are articulated, in my opinion, the weakness of an excuse and/or the absence of a bona fide intention to appeal within the prescribed time period may fade in significance. The proposed grounds of appeal identified by Mr. Farrell claim that the trial judge erred in finding that Mr. Casavant had satisfied the onus on the defendant to prove that the accident occurred without fault by accepting Casavant's evidence without the benefit of expert evidence to corroborate it. He also claims that the trial judge erred as to the "legal effect" of the warning sign locate just prior to the bridge/overpass, which read "BRIDGES FREEZE BEFORE ROAD". Lastly, the applicant claims that the trial judge erred in determining that Mr. Farrell's injuries were "minor injuries within the provisions of the *Insurance Act* and hence caught by the "cap".

22 I have reviewed the decision of the trial judge. It is some 240 paragraphs in length. The trial judge carefully set out the evidence, and positions of the parties. She made very specific findings of fact. At the hearing of this application, Mr. Farrell was adamant that it was an error by the trial judge to have accepted "his word against mine". However, the decision of the trial judge reflects no conflict between the evidence offered by the applicant and by the respondent at trial. There was a difference in positions. The applicant argued that the respondent had failed to establish that the accident occurred without negligence. The respondent took the position that although his vehicle crossed the center line and plainly caused the accident, it was not due to a lack of reasonable care on his part.

23 The applicant does not suggest clear and overriding error by the trial judge in her assessment of the evidence. The trial judge made a number of key findings of fact. She found that neither party had any difficulty with traction prior to the collision. She found that both parties were travelling well below the speed limit and that the respondent was operating a vehicle in sound mechanical condition and with good tires. The trial judge plainly understood that the onus was on the respondent. She wrote:

> [37] I am satisfied, on a balance of probabilities, and I find that the accident occurred when the Defendants' vehicle hit a patch of ice and slid into the Plaintiff's lane of travel. The Defendant breached his statutory and common law duty to allow the Plaintiff one half of the road free and clear. This gives rise to *prima facie* case of negligence against the Defendant casting upon him the "onus of explanation" (***Gauthier Co., v. Canada***, *[1945] S.C.R. 143*, *supra*, at p. 150.)

She concluded as follows:

> [39] I have carefully reviewed all of the evidence at trial. The Defendant has satisfied me that the skid which caused this accident occurred without his negligence.

24 The basis for her decision was that the defendant had no indication that the highway was slippery, was not driving at an excessive speed, and used the kind of care and caution that a reasonably prudent

driver would exercise under similar circumstances. In addition, once the skid occurred, he acted reasonably. The applicant has failed to identify any authority for the proposition that to satisfy the onus on the respondent there was a need for corroborative evidence, either lay or expert.

25 With respect to the "legal effect" of the warning sign, the trial judge was well aware of the existence of the sign and its claimed significance. She wrote:

> [48] Further, during the trial a great deal of attention was paid to the fact that prior to entering the area where the accident occurred the Defendant passed a sign which read "BRIDGES FREEZE BEFORE ROAD". The Plaintiff submits that this sign was a warning to the Defendant of possible ice on the bridge ahead and that this sign, along with a number of other factors (including the fact that this was a bridge -- not just an overpass), should have caused the Defendant to reduce his speed before entering upon the bridge that day.
>
> [49] While I agree that this sign provided a warning to drivers that bridges freeze before the roads, I do not accept the suggestion that this sign, along with the circumstances that existed that day, should have caused the Defendant to reduce his speed prior to entering upon the bridge.
>
> [50] I have found that the temperature on the day of the accident was well below zero. The Defendant testified that it was so cold that day that he assumed that everything would be frozen. This was a reasonable assumption in light of the temperature that day.
>
> [51] Further, the evidence established that the Defendant had passed over a number of overpasses and bridges that day while travelling from home to the area of the accident, a number of which had signs indicating that bridges freeze before the road. The Defendant had no difficulty with ice or slipperiness on any of those overpasses/bridges. Looking at all of the circumstances, and taking into account what would be expected of a reasonable and prudent driver in light of those circumstances, I am not satisfied that it was incumbent upon the Defendant to reduce his speed as he approached the overpass in question even though there was a sign on the road which read "BRIDGES FREEZE BEFORE ROAD".

26 Quite apart from the applicant's assertion that the trial judge made an error in law, he fails to articulate what that error is.

27 The last claimed error has to do with the trial judge's determination that the applicant's injuries were caught by the cap introduced by the *Automobile Insurance Reform Act* and the *Automobile Insurance Tort Recover Limitation Regulations*. These provisions were recently reviewed by this court in *Hartling v. Nova Scotia (Attorney General)*, *2009 NSCA 130* (leave to appeal refused *[2010] S.C.C.A. No. 63*).

28 There are two hurdles that the applicant faces. The first is any complaint of error by the trial judge in her assessment of damages is moot since the respondents have been found not to have been liable for the accident that caused his injuries. The second is that the applicant fails to identify how the trial judge erred in law, or otherwise, in her determination that the personal injuries suffered by the applicant were limited by the legislated definition of "minor injury". To Mr. Farrell, his injuries were far from minor. To him they were serious and caused ongoing interference with his daily activities. The trial judge did not say otherwise. However, she was required to apply, not a lay definition to such consequences, but a legislated definition of what constitute a "minor injury" and hence caught by the "cap".

29 Although Mr. Farrell is self represented at the hearing of this application, he had the assistance of counsel in drafting all of the motion documents, including the prospective grounds of appeal. In my

opinion, the proposed appeal lacks sufficient merit or substance to permit me to conclude that it raises fairly arguable issues.

SUMMARY AND CONCLUSION

30 Mr. Farrell finds himself in the unfortunate position of having suffered injuries through no fault of his own. As reflected in the decision by the trial judge on costs, Mr. Farrell turned down a significant settlement offer. The fact of him having done so is of no immediate consequence to this application. It merely makes his circumstances all that more unfortunate. The trial judge made a number of findings of fact, and of mixed law and fact. The key one was that the respondent had established, on a balance of probabilities, that the skid which caused the accident occurred without the respondent's negligence and hence there was no liability for the injuries caused by the accident.

31 The applicant was obviously profoundly disappointed by the outcome of trial. But it is clear he knew what his options were. He instructed his counsel to appeal and then changed those instructions by making a conscious decision not to proceed with an appeal within the time period he knew to govern his right to do so. More than eight months after the appeal period expired, Mr. Farrell then announces his intention to seek an extension of time to pursue an appeal just at the time that the respondents are about to commence collection procedures for their costs.

32 I am not satisfied that the proposed appeal raises fairly arguable issues. The objective of the discretion is to do justice between the parties. The circumstances here are not such that justice requires this application to be granted. To the contrary, to grant an extension on these circumstances would be inappropriate.

33 The parties agree that costs on the application should be in the amount of $750. Accordingly, the application is dismissed with costs to the respondents in that amount.

D.R. BEVERIDGE J.A.

Health Protection Act

CHAPTER 4 OF THE ACTS OF 2004

as amended by

2010, c. 41, s. 112; 2014, c. 32, ss. 122-126; 2018, c. 33, s. 19;
2019, c. 8, s. 184; 2021, c. 6, ss. 9-26

Published by Authority of the Speaker of the House of Assembly
Halifax

This page is intentionally blank.

CHAPTER 4 OF THE ACTS OF 2004
amended 2010, c. 41, s. 112; 2014, c. 32, ss. 122-126; 2018, c. 33, s. 19; 2019, c. 8, s. 184; 2021, c. 6, ss. 9-26

An Act to Provide for the Protection of Health

Table of Contents

(The table of contents is not part of the statute)

Short title

1 This Act may be cited as the *Health Protection Act*. 2004, c. 4, s. 1.

Restrictions on private rights and freedoms limited

2 Restrictions on private rights and freedoms arising as a result of the exercise of any power under this Act shall be no greater than are reasonably required, considering all of the circumstances, to respond to a health hazard, notifiable disease or condition, communicable disease or public health emergency. 2004, c. 4, s. 2.

Interpretation

3 In this Act,

(a) "dwelling" means a building or a portion of a building that is occupied and used as a residence and includes a house, condominium, apartment, cottage, mobile home, trailer or boat that is occupied and used as a residence;

(b) "health hazard" means

(i) a condition of premises,

(ii) a substance, thing, plant, animal or organism other than a human,

(iii) a solid, liquid or gas,

(iv) radiation, noise, vibration or heat, or

(v) an activity,

or combination of any of them, that presents or may present a threat to the public health;

(c) "justice of the peace" does not include a staff justice of the peace or administrative justice of the peace appointed pursuant to the *Justices of the Peace Act*-[;]

(d) "medical officer" means a medical officer of health appointed pursuant to this Act and includes the Chief Medical Officer and the Deputy Chief Medical Officer;

(e) "occupier" means an occupier at common law and includes

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,

and, for the purpose of this Act, there may be more than one occupier of the same premises;

(f) "premises" means lands and structures, or either of them, and any adjacent yards and associated buildings and structures, whether of a portable, temporary or permanent nature, and includes

(i) a body of water,

(ii) a motor vehicle or trailer,

(iii) a train or railway car,

(iv) a boat, ship or similar vessel, and

(v) an aircraft;

(g) "public health inspector" means a public health inspector designated pursuant to this Act. 2004, c. 4, s. 3.

PART I

DISEASES AND HEALTH HAZARDS

Interpretation of Part

4 In this Part,

(a) "Chief Medical Officer" means the Chief Medical Officer of Health appointed pursuant to this Part;

(b) "communicable disease" means a disease, due to a specific infectious agent or its toxic products, that arises through the transmission of that agent or its toxic products

(i) directly or indirectly from an infected person or animal, or

(ii) directly or indirectly through the agency of a disease vector, an inanimate object or the environment;

(c) "dangerous disease" means Ebola, Lassa fever, plague, smallpox, severe acute respiratory syndrome or tuberculosis or any other communicable disease designated as a dangerous disease in the regulations;

(d) "Deputy Chief Medical Officer" means the Deputy Chief Medical Officer of Health appointed pursuant to this Part;

(e) "disease vector" means a plant or animal that is a carrier of a communicable disease or a notifiable disease or condition;

(f) *repealed 2014, c. 32, s. 122.*

(g) "examination" includes the taking of a medical history, a physical inspection, palpation, percussion, auscultation of the human body, ancillary laboratory tests and other investigations such as x-rays;

(ga) "health authority" has the same meaning as in the *Health Authorities Act*;

(h) "hospital" means a hospital within the meaning of the *Hospitals Act*;

(i) "institution" means

(i) a child-caring facility within the meaning of the *Children and Family Services Act,*

(ii) a facility within the meaning of the *Early Learning and Child Care Act,*

(iii) any place licensed pursuant to the *Homes for Special Care Act,*

(iv) a hospital,

(v) a correctional facility within the meaning of the *Corrections Act,*

(vi) a place or facility designated as a youth custody facility under subsection 85(2) of the *Youth Criminal Justice Act* (Canada),

(vii) a place or facility designated as a place of temporary detention under subsection 30(1) of the *Youth Criminal Justice Act* (Canada),

(viii) any place that for compensation provides supervisory or personal care to individuals, and

(ix) any other place prescribed in the regulations;

(j) "isolation" means the requirement of any person who has a communicable disease or is infected with an agent of a communicable disease to remain separate from others in such places and under such conditions so as to prevent or limit the direct or indirect transmission of the communicable disease or infectious agent to those who are susceptible to the agent or who may spread the agent to others;

(k) "isolation facility" means a hospital or other place designated by the Minister for the purpose of isolation;

(l) "Minister" means the Minister of Health and Wellness;

Note: *All affairs and matters relating to public health inspectors under clauses 6(1)(c) and (d) and 74(1)(q) reassigned to Minister of Environment under Order in Council 2016-230 dated September 27, 2016.*

(m) "notifiable disease or condition" means a disease or condition designated as a notifiable disease or condition in the regulations;

(n) "personal services facility" means the place of business of a tattooist, esthetician, pedicurist, hairdresser, cosmetologist, barber or person who performs body piercing, or any other place of business of a type prescribed in the regulations as a personal services facility;

(o) "physician" means a duly qualified medical practitioner;

(p) "public health emergency" means an imminent and serious threat to the public health that is posed by a dangerous disease or a health hazard;

(q) "public health laboratory" means a laboratory established or designated by the Minister to carry out laboratory functions required for public health work in the Province;

(r) "public health nurse" means

(i) a public health nurse employed by a health authority, or

(ii) any other individual designated as a public health nurse by the Minister;

(s) "quarantine" means the requirement of any person who has been exposed or may have been exposed to a communicable disease during its period of communicability to restrict that person's activities in order to prevent disease transmission during the incubation period for that disease;

(t) "quarantine facility" means a dwelling or a place designated by the Minister for the purpose of quarantine;

(u) "sanitary facilities" means a room or rooms containing one or more toilets and one or more washbasins. 2004, c. 4, s. 4; O.I.C. 2011-15; 2014, c. 32, s. 122; 2018, c. 33, s. 19.

ADMINISTRATION

Supervision and management of Part

5 The Minister has the general supervision and management of this Part and the regulations. 2004, c. 4, s. 5.

Duties and powers of Minister

6 **(1)** The Minister shall

(a) appoint a Chief Medical Officer of Health, a Deputy Chief Medical Officer of Health and medical officers of health;

(b) establish the qualifications, skills and standards that individuals must have to be appointed pursuant to clause (a);

(c) designate public health inspectors and public health nurses for the purpose of this Part from among employees in the public service of the Province or employees of the Government of Canada or the government of another province of Canada;

(d) establish the qualifications, skills and standards required for a public health inspector to carry out duties and functions under this Part;

(e) establish the qualifications, skills and standards required for a public health nurse to carry out duties and functions under this Part;

(f) publish guidelines, standards and targets for the provision of health-protection programs and services under this Part;

(g) require a health authority or an institution to comply with any guideline, standard or target published pursuant to clause (f);

(h) provide a report to the House of Assembly on an annual basis outlining the progress of the Department of Health and Wellness with respect to the surveillance of and response to health hazards, notifiable diseases or conditions and communicable diseases;

(i) after a public health emergency has ended, direct that a review be conducted and, within one year, report to the House of Assembly on the cause and duration of the emergency and on the measures implemented in response to the emergency.

(2) The Minister may

(a) give directions to the Chief Medical Officer;

(b) direct a health authority or an institution to take action to prevent, eliminate or decrease a risk of a communicable disease, a notifiable disease, a dangerous disease or a health hazard;

(c) subject to the *Public Service Act*, enter into agreements with

(i) the government of Canada or the government of a province of Canada, or a department, agency or body under the jurisdiction of one of those governments,

(ii) the government of the United States of America or the government of a state of the United States of America, or a department, agency or body under the jurisdiction of any of those governments,

(iii) a municipality within the meaning of the *Municipal Government Act*,

(iv) a band council as defined in the *Indian Act* (Canada), or

(v) any other person, organization or other government department in the Province,

in order to carry out the provisions of this Part;

(d) establish and maintain such public health laboratories and other laboratory services as the Minister considers necessary or advisable for properly carrying on public health work in the Province with appropriate equipment and staff;

(e) designate an existing laboratory operated by a health authority as a public health laboratory;

(f) direct a public health laboratory as to its operation and the nature and extent of its work.

(3) No person may be appointed pursuant to clause (1)(a) who is not a physician.

(4) No person may be designated as a public health nurse pursuant to clause (1)(c) who is not a duly qualified registered nurse. 2004, c. 4, s. 6; O.I.C. 2011-15; 2014, c. 32, s. 123.

Medical officers accountable to Minister

7 Medical officers are accountable to the Minister. 2004, c. 4, s. 7.

Medical officers to protect public health

8 (1) Medical officers may take such reasonable actions as they consider necessary in the circumstances to protect the public health including the issuance of public health advisories and bulletins.

(2) A medical officer shall inform the Minister and the Deputy Minister of Health and Wellness of any action carried out pursuant to the authority in subsection (1) either before taking it or as soon as practicable after taking it.

(3) A medical officer may investigate any situation and take such actions as the medical officer considers appropriate to prevent, eliminate or decrease

a risk to the public health if the medical officer is of the opinion that a situation exists anywhere in the Province that constitutes or may constitute a risk to the public health. 2004, c. 4, s. 8; O.I.C. 2011-15.

Powers, duties and functions of Chief Medical Officer

9 **(1)** The Chief Medical Officer may delegate any of the Chief Medical Officer's powers, duties or functions to the Deputy Chief Medical Officer, a medical officer, a public health nurse or a public health inspector and the person to whom the power, duty or function has been delegated has authority to the same extent as if the power, duty or function was being exercised by the Chief Medical Officer.

(2) The Chief Medical Officer may give directions to the Deputy Chief Medical Officer or a medical officer for the purpose of enforcing this Act and the regulations.

(3) The Deputy Chief Medical Officer has all the powers and authority of the Chief Medical Officer in the absence of the Chief Medical Officer, or when the Chief Medical Officer is unable to act. 2004, c. 4, s. 9.

Chief Medical Officer directs and monitors medical officers

10 The Chief Medical Officer is responsible for directing and monitoring the work of the medical officers. 2004, c. 4, s. 10.

Medical officers may direct inspectors and nurses

11 A medical officer may direct a public health inspector or a public health nurse to assist the medical officer in enforcing this Act and the regulations. 2004, c. 4, s. 11.

Immunity from liability

12 The Chief Medical Officer, the Deputy Chief Medical Officer, a medical officer, a public health inspector or a public health nurse has immunity for performance of any duty or any power exercised under this Act that has been exercised in good faith. 2004, c. 4, s. 12.

Epidemiological studies

13 Subject to the *Fatality Investigations Act*, the Chief Medical Officer may carry out epidemiological studies that may include an investigation as to the cause of any communicable disease, notifiable disease, health hazard or illness related to a health hazard, or any death, accident or injury. 2004, c. 4, s. 13.

Duties and powers of Chief Medical Officer

14 **(1)** The Chief Medical Officer shall

(a) develop plans for ongoing surveillance of communicable diseases, notifiable diseases and dangerous diseases; and

(b) develop a communications plan and protocol designed to ensure that information necessary for proper response to the presence of a health hazard, notifiable disease or condition, communicable disease or public health emergency is promptly provided to all necessary and appropriate persons while ensuring that appropriate privacy protections are adhered to.

(2) The Chief Medical Officer may

(a) afford such medical relief to and among persons in need in the Province as in the opinion of the Chief Medical Officer is required for the protection of the public health;

(b) order any person who owns or occupies premises or any organization, corporation or municipality to control disease vectors in the manner prescribed in the regulations. 2004, c. 4, s. 14.

Access to data or records

15 (1) A medical officer may access or order data or records from all possible sources of information, including municipalities, Canadian Blood Services and other government departments, for the purpose of carrying out the duties of the medical officer under this Act and the regulations.

(2) The Chief Medical Officer may share with other jurisdictions or parties any information the Chief Medical Officer considers necessary to carry out the functions and duties of the Chief Medical Officer.

(3) A medical officer may communicate to the public the identity of a person who has a communicable disease if the medical officer reasonably believes that such action is required to protect the public health and that such protection cannot be achieved by any less intrusive means. 2004, c. 4, s. 15.

Disclosure to medical officer

16 (1) *repealed 2010, c. 41, s. 112.*

(2) Any hospital shall, upon request from a medical officer, immediately make full disclosure to the medical officer of all information, records, particulars and documents of whatever description, including x-rays, photographs and laboratory or blood samples, that relate in any way to any matter about which the medical officer has inquired. 2004, c. 4, s. 16; 2010, c. 41, s. 112.

Information privileged

17 (1) The information, records of interviews, reports, statements, notes, memoranda or other data or material prepared by or supplied to or received by a medical officer, public health inspector or public health nurse, in connection with research, studies or evaluations relating to morbidity, mortality or the cause, prevention, treatment or incidence of disease, or prepared by, supplied to or received by any person engaged in such research or study with the approval of the

Minister, are privileged and are not admissible in evidence in any court or before any tribunal, board or agency except as and to the extent that the Minister directs.

(2) Nothing in this Section prevents the publication of reports or statistical compilations relating to research or studies that do not identify individual cases or sources of information or religious affiliations.

(3) A medical officer, a public health nurse or a public health inspector shall not be compelled to give evidence in court or in proceedings of a judicial nature concerning knowledge of any of the matters referred to in subsection (1) gained in the exercise of a power or duty under this Act except as and to the extent that the Minister directs.

(4) Notwithstanding subsections (1) and (3), where a judge of the Supreme Court of Nova Scotia is satisfied, upon application, that it is in the public interest to do so, the judge may order the disclosure of any information or the giving of any evidence for the purpose of an inquiry authorized by the Governor in Council pursuant to the *Public Inquiries Act*. 2004, c. 4, s. 17.

HEALTH HAZARDS

Risk assessments

18 (1) A medical officer may conduct risk assessments in relation to existing or potential health hazards.

(2) A medical officer may monitor or audit potential or existing ~~heath~~ [health] hazards. 2004, c. 4, s. 18.

Duty to report health hazard

19 (1) Every person who is

(a) required by the regulations to report a prescribed health hazard; or

(b) a member of a class of persons that is required by the regulations to report a prescribed health hazard,

shall, where that person has reasonable and probable grounds to believe that a prescribed health hazard exists, forthwith report that belief to a medical officer.

(2) In subsection (1), "prescribed health hazard" means a health hazard of a type prescribed in the regulations. 2004, c. 4, s. 19.

Orders respecting health hazards

20 (1) Where a medical officer reasonably believes that

(a) a health hazard exists or may exist; and

(b) an order is necessary to prevent, remedy, mitigate or otherwise deal with the health hazard,

the medical officer may make any order that the medical officer considers necessary to prevent, remedy, mitigate or otherwise deal with the health hazard.

(2) A medical officer may make an order orally if a delay is likely to increase substantially the hazard to the public health.

(3) Where an order is made orally pursuant to subsection (2), the contents and reasons for the order shall be put into writing and served on each person to whom the order was directed within seventy-two hours after the making of the oral order, but a failure to comply with this subsection does not invalidate the order.

(4) A public health inspector has the same power as a medical officer to make an order under subsections (1) to (3) if the public health inspector reasonably believes that

(a) a health hazard exists or may exist and an order is necessary to prevent, remedy, mitigate or otherwise deal with the health hazard; and

(b) in the time necessary for a medical officer to make an order, a health hazard could arise that presents or may present a serious and imminent threat to the public health or an existing health hazard could worsen and pose a serious and imminent threat to the public health.

(5) Any action taken pursuant to subsection (4) must be the minimum action that the public health inspector reasonably believes necessary to deal with the health hazard and protect the public health.

(6) A public health inspector who takes action under subsection (4) must notify a medical officer about the action taken as soon as practicable. 2004, c. 4, s. 20.

Orders respecting premises

21 (1) A medical officer may make an order under subsection 20(1) against any person that

(a) owns or occupies premises;

(b) is or appears to be responsible for any

(i) condition of premises,

(ii) substance, thing, plant, animal or organism other than a human on the premises,

(iii) solid, liquid or gas on or emanating from the premises, or

(iv) radiation, noise, vibration or heat on or emanating from premises;

(c) is engaged in or administers an activity in or on any premises; or

(d) is a person or class of persons specified in the regulations.

(2) Without limiting the generality of subsection 20(1), an order made under subsection (1) may

(a) require the vacating of premises;

(b) require the owner or occupier of premises to close the premises or a part of the premises or restrict access to the premises;

(c) require the displaying of signage on premises to give notice of an order requiring the closing of the premises;

(d) require the doing of work specified in the order in, on or about premises specified in the order;

(e) require the removal of anything that the order states is a health hazard from the premises or the environs of the premises specified in the order;

(f) require the cleaning or disinfecting, or both, of the premises or the thing specified in the order;

(g) require the destruction of a matter or thing specified in the order;

(h) prohibit or regulate the manufacturing, processing, preparation, storage, handling, display, transportation, sale, offering for sale or distribution of any thing;

(i) prohibit or regulate the use of any premises or thing;

(j) require a person who is the subject of an order made pursuant to subsection 20(1) to investigate the situation, or undertake tests, examination, analysis, monitoring or recording, and provide the medical officer with any information the medical officer requires;

(k) require a person to whom an order made pursuant to subsection 20(1) is directed to isolate, hold or contain a substance, thing, solid, liquid, gas, plant, animal or other organism specified in the order. 2004, c. 4, s. 21.

Requirements respecting orders

22 (1) Actions specified in an order must be necessary to achieve a decrease in the effect of or to eliminate the health hazard.

(2) Actions included in an order shall be framed as clear directions or requirements to terminate or mitigate the health hazard and a medical officer must give reasons for the order in the order.

(3) A medical officer shall give the person or organization to whom an order is directed every reasonable opportunity to comply with the order.

(4) An order may be hand delivered or sent by registered mail to a person or organization to whom the order is directed.

(5) Where an order is served on a person to whom it is directed, that person shall comply with the order forthwith or, where a period of compliance is specified in the order, within the time period specified.

(6) It is sufficient in an order made under Section 20 or 21 to direct the order to a person or class of persons described in the order, and an order under Section 20 or 21 is not invalid by reason only of the fact that a person to whom the order is directed is not named in the order.

(7) A medical officer who makes an order under Section 20 or 21 may require the person to whom the order is directed to communicate the contents of the order to other persons as specified by the medical officer.

(8) An order shall specify the time within which or the date by which the person or persons to whom it is directed must comply with the order. 2004, c. 4, s. 22.

Extension, revocation or amendment of orders

23 A medical officer may

(a) extend an order made under subsection 20(1) for any additional period the medical officer reasonably believes is necessary; or

(b) revoke or amend an order made under subsection 20(1), to the extent that it has not yet been carried out. 2004, c. 4, s. 23.

Power to ensure compliance

24 (1) Where a medical officer has reasonable and probable grounds to believe that a health hazard exists and the person to whom an order is or would be directed

(a) has refused to comply with or is not complying with the order;

(b) is not likely to comply promptly with the order;

(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 complying with the order,

the medical officer may take whatever action the medical officer considers necessary, including providing authority for such persons, materials and equipment to enter upon 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 the person who failed to comply to pay the costs of taking that action.

(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), those persons have the authority to act to the same extent as if the act was carried out by the medical officer.

(4) Without limiting the generality of subsection (1), actions under that subsection may include

(a) the displaying of signage on premises to give notice of the existence of a health hazard or of an order made under this Part;

(b) doing any work the medical officer considers necessary in, on or about any premises;

(c) removing any thing from premises or the environs of the premises;

(d) detaining any thing removed from any premises or the environs of any premises;

(e) the delivery of notice to the public through any media a medical officer considers appropriate indicating the risk of the health hazard;

(f) closing premises or a part of premises or restricting access to premises;

(g) cleaning or disinfecting, or both, of any premises or thing; and

(h) destroying any thing found on premises or the environs of premises.

(5) No person shall conceal, alter, deface or remove signage that has been placed or posted pursuant to clause 21(2)(c) or clause (3)(a). 2004, c. 4, s. 24.

Powers respecting serious and imminent threats

25 (1) Notwithstanding any other provision of this Part, a medical officer may take any action under subsection 24(1) if the medical officer reasonably believes that in the time necessary to make an order under Section 20, or allow for compliance, a health hazard could arise that would pose a serious and imminent threat to the public health or that an existing health hazard could worsen and pose a serious and imminent threat to the public health.

(2) A public health inspector has the same power as a medical officer under subsection (1) if the public health inspector reasonably believes that, in the time necessary for a medical officer to take action, a health hazard could arise or an existing health hazard could worsen.

(3) Any action taken under this Section must be the minimum action that the person taking it reasonably believes necessary to deal with the health hazard and protect the public health.

(4) A public health inspector who takes action pursuant to subsection (2) shall notify a medical officer about the action taken as soon as practicable.

(5) After any action is taken under Section 24, the Chief Medical Officer may order any person to whom an order was directed or would have been directed under subsection 21(1) by either a medical officer or a public health inspector to pay the costs of taking the action. 2004, c. 4, s. 25.

Recovery of costs

26 (1) Reasonable costs, expenses or charges incurred by a medical officer or public health inspector pursuant to Section 24 or 25 are recoverable by order of the Chief Medical Officer and are payable to the Minister by

(a) the person to whom an order was directed; or

(b) any person who has purchased real property from the person to whom an order was directed from any money that is still owed to the vendor, where the person who purchased the property is directed by the Minister to pay a sum not to exceed the amount owing in respect of the costs, expenses or charges.

(2) A purchaser who pays an amount to the Minister pursuant to clause (1)(b) is discharged from any obligation to pay that amount to the vendor.

(3) In any claim or action under this Section, a certificate purporting to be signed by the Minister setting out the amount of the cost, expense or charge is admissible in evidence and is, in the absence of evidence to the contrary, proof

(a) of the amount of the cost, expense or charge set out in the certificate; and

(b) that the cost, expense or charge was made necessary or caused by the termination or mitigation of the health hazard to which the claim or action relates.

(4) Where an order to pay is issued by the Chief Medical Officer pursuant to subsection (1), the order shall be filed with the prothonotary of the Supreme Court of Nova Scotia and, when so filed,

(a) the order is of the same force and effect as if it were a judgment against real property that the person named in the order may then or thereafter own;

(b) a lien is established on the property referred to in clause (a) for the amount stated and it is deemed to be taxes in respect of the real property and may be collected in the same way and in the same priority as taxes under the *Assessment Act*; and

(c) the order may be enforced in the same manner as a judgment of the Supreme Court in civil proceedings. 2004, c. 4, s. 26.

Court may order compliance

27 Where a person has failed to comply with an order made under subsection 22(5), a court may, in addition to any other penalty it may impose, order the person to comply with subsection 22(5). 2004, c. 4, s. 27.

Joint and several liability

28 (1) Where an order made pursuant to Section 20 is directed to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so, including any costs incurred by a medical officer pursuant to Section 24.

(2) Subsection (1) does not apply to an order where the Chief Medical Officer and the persons responsible for carrying out the terms of the order have agreed to an apportionment of costs. 2004, c. 4, s. 28.

Costs are in addition to penalties

29 Costs recoverable pursuant to Section 26 are in addition to any penalties under this Act and the regulations. 2004, c. 4, s. 29.

Appeal

30 (1) A person to whom an order made pursuant to Section 20 is directed may, within ten days of the order being made, appeal to the Minister, by notice in writing, stating concisely the reasons for the appeal.

(2) The appeal shall be conducted in the manner prescribed by the regulations.

(3) The Minister may dismiss the appeal, allow the appeal or make any decision the medical officer or public health inspector was authorized to make.

(4) A decision of the Minister may, within thirty days of the decision, be appealed on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court of Nova Scotia, and the decision of the judge is final and binding on the Minister and the appellant, and the Minister

and the appellant shall take such action as may be necessary to implement the decision.

(5) An appeal taken pursuant to subsection (4) does not operate as a stay of the decision appealed from except in so far as the judge directs. 2004, c. 4, s. 30.

NOTIFIABLE DISEASES OR CONDITIONS

Reporting notifiable disease or condition

31 (1) A physician, a registered nurse licensed pursuant to the *Nursing Act* or a medical laboratory technologist licensed pursuant to the *Medical Laboratory Technology Act* who has reasonable and probable grounds to believe that a person

(a) has or may have a notifiable disease or condition; or

(b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(2) A principal of a public school or the operator of a private school under the *Education Act* who has reasonable and probable grounds to believe that a student in the school

(a) has or may have a notifiable disease or condition; or

(b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(3) An administrator of an institution who has reasonable and probable grounds to believe that a person who is a resident of the institution

(a) has or may have a notifiable disease or condition; or

(b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(4) An individual or member of a class of individuals, under such circumstances as prescribed by the regulations, who has reasonable and probable grounds to believe that a person

(a) has or may have a notifiable disease or condition; or

(b) has had a notifiable disease or condition,

shall forthwith report that belief to a medical officer.

(5) A physician, registered nurse licensed pursuant to the *Nursing Act* or an administrator of an institution who believes that an illness is serious and is occurring at a higher rate than is normal, shall forthwith report that belief to a medical officer.

(6) A physician signing a death certificate who has reasonable and probable grounds to believe that the person who died suffered from a notifiable disease or condition at the time of death shall forthwith report that belief to a medical officer. 2004, c. 4, s. 31; 2019, c. 8, s. 184.

COMMUNICABLE DISEASES

Powers respecting communicable diseases

32 (1) Where a medical officer is of the opinion, upon reasonable and probable grounds, that

(a) a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease;

(b) the communicable disease presents a risk to the public health; and

(c) the requirements specified in the order are necessary in order to decrease or eliminate the risk to the public health presented by the communicable disease,

the medical officer may 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.

(2) In an order made under this Section, a medical officer may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order.

(3) Without limiting the generality of subsection (1), an order made under this Section may

(a) require the owner or occupier of premises to close the premises or a part of the premises or to restrict access to the premises;

(b) require the displaying of signage on premises to give notice of an order requiring the closing of the premises;

(c) require any person that the order states has been exposed or may have been exposed to a communicable disease to quarantine himself or herself from other persons;

(d) require any person who has a communicable disease or is infected with an agent of a communicable disease to isolate himself or herself from other persons;

(e) require the cleaning or disinfecting, or both, of the premises or any thing specified in the order;

(f) require the destruction of any matter or thing specified in the order;

(g) require the person to whom the order is directed to submit to an examination by a physician who is acceptable to a medical officer and to deliver to the medical officer a report by the physician

as to whether or not the person has a communicable disease or is or is not infected with an agent of a communicable disease;

(h) require the person to whom the order is directed in respect of a communicable disease to place himself or herself forthwith under the care and treatment of a physician who is acceptable to a medical officer;

(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.

(4) An order under this Section is subject to such conditions as determined by the medical officer and set out in the order.

(5) Where an order made under this Section is to be carried out by a physician or other health professional, the failure of the person subject to such an order to consent does not constitute an assault or battery against that person by the physician or other health professional should the order be carried out. 2004, c. 4, s. 32.

Communication of order

33 (1) A medical officer who makes an order under Section 32 may require the person to whom the order is directed to communicate the contents of the order to other persons specified by the medical officer.

(2) An order made under Section 32 may be directed to a person who

(a) resides or is present in premises;

(b) owns or is the occupier of premises;

(c) owns or is in charge of any thing; or

(d) is engaged in or administers an enterprise or activity,

in the Province.

(3) An order made under Section 32 may be made with respect to a class of persons who reside or are present in the Province.

(4) Where a class of persons is the subject of an order made under subsection (3), notice of the order shall be delivered to each member of the class if it is practicable to do so in a reasonable amount of time.

(5) Where delivery of notice of an order to each member of a class of persons is likely to cause a delay that could, in the opinion of the medical officer, significantly increase the risk to the health of any person, the medical officer may deliver a general notice to the members of the class through any communications media that the medical officer considers appropriate, and the medical officer shall post the order at an address or at addresses that is or are most likely to bring the notice to the attention of the members of the class.

(6) A notice under subsection (5) must contain sufficient information to allow members of the class to understand to whom the order is directed, the terms of the order and where to direct inquiries. 2004, c. 4, s. 33.

Requirements for a report

34 In an order made under Section 32, a medical officer may specify

(a) that a report will not be accepted as complying with the order unless it is a report by a physician specified or approved by the medical officer; and

(b) the period of time within which the report mentioned in this Section must be delivered to the medical officer. 2004, c. 4, s. 34.

Reasons required

35 An order made under Section 32 is not effective unless the reasons for the order are set out in the order. 2004, c. 4, s. 35.

Oral order

36 (1) Where the delay necessary to put an order made under Section 32 in writing will or is likely to increase substantially the risk presented by a communicable disease to the public health, a medical officer may make an order orally and Section 35 does not apply.

(2) Where an oral order is made under subsection (1), the contents of the order and the reasons for the order shall be put into writing and served on each person to whom the order was directed within seventy-two hours after the making of the oral order, but a failure to comply with this subsection does not invalidate the order. 2004, c. 4, s. 36.

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

(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. 2004, c. 4, s. 37.

Court may ensure compliance

38 (1) Where, upon application by a medical officer, a judge of the provincial court is satisfied that

(a) a person has failed to comply with an order by a medical officer made under to Section 32 that

(i) the person quarantine himself or herself from other persons,

(ii) the person isolate himself or herself from other persons,

(iii) the person submit to an examination by a physician who is acceptable to the medical officer,

(iv) the person place himself or herself under the care and treatment of a physician who is acceptable to the medical officer, or

(v) the person conduct himself or herself in such a manner as not to expose another person to infection,

the judge may order that the person who has failed to comply with the order of the medical officer

(b) be taken into custody and be admitted to and detained in a quarantine facility named in the order;

(c) be taken into custody and be admitted to, detained and treated in an isolation facility named in the order;

(d) be examined by a physician who is acceptable to the medical officer to ascertain whether or not the person is infected with an agent of a communicable disease; or

(e) where found on examination to be infected with an agent of a communicable disease, be treated for the disease.

(2) Where an order made by a judge pursuant to subsection (1) is to be carried out by a physician or other health professional, the failure of the person subject to such an order to consent does not constitute an assault or battery against that person by the physician or other health professional should the order be carried out.

(3) A physician or other health professional carrying out an order pursuant to subsection (1) may obtain such assistance from a peace officer or other person as the physician or health professional reasonably believes is necessary.

(4) A judge shall not name an isolation facility or quarantine facility in an order under this Section unless the judge is satisfied that the isolation facility or quarantine facility is able to provide detention, care and treatment as required for the person who is the subject of the order. 2004, c. 4, s. 38.

Authority to apprehend and isolate or quarantine

39 **(1)** An order made under Section 38 is authority for any person to

(a) locate and apprehend the person who is the subject of the order; and

(b) deliver the person who is the subject of the order to the isolation facility or quarantine facility named in the order or to a physician for examination.

(2) An order made under Section 38 may be directed to a police force that has jurisdiction in the area where the person who is the subject of the order may be located, and the police force shall do all things reasonably able to be done to locate, apprehend and deliver the person to an isolation or quarantine facility in the jurisdiction where the person was apprehended or to an isolation or quarantine facility specified in the order.

(3) A person who apprehends a person who is the subject of an order pursuant to subsection (2) shall promptly

(a) inform the person of the reasons for the apprehension and of the person's right to retain and instruct counsel without delay; and

(b) tell the person where the person is being taken.

(4) An order made under clause 38(1)(c) is authority to detain the person who is the subject of the order in the isolation facility named in the order and to care for and examine the person and to treat the person for the communicable disease in accordance with generally accepted medical practice for a period of not more than four months from and including the day that the order was issued.

(5) An order made under clause 38(1)(b) is authority to detain the person who is the subject of the order in the quarantine facility named in the order and to care for and examine the person for the incubation period of the communicable disease as determined by the judge.

(6) In the case of an order made under clause 38(1)(c),

(a) where a hospital is named as the isolation facility, the person authorized by the by-laws of the hospital shall designate a physician to have responsibility for the treatment of the person named in the order or, where the by-laws do not provide the authorization, the chief executive officer of the hospital or a person delegated by the chief executive officer shall designate a physician who is acceptable to the medical officer to have responsibility for the person named in the order;

(b) where an institution is named as the isolation facility, the administrator of the institution shall designate a physician who is acceptable to the medical officer to have responsibility for the person named in the order; or

(c) where the isolation facility is not a hospital or an institution, the chief executive officer of the provincial health authority, as defined by the *Health Authorities Act*[,] shall designate a physician who is acceptable to the medical officer to have responsibility for the person named in the order. 2004, c. 4, s. 39; 2014, c. 32, s. 124.

Duty of treating physicians

40 A physician responsible for treating a person pursuant to subsection 38(1) shall report in respect of the treatment and the condition of the person to a medical officer. 2004, c. 4, s. 40.

Monitoring person and reporting condition

41 In the case of an order made under clause 38(1)(b),

(a) a medical officer shall designate a public health inspector or a public health nurse to be responsible for the monitoring of the person named in the order; and

(b) the designated public health inspector or public health nurse shall report in respect of the condition of the person to the medical officer. 2004, c. 4, s. 41.

Duty to report

42 Where ordered by a medical officer, a physician, public health inspector or public health nurse shall report to the medical officer on any matter in the manner, at the times and with the information specified by the medical officer in the order. 2004, c. 4, s. 42.

Court may extend detention and treatment

43 (1) Where, upon an application by a medical officer, a judge of the provincial court is satisfied that

(a) a person continues to be infectious and contagious; and

(b) the discharge of the person from the isolation facility would present a significant risk to the public health,

the judge may, by order, extend the period of detention and treatment ordered pursuant to clause 38(1)(c) for not more than four months and, upon further applications by the medical officer, the judge may extend the period of detention and treatment for further periods each of which is not for more than four months.

(2) A person detained in accordance with an order made under this Section shall be released from detention and discharged from the isolation facility or quarantine facility upon the certificate of a medical officer.

(3) A medical officer shall monitor the treatment and condition of a detained person and shall issue a certificate authorizing the release and discharge of the person as soon as the medical officer is of the opinion that the person is no longer infectious or contagious or that the release and discharge of the person will not present a significant risk to the public health. 2004, c. 4, s. 43.

Exceptions to public hearings

44 (1) An application referred to in subsection 38(1) or subsection 43(1) shall be heard in public unless

(a) the judge hearing the application is satisfied that

(i) matters involving public security may be disclosed,

(ii) the possible disclosure of intimate financial or personal matters of any person outweighs the desirability of holding the hearing in public, or

(iii) a medical officer is of the opinion that the person in respect of whom the application is made is infectious and to conduct the hearing in public would be a risk to the public health; or

(b) the person in respect of whom the application is made requests otherwise and the judge hearing the application is satisfied that it is appropriate in the circumstances to conduct the hearing in private.

(2) Any party to an application under subsection 38(1) or subsection 43(1) may appeal from the decision or order to the Nova Scotia Court of Appeal.

(3) The filing of a notice of appeal does not apply to stay the decision or order appealed from unless a judge of the court to which the appeal is taken so orders. 2004, c. 4, s. 44.

Withdrawal from treatment or failure to continue

45 Where a medical officer has made an order pursuant to Section 32 requiring a person to be placed under the care and treatment of a physician or to take other action specified in the order and the person withdraws from the care and treatment or fails to continue the specified action, Section 38 applies *mutatis mutandis* and the person is deemed to have failed to comply with an order of the medical officer. 2004, c. 4, s. 45.

Apprehension and detention where disease dangerous

46 A medical officer may apprehend and detain an individual where that individual has failed to comply with an order that was issued in relation to a dangerous disease and the medical officer reasonably believes that the individual poses a significant and imminent threat to the public health if not apprehended and detained. 2004, c. 4, s. 46.

Rights of detainee

47 (1) An individual apprehended and detained pursuant Section 46 shall be informed of the individual's right to counsel.

(2) An individual apprehended and detained pursuant to Section 46 shall not be held for longer than seventy-two hours unless a hearing is held within that time period and an order is made under Section 38. 2004, c. 4, s. 47.

Persons found to have communicable disease in detention facilities

48 (1) In this Section,

(a) "correctional facility" has the same meaning as in clause 3(b) of the *Corrections Act;*

(b) "lock-up facility" has the same meaning as in clause 3(b) of the *Corrections Act;*

(c) "place of temporary detention" means a place or facility designated as a place of temporary detention under subsection 30(1) of the *Youth Criminal Justice Act* (Canada);

(d) "youth custody facility" means a place or facility designated as a place of secure custody under subsection 85(2) of the *Youth Criminal Justice Act* (Canada).

(2) A medical officer by order may require the superintendent of a correctional facility, a youth custody facility, a lock-up facility or a place of temporary detention to take such action as is specified in the order to prevent the infection of others by a person who is detained in the correctional facility, youth custody facility, lock-up facility or place of temporary detention and who has been examined and found to be infected with an agent of a communicable disease. 2004, c. 4, s. 48.

General immunization program

49 The Minister may order a general immunization program in the Province or any part of the Province for the purpose of preventing the spread of a communicable disease. 2004, c. 4, s. 49.

Medical officer may require further information

50 A medical officer may require any person to provide further information on any report of a notifiable disease or condition at times determined by the medical officer. 2004, c. 4, s. 50.

Death from dangerous disease

51 In the case of a death of a person from a dangerous disease, access to the body of that person and the care, handling and transport of the body of that person shall be carried out in the manner directed by a medical officer unless otherwise provided for in the regulations. 2004, c. 4, s. 51.

Disinterment

52 (1) No person shall disinter or remove a buried human body except at the instance of the Attorney General unless with the written permission of the medical officer for the place in which the body is buried.

(2) The disinterment, removal, transportation and reinterment of a human body shall be carried out in the manner directed by a medical officer unless otherwise provided for in the regulations. 2004, c. 4, s. 52.

PUBLIC HEALTH EMERGENCIES

Declaration of emergency

53 (1) Where the Chief Medical Officer reasonably believes that a public health emergency exists in the Province, and reasonably believes that the public health emergency cannot be mitigated or remedied without the implementation of special measures pursuant to this Section, the Chief Medical Officer shall recommend to the Minister that a public health emergency be declared for all or part of the Province and the Minister may declare a public health emergency for all or part of the Province.

(2) Where the Minister has declared a public health emergency, the Chief Medical Officer may implement special measures to mitigate or remedy the emergency including

(a) establishing a voluntary immunization program for the Province or any part of the Province;

(b) preparing a list of individuals or classes of individuals to be given priority for active and passive immunizing agents, drugs, medical supplies or equipment;

(c) ordering the closing of any educational setting or place of assembly;

(d) prohibiting or limiting access to certain areas of the Province or evacuating persons from an area of the Province;

(e) ensuring that necessities are provided to a person who is quarantined if the person has no alternative means of obtaining such necessities;

(f) ordering construction of any work or the installation of facilities required for this Section, including sanitary facilities;

(g) procuring first right at a reasonable cost to active and passive immunizing agents, drugs, medical supplies or equipment from any organization or corporation;

(h) confiscating active and passive immunizing agents, drugs, medical supplies or equipment from wholesalers, health authorities, pharmacies, physicians, institutions or any other persons or classes of persons prescribed in the regulations; and

(i) any other measure the Chief Medical Officer reasonably believes is necessary for the protection of public health during the public health emergency.

(3) Where the Chief Medical Officer determines that a public health emergency has ended, the Chief Medical Officer shall advise the Minister and the Minister may make a declaration to that effect. 2004, c. 4, s. 53; 2014, c. 32, s. 125.

Minister may provide grant

54 Where the Minister considers it appropriate to do so, the Minister may provide a grant to any person to

(a) assist that person to comply with special measures implemented by the Chief Medical Officer; or

(b) reimburse that person for costs that person incurred in complying with special measures implemented by the Chief Medical Officer. 2004, c. 4, s. 54.

Possession of premises for temporary isolation or quarantine facility

55 (1) The Minister, in the circumstances mentioned in subsection (3), may, by order, require the owner or occupier of any premises to deliver possession of all or any specified part of the premises to the Minister to be used as an isolation or quarantine facility or as part of an isolation or quarantine facility.

(2) An order made under subsection (1) shall set out an expiry date for the order that is not more than twelve months after the day of its making and the Minister may, by a further order, extend the order for a further period of not more than twelve months.

(3) The Minister may make an order in writing under subsection (1) where the Chief Medical Officer certifies to the Minister that

(a) there exists or there is an immediate risk of an outbreak of a dangerous disease anywhere in the Province; and

(b) the premises are needed for use as an isolation or quarantine facility or as part of an isolation or quarantine facility in respect of the dangerous disease.

(4) An order made under subsection (1) may require delivery of possession of the premises on a date specified in the order.

(5) The Minister need not hold or afford to any person an opportunity for a hearing or afford to any person an opportunity to make submissions before making an order under subsection (1). 2004, c. 4, s. 55.

Order for possession of premises

56 (1) Where a judge of the Supreme Court of Nova Scotia is satisfied on evidence upon oath that

(a) there exists or there is an immediate risk of an outbreak of a dangerous disease anywhere in the Province;

(b) premises are needed for use as an isolation or quarantine facility or as part of an isolation or quarantine facility in respect of the dangerous disease; and

(c) the owner or occupier of the premises

(i) has refused to deliver possession of the premises to the Minister in accordance with an order under subsection 55(1),

(ii) is not likely to comply with an order under subsection 55(1), or

(iii) cannot be readily identified or located and as a result an order under subsection 55(1) cannot be carried out promptly,

the judge may make an order directing a peace officer for the area in which the premises are located, or any other person whom the judge considers suitable, to put and maintain the Minister and any person designated by the Minister in possession of the premises, by force if necessary.

(2) An order made under this Section shall be executed at reasonable times as specified in the order.

(3) A judge may receive and consider an application for an order under this Section without notice to and in the absence of the owner or the occupier of the premises.

(4) The Minister shall, before restoring the possession of premises to the owner or occupier, cleanse and disinfect it and put it in the same state of repair as it was in when possession was taken, and shall give notice to the owner or occupier that this has been done. 2004, c. 4, s. 56.

Compensation

57 (1) The occupier of premises used or occupied pursuant to Section 55 or 56 is entitled to compensation from Her Majesty in right of the Province for the use and occupation of the premises and, in the absence of agreement as to the compensation, the Nova Scotia Utility and Review Board, upon application in accordance with the rules governing the practice and procedure of that Board, shall determine the compensation in accordance with the *Expropriation Act*.

(2) Except in respect of proceedings before the Nova Scotia Utility and Review Board in accordance with subsection (1), the *Expropriation Act* does not apply to proceedings under this Section. 2004, c. 4, s. 57.

POWER TO ENTER

Powers of entry to administer or investigate

58 (1) When reasonably required to administer or determine compliance with this Act or the regulations or to investigate a potential health hazard or communicable disease, a medical officer may enter any premises, other than a dwelling, at any reasonable time, and may

(a) make any inspection, investigation, examination, test, analysis or inquiry that the medical officer considers necessary;

(b) detain or cause to be detained any motor vehicle, trailer, train, railway car, aircraft, boat, ship or similar vessel;

(c) require any substance, thing, solid, liquid, gas, plant, animal or other organism to be produced for inspection, examination, testing or analysis;

(d) seize or take samples of any substance, thing, solid, liquid, gas, plant, animal or other organism, other than samples of human bodily substances;

(e) require any person to

(i) provide the medical officer with information, including personal information, personal health information or proprietary or confidential business information, and

(ii) produce any document or record, including a document or record containing personal information, personal health information or proprietary or confidential business information,

and examine or copy the information, document or record, or take it to copy or retain as evidence;

(f) take photographs or videotapes of premises, or any condition, process, substance, thing, solid, liquid, gas, plant, animal or other organism located in or on the premises;

(g) bring any machinery, equipment or other thing into or onto the premises;

(h) use any machinery, equipment or other thing located in or on the premises;

(i) require that any machinery, equipment or other thing be operated, used or dismantled in or on the premises under specified conditions;

(j) make or cause an excavation to be carried out in or on the premises.

(2) Where

(a) an owner or occupier of premises denies entry or access to, through or over the premises to a medical officer or there are reasonable grounds for believing that the owner or occupier may deny entry or access to, through or over the premises to a medical officer;

(b) an owner or occupier of premises obstructs a medical officer in the exercise of powers under subsection (1);

(c) an owner or occupier of premises refuses to produce any substance, thing, solid, liquid, gas, plant, animal or other organism for the purpose of inspection, examination, test or inquiry;

(d) there are reasonable grounds to believe that the owner or occupier of premises may prevent a medical officer from carrying out powers under subsection (1) or may deny access to any thing as a result of which the medical officer may be unable to carry out powers under subsection (1); or

(e) no person is present to grant access to premises that are locked or otherwise inaccessible,

a medical officer may apply to a justice of the peace for a warrant under Section 59.

(3) Notwithstanding subsection (1), a medical officer may enter and inspect a dwelling with the consent of the owner or occupier of the dwelling. 2004, c. 4, s. 58.

Warrant for entry into premises or dwelling

59 **(1)** Where a justice of the peace is satisfied on the evidence upon oath that

(a) there are reasonable and probable grounds for believing that it is necessary to

(i) enter and have access to, through or over any premises,

(ii) make examinations, tests, and inquiries,

(iii) make, take and remove samples other than samples of human bodily substances, or to make, take and remove copies or extracts related to an examination, investigation, test or inquiry,

or to do any of such things, for the purpose of this Part or the regulations, the enforcement of any Section of this Part or the regulations, the exercise of a power or the carrying out of a duty under this Part or the regulations or the carrying out of a direction given under this Part; and

(b) a medical officer, a public health inspector or public health nurse or a person acting under a direction given by a medical officer

(i) has been denied entry to the premises,

(ii) has been instructed to leave the premises,

(iii) has been obstructed, or

(iv) has been refused production of any substance, thing, solid, liquid, gas, plant, animal or other organism related to an examination, investigation, test or inquiry,

by the owner or occupier of the premises, or with respect to premises or a dwelling

(v) entry has been refused or there are reasonable grounds to believe that entry will be refused,

(vi) the owner or occupier of the premises or the occupant of the dwelling is temporarily absent, or

(vii) the premises or dwelling is unoccupied,

the justice of the peace may at any time issue a warrant authorizing the medical officer, a public health inspector, a public health nurse and any person who is acting under a direction given by a medical officer, or any of them, to carry out any action

under subsection 58(1), by force if necessary, together with such peace officers as they call upon to assist them.

(2) A warrant issued under this Section shall state the date on which it expires, which must be a date not later than fifteen days after the warrant is issued.

(3) A justice of the peace may receive and consider an application for a warrant under subsection 58(2) without notice to and in the absence of the owner or occupier of the premises or the occupier of the dwelling.

(4) A warrant may be made subject to any conditions that are specified in it. 2004, c. 4, s. 59.

Entry without warrant in public health emergency

60 Where the Minister has declared a public health emergency, a medical officer may

(a) enter and inspect any premises, including a dwelling, at any time and without a warrant; and

(b) take such action under this Act and the regulations as the medical officer reasonably believes is necessary to prevent, control or deal with the public health emergency. 2004, c. 4, s. 60.

Entry by public health inspector

61 (1) A public health inspector

(a) has the same powers as a medical officer under subsections 58(1), (2) and (3) and Section 59; and

(b) has the same powers as a medical officer under Section 60 if

(i) a medical officer has authorized the public health inspector to exercise the powers, or

(ii) the public health inspector reasonably believes that immediate action is necessary and there is no time to locate a medical officer.

(2) A public health nurse has the same powers as a medical officer under clauses 58(1)(a) and (e) and subsection 58(3) for the purposes of investigating a suspected case of a communicable disease or exposure to a health hazard.

(3) In exercising a power under this Part, a medical officer, public health inspector or public health nurse may use such reasonable force or obtain such assistance from a peace officer or other person as the medical officer, public health inspector or public health nurse reasonably believes is necessary. 2004, c. 4, s. 61.

Removal of documents

62 **(1)** Where a medical officer, public health nurse or public health inspector removes documents or records from premises for the purposes of clause 58(1)(e) and makes a copy or extract of them or any part of them, the medical officer, public health nurse or public health inspector shall give a receipt to the occupier for the documents or records removed.

(2) Where documents or records are removed from premises, the documents or records shall be returned to the occupier as soon as possible after the making of the copies or extracts.

(3) A copy or extract of any document or record related to an inspection, examination, test or inquiry and purporting to be certified by a person referred to in subsection (1) is admissible in evidence in any action, proceeding or prosecution as proof, in the absence of evidence to the contrary, of the original without proof of the appointment, designation, authority or signature of the person purporting to have certified the copy. 2004, c. 4, s. 62.

Other persons may accompany

63 A medical officer, public health inspector or public health nurse may be accompanied by other persons for any purpose mentioned in subsection 58(1) and those persons may carry out inspections, examinations, tests and inquiries and take such samples or do such other things as directed by the medical officer, public health inspector or public health nurse. 2004, c. 4, s. 63.

Minister may make recommendations respecting emergency measures

64 The Minister may make recommendations to the member of the Executive Council to whom is assigned the administration of the *Emergency* ~~Measures~~ [*Management*] *Act* respecting matters relating to public health emergencies that should be included in emergency measures plans made or required to be made under that Act. 2004, c. 4, s. 64.

GENERAL

Duty to assist

65 **(1)** An owner or occupier of premises and any employees or agents of the owner or occupier shall give all reasonable assistance to a medical officer, public health nurse or public health inspector to enable the medical officer, public health nurse or public health inspector to exercise powers or carry out duties and functions under this Part and the regulations, and shall furnish the medical officer, public health nurse or public health inspector with such information that the medical officer, public health nurse or public health inspector reasonably requires for purposes referred to in subsection 58(1).

(2) A medical officer, public health inspector, public health nurse or other person who is exercising powers or performing duties or functions under this Part may call for the assistance of any constable, police officer or other peace

officer and, where called for such assistance, it is the duty of the constable, police officer or peace officer to render the assistance. 2004, c. 4, s. 65.

Hindering or obstructing

66 (1) No person shall hinder or obstruct a medical officer, public health nurse or public health inspector in the exercise of powers or carrying out of duties or functions under this Part and the regulations.

(2) A refusal of consent to enter a private dwelling is not and shall not be considered to be hindering or obstructing within the meaning of subsection (1), except where a warrant has been obtained or entry is carried out pursuant to Section 60. 2004, c. 4, s. 66.

False or misleading statements

67 No person shall knowingly make a false or misleading statement, either orally or in writing, to a medical officer, public health nurse or public health inspector while the medical officer, public health nurse or public health inspector is exercising powers or carrying out duties or functions under this Part or the regulations. 2004, c. 4, s. 67.

Analysts

68 The Minister may designate persons as analysts for the purpose of this Part. 2004, c. 4, s. 68.

Certificate of analyst

69 (1) Subject to this Section, a certificate of an analyst stating that the analyst has analyzed or examined a sample submitted to the analyst by a medical officer, public health nurse or public health inspector and stating the result of the analysis or examination is admissible in evidence in a prosecution with respect to an offence under this Part or the regulations and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the appointment, authority or signature of the person purporting to have signed the certificate.

(2) A party against whom a certificate of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for purposes of cross-examination.

(3) A certificate shall not be received in evidence under subsection (1) unless the party intending to produce it has given reasonable notice of the intention, together with a copy of the certificate, to any party against whom it is intended to be produced. 2004, c. 4, s. 69.

Copy of order as evidence

70 A copy of an order purporting to be made by a medical officer, public health nurse or a public health inspector is, without proof of the office or signature

of the medical officer, public health nurse or a public health inspector, as the case may be, receivable in evidence as proof, in the absence of evidence to the contrary, of the making of the order and of its contents for all purposes in any action, proceeding or prosecution. 2004, c. 4, s. 70.

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

(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. 2004, c. 4, s. 71.

Offences by employees, agents or corporations

72 (1) In a prosecution for an offence under this Part or the regulations, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused.

(2) Where a corporation commits an offence under this Part or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the violation of this Part or the regulations is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted.

(3) Unless otherwise provided in this Part, no person shall be convicted of an offence under this Part or the regulations if the person establishes that the person exercised all due diligence to prevent the commission of the offence. 2004, c. 4, s. 72.

Prohibition on sale of immunizing agents

73 **(1)** No person shall sell any active or passive immunizing agent that has been provided free of charge to that person by the Minister.

(2) Every person who contravenes subsection (1) and a director or officer of a corporation who authorizes, permits or concurs in such a contravention by the corporation is guilty of an offence and, notwithstanding Section 71, is liable on summary conviction to a penalty of not more than five thousand dollars. 2004, c. 4, s. 73.

Regulations

74 **(1)** The Governor in Council may make regulations

(a) prescribing the duties of the Chief Medical Officer and the Deputy Chief Medical Officer;

(b) respecting the detection, investigation, prevention, reduction, control and removal of health hazards;

(c) requiring persons or classes of persons to report prescribed health hazards;

(d) prescribing health hazards that must be reported to a medical officer;

(e) classifying persons, organizations, premises, places, animals, plants and things, or any of them, for the purpose of this Part and the regulations;

(f) establishing standards and requirements in relation to this Part and the regulations;

(g) exempting any person, organization, premises, institution, food, substance, thing, plant, gas, heat, radiation or class of them for any provision of this Part and the regulations and prescribing conditions that apply in respect of such an exemption;

(h) establishing standards and requirements for the construction, equipment, facilities, including sanitary facilities, establishment and maintenance of recreational camps;

(i) establishing standards and requirements in respect of industrial or construction camps or other places where labour is employed and requiring owners and operators of such camps, works or other places to comply with such standards and requirements;

(j) respecting the detention, isolation, examination, disposition or destruction of any animal that has or may have a disease or a condition that may adversely affect the health of any person;

(k) requiring the immunization of do1mestic animals against any disease that may adversely affect the health of any person;

(l) requiring the reporting of cases of animals that have or may have diseases that may adversely affect the health of any person;

(m) prescribing the classes of persons who must make and receive reports concerning animals that have or may have diseases that adversely affect the health of any person;

(n) respecting the procurement, storage, distribution, use and availability of drugs, medical supplies and equipment, and active and passive immunizing agents;

(o) requiring the payment of fees for active and passive immunizing agents;

(p) respecting the immune status of employees who work in hospitals and institutions;

(q) respecting certificates or other means of identification for medical officers, public health nurses and public health inspectors;

(r) governing the handling, transportation, burial, disinterment and reinterment of bodies of persons who have died of a communicable disease or who had a communicable disease at the time of death;

(s) specifying additional persons or classes of persons who must report the existence or the probable existence of a notifiable disease or condition, specifying circumstances under which such a report must be made and specifying to whom the report is to be made;

(t) respecting the reporting of communicable diseases, notifiable diseases or conditions and dangerous diseases;

(u) respecting the control and classification of communicable diseases, notifiable diseases or conditions and dangerous diseases, including control of disease vectors;

(v) designating a disease or condition as a notifiable disease or condition or as a dangerous disease;

(w) requiring the evacuation of persons from localities where there are a large number of cases of a communicable disease or a dangerous disease;

(x) respecting the isolation or quarantine of persons having or who have been exposed to a communicable disease or a dangerous disease;

(y) requiring the mandatory reporting of immunizations;

(z) respecting the establishment, operation and maintenance of personal service facilities;

(aa) prescribing places of business or classes of places as personal service facilities;

(ab) prescribing places as institutions;

(ac) respecting any matter related to the health or safety of persons in, on or about public pools, including standards and requirements to protect the health and safety of such persons;

(ad) establishing responsibilities, guidelines and standards for public health laboratories;

(ae) respecting appeals of orders made respecting health hazards;

(af) respecting the determination of costs associated with actions taken by medical officers where orders are not complied with;

(ag) establishing standards and requirements regarding the health or safety of persons in, on or about recreational waters;

(ah) establishing standards and requirements regarding the health or safety of persons at exhibitions, fairs, festivals, and mass gatherings;

(ai) respecting a public health emergency;

(aj) prescribing persons or classes of persons for the purpose of clause 53(2)(h);

(ak) establishing reporting requirements for a health authority;

(al) incorporating and adopting by reference, in whole or in part, a written standard, rule, regulation, guideline, code or document as it reads on a prescribed day or as it is amended from time to time;

(am) establishing standards for confidentiality of records or information obtained by a medical officer pursuant to this Part.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 2004, c. 4, s. 74; 2014, c. 32, s. 126.

PART II

FOOD SAFETY

Interpretation of Part

75 In this Part,

(a) "administrator" means an inspector who is appointed as an administrator by the Minister for the purpose of this Part;

(b) "food" means a raw or processed substance, ice, beverage, milk or milk product, used or intended to be used for human consumption and an ingredient that may be mixed with food for human consumption;

(c) "food establishment" means any premises, including a mobile, stationary, temporary or permanent facility or location and the surroundings under control of the same person, in which food is processed, manufactured, prepared, labelled, served, sold, offered for sale or distributed free of charge, dispensed, displayed, stored or distributed, but does not include a dwelling except a dwelling used for commercial food preparation;

(d) "inspector" means a person appointed as an inspector by the Minister;

(e) "Minister" means the Minister of Environment and Climate Change;

(f) "permit" means a permit issued pursuant to this Part;

(g) "prepare" includes cut, wrap, package, freeze, cure or smoke. 2004, c. 4, s. 75; O.I.C. 2006-121; O.I.C. 2016-230; 2021, c. 6, s. 9.

Supervision and management of Part

76 The Minister has the general supervision and management of this Part and the regulations. 2004, c. 4, s. 76.

Delegation of Minister's duties or functions

77 The Minister may delegate to any person, any duty or function conferred on the Minister under this Part. 2004, c. 4, s. 77.

Administrator

78 The administrators and inspectors necessary for the administration and enforcement of this Part and the regulations shall be appointed in accordance with the *Civil Service Act*. 2004, c. 4, s. 78; 2021, c. 6, s. 10.

Qualifications and powers of administrator

79 (1) An administrator must have a Certified Public Health Inspector designation from the Canadian Institute of Public Health Inspectors or an equivalent designation, together with such other qualifications, as are prescribed in the regulations.

(2) An administrator has all the powers of a public health inspector under Part I. 2004, c. 4, s. 79; 2021, c. 6, s. 11.

Personnel

80 The Minister may engage, upon such terms and conditions as the Minister considers necessary, the services of such professional or technical persons to assist in the efficient carrying out of the intent and purpose of this Part and the regulations. 2004, c. 4, s. 80.

Establishment or operation of food establishment

81 No person shall establish or operate a food establishment except in accordance with this Part and the regulations. 2004, c. 4, s. 81.

Permit required

82 (1) No person shall operate a food establishment, unless exempted by an administrator, without first having obtained a permit from an administrator.

(2) An application for a permit in respect of a food establishment shall be made to an administrator in accordance with the regulations.

(3) Subject to this Part and the regulations, an administrator shall issue a permit in respect of a food establishment to an applicant upon payment of the prescribed fee. 2004, c. 4, s. 82; 2021, c. 6, s. 12.

Closure order

82A Where a person operates a food establishment without having obtained a permit or an exemption under Section 82, an administrator may order the closure of the food establishment or take any other action the administrator considers appropriate. 2021, c. 6, s. 13.

Where permit is not to be issued or may be revoked

83 (1) An administrator shall not issue or renew a permit, or may suspend or revoke a permit, in respect of a food establishment to an applicant where the administrator is of the opinion that

(a) the past conduct of the applicant or, where the applicant is a corporation, of any of its officers or directors, affords reasonable grounds to believe that the operation of the food establishment would not be carried on in accordance with this Part and the regulations;

(b) the applicant does not have or will not have available all premises, facilities and equipment necessary to operate a food establishment in accordance with this Part and the regulations;

(c) the applicant is not complying or will not be able to comply with this Part and the regulations; or

(d) the operation of the food establishment represents or would represent a risk to human health.

(2) Any condition that is injurious to human health or, in the opinion of an administrator, is potentially injurious to human health is deemed a risk under this Part. 2004, c. 4, s. 83; 2021, c. 6, s. 14.

Investigation may be requested

84 An inspector or an administrator may request a medical officer to investigate pursuant to Part I if a food-related health hazard exists or may exist. 2004, c. 4, s. 84; 2021, c. 6, s. 15.

Appeal

85 (1) Where an applicant or permit holder has received notification that an administrator has refused to grant or renew a permit or has suspended or revoked a permit, the permit holder may appeal to the Minister, by notice in writing, stating concisely the reasons for the appeal.

(2) An appeal must be conducted in the manner prescribed by the Minister.

(3) The Minister may dismiss an appeal, allow the appeal or make any decision the administrator was authorized to make.

(4) The decision of the Minister is final and binding on the appellant and the Minister, and the appellant shall take such action as may be necessary to implement the decision. 2004, c. 4, s. 85; 2021, c. 6, s. 16.

Designation of types or classes of food establishments

86 An administrator may designate types or classes of food establishments for which permits are issued under Section 82. 2004, c. 4, s. 86; 2021, c. 6, s. 17.

Terms and conditions on permit

87 An administrator may amend, add or impose terms and conditions on a permit. 2004, c. 4, s. 87; 2021, c. 6, s. 18.

Permit holder shall comply with terms and conditions

88 A person to whom a permit is issued shall comply with all terms and conditions of the permit. 2004, c. 4, s. 88.

Construction and maintenance of food establishment

89 A food establishment must be constructed and maintained in such a manner that no condition exists that is injurious to human health or that, in the opinion of an administrator, is potentially injurious to human health. 2004, c. 4, s. 89; 2021, c. 6, s. 19.

Control of contamination

90 A food establishment must have appropriate maintenance, cleaning and sanitation programs to control physical, chemical and microbiological contamination of food, equipment, utensils and other facilities in the food establishment. 2004, c. 4, s. 90.

Unwholesome, stale or decayed food

91 **(1)** No person shall sell or offer for sale, or have in that person's possession for the purpose of sale, any unwholesome, stale or decayed article of food, and any such article may be seized and destroyed by an inspector with the approval of a medical officer.

(2) Notwithstanding subsection (1), an inspector may seize an article of the type described in that subsection and may destroy it without the approval of a medical officer where the inspector reasonably believes that the article poses a serious and imminent threat to the public health. 2004, c. 4, s. 91.

Restrictions on diseased persons

92 No person who is infected with a disease or condition prescribed in the regulations or is known to be a carrier of such a disease shall participate in any way in the storage, production, manufacture, transportation, preparation, dispensing, serving, keeping for sale or sale of milk, milk products and other food, except as prescribed by the regulations. 2004, c. 4, s. 92.

Entry and inspection without warrant

93 **(1)** An administrator or an inspector may, at any reasonable time, for the purpose of carrying out the administrator's duties or inspector's duties, as the case may be, under this Part or the regulations,

(a) enter without a warrant any premises where there are reasonable and probable grounds to believe that the premises are a food establishment and that records relating to the food establishment are to be found in the premises; and

(b) inspect the premises and any food or records relating to food.

(2) Notwithstanding subsection (1), an administrator or an inspector shall not enter any part of a dwelling without the consent of the occupier unless pursuant to a warrant. 2004, c. 4, s. 93; 2021, c. 6, s. 20.

Hindering or obstructing

94 No person shall hinder or obstruct an administrator or an inspector in the performance of that person's duties, provide an administrator or an inspector with false information or refuse to provide an administrator or an inspector with information required for the purpose of this Part and the regulations. 2004, c. 4, s. 94; 2021, c. 6, s. 21.

Use of force

95 Where an administrator or an inspector is empowered, authorized or required by any of the provisions of this Part or of the regulations to do any act, matter or thing, the administrator or the inspector may use such force as is reasonably necessary. 2004, c. 4, s. 95; 2021, c. 6, s. 22.

Administrator or inspector may call for assistance

96 An administrator or an inspector may, in the performance of duties under this Part, call for the assistance of any constable, police officer or other peace officer and, where called for such assistance, it is the duty of the constable, police officer or peace officer to render the assistance. 2004, c. 4, s. 96; 2021, c. 6, s. 23.

Certificate of appointment as proof

97 The production by an inspector of a certificate of appointment purporting to be signed by the Minister is admissible in evidence as proof of the appointment without further proof of the signature or authority of the Minister. 2004, c. 4, s. 97.

Offences by employees or agents

98 In a prosecution for a violation of this Part or the regulations, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused. 2004, c. 4, s. 98.

Prima facie proof respecting food or packaging

99 Proof that food, or a package containing food, bore

(a) a name and address purporting to be the name and address of the person by whom it was produced, processed or prepared; or

(b) a registered number or brand mark purporting to be the registered number or brand mark of the establishment where it was produced, processed or prepared,

is *prima facie* proof that the food was produced, processed or prepared and that the food or package was marked by the person whose name or address appeared on the food product or package or by the person operating the food establishment whose registered number or brand mark appeared on the package, as the case may be. 2004, c. 4, s. 99.

Other persons may accompany

100 An administrator or an inspector in carrying out any duties or exercising any powers under this Part or the regulations may be accompanied by any persons considered by the administrator or the inspector, as the case may be, to be necessary to enable the administrator or inspector to carry out those duties and exercise those powers. 2004, c. 4, s. 100; 2021, c. 6, s. 24.

Agreements between the Province and Canada

101 (1) Subject to the *Public Service Act*, the Minister may enter into agreements with the Government of Canada for

(a) the performance by the Government of Canada, on behalf of the Province, of functions and duties under this Part and the regulations that are the responsibility of the Province;

(b) the performance by the Province, on behalf of the Government of Canada, of functions and duties that are the responsibility of the Government of Canada under an Act of the Parliament of Canada.

(2) The Minister may enter into agreements for the more efficient carrying out of the object and purpose of this Part and the regulations. 2004, c. 4, s. 101.

Offences

102 (1) A person who contravenes this Part or the regulations, and a director or officer of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and upon summary conviction is liable for a first offence to a fine of not more than two thousand dollars or to imprisonment for a term of not more than six months, or to both, and for a subsequent offence to a fine of not more than ten thousand dollars or to imprisonment for a term of not more than one year, or to both.

(2) Notwithstanding subsection (1), a corporation that is convicted of an offence is liable for a first offence to a fine of not more than ten thousand dollars and for a subsequent offence to a fine of not more than fifty thousand dollars. 2004, c. 4, s. 102.

Conflict with Part

103 (1) Where the provisions of any Act or by-law or regulation of a regional municipality, town, municipality of a county or district or other local body are in conflict with this Part or the regulations, this Part and the regulations prevail to the extent of the conflict.

(2) Notwithstanding subsection (1), a by-law or regulation referred to in subsection (1) may impose or prescribe higher or more stringent standards or requirements than those provided for by this Part or the regulations where an enactment authorizes the by-law or regulation to impose or prescribe such standards or requirements. 2004, c. 4, s. 103.

Duties and powers of Minister and privilege

104 (1) Clause 6(h) applies *mutatis mutandis* to the Minister.

(2) Section 17 applies *mutatis mutandis* to the Minister, the administrators and the inspectors. 2004, c. 4, s. 104; 2021, c. 6, s. 25.

Regulations

105 (1) The Governor in Council may make regulations

(a) prescribing the powers and duties of administrators and inspectors or any class of administrators or inspectors;

(b) prescribing the qualifications of administrators;

(c) providing for the exemption from this Part or the regulations, or any part thereof, of any person or any class of persons or of any food product and prescribing the terms and conditions of the exemption;

(d) prescribing the manner of and the devices to be used in the operation of food establishments;

(e) prescribing the facilities and equipment to be provided and maintained at food establishments and the operation of food establishments;

(f) respecting cleanliness and sanitation of food establishments;

(g) requiring and governing the detention and disposal of any food at a food establishment and prescribing the procedures for the detention and disposal of food;

(h) respecting the transportation and delivery of food from a food establishment;

(i) prescribing the records to be made and kept by the operator of a food establishment;

(j) providing for the issue, renewal, suspension, reinstatement or revocation of or refusal to issue or renew permits and prescribing the fees payable for permits or the renewal of permits;

(k) providing for the inspection of food establishments and of vehicles in which food is transported;

(l) prohibiting the sale or delivery of milk, milk products or any other food from a food establishment if conditions in that food establishment are unsanitary or if the person in charge of the food establishment refuses to permit the food establishment to be inspected by an inspector;

(m) respecting how milk or cream must be pasteurized;

(n) respecting the temperature to which milk or cream must be subjected and in respect of the time during which such temperature must be maintained, the period during which such milk or cream must be cooled and the temperature to and the manner in which such milk or cream must be cooled;

(o) respecting the provision of safe and potable water supplies, for the control of sources of water and systems of distribution, and respecting the prevention of contamination or pollution of water that is used for human consumption;

(p) providing for inspection of premises before the issue of permits;

(q) providing for the keeping of records of permits and for inspection of those records by any person;

(r) prescribing conditions to which permits may be subject;

(s) governing appeals;

(t) prescribing terms and conditions under which food may be inspected at any food establishment and the fees payable for inspection;

(u) prescribing standards for any class or variety of food;

(v) providing for the taking of samples at a food establishment at the expense of the owner for the purpose of testing;

(w) providing for the labelling of food at a food establishment;

(x) extending the period during which food or things may be retained by an inspector;

(y) respecting the detention of food or things seized pursuant to this Part and for preserving or safeguarding the food or things;

(z) prescribing diseases or conditions for the purpose of Section 92;

(aa) establishing the circumstances under which a person described in Section 92 may return to work;

(ab) incorporating and adopting by reference, in whole or in part, a written standard, rule, regulation, guideline, code or document as it reads on a prescribed day or as it is amended from time to time;

(ac) respecting any matter the Governor in Council considers necessary or advisable for the administration of a system of administrative penalties;

(ad) respecting any matter the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Part.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 2004, c. 4, s. 105; 2021, c. 6, s. 26.

PART III

GENERAL

Regulations

106 **(1)** The Governor in Council may make regulations

(a) prescribing forms for the purpose of this Act and the regulations;

(b) defining any word or expression used but not defined in this Act;

(c) further defining any word or expression defined in this Act;

(d) respecting any matter that the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 2004, c. 4, s. 106.

Exception from freedom of information legislation

107 Sections 15, 16, 31, 40, 42 and 50, clause 58(1)(e), clauses 74(1)(p), (s), (t) and (y) and Section 104 apply notwithstanding the *Freedom of Information and Protection of Privacy Act*. 2004, c. 4, s. 107.

Cosmetology Act amended

108 *amendment*

Dairy Industry Act amended

109 *amendment*

Education Act amended

110 *amendments*

Fatality Investigations Act amended

111 *amendment*

Freedom of Information and Protection of Privacy Act amended

112 *amendment*

Health Act amended

113 *amendments*

Health Authorities Act amended

114 *amendment*

Health Services and Insurance Act amended

115 *amendment*

Municipal Government Act amended

116 *amendment*

Registered Barbers Act amended

117 *amendment*

Summary Proceedings Act amended

118 *amendment*

Proclamation

119 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. 2004, c. 4, s. 119.

Proclaimed (except s. 113(2))	-	October 14, 2005
In force (except s. 113(2))	-	November 1, 2005
s. 113(2)	-	not proclaimed

Judicature Act

CHAPTER 240 OF THE REVISED STATUTES, 1989

as amended by

1989, c. 20, s. 1; 1992, c. 16, ss. 30-68; 1996, c. 23, ss. 10, 11;
1997 (2nd Sess.), c. 5; 1998, c. 12, ss. 3-10; 2000, c. 28, s. 55;
2003 (2nd Sess.), c. 1, s. 26; 2008, c. 60; 2009, c. 17; 2019, c. 17

Published by Authority of the Speaker of the House of Assembly
Halifax

This page is intentionally blank.

CHAPTER 240 OF THE REVISED STATUTES, 1989
amended 1989, c. 20, s. 1; 1992, c. 16, ss. 30-68; 1996, c. 23, ss. 10, 11;
1997 (2nd Sess.), c. 5; 1998, c. 12, ss. 3-10; 2000, c. 28, s. 55;
2003 (2nd Sess.), c. 1, s. 26; 2008, c. 60; 2009, c. 17; 2019, c. 17

An Act Respecting a Supreme Court of Judicature

Table of Contents

(The table of contents is not part of the statute)

Sessions and Sittings

Family Division

Trials and Procedures

Appeals

Rules of Law

Rules

General Provisions

_____

NOTE - *See transitional provisions contained in 1997 (2nd Sess.), c. 5, ss. 8-11.*

Short title

1 This Act may be cited as the *Judicature Act*. R.S., c. 240, s. 1.

INTERPRETATION

Interpretation

2 In this Act, and the Rules,

(a) "Court" means the Court of Appeal or the Supreme Court;

(aa) "Court of Appeal" means the Nova Scotia Court of Appeal and includes a judge thereof whether sitting in court or in chambers;

(b) "defendant" includes every person served with an originating notice or other process or entitled to attend any proceeding;

(c) "judgment" includes an order, rule or decree;

(d) "oath" includes solemn affirmation and statutory declaration;

(e) "party" includes every person served with an originating notice, or entitled to attend any proceeding although not named on the record;

(f) "plaintiff" includes every person asking any relief or declaration against any other person in any proceeding;

(g) "proceeding" means any civil or criminal action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons or originating motion or in any other manner;

(h) "Rules" includes the *Civil Procedure Rules* and any other rules made pursuant to this Act;

(i) "Supreme Court" means the Supreme Court of Nova Scotia and includes a judge thereof whether sitting in court or in chambers;

(j) "Supreme Court (Family Division)" means the Supreme Court of Nova Scotia (Family Division) and includes a judge thereof whether sitting in court or in chambers. R.S., c. 240, s. 2; 1992, c. 16, s. 30; 1998, c. 12, s. 3.

CONSTITUTION OF THE COURT OF APPEAL
AND THE SUPREME COURT

Supreme Court of Nova Scotia

3 The Supreme Court of Nova Scotia as constituted before this Act, a court of common law and equity possessing original and appellate jurisdiction in both civil and criminal cases, shall continue as the Supreme Court of Nova Scotia with original jurisdiction and as the Nova Scotia Court of Appeal with appellate jurisdiction for the Province. R.S., c. 240, s. 3; 1992, c. 16, s. 32.

Jurisdiction, power and authority

4 **(1)** The Court shall continue to be a superior court of record, having civil and criminal jurisdiction and it has all the jurisdiction, power and authority that on the coming into force of this Act, was vested in or might have been exercised by the Supreme Court, and such jurisdiction, power, and authority shall be exercised in the name of the Court.

(2) *repealed 1992, c. 16, s. 33.*

R.S., c. 240, s. 4; 1992, c. 16, s. 33.

Court for Divorce and Matrimonial Causes

5 The Supreme Court shall exercise all the jurisdiction, powers and authority belonging to or exercised by the Court for Divorce and Matrimonial Causes before the first day of March, 1972. R.S., c. 240, s. 5; 1992, c. 16, s. 34.

6 *repealed 1992, c. 16, s. 35.*

Jurisdiction and power of Court of Appeal

7 The Court of Appeal shall exercise all the jurisdiction, powers and authority belonging to or exercised by the Supreme Court *in banco* before the first day of August, 1966, and the judges of the Court of Appeal shall exercise all the jurisdiction, powers and authority belonging to or exercised by a judge of the Supreme Court before that date in relation to the Supreme Court *in banco*. R.S., c. 240, s. 7; 1992, c. 16, s. 36.

Jurisdiction and power of Supreme Court

8 The Supreme Court shall exercise all the jurisdiction, powers and authority belonging to or exercised by the Supreme Court of Nova Scotia before the first day of August, 1966, and not assigned to the Court of Appeal by this or any other Act and the judges of the Supreme Court shall exercise all the jurisdiction, powers and authority belonging to or exercised by a judge of the Supreme Court of Nova Scotia before that date and not assigned to the judges of the Court of Appeal by this or any other Act. R.S., c. 240, s. 8; 1992, c. 16, s. 37.

Reference to Supreme Court in banco or Appeal Division

9 A reference in any enactment to the Supreme Court *in banco* or a judge thereof or to the Appeal Division of the Court or a judge thereof is, whether expressed in those terms or not, a reference to the Court of Appeal or a judge thereof and shall be so construed. R.S., c. 240, s. 9; 1992, c. 16, s. 38.

Reference to Supreme Court or Trial Division

10 Subject to Section 9, a reference in any other enactment to the Supreme Court or the Trial Division of the Supreme Court or a judge thereof is a reference to the Supreme Court or a judge thereof and shall be so construed. R.S., c. 240, s. 10; 1992, c. 16, s. 39.

Reference to Chief Justice

11 A reference in any other enactment to the Chief Justice that relates to the functions assigned by this Act to the Supreme Court or a reference in any other enactment to the Chief Justice of the Trial Division of the Supreme Court is a reference to the Chief Justice of the Supreme Court and shall be so construed, but in any other case a reference to the Chief Justice is a reference to the Chief Justice of Nova Scotia. R.S., c. 240, s. 11; 1992, c. 16, s. 40.

Reference to Court for Divorce and Matrimonial Causes

12 A reference in any other enactment to the Court for Divorce and Matrimonial Causes, or to judges of that Court, shall be and shall be construed as a reference to the Supreme Court or a judge thereof. R.S., c. 240, s. 12; 1992, c. 16, s. 41.

Exercise of jurisdiction

13 The jurisdiction of the Court shall be exercised in the manner provided in this Act and the Rules and, where no special provisions are contained in this Act or the Rules, it shall be exercised in accordance with the practice and procedure followed by the Supreme Court of Nova Scotia before the first day of March, 1972. R.S., c. 240, s. 13; 1992, c. 16, s. 42.

Marking of court documents

14 **(1)** *repealed 1992, c. 16, s. 43.*

(2) Every document relating to a proceeding in the Court of Appeal shall be marked with the name of the Court of Appeal.

(3) Every document relating to a proceeding in the Supreme Court shall be marked with the name of the Supreme Court.

(4) Every document relating to a proceeding in the Supreme Court (Family Division) shall be marked with the name of the Supreme Court (Family Division). R.S., c. 240, s. 14; 1992, c. 16, s. 43; 1998, c. 12, s. 4.

SEAL

Seal for Supreme Court and for Court of Appeal

15 (1) The Governor in Council may from time to time determine and declare the seal to be used in the Supreme Court and by which its proceedings shall be certified and authenticated.

(2) The Governor in Council may from time to time determine and declare the seal to be used in the Court of Appeal and by which its proceedings shall be certified and authenticated. R.S., c. 240, s. 15; 1992, c. 16, s. 44.

JUDGES

Composition of Court of Appeal

16 (1) The Court of Appeal shall be composed of the Chief Justice of Nova Scotia, who shall be the chief justice of the Court of Appeal, and seven other judges.

(2) For each office of judge of the Court of Appeal there shall be the additional office of supernumerary judge of the Court of Appeal and for the office of Chief Justice of Nova Scotia there shall be such additional offices of judge as are, from time to time, required for the purpose of section 32 of the *Judges Act* (Canada). 1992, c. 16, s. 45.

Composition of Supreme Court

17 (1) The Supreme Court shall be composed of

(a) the Chief Justice of the Supreme Court;

(b) the Associate Chief Justice of the Supreme Court;

(c) the Associate Chief Justice of the Supreme Court (Family Division); and

(d) not more than forty-seven other judges.

(1A) The Supreme Court shall include a Family Division composed of the Chief Justice of the Supreme Court, the Associate Chief Justice of the Supreme Court (Family Division) and not more than twenty-four other judges.

(2) For each office of judge of the Supreme Court there shall be the additional office of supernumerary judge of the Supreme Court and for the office of Chief Justice of the Supreme Court and the office of Associate Chief Justice of the Supreme Court there shall be such additional offices of judge as are, from time to time, required for the purpose of section 32 of the *Judges Act* (Canada). 1992, c. 16, s. 45; 1997 (2nd Sess.), c. 5, s. 1; 2000, c. 28, s. 55; 2019, c. 17, s. 1.

18 *repealed 1998, c. 12, s. 5.*

Holding other office under Government

19 The judges of the Court shall hold no other office under Government, except by way of judicial appointment. R.S., c. 240, s. 19.

Constitution Act, 1867

20 The person appointed Chief Justice of Nova Scotia, the person appointed Chief Justice of the Supreme Court, the person appointed Associate Chief Justice of the Supreme Court, ~~and~~ the person appointed Associate Chief Justice of the Supreme Court (Family Division) and the persons appointed as judges of the Court shall be appointed in accordance with the provisions of the *Constitution Act*, *1867*. R.S., c. 240, s. 20; 1992, c. 16, s. 46; 1997 (2nd Sess.), c. 5, s. 2.

Responsibilities of Chief Justices and duties of Associate Chief Justices

20A (1) The Chief Justice of Nova Scotia is responsible for the administration of the judicial functions of the Court of Appeal, including, without limiting the generality of the foregoing, the scheduling of the sittings of the Court of Appeal and the assignment of judicial duties.

(2) The Chief Justice of the Supreme Court is responsible for the administration of the judicial functions of the Supreme Court, including, without limiting the generality of the foregoing, the scheduling of the sittings of the Supreme Court and the assignment of judicial duties.

(3) The Associate Chief Justice of the Supreme Court shall carry out the duties assigned to the Associate Chief Justice by the Chief Justice of the Supreme Court.

(4) The Associate Chief Justice of the Supreme Court (Family Division) shall carry out the duties assigned to the Associate Chief Justice (Family Division) by the Chief Justice of the Supreme Court. 1992, c. 16, s. 47; 1997 (2nd Sess.), c. 5, s. 3.

Equal power and jurisdiction of judges

21 Except where otherwise provided, all judges of the Court of Appeal have in all respects equal power, authority and jurisdiction and all judges of the Supreme Court have in all respects equal power, authority and jurisdiction. 1992, c. 16. s. 48.

Ex officio judge

21A A judge of the Supreme Court is *ex officio* a judge of the Court of Appeal. 1996, c. 23, s. 10.

Precedence of judges

22 (1) The Chief Justice of Nova Scotia shall have precedence over all the other judges of the Court.

(2) The Chief Justice of the Supreme Court shall have precedence next after the Chief Justice of Nova Scotia over all other judges of the Court.

(3) The Associate Chief Justice of the Supreme Court shall have precedence next after the Chief Justice of the Supreme Court over all other judges of the Court.

(3A) The Associate Chief Justice of the Supreme Court (Family Division) shall have precedence next after the Associate Chief Justice of the Supreme Court over all other judges of the Court.

(4) The other judges of the Court of Appeal shall have precedence next after the Associate Chief Justice of the Supreme Court (Family Division) according to seniority of appointment.

(5) The other judges of the Supreme Court shall have precedence next after the judges of the Court of Appeal according to seniority of first appointment to a court pursuant to section 96 of the *Constitution Act, 1867*. R.S., c. 240, s. 22; 1992, c. 16, s. 49; 1997 (2nd Sess.), c. 5, s. 4.

Acting Chief Justices and judges

23 (1) In the absence or incapacity of the Chief Justice of Nova Scotia or if such office is vacant, the next senior judge, other than a supernumerary judge of the Court of Appeal shall have and exercise the powers and perform the duties of the Chief Justice of Nova Scotia.

(2) In the absence or incapacity of a judge of the Court of Appeal or in case of a vacancy in the Court of Appeal, the Chief Justice of Nova Scotia may designate a judge of the Supreme Court to act as a judge of the Court of Appeal.

(3) In the absence or incapacity of the Chief Justice of the Supreme Court or if such office is vacant, the Associate Chief Justice of the Supreme Court shall have and exercise the powers and perform the duties of the Chief Justice.

(3A) In the absence or incapacity of the Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court or if such offices are vacant, the Associate Chief Justice (Family Division) shall have and exercise the powers and perform the duties of the Chief Justice.

(4) In the absence or incapacity of the Chief Justice of the Supreme Court, the Associate Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court (Family Division) or if such offices are vacant, the next senior judge, other than a supernumerary judge, of the Supreme Court shall have and exercise the powers and perform the duties of the Chief Justice. R.S., c. 240, s. 23; 1992, c. 16, s. 50; 1997 (2nd Sess.), c. 5, s. 5.

Attendance at meetings

24 The judges of the Court are authorized from time to time to attend meetings, on the call of either the Chief Justice of Nova Scotia or the Chief Justice of the Supreme Court, for the purpose of considering the operation of this Act or any other matters relating to the administration of justice. R.S., c. 240, s. 24; 1992, c. 16, s. 51.

JUDICIAL DISTRICTS

Descriptions of districts and resident judges

25 **(1)** The Province consists of the following judicial districts:

(a) Cape Breton District, consisting of the counties of Cape Breton, Inverness, Richmond and Victoria;

(b) Central District, consisting of the counties of Antigonish, Colchester, Cumberland, Guysborough and Pictou and the Municipality of the District of East Hants;

(c) Halifax District, consisting of the County of Halifax;

(d) Southwestern District, consisting of the Counties of Annapolis, Digby, Kings, Lunenburg, Queens, Shelburne and Yarmouth and the Municipality of the District of West Hants.

(2) There shall be for each judicial district at least two judges of the Supreme Court designated as resident judges.

(3) Subject to subsection (4), the resident judges shall be designated by the Chief Justice of the Supreme Court after consultation with the Attorney General.

(4) A judge of the Supreme Court who was, immediately prior to the coming into force of this subsection, a judge of a county court is deemed to be designated as a resident judge for the judicial district in which that county court would be located but for its abolition.

(5) A designation of a judge pursuant to or deemed by this Section shall not be changed or rescinded except with the consent of that judge.

(6) A resident judge shall reside within the judicial district for which the judge is designated. 1992, c. 16, s. 52.

Power to establish justice centres and areas

26 The Minister of Justice may establish justice centres and for each the justice centre area it serves. 1996, c. 23, s. 11.

OATH OF JUSTICES

Oath of office

27 **(1)** Before assuming the duties of his office, a judge of the Court shall take the following oath:

> I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as . . . . . So help me God.

(2) The oath shall be administered by the Lieutenant Governor or such person as is appointed by him to administer the same or by any person who is appointed by the Governor General to administer oaths of office. R.S., c. 240, s. 27.

SESSIONS AND SITTINGS

Sessions and sittings

28 Subject to the Rules, the Supreme Court and the judges thereof shall have power to sit and act at any time and at any place for the transaction of any part of the business of the Supreme Court, or of a judge, or for the discharge of any duty which by any statute or otherwise is required to be discharged. R.S., c. 240, s. 28; 1992, c. 16, s. 54.

Rules

29 The judges of the Supreme Court or a majority of them, in addition to any other such power granted to them by this Act, may make rules respecting sessions, sittings or circuits of the Supreme Court and any matter relating thereto. R.S., c. 240, s. 29; 1992, c. 16, s. 54.

Special sittings

30 **(1)** Whenever it appears necessary for the disposal of any proceeding in any county, the Supreme Court may order special sittings of the Supreme Court to be held in such county for the trial and disposal of such proceeding.

(2) The judge presiding at such sittings may hear and determine any proceeding which may be disposed of by a judge sitting in court or chambers. R.S., c. 240, s. 30; 1992, c. 16, s. 54.

Extension and adjournment of sittings

31 The presiding judge may from time to time in his discretion extend and adjourn any sittings for such time as he deems necessary for the disposal of any proceeding on the docket. R.S., c. 240, s. 31.

Delay of sittings

32 If a judge is prevented for any reason from arriving at the place appointed for holding sittings on the day fixed for holding the same, the sheriff shall

give public notice that the Supreme Court will sit on the following day and shall give such notice from day to day until a judge arrives for the sittings. R.S., c. 240, s. 32; 1992, c. 16, s. 54.

FAMILY DIVISION

Jurisdiction

32A (1) The Supreme Court (Family Division) has and may exercise in such judicial districts, or parts of a district, as are designated by the Governor in Council pursuant to Section 32H the powers and duties possessed by the Supreme Court in relation to, and has and may exercise jurisdiction in relation to, proceedings in the following matters:

(a) formation of marriage;

(b) dissolution and annulment of marriage;

(c) judicial separation and separation orders;

(d) rights to property in disputes among spouses or members of the same family;

(e) restitution of conjugal rights;

(f) applications under the *Testators' Family Maintenance Act*;

(g) declarations of status, including validity of marriage, parentage, legitimacy and legitimation;

(h) alimony, maintenance and protection for spouses;

(i) maintenance of children, including affiliation proceedings and agreements;

(j) maintenance of parents;

(k) enforcement of alimony and maintenance orders, including reciprocal enforcement of those orders;

(l) custody and access to children;

(m) adoption;

(n) matters arising under the *Child Abduction Act*;

(o) interspousal and familial torts;

(p) *repealed 1998, c. 12, s. 6.*

(q) consent to medical treatment of minors;

(r) *repealed 1998, c. 12, s. 6.*

(s) change of name;

(t) *parens patriae* jurisdiction;

(u) divorce;

(v) the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement or paternity agreement;

(w) resulting trust or unjust enrichment involving persons who have cohabited including, but not limited to, relief by way of constructive trust or a monetary award;

(x) those other matters that are provided by or under an enactment to be within the jurisdiction of the Family Division.

(2) In addition to those matters referred to in subsection (1), the Governor in Council may by order confer on the Supreme Court (Family Division) jurisdiction over any or all charges, offences and matters arising from any one or more of the following Acts or subjects:

(a) the *Labour Standards Code* in so far as it relates to a prosecution for an offence respecting the employment of children;

(b) the Y*oung Persons' Summary Proceedings Act*;

(c) the *Young Offenders' Act* (Canada);

(d) sections 172, 215 and 733.1 of the *Criminal Code* (Canada);

(e) sections 266, 810 and 811 of the *Criminal Code* (Canada), where the parties are spouses or parent and child;

(f) charges or proceedings under the *Criminal Code* (Canada) with respect to incest and other sexual offences committed by a family member against another member of the same family, corrupting children, failing to provide necessaries, abandoning children, abduction of children by members of the same family, assaults by a member of a family against another member of the same family and thefts by a family member from another member of the same family;

(g) such other Acts or matters as the Governor in Council deems appropriate. 1997 (2nd Sess.), c. 5, s. 6.

Judges of Family Division

32B (1) Any judge of the Supreme Court may hear and determine proceedings brought in the Supreme Court (Family Division) and for such purpose such judge is a judge of the Supreme Court (Family Division).

(2) Any judge of the Supreme Court (Family Division) may hear and determine any proceeding brought in the Supreme Court but the substantial majority of that judge's time shall be spent hearing and determining proceedings in the Supreme Court (Family Division). 1998, c. 12, s. 7.

Transfer from or to Family Division

32C (1) A judge of the Supreme Court (Family Division) may, in accordance with the Rules, order that a proceeding commenced in the Supreme Court (Family Division) be transferred out of that Division or to another court.

(2) Where a proceeding that should not have been commenced in the Supreme Court (Family Division) is so commenced, a judge of the Supreme Court (Family Division) may at any stage of the proceeding, order that the proceeding be transferred out of that Division or to another court in which the proceeding may properly be taken, and all steps taken by any party in the proceeding and all orders made therein before the transfer are valid and effectual as if they were taken or made where the proceedings ought to have been commenced.

(3) A judge of the Supreme Court or of another court having jurisdiction in a proceeding that could be commenced in the Supreme Court (Family Division) may, in accordance with the Rules, order that the proceeding be transferred to the Supreme Court (Family Division). 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

Open court

32D Subject to Section 37 and any other Act, whether of the Legislature of the Province or of the Parliament of Canada, that applies to proceedings in the Supreme Court (Family Division), a judge of the Supreme Court (Family Division) shall hear a matter in open court unless after considering

(a) the public interest in hearing the proceeding in open court;

(b) any potential harm that may be caused to any person if matters of a private nature were disclosed in open court; and

(c) any representations made by the parties,

the judge is of the opinion that the matter should be heard, in whole or in part, *in camera*. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

Power to adjourn

32E (1) A judge, on application or on the judge's own motion, may adjourn a proceeding brought in the Supreme Court (Family Division) where the judge considers that any party to the proceeding or any child affected by the proceeding would benefit by counselling or mediation or professional services.

(2) Where a proceeding brought in the Supreme Court (Family Division) is adjourned pursuant to subsection (1), the judge may order a party to pay all or any portion of the fees and expenses specified in the order for any of the services. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

Power to direct report

32F (1) Upon application or on the judge's own motion, a judge of the Supreme Court (Family Division) may direct a family counsellor, social worker,

probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.

(2) A person directed to make a report pursuant to subsection (1) shall file a written report with the Supreme Court (Family Division) together with a copy of the report for each party to the proceeding and for the judge.

(3) The contents of a report filed pursuant to subsection (2) may be received in evidence in the proceeding.

(4) A person filing a report pursuant to subsection (2) is a competent and compellable witness.

(5) Any party, including the party calling the person as a witness, may cross-examine the person referred to in subsection (4).

(6) No action lies or shall be instituted against a person who prepares a report pursuant to subsection (1) for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done by that person in the carrying out or supposed carrying out of that duty.

(7) A judge may, subject to the regulations, specify in an order made pursuant to subsection (1) the amount of any charge for the report that each party is required to pay. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

Duties of peace officer

32G It is the duty of a peace officer to serve any process issued out of the Supreme Court (Family Division), to execute any order issued by any judge of the Supreme Court (Family Division), to convey a young offender to such place or places as may be directed in such orders and to assist the Supreme Court (Family Division) and the officers of the Division in carrying out the *Young Offenders Act* (Canada) and any other matters or enactment for which the Supreme Court (Family Division) is responsible. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

Power to designate area

32H The Governor in Council may designate a judicial district, or part of a district, in which the Supreme Court (Family Division) may exercise its jurisdiction and may designate whether that jurisdiction is exclusive or concurrent. 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 8.

Regulations

32I The Governor in Council may make regulations respecting

(a) mediation and alternate dispute-resolution mechanisms; and

(b) costs and fees for services provided in the Supreme Court (Family Division). 1997 (2nd Sess.), c. 5, s. 6; 1998, c. 12, s. 9.

TRIALS AND PROCEDURES

Single judge in Supreme Court and power to decide or reserve decision

33 **(1)** Every proceeding in the Supreme Court and all business arising out of the same shall be heard, determined and disposed of before a single judge.

(2) In all such proceedings any judge sitting in court shall be deemed to constitute the Supreme Court.

(3) A judge of the Supreme Court shall decide questions coming properly before him, but may reserve any proceeding or any point in any proceeding for the consideration of the Court of Appeal. R.S., c. 240, s. 33; 1992, c. 16, s. 55.

Trials and procedure

34 Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:

(a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:

(i) where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment,

(ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,

(iii) where the judge at the trial in his discretion directs that the issues of fact shall be tried or the damages assessed or inquired of with a jury;

(b) in all other cases the issues of fact or the assessment or inquiry of damages in civil proceedings shall be tried, heard and determined and judgment given by a judge without a jury;

(c) if in any proceeding both legal and equitable issues are raised, they shall be heard and determined at the same time, unless the Supreme Court or a judge, or the judge at the trial, otherwise directs or unless under the foregoing provisions of this Section either of the parties requires that the legal issues of fact be tried with a jury;

(d) upon the hearing of any proceeding, the presiding judge may, of his own motion or by consent of the parties, reserve judgment until a future day, not later than six months from the day of reserving judgment, and his judgment whenever given shall be considered as if given at the time of the hearing and shall be filed with the prothonotary of the Supreme Court for the county in which the hearing was tried, who shall immediately give notice in writing to the parties to the cause or their respective solicitors that such judgment has been filed, and each of the parties shall have and exercise, within twenty days, or within such further time as the Supreme Court may order, from the service of such notice, all such rights as he possessed or might have exercised if judgment had been given on the hearing of the proceeding;

(e) upon any trial with a jury of any proceeding except a proceeding for libel, the jury shall, if so directed by the judge, give a special verdict, and if not so directed may give either a general or a special verdict;

(f) upon a trial with a jury of any proceeding, except a proceeding for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment,

(i) the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact raised by the issues,

(ii) such questions may be stated to them by the judge, and counsel may require the judge to direct the jury to answer any other questions raised by the issues or necessary to be answered by the jury in order to obtain a complete determination of all matters involved in the proceeding,

(iii) the jury shall answer such questions and shall not give any verdict and the judge shall give a judgment in the proceeding not inconsistent with the answers of the jury to such questions,

(iv) if the judge refuses to direct the jury to answer any questions which counsel requires him to submit to them, such refusal may be used as a ground for a new trial. R.S., c. 240, s. 34; 1992, c. 16, s. 56.

Assessor to assist Court

35 (1) Subject to the Rules, the Court may, in any proceeding in which it deems it expedient, call in the aid of one or more assessors specially qualified and try and hear such proceeding wholly or in part with the assistance of such assessor or assessors.

(2) The remuneration, if any, to be paid by any party to such assessor shall be determined by the Court. R.S., c. 240, s. 35.

Interpretation of Sections 35B to 35H

35A In Sections 35B to 35H,

(a) "judgment creditor" means a person who is entitled to receive payment of or to enforce a judgment;

(b) "judgment debtor" means an person who is obligated to make payment under a judgment or against whom a judgment may be enforced;

(c) "periodic payments" means the payment of money to a judgment creditor at a future time or times. 2003 (2nd Sess.), c. 1, s. 26.

Periodic payments

35B In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under the *Fatal Injuries Act*, the court may, on the application of any party, order that the future pecuniary damages and such other damages as the parties may agree be paid in whole or in part by periodic payments. 2003 (2nd Sess.), c. 1, s. 26.

Duty of court respecting order for periodic payments

35C Where the court orders damages to be paid by periodic payments, the judgment shall

(a) identify each head of damage for which a periodic payment is to be made;

(b) in respect of each head of damage for which periodic payments are awarded, state

(i) the amount of each periodic payment,

(ii) the date of or the interval between each periodic payment,

(iii) the recipient of each periodic payment,

(iv) any annual percentage increase in the amount of each periodic payment, and

(v) the date or event on which the periodic payments will terminate;

and

(c) contain or have attached to it any other material that the court considers appropriate. 2003 (2nd Sess.), c. 1, s. 26.

Security for periodic payments

35D (1) Unless the court orders otherwise, a judgment that orders damages to be paid by periodic payments is conditional on the judgment debtor's filing with the court, within thirty days after the day the judgment is rendered or such other time as the court may fix, security to assure the payment of the judgment.

(2) Security under subsection (1) shall be in the form of an annuity contract issued by a life insurer satisfactory to the court, or in any other form that is satisfactory to the court.

(3) Where security is filed and approved under this Section, the judgment debtor by whom or on whose behalf the security is filed is discharged from all liability to the judgment creditor in respect of the damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid. 2003 (2nd Sess.), c. 1, s. 26.

Where judgment creditor dies

35E Where a judgment creditor dies before the date or event on which periodic payments are terminated for a head of damage under subclause (v) of clause (b) of Section 35C, the remaining periodic payments for that head of damage shall continue to be paid to the estate of the judgment creditor until the termination date, unless the judgment provides otherwise. 2003 (2nd Sess.), c. 1, s. 26.

Commutation of periodic payments to lump sum

35F Except as provided in subsection (2) of Section 35D and Section 35E, no award for periodic payments of damages shall be commuted into a lump sum. 2003 (2nd Sess.), c. 1, s. 26.

Exemption of periodic payments from execution, etc.

35G Periodic payments of damages for loss of future earnings are exempt from garnishment, attachment, execution or any other process or claim to the same extent that wages or earnings are exempt under law. 2003 (2nd Sess.), c. 1, s. 26.

Award for periodic payments not assignable or transferable

35H An award for periodic payments is not assignable or transferable. 2003 (2nd Sess.), c. 1, s. 26.

Application of Sections 35A to 35H

35I Sections 35A to 35H apply to all proceedings, whether commenced before or after the coming into force of those Sections. 2003 (2nd Sess.), c. 1, s. 26.

Judgment by judge leaving office or absent

36 (1) Where a judge resigns his office, is appointed to any other court or ceases to hold office, he may at any time within eight weeks after such event give judgment or grant an order in any proceeding previously tried or heard before him, as if he had continued in office.

(2) Where a judge has heard any proceeding jointly with other judges in the Court of Appeal, he may at any time within the period mentioned in subsection (1) take part in the giving of judgment by the Court of Appeal, as if he were a member of it.

(3) Where a judge has heard a proceeding jointly with other judges in the Court of Appeal and he resigns, is appointed to any other court, ceases to hold office, dies or is absent through illness or other cause without having handed his opinion in writing to any other judge of the Court of Appeal, then the remaining

judges shall, notwithstanding any other provisions of this Act, give the judgment or order of the Court of Appeal in the proceeding.

(4) Where a judge has heard a proceeding jointly with other judges in the Court of Appeal, and he resigns, is appointed to any other court, ceases to hold office, dies or is absent through illness or other cause before judgment is delivered by the Court of Appeal but has handed his opinion in writing to any other judge of the Court of Appeal, the remaining judges shall, notwithstanding any other provision of this Act, deliver judgment in the proceeding and the written judgment of the dead or absent judge shall be read by one of the other judges and has the same effect as if he were present. R.S., c. 240, s. 36; 1992, c. 16, s. 57.

Exclusion of public from court

37 Where a judge of the Supreme Court at any proceeding deems it to be in the interest of public morals, the maintenance of order or the proper administration of justice, he may order that the public be excluded from the court. R.S., c. 240, s. 37; 1992, c. 16, s. 58.

APPEALS

Appeal to Court of Appeal

38 (1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.

(1A) Notwithstanding any enactment but subject to Sections 39 and 40, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court (Family Division) or a judge thereof.

(2) The Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature.

(3) If, upon the hearing of any appeal, it appears to the Court of Appeal that a new trial should be ordered, it may order that the decision, verdict, judgment or order be set aside and that a new trial be held subject to such terms and conditions as the Court of Appeal may direct.

(4) Nothing in this Section restricts the jurisdiction and power of the Court of Appeal exercised by the Appeal Division of the Supreme Court before the first day of March, 1972. R.S., c. 240, s. 38; 1992, c. 16, s. 59; 1997 (2nd Sess.), c. 5, s. 7; 1998, c. 12, s. 10.

Appeal from costs or consented to order

39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehen-

sion as to the facts or the law or on any other ground, except by leave of the Court of Appeal. R.S., c. 240, s. 39; 1992, c. 16, s. 60.

Appeal from interlocutory order upon leave

40 There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules or by leave of the Court of Appeal. R.S., c. 240, s. 40; 1992, c. 16, s. 61.

RULES OF LAW

Rules of law

41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:

(a) if a plaintiff claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title, or claim whatsoever, asserted by a defendant in any such proceeding or to relief founded upon a legal right which before the first day of October, 1884, could only have been given by a court of equity, the Court shall give to the plaintiff the same relief as would have been given by the court of the Equity Judge or the High Court of Chancery in England when the same existed, in a suit or proceedings for the same or the like purpose properly instituted before the first day of October, 1884;

(b) if a defendant

(i) claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract or against any right, title or claim, asserted by a plaintiff in a proceeding, or

(ii) alleges any ground of equitable defence to any claim of the plaintiff in such a proceeding,

the Court shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, the same effect by way of defence against the claim of the plaintiff as the court of the Equity Judge or the Court of Chancery would have given, if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in either of those courts, for the same or the like purpose, before the first day of October, 1884;

(c) the Court shall have power to grant to a defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him,

(i) all such relief against a plaintiff or petitioner as such defendant has properly claimed by his pleading, and as the Court might grant in any suit instituted for that purpose by the same defendant against the same plaintiff, and

(ii) also all such relief relating to or connected with the original subject of the proceeding and in like manner claimed against any other person, whether already a party to the same proceeding or not, who has been duly served with notice in writing of the claim, pursuant to any rule of Court or any order of the Court, as might properly be granted against such person if he had been made a defendant to a proceeding duly instituted by the same defendant for the like purpose,

and every person served with any such notice shall thenceforth be deemed a party to the proceeding with the same rights in respect of his defence against the claim as if he had been duly sued in the ordinary way by the defendant;

(d) the Court shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any proceeding, in the same manner in which the court of equity judge, or the said Court of Chancery, would have recognized, and taken notice of the same, in any suit or proceeding duly instituted therein before the first day of October, 1884;

(e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;

(f) subject to the foregoing provisions for giving effect to equitable rights and other matters of equity, and to the other express provisions of this Act, the Court shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect to prior to the first day of October, 1884, by the Court either at law or in equity;

(g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be com-

pletely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

(h) when

(i) bondholders, debenture holders or debenture-stock holders are entitled to a mortgage or charge or both by virtue of a trust deed,

(ii) a proceeding is brought for foreclosure and sale of the mortgaged property, and

(iii) on bringing the same to sale no offer is made therefor or no bid or offer as high as the reserved bid, if any, is received therefor,

the sheriff or person authorized by the Court to make such sale, may, with the approbation of the Court, sell the mortgaged property as a whole or in parcels, to the best purchaser or purchasers that can be found, and where, under the terms of such trust deed, the bondholders, debenture holders or debenture-stock holders, or a specified majority of them, have power to sanction the sale or exchange of the mortgaged premises for a consideration, in whole or in part, other than cash, the Court shall have power in any such proceeding to sanction any such sale or exchange, first ascertaining that it has the approval of the requisite number or proportion of bondholders, debenture holders or debenture-stock holders, and to give the necessary directions for the purpose of carrying the same into effect and to direct the trustee to exercise all or any of the powers conferred by such trust deed;

(i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;

(j) where a party pays money into court in satisfaction of a claim and another party becomes entitled to judgment for an amount equal to or less than that paid into court, the Court shall award interest under clause (i) only to the date of payment into court as if said date had been the date of judgment;

(k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if

(i) interest is payable as of right by virtue of an agreement or otherwise by law,

(ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or

(iii) the claimant has been responsible for undue delay in the litigation. R.S., c. 240, s. 41.

Discontinuance of foreclosure proceeding

42 **(1)** In this Section, "mortgagor" means the original mortgagor to a mortgage document and includes any person deriving title through him.

(2) A mortgagor, who is in default of a mortgage

(a) either

(i) in failing to make a payment of principal or interest or a payment otherwise due under the mortgage, or

(ii) in failing to observe a covenant or term of the mortgage; and

(b) if, as a result of the default referred to in either subclause (i) or (ii) of clause (a) or both, the whole of the balance of the outstanding principal and interest secured by the mortgage has become due and payable,

may before the granting of an order for foreclosure or foreclosure and sale make an application to the Supreme Court to have any proceedings commenced by the mortgagee for the order for foreclosure or foreclosure and sale discontinued.

(3) The Supreme Court may grant an order of discontinuance conditional upon

(a) the payment of all arrears of principal and interest and any other payments due under the mortgage;

(b) the performance of the covenant in default;

(c) the payment of any costs and expenses incurred by the mortgagee and allowed by the Supreme Court; and

(d) the performance of the conditions of the order within such time as the Supreme Court may allow.

(4) The Supreme Court may not grant more than one order pursuant to this Section in respect of the same mortgage.

(5) Her Majesty in right of the Province is bound by this Section.
R.S., c. 240, s. 42; 1992, c. 16, s. 62.

Further rules of law

43 **(1)** No claim of a *cestui que trust* against his trustee, for any property held on any express trust or in respect of any breach of such trust, shall be held to be barred by any statute of limitation.

(2) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

(3) There shall not be any merger by operation of law only of any estate the beneficial interest in which would not prior to the first day of October, 1884, have been deemed merged or extinguished in equity.

(4) A mortgagor entitled for the time being to the possession or the receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof has been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent injury or recover damages in respect to any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue jointly with such other person.

(5) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this subsection had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

(6) In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he may if he thinks fit call upon the several persons making claim thereto to interplead concerning the same, or he may if he thinks fit pay the same into the Supreme Court, upon obtaining an order therefor, to abide the determination of the Supreme Court in respect thereof.

(7) Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays such debt or performs such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security is or is not deemed at law to be satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies and, if need be, and upon a proper indemnity, use the name of the creditor in any proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and the loss sustained by the person who has so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be a defence to such proceeding by him, provided always, that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person is justly liable.

(8) Stipulations in contracts, as to time or otherwise, which would not before the first day of October, 1884, have been deemed to be, or to have become, of the essence of such contracts in a court of equity, shall receive in the Court the same construction and effect as they would previously thereto have received in equity.

(9) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

(10) In questions relating to the custody and education of infants, the rules of equity shall prevail.

(11) Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. R.S., c. 240, s. 43; 1992, c. 16, s. 63.

Injunction in labour-management dispute

44 **(1)** In this Section,

(a) "injunction" means an injunction granted by an interlocutory order or judgment and includes an interim injunction;

(b) "labour-management dispute" means a dispute or difference affecting an employer and his employees or a trade union as defined in the *Trade Union Act*.

(2) Subject to subsection (3), no injunction to restrain a person or a trade union from any act in connection with a labour-management dispute shall be granted *ex parte*.

(3) The Supreme Court may grant an injunction *ex parte* in a labour-management dispute if it is satisfied that the case is a proper one for the granting of an injunction and that

(a) a breach of the peace, an interruption of an essential public service, injury to persons or severe damage to property has occurred or is about to occur; and

(b) reasonable attempts have been made to notify the persons or the trade union affected by the application. R.S., c. 240, s. 44; 1992, c. 16, s. 64.

Exemption from seizure under execution

45 **(1)** The following articles are exempt from seizure under execution:

(a) the wearing apparel and household furnishings and furniture which are reasonably necessary for the debtor and his family;

(b) all fuel and food reasonably necessary for the ordinary use of the family;

(c) all grain and other seeds, and all cattle, hogs, fowl, sheep and other livestock which are reasonably necessary for the domestic use of the debtor and his family;

(d) all medical and health aids reasonably necessary for the debtor and his family;

(e) such farm equipment, fishing nets, tools and implements of, or other chattels, as are used in the debtor's chief occupation, not exceeding in aggregate value the sum determined by the Governor in Council;

(f) one motor vehicle not exceeding in aggregate value the sum of three thousand dollars or such sum as may be determined by the Governor in Council.

(2) For greater certainty, subsection (1) does not affect the rights of a person secured by a duly filed agreement for hire, lease, chattel, conditional sale or charge, other than a floating charge, on a chattel to secure the payment of money or the performance of an obligation and acting pursuant to that agreement, lease, contract, conditional sale or charge, other than a floating charge, on a chattel to secure the payment of money or the performance of an obligation.

(3) The Governor in Council may make regulations determining the aggregate value of chattels used in the debtor's chief occupation and of the motor vehicle actually used in the course of and required for the debtor's full-time occupation, which are exempt from seizure pursuant to this Section.

(4) The exercise by the Governor in Council of the authority contained in subsection (3) shall be regulations within the meaning of the *Regulations Act*. R.S., c. 240, s. 45.

Interpretation of Sections 45B to 45E

45A In Sections 45B to 45E,

(a) "clerk of the court" means

(i) for the Supreme Court, the prothonotary,

(ii) for the Supreme Court (Family Division), a court officer, or

(iii) for the Court of Appeal, the Registrar;

(b) "court" means the Supreme Court or the Court of Appeal. 2009, c. 17, s. 1.

Order against proceeding without leave

45B (1) Where a court is satisfied that a person has habitually, persistently and without reasonable grounds, started a vexatious proceeding or conducted a proceeding in a vexatious manner in the court, the court may make an order restraining the person from

(a) starting a further proceeding on the person's own behalf or on behalf of another person;

(b) continuing to conduct a proceeding,

without leave of the court.

(2) The court may make the order apply to a spokesperson or agent of a party or to any other person specified by the court who in the opinion of the court is associated with the person against whom the order is made.

(3) Notice of a motion for an order under subsection (1) or (2) must be given to the Minister of Justice and Attorney General, except when the Minister is a party to the proceeding in respect of which the motion is made.

(4) A motion for an order under subsection (1) or (2) may be made by the party against whom the vexatious litigation has been started or conducted, a clerk of the court or, with leave of the court, any other person.

(5) An order may not be made against counsel of record or a lawyer who substitutes for counsel of record. 2009, c. 17, s. 1.

Appeal

45C A person against whom an order has been made under subsection (1) or (2) of Section 45B by the Supreme Court or a judge of the Court of Appeal may appeal the order to the Court of Appeal. 2009, c. 17, s. 1.

Leave to start or continue proceeding

45D (1) A person against whom an order has been made under subsection (1) or (2) of Section 45B may make a motion for leave to start or continue a proceeding and, where a court is satisfied that the proceeding is not an abuse of process and is based on reasonable grounds, the court may grant leave on such terms as the court determines.

(2) A motion in a proceeding in the Court of Appeal for a restraining order under subsection (1) or (2) of Section 45B, or for an order for leave under subsection (1), may be made to a judge of the Court of Appeal.

(3) A court may make rules of court respecting granting leave, including a rule requiring the court to consider the frequency of motions made by or on behalf of the person making the motion for leave. 2009, c. 17, s. 1.

Effect of Sections 45B to 45D

45E Nothing in Sections 45B to 45D limits the authority of a court to make an order in respect of an abuse of a process of the court, including an order for dismissal, a stay or indemnification or to strike a pleading. 2009, c. 17, s. 1.

RULES

Rules of Court

46 The judges of the Court of Appeal or a majority of them may make rules of court in respect of the Court of Appeal and the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular,

(a) regulating the sittings of the Court and of the judges of the Court in chambers;

(b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;

(c) regulating appeals and applications in the nature of appeals;

(d) providing for service out of the jurisdiction;

(e) prescribing and regulating the proceedings under any enactment that confers jurisdiction upon the Court or a judge;

(f) regulating the payment, transfer or deposit into, in or out of any court of any money or property or the dealing therewith;

(g) respecting the rate of interest to be used in determining the capitalized value of an award in respect of future damages;

(h) providing for the physical or mental examination of a party to any proceeding;

(i) regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceeding or on any application in connection with or at any stage of any proceeding;

(j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying

into effect the provisions of this Act, and of all other statutes in force respecting the Court. R.S., c. 240, s. 46; 1992, c. 16, s. 65.

Publication, confirmation and evidence of rules of Court

47 (1) All rules of Court made in pursuance of this Act shall, from and after the publication thereof in the Royal Gazette, or from and after publication in such other manner as the Governor in Council determines, regulate all matters to which they extend.

(2) Notwithstanding subsection (1), the *Civil Procedure Rules* made by the judges of the Supreme Court on the second day of December, 1971, a copy of which was deposited in the office of the Provincial Secretary, are hereby ratified and confirmed and are declared to be the *Civil Procedure Rules* of the Supreme Court and shall have the force of law on and after the first day of March, 1972, until varied in accordance with the provisions of this Act.

(3) Rule 60 of the *Civil Procedure Rules* made by the judges of the Supreme Court on the second day of December, 1971, a copy of which was deposited in the office of the Provincial Secretary, is hereby ratified and confirmed and has the force of law on and after the first day of March, 1972, notwithstanding that it was not published in the Royal Gazette in accordance with Section 65 of the Revised Statutes, 1967, the *Controverted Elections Act*.

(3A) Notwithstanding subsections (1) to (3) and Section 51, the *Civil Procedure Rules* made by the judges of the Court of Appeal and the Supreme Court on the sixth day of June, 2008, and tabled in the House of Assembly by the Minister of Justice, are hereby ratified and confirmed and are declared to be the *Civil Procedure Rules* of the Court of Appeal and the Supreme Court and shall have the force of law as and to the extent provided in those *Civil Procedure Rules* until varied in accordance with the provisions of this Act.

(4) Printed copies of the Rules purporting to be published by the Queen's Printer are evidence of those Rules. R.S., c. 240, s. 47; 2008, c. 60, s. 1.

Powers to make rules of Court

48 Subject to any rules of Court which are made under the provisions of this Act, the judges of the Court shall continue to have and exercise all the powers which immediately preceding the coming into force of this Act they possessed or exercised as to making rules of Court for the regulation of the practice of the Court. R.S., c. 240, s. 48.

Modification of statutory provision

49 Where any provisions in respect of the Court are contained in any Act, rules of Court may be made for modifying such provisions to any extent that is deemed necessary for adapting the same to the practice and procedure of the Court, unless, in the case of any Act passed on or after the first day of October, 1884, this

power is expressly excluded with respect to such Act or any provision thereof. R.S., c. 240, s. 49.

Extension of time

50 Where an enactment authorizes an appeal to the Supreme Court or the Court of Appeal and prescribes a time period during which

(a) the appeal is to be commenced;

(b) an application for leave to appeal is to be made;

(c) a notice is to be given; or

(d) any other procedural step preliminary to the appeal is to be taken,

the judges of the Court may make rules respecting extension of the time period, notwithstanding that the time period has expired. R.S., c. 240, s. 50; 1992, c. 16, s. 66.

Tabling of rules

51 All rules made in pursuance of this Act shall be laid before the House of Assembly within twenty days next after the same are made, if the Legislature is then sitting, or, if the Legislature is not then sitting, within twenty days after the meeting of the Legislature next after such rules are made, and, if an address praying that any such rules may be cancelled is presented to the Lieutenant Governor by the Assembly within thirty days during which the Legislature has been sitting next after such rules are laid before it, the Governor in Council may thereupon, by order in council, annul the same and the rules so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceeding which in the meantime has been taken under the same. R.S., c. 240, s. 51.

GENERAL PROVISIONS

Officers of Court directed by Rules

52 Subject to any order in that behalf, the business to be performed in the Court or in the chambers of any judge thereof, other than that performed by the judges, shall be distributed among the several officers attached to the Court, in such manner as is directed by the Rules and the officers shall perform such duties in relation to the business as is directed by the Rules and subject to such Rules, all officers respectively shall continue to perform the same duties, as nearly as may be, and in the same manner, as before this Act came into force. R.S., c. 240, s. 52.

Referees

53 Subject to the Rules, the prothonotaries and clerks of the Crown shall be official referees for the trial of such questions as are directed to be tried by such officer and the Governor in Council may, if necessary, appoint additional official referees. R.S., c. 240, s. 53; 1992, c. 16, s. 67.

Disposal of court records

54 **(1)** In this Section, "court records" include all documents, records, letters, transcripts, recordings, exhibits and papers of any kind, or any thing on which information is recorded or stored by any means including graphic, electronic or mechanical means, deposited or on file with or held by the Court.

(2) Court records of the Court of Appeal that are no longer required shall be disposed of by

(a) destruction without photographing or preserving an image thereof in electronic or other form;

(b) destruction after having been photographed or an image thereof having been preserved in electronic or other form; or

(c) transfer to the Public Archives,

in accordance with the directions of the Deputy Attorney General, after consultation with the Provincial Archivist or such other officer or employee of The Board of Trustees of Public Archives of Nova Scotia as the Provincial Archivist may designate, and subject to the approval of the Chief Justice of Nova Scotia, or in accordance with a schedule for the retention and disposal of court records established by the Deputy Attorney General and the Chief Justice after consultation with the Provincial Archivist or such other officer or employee.

(3) Court records of the Supreme Court that are no longer required shall be disposed of by

(a) destruction without photographing or preserving an image thereof in ~~electonic~~ [electronic] or other form;

(b) destruction after having been photographed or an image thereof having been preserved in electronic or other form; or

(c) transfer to the Public Archives,

in accordance with the directions of the Deputy Attorney General, after consultation with the Provincial Archivist or such other officer or employee of The Board of Trustees of Public Archives of Nova Scotia as the Provincial Archivist may designate, and subject to the approval of the Chief Justice of the Supreme Court, or in accordance with a schedule for the retention and disposal of court records established by the Deputy Attorney General and the Chief Justice after consultation with the Provincial Archivist or such other officer or employee. 1992, c. 16, s. 68.

Case No: B2/2011/0755

Neutral Citation Number: [2012] EWCA Civ 56
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CLERKENWELL AND SHOREDITCH COUNTY COURT
HIS HONOUR JUDGE MITCHELL
9EC02371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2012

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
and
LADY JUSTICE RAFFERTY

- -

Between :

	LONDON BOROUGH OF ISLINGTON	**Appellant/ Defendant**
	- and -	
	(1) MARGARET ELLIOTT **(2) PETER MORRIS**	**Respondents/ Claimants**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr S Butler (instructed by **Legal Services**) for the **Appellants**
Mr R. Duddridge (instructed by **Bishop & Sewell LLP**) for the **Respondents**

Hearing date : 5th December 2011

- -

Judgment Lord Justice Patten :

Introduction

1. This is an appeal by the London Borough of Islington ("the Council") with the leave of the court against an order of His Honour Judge Mitchell made in the Clerkenwell and Shoreditch County Court on 14th February 2011. The judge ordered the Council, which was the defendant in the action, to pay to the claimants their costs of the claim up to 6th March 2009; one half of their costs from 7th March up to and including 20th March 2009; and the whole of their costs thereafter.

2. The appeal is therefore one against an order for costs but in substance it is a challenge to the way in which the judge assessed the claimants' prospects of success in relation to the grant of a *quia timet* injunction which they had sought in the proceedings in order to compel the Council to remove a number of Ash trees from the garden of a property at 47, Balfour Road, London N5 ("Number 47") of which the Council is the freehold owner. The basis of the claim was an allegation that the roots of the trees constituted an actual or potential nuisance to the claimants' adjoining property at 49 Balfour Road ("Number 49") but in its defence (served on 28th April 2009) the Council confirmed that a works order to remove the trees had been issued to its contractors on 10th December 2008 and on 23rd June 2009 the trees were actually removed.

3. The action continued only because the parties were unable to resolve their differences about costs and the judge had the unenviable task of having to try the action in order to decide what costs order to make. Although lamentable, this proved to be unavoidable and neither party to this appeal has suggested that the judge was wrong in principle to take this course as opposed to resolving the issue on a summary basis. The issue of principle which the judge had therefore to consider and which justified the grant of permission to appeal in this case is whether a claim to a *quia timet* injunction to prevent a nuisance can succeed when the alleged nuisance (in this case the tree roots) has at the date of the trial caused no physical damage to the claimants' property but is likely ultimately to do so unless prevented by an order of the court. In short, the question is how proximate and likely does the occurrence of physical damage have to be before the court will intervene.

The facts

4. Number 47 is owned by the Council and is let to tenants on short-term tenancies. The contemporary photographs show that the gardens were not well maintained and that a number of saplings and small trees had been allowed to grow unchecked. The judge found that there were six Ash trees in the rear garden and about three in the front. One of the Ash trees in the rear garden was about one metre from the boundary fence with number 49 and some two metres from the rear wall of that house. When a plan was prepared in October 2008 this tree was already four metres in height with a girth of 150 mm. One of the Ash trees in the front garden was about four metres away from the front wall of Number 49; was four to five metres in height and had a girth of between 150 and 200 mm. All these trees were self-sown. It was also the view of the expert witnesses

called to give evidence that Ash trees are unsuitable (due to their size and rate of growth) for planting in a small garden of this kind.

5. In May 2004 Ms Elliott wrote to the Council expressing concern that the trees growing in the garden of Number 47 might undermine the foundations of her house if allowed to grow unchecked. The Council appear to have written to its tenant about this but no further action was taken. In October 2004 Ms Elliott wrote again to complain that the trees had grown by several feet and were now obstructing the light to her first floor windows. This was followed by further correspondence in January and November 2005 all directed to the rate of growth of the trees. It was made clear to the Council that the tenants of Number 47 made minimal use of the garden and had taken no steps to cut back or remove the trees. It was therefore clear that the Council would have to take responsibility for this.

6. By November 2006 the position remained unchanged but on 13th November an officer in the Tenancy Management section wrote to the claimants' ward councillor saying that instructions had been given to deal with the problem but that, due to an oversight, nothing had been done. However, she assured the councillor that the matter would now be dealt with promptly.

7. Again this proved to be a false hope because by September 2007 no steps had been taken to reduce the size of the trees or to remove them. The claimants, who by now were understandably exasperated by the lack of progress, instructed solicitors (Messrs Bishops & Sewell LLP) and they wrote to the Council on 11th September 2007 about the problems emanating from Number 47. The first was water penetration which was thought to be due to a problem with the kitchen or a shower unit at Number 47. This is unconnected to the second problem which was the trees. They said in the letter that the overhanging branches were now blocking out the light to Number 49 and that the roots "may be causing damage to [the claimants'] property".

8. The Council was asked to take steps to remedy these problems failing which the claimants would have no alternative but to institute proceedings. This did provoke a response from the Council. An officer wrote on 28th September asking for more information about the water leak but said that the Council had no obligation to maintain the gardens on behalf of the tenants. It would, however, arrange for Greenspace (a division of the Council's Environmental and Conservation Department) to carry out an inspection of the overhanging branches to decide whether further action needed to be taken. This might, however, take some time due to lack of resources.

9. In relation to the tree roots, the letter stated that it would be necessary for root samples to be taken:

> "so it can conclusively be determined that the trees are in fact the

> cause of any damage ….. As your clients are making these claims then the onus is on them to provide any report".

10. It looks as if this letter may not have been received by the claimants' solicitors because they wrote again on 28th November repeating their complaints about the tree roots and saying that there were signs of cracking in the concrete patio at the rear of Number 49 which might be attributable to the tree roots. The Council replied on 17th December and explained that due to a change in the tenants of Number 47 and associated problems of access, an inspection by Greenspace would not take place until the New Year. It would, however, still be necessary for the root samples to be taken to establish any alleged encroachment by the trees. This would be a matter for the claimants to arrange.

11. In these circumstances, the claimants instructed Mr George Mathieson, a civil engineer, to inspect their property and report. He did so early in 2008 and wrote a letter of advice to the claimants dated 12th March 2008 setting out his preliminary findings. He explained that due to their high water demand, trees such as the Ash should not be planted within 15-20 m from the nearest house and should be regularly pruned. His letter went on:

> "While the Ash saplings in the garden bordering onto yours have not yet caused any damage to your property, they need to be dealt with as a matter of urgency so as to prevent them from causing inevitable damage in the short to medium term."

12. The claimants' solicitors wrote to the Council on 18th March 2008 saying that the damp problem was continuing and, that in relation to the trees, Mr Mathieson had advised that there was an urgent need to deal with the Ash saplings adjacent to Number 49. They asked for the work to be carried out in four weeks without the need for an application to be made for an injunction. The letter of advice from Mr Mathieson was forwarded to the Council on 7th April together with recommendations from a builder as to how to deal with the damp problem.

13. In the meantime, the Council had written to Bishop & Sewell on 3rd April stating that Greenspace had taken soil samples from the Ash tree near the fence and their comments were awaited. On 23rd April the Council wrote a further letter to the claimants' solicitors which indicated that they should direct their complaints about the trees to Greenspace who were responsible for deciding whether trees in the Borough should be lopped or removed. Accordingly on 1st May the solicitors did just that. They sent a copy of Mr Mathieson's letter to Greenspace and asked to be informed about the results of the soil samples taken. They also asked for an undertaking that the Ash trees would be removed and the other trees kept regularly pruned.

14. The reply from Mr James Chambers, the Council's Senior Tree Officer, was not encouraging and also disclosed a state of internal confusion about who (if anybody) had been instructed to deal with the tree issue on behalf of the Council. He said in his letter that he had no record of receiving any request to inspect the trees at Number 47 and did not intend to do so until the "required documents are received". But in relation to the complaint about the tree roots, he said this:

> "… I note you have also provided a copy of a letter from a 'George Mathieson Associates' offering some opinions on trees in the area. This letter does clearly state that there is no damage to no. 49 at this time.
>
> No tree removal will be undertaken in relation to Alleged Tree Root Damage (ATRD) claims unless and until detailed and extensive evidence that directly implicates a tree as a major causal factor in significant damage to a building, and where no other alternative remains.
>
> Trees will certainly not be removed on the grounds that they may hypothetically cause damage at some point in the future. Any necessary tree work can only be determined through a tree inspection, which you can request as mentioned above."

15. The claimants' solicitors responded on 2nd June saying that their client was frustrated by the lack of progress and that she reserved her right to issue proceedings for an injunction to compel the Council to abate the nuisance. They received a reply from the Council on 4th June saying that Greenspace were now arranging an inspection of the trees but that it would be for the claimants to provide the root samples in order to substantiate their claim that damage was being caused. In fact the statement in this letter about an inspection being arranged was incorrect. The Council's evidence at the trial in the form of a witness statement from Mr Chambers was that the Tree Service was first asked to inspect the trees at Number 47 in November 2008 and that a works order was issued to remove the saplings on 3rd December 2008. As mentioned earlier (due, it is said, to access difficulties), the work was not carried out until 23rd June 2009.

16. The claimants' position as of June 2008 was that they had reached something of an impasse. The Council's position (as communicated in the letter from Mr Chambers) was that the trees would not be removed unless and until they could be proved to be causing significant damage to Number 49. The claimants therefore sought further advice from Mr Mathieson. His recommendation was that the taking of soil samples would be expensive and was unnecessary because it was obvious that the trees were growing rapidly and would, if unchecked, inevitably lead to damage being caused to both properties. The trees should therefore be removed immediately and at relatively little cost instead of being allowed to grow and cause potentially extensive damage in the

future which could only be remedied at considerable expense.

17. Accordingly Bishop & Sewell wrote to the Council on 26th June enclosing a copy of Mr Mathieson's recent letter of advice. The letter concluded by saying that:

> "In a final attempt to avoid the issue of court proceedings, our client requires that the trees in the front and rear gardens are properly lopped in accordance with our client's expert's report by close of business on Thursday 10 July 2008. If this is not done by this date, then our client will have no alternative but to make an application to the court to compel you to abate this nuisance".

18. The Council then wrote to Bishop & Sewell stating that a tree referral request had been sent to the Tree Service. As mentioned earlier, this was untrue but in November the request was made with the consequences I have outlined. Bishop & Sewell were not, however, informed of this. They instructed Mr Mathieson to produce a detailed report which could be used in court proceedings which he did based on inspections of the property in February and September 2008. In his report dated 30th November 2008 he concluded that there was no evidence of actual root intrusion and damage in respect of the drains and foundations of Number 49 but that damage of this kind was in time inevitable absent the pruning and removal of the trees. He estimated that significant damage would probably begin to appear within about five years.

19. Between July 2008 and March 2009 there was no further correspondence between the parties about the possibility of the claimants seeking injunctive relief and had the Council communicated its intention to remove the trees that would have been the end of the matter. On 3rd March 2009 Bishop & Sewell wrote again to the Council but this letter does not refer to the issue about tree roots. It was all about the damp problem which they said had recurred and needed to be remedied failing which proceedings would be commenced. The Council replied to this letter on 16th March promising action but again there is no mention of the trees.

20. The position therefore is that there was no further communication between the parties on the issue of nuisance from trees after the correspondence in June 2008. The claimants had put the Council on notice that unless the trees were lopped or removed, proceedings for an injunction would be instituted and had imposed a deadline of 10th July. But this was allowed to pass without action being taken. The Council had subsequently decided to remove the trees but had not informed the claimants of this or carried out the work by the time that the proceedings were issued on 20th March 2009.

21. Had Bishop & Sewell taken the precaution of writing a formal letter before action to the Council before instituting the claim then it seems likely that they would have been told

of what was planned. But they did not do that. The claim form was issued seeking damages and an injunction and the particulars of claim alleged that if the Ash trees were not appropriately maintained or cut back they threatened to cause damage to Number 49 by encroaching roots and the extraction of water from the foundations which was likely to be disruptive and expensive to repair.

22. In the defence served on 28th April 2009 the allegation that the Ash trees constituted an actual or potential nuisance was denied as was the claimants' entitlement to a *quia timet* injunction. But in paragraph 3 the Council pleaded that a works order had been issued on 10th December 2008 to remove the trees and that the work would be carried out within a reasonable period of time.

23. As already stated, the removal of the trees took place on 23rd June. On 12th August Bishop & Sewell proposed the making of a consent order in *Tomlin* form staying the proceedings on terms that the Council should carry out regular inspections of Number 47; should take any necessary steps to reduce the growth of any remaining trees; and should undertake to pay the reasonable costs of any repairs to Number 49 caused by past or future tree growth. The *Tomlin* order also provided for the Council to pay the costs of the action.

24. The action was stayed on 2nd September 2009 to allow for settlement but the Council declined to agree to the terms proposed. I should mention that at that stage the claimants' costs were stated to be some £24,251 which included an After the Event insurance premium of £7,875 and solicitors' profit costs of £9,550. The claimants modified their terms of settlement by offering simply to discontinue on the payment by the Council of £22,000 towards their costs. But this was not acceptable and the action therefore proceeded to trial.

25. The judge heard expert evidence from Mr Mathieson and from Ms Fiona Critchley, an arboriculturalist instructed on behalf of the Council. They had met in the usual way before the trial and had reached agreement on a number of matters. Trees more than 10 metres from Number 49 were unlikely to have any significant effect on the building. The growth rate of the relevant trees and their rooting patterns could not be predicted. It was therefore impossible to say precisely how and when damage would occur. What they disagreed on was how imminent the risk of significant and serious damage was. Mr Mathieson (as foreshadowed in his reports) thought that the risk was impending and that such damage was likely to occur to the drainage system within 5 years. Ms Critchley considered that it was impossible to predict if or when the closest trees would cause damage or what its nature would be. The judge set out his conclusions on this issue in paragraphs 43-46 of his judgment:

> "43. I conclude from this evidence that there are a number of areas of uncertainty in this case; uncertainty about the nature of the soil (Is it gravel? Is it clay?); about the depth of the

> foundations; whether or not there are drains present in the backgarden under the patio and uncertainty about the rate of growth of the trees.
>
> 44. The evidence shows that the work could be carried out in early 2010 without great expense or effort. The evidence I have had from Mr. Chambers is that it would have cost £500 to cut down the 8 saplings and to treat them with poison. It would require much greater work and expense the larger the trees.
>
> 45. I am also satisfied that both experts were satisfied that there was a risk that trees 1 and 10 would penetrate drains and affect the foundations, but the effects could not be seen possibly because damage would not occur after some years - possibly three or five years or more. I would add this to the experts' conclusions. The uncertainties that I have listed could not be resolved without expense which was out of all proportion to the cost of the works (for example the drains under the patio, taking soil samples and so forth). I note that Mr. Chambers did not consider that it was necessary to take root samples before he cut down the Ash-saplings.
>
> 46. I also conclude that, unless cracking was caused in the patio, it was unlikely that more evidence of the risk increasing or becoming more imminent could be obtained before serious damage was done to the property."

26. The judge was obviously right to conclude that damage to Number 49 could well occur before there was any physical sign of it above ground level. He was also clearly right that the cost and trouble of removing the trees at an early stage would be considerably less than if they were allowed to grow unchecked for several more years. Any prudent landowner would therefore take the course recommended by Mr Mathieson in this case. It would also have been no more than good neighbourliness for the Council to have recognised the concerns of the claimants at an early stage and that the problem caused by the Ash trees was due to the neglect of the gardens of Number 47 by the tenants of that property. The trees were self-sown and entirely unsuitable for the location where they had been allowed to grow. Even a properly cautious policy of preservation and environmental conservation should have recognised this.

27. But this appeal is not about the reasonableness of the Council's position at the time. As the judge himself recognised, damage is the essential component of any claim in nuisance and the claimants had no cause of action unless they could prove either that their property had already suffered physical damage due to the encroachment by the trees or that the prospect of such damage was sufficiently imminent and certain as to justify the grant of *quia timet* relief.

28. On the judge's findings, actual damage was not established and the success of the claim (and therefore the costs outcome) depended on the claimants' proving the existence of a real and substantial risk of damage of an imminent kind.

Quia timet relief

29. The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.

30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v. North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that:

> "… it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the

damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:

> "On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7th January 1997 was *quia timet*. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20th June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm -- that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" -- see Graigola Merthyr Co Ltd v Swansea Corporation [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see Attorney-General v Nottingham Corporation [1904] 1 Ch 673 at page 677).
>
> ….
>
> In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22nd April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further

> occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction *quia timet* was appropriate in the circumstances of this case."

32. In this case there is, I think, no real dispute that if the roots of the Ash tree had in time extended under the drains and foundations of Number 49, serious and substantial damage was likely to result. Nor would damages in those circumstances have been an adequate remedy. Had it been established that there was an imminent likelihood of such damage occurring, the court's equitable jurisdiction to prevent an apprehended infringement of property rights would undoubtedly be exercised so as to prevent the claimants from having to suffer the disruption which would be involved. Inevitably there will be cases where other discretionary considerations require to be taken into account. If the offending tree was particularly rare or valuable in terms of its appearance, one would expect the court to attempt to strike a balance which might involve less drastic action being taken than the complete removal of the tree. But this is not that kind of case. Here the determining issue was whether (absent an injunction) there was imminent danger of actual damage.

33. In *Hooper v Rogers* [1973] 1 Ch 43 the defendant had cut a track across a steep slope which provided the foundation of the plaintiff's farmhouse. The evidence was that this had exposed the slope to a process of soil erosion which would eventually undermine the farmhouse and cause it to collapse. The judge at first instance found that this constituted a real risk of damage and granted a mandatory injunction requiring the slope to be re-instated. In the Court of Appeal the grant of the injunction was challenged on the basis that the test of imminent danger set out by Pearson J in *Fletcher v Bealey* (supra) was not satisfied. Russell LJ (at p. 30) addressed that issue in these terms:

> "Again it seems to me that "imminent" is used in the sense that the circumstances must be such that the remedy sought is not premature; and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.
>
> In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances. I am not prepared to hold that on the evidence in this unusual case the judge was wrong in considering that he could have ordered the defendant to fill in and consolidate the road at the suit of the plaintiff as owner of the farm-house, or that he was wrong in ordering damages in lieu of such an order."

34. The question therefore is one of assessing the likelihood of the damage occurring at all and (if that is established) the probable timescale. The judge's conclusions on those issues are set out in paragraphs 49-50 of his judgment:

> "49. Examining the matter in relation to the *quia timet* injunction, I am satisfied that there was a real likelihood of harm at some stage - that is a harm which could not sensibly be ignored. The likely extent of the harm would be damage to the drains resulting in seepage, possibly of sewage or other waste water, and/or the foundations including cracking of walls and settlement. Harm of either kind would raise concern about the other kind of harm. There would be the risk of increased insurance cover and difficulties, possibly, in selling the property. The costs or effort required by the defendant to remove the harm was minimal. There was no likelihood, in my judgment, of other methods of reducing the harm becoming available before the damage occurred. The same steps would be needed; the trees would have had to have been cut down. But I have to ask myself, however, would there be a need for an order? While there was no imminent harm in the sense of something happening within a three to five year period, there was a likelihood that in some years the work would needed to have been done to avoid damage. There was no reason for delaying the work. Delay would only increase costs.
>
> 50. Given the Local Authority's history of dealing with the claimants' reasonable complaints, I am not satisfied that they would have done the work without an order. It was reasonable, in my judgment, for the claimants to commence the action when they did rather than wait. As has been pointed out, it has taken two years for this case to come onto trial even after the claim was issued. I am satisfied therefore that, if the work had not been carried out, the claimants would have been successful in obtaining their injunction. Therefore, the general rule should apply in relation to costs."

35. Mr Butler, on behalf of the Council, submits that, on the basis of a finding that no damage was likely to be caused in less than 3 years, it could not be said that there was any imminent danger of such damage at the time when the injunction was granted. It was therefore premature. Mr Duddridge, for the claimants, relies on the judge's findings that damage to Number 49 by the trees was likely to occur. In these circumstances, the judge was entitled (as in *Hooper v Rogers*) to conclude that an actionable nuisance was inevitable and to require the trees to be removed at minimal cost and inconvenience to both parties.

36. The question whether this was an appropriate case for the grant of *quia timet* relief has, I think, to be considered in the light of all the relevant circumstances known at the trial

and not merely by reference to the narrower question of whether the tree roots were likely to cause physical damage to Number 49 within a particular period of time. The wider consideration of relevant factors had, in my view, to take into account the issues of the relative cost of removing the trees (which the judge did consider) and also the likelihood of the potential source of nuisance being controlled by action taken by the Council in the intervening period of 3 years before any actual damage occurred.

37. In *Hooper v Rogers* the inevitability of subsidence attributable to the new track was such that nothing short of its removal would cure the problem. It was therefore realistic for the judge in that case to have taken the view that an injunction should be granted as the only means of preventing that risk from materialising. Questions of timing were less significant because the defendant landowner was not prepared to restore the slope underpinning the plaintiff's property unless compelled to do so by an order of the court.

38. But cases involving damage caused by trees are not necessarily so stark. Where, as in this case, the experts have identified an appreciable period of time before any actual damage is likely to occur, the judge must take into account the ability and willingness of the defendant to prevent such damage occurring by taking steps in the meantime to control the growth of the trees on his land. The claimant has to show that an injunction is necessary in order to prevent the occurrence of the nuisance. The defendant is entitled to rely on his own rights and obligations as an adjoining landowner to cure the problem and it ought therefore in principle to be only in cases where the risk of damage is so imminent and the intransigence of the defendant so obvious that the court should ordinarily be prepared to grant an injunction in order to prevent a nuisance which does not yet exist. Mandatory injunctions of this kind are not justified merely on the ground that if nothing is done a tree on adjoining land may at some point in the future begin to cause damage to the claimant's property.

39. Judge Mitchell expressed the view that the Council would not have done the work without an order and that the claimants would have obtained an injunction had the work not been carried out. The judge gives no reasons for this conclusion and it is difficult to reconcile that with his earlier finding of fact that on 10th December 2008 a works order was in fact signed for the removal of the trees. Nor was there any challenge to the pleading in the Council's defence that it intended to carry those works out.

40. In these circumstances, it was not open to the judge in my view to hold that the injunction was necessary in order to prevent the potential nuisance from becoming an actual one. Although the claimants had initially to face a combination of delay and misleading information from the Council, it had by December 2008 at the latest resolved to remedy the problem by removing the trees. There was therefore no necessity for the grant of *quia timet* relief at the trial and the plea that the Council intended to carry out the work was a complete answer to the claim. If the appropriate rule to apply was that costs should follow the event then the judge should have dismissed the claim with costs.

The costs order

41. The judge's order was split into three periods in order to incorporate a discount for the 14 day period between 3rd March 2009 when the letter was sent by the claimants' solicitors complaining about the leak and the issue of the claim form on 20th March. The judge explained the thinking behind his order as follows:

> "51. I also have regard to the defendants' litigation conduct. There has been a failure by the defendants over five years until November 2009, to do anything at all. Opportunities were missed when the property was vacant in 2006 and 2008. Assurances that the works would be done in 2006 were not met. Misleading or false information was provided in April 2008. In June 2008, even if the claimants are not entitled under the general rule to costs, in my judgment, the defendants' conduct was such as to lead to only one conclusion, namely that the claimants were acting reasonably in commencing their action. The defendant's did not act reasonably and they should pay the claimants' costs.
>
> 52. But that is subject to one proviso. Letters before action were written on 1st May 2008, 2nd June 2008 and 26th June 2008. Nothing was thereafter written until March 2009 - a considerable gap. Despite the lamentable history, in my judgment, it would have been reasonable to expect the claimants to send one further letter. That might have resulted in their being told the work was in hand and, therefore, the claim did not need to be issued. But, given the history, they might not have been told that. They must therefore bear some responsibility, but the greater responsibility by far is that of the defendants.
>
> 53. Therefore, I shall make an order that the defendants are to pay the costs up to and including 2nd March 2009 - that is 14 days before the claim commenced - but, thereafter, only one half of the costs between 2nd March 2009 and up to and including the issue of the claim. The half costs cover the 14 day period, when a letter before action should have been written and considered and is calculated to take into account the real possibility that the defendants would not have notified the claimants that there was no need to commence the action."

42. Because I consider that the judge was wrong in his assessment of whether an injunction

was needed in this case to prevent the potential nuisance, it is for this court to re-consider how the discretion under CPR 44 should be exercised. Neither side wished the matter to be remitted to the County Court for that purpose.

43. The judge's alternative basis for his costs order was that the claimants had acted reasonably in commencing the action because assurances given much earlier that the work would be done were not carried out and false and misleading information was given in 2008. The history does, however, have to be examined in more detail than that. The assurance given to the claimants' ward councillor in November 2006 was certainly not acted on but the Council's response to Bishop & Sewell's letter of 28th September 2007 was that it had no obligation to maintain the garden of Number 47. The most that was promised was an inspection by Greenspace. It was for the claimants to produce evidence of the incursion of tree roots.

44. Mr Mathieson was instructed for this purpose and produced the reports I have referred to but the Council's response to this was that any risk of damage was still some years away. The information about the date of inspections by Greenspace in 2008 was misleading but it did not initially affect the claimants because they assumed that the inspections were taking place. When the 10th July deadline passed it was reasonable for them to have assumed that nothing was about to be done but the decision to wait until March before issuing proceedings could also be taken as an indication that proceedings were still not in contemplation.

45. The gap in the correspondence between July 2008 and March 2009 covers the period in which the Council did finally inspect and decide to remove the trees. It had received the threat of proceedings in June 2008 but the decision to remove the trees (if carried out) really brought the possibility of a successful action for an injunction to an end.

46. It is misleading to regard the letter of 3rd March 2009 as the resumption of the earlier correspondence. It makes no mention of the tree problem but was directed solely to the continuing issue of the damp. The Council dealt with it on that basis. The first it knew of the proceedings was when it was served with the claim form. The judge was therefore right to take the absence of a further letter before action into account but was, I think, wrong merely to reduce the costs awarded to the claimants for the 14 days before the claim was commenced. Given that there had been no further correspondence in relation to the trees before June 2008, the claimants should have written a letter before action prior to the issue of the claim form to make it clear that they did intend to go ahead with the action. This would have led to their being informed about the works order and the proceedings could have been avoided.

47. But at the same time I recognise the uncertainty which may have been created by the promises of an inspection in 2008 followed by silence on the part of the Council as to whether it intended to carry out any work to the trees. Although this is likely to have

been cleared up by the sending of a letter before action, some allowance should be made for the Council's own failure to respond substantively to the June 2008 letter once it had decided to remove the trees.

48. It seems to me therefore that the right order is that there should be no order for costs in relation to the period up to and including the service of the defence. From that moment on it was apparent that the claim must fail and the Council is entitled to its costs of the action after that date. Neither of the offers of settlement made by the claimants accurately reflects their position in the litigation.

Conclusion

49. I would therefore allow the appeal and make an order in the terms referred to above.

Lady Justice Rafferty:

50. I agree.

Lord Justice Longmore:

51. I also agree.

Nova Scotia v. Freedom Nova Scotia

Nova Scotia Judgments

Nova Scotia Supreme Court

Halifax, Nova Scotia

S. Norton J.

Heard: May 14, 2021.

Judgment: May 14, 2021.

Docket: Hfx. No. 506040

[2021] N.S.J. No. 199 | 2021 NSSC 170

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, Respondents

(39 paras.)

Counsel

Halifax, Nova Scotia.

DECISION ON *EX PARTE* INJUNCTION

S. NORTON J.

Introduction

1 An anti-mask rally organized by the Respondents, "Freedom Nova Scotia", is scheduled to occur at Citadel Hill, in Halifax, on Saturday May 15, 2021 at 1:00 p.m. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 p.m. at the Barrington baseball field.

2 Historical gatherings organized by Freedom Nova Scotia and others have failed to comply with COVID-19 Emergency Health Orders made under section 32 of the Nova Scotia *Health Protection Act*, SNS, 2004, c. 4, s. 1. Consequently, the Attorney General of Nova Scotia (hereinafter, "Province") is seeking a *quia timet* injunction on evidence to prohibit the rally from taking place, among other relief. The injunction is said to be required to prevent or reduce the community spread of COVID-19 within the Province of Nova Scotia and to ensure compliance with current Health Orders made under the *Health Protection Act*.

3 The *quia timet* or pre-emptive injunction sought would: (1) order compliance with the provisions of the *Health Protection Act*; (2) enjoin the Respondents and any other person acting under their instructions or

in concert with them, from organizing in-person public gatherings; and (3) authorize law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any order issued to date under that Act.

Procedure

4 By letter dated May 11, 2021, the Attorney General wrote to the Court requesting permission to file the Application on an expedited basis pursuant to *Civil Procedure Rules* 2.03 and 5.02. As designated Chambers Judge, I granted the request allowing the filing deadlines to be abridged and scheduled a virtual hearing for May 14, 2021 at 9:30 a.m.

5 On May 13, 2021 the Applicants filed the Notice of *Ex Parte* Application pursuant to *Civil Procedure Rule* 5.02. Accompanying the Notice, and forming the evidentiary basis for the Application, were Affidavits of Dr. Robert Strang, Nova Scotia's Chief Medical Officer of Health, sworn May 12, 2021; and, Hayley Crichton, Director of Public Safety and Investigations, Department of Justice for the Province of Nova Scotia, sworn May 12, 2021. On May 14, 2021 the Applicants filed "Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act* 2004, c.4, s.1", dated May 13, 2021. The Applicants also filed a Pre- Hearing Memorandum. I reviewed all of these materials in advance of the hearing.

6 Today, May 14, 2021 I heard oral submissions from the Applicants virtually.

Facts

7 Based on the qualifications cited in his affidavit, I qualify Dr. Robert Strang as an expert witness capable of giving expert opinion evidence in the field of Public Health and Preventative Medicine, the assessment and interpretation of evidence in public health matters and in particular those related to SARS-CoV-2 and COVID-19. His affidavit will be accepted as his written report.

8 Based on the affidavit evidence of Hayley Crichton, I make the following findings of fact:

1. Worldwide Rally for Freedom and Democracy is a global movement and organizer that has been developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.
2. In the Nova Scotia context, mask requirements and adherence to restrictions are set out in the Public Health Orders.
3. The Restated Public Health Order issued under section 32 of the *Health Protection Act*, SNS, 2004, c. 4, s. 1, by Dr. Robert Strang, was last updated on May 8, 2021 ("Public Health Order"). A true copy of the Public Health Order is marked Exhibit "A" of Hayley Crichton's affidavit.
4. On April 23, 2021, Halifax Regional Police attended a large gathering at a private residence. 22 fines were issued as a result of this gathering as it was in contravention of the Public Health Order.
5. On April 25, 2021, RCMP attended a residence in Wolfville, Nova Scotia, at which 30 people were gathered in contravention of the Public Health Order for a party. 4 fines were issued as a result of this gathering.

6. On May 3, 2021, New Glasgow Police attended a private residence in Trenton, Nova Scotia. Eight people were gathered in contravention of the Public Health Order and were subsequently ticketed.

7. Worldwide Rally for Freedom and Democracy has planned a global event entitled, "The Worldwide Demonstration May 15, 2021". The associated open Facebook event page has a total of 31,000 followers.

8. In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy global events are organized by the local Facebook group "Freedom Nova Scotia". The Freedom Nova Scotia Facebook open group has a total of 896 followers and the related Instagram account has 100 followers.

9. On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention.

10. A picture of the event derived from CTV News is marked Exhibit "B" of Hayley Crichton's affidavit. The picture shows a large gathering of people who can be observed to not be wearing masks, nor maintaining a distance of six feet from one another.

11. Freedom Nova Scotia has also organized rallies in the greater Halifax area on March 28, 2021 (Spring Garden Road), April 1, 2021 (Alderney Landing) and May 1, 2021 (Halifax). The rallies were in contravention of the Public Health Order.

Anti-Mask Rally

12. Freedom Nova Scotia has scheduled an event for Saturday May 15, 2021, at 1:00pm entitled, "Worldwide Rally for Freedom - Halifax" in support of anti-mask rhetoric. The event is open and there are 261 comments on the event page, with 88 people listed as "interested" and 66 people listed as "going" as of May 12, 2021.

13. Historical public gatherings organized by Freedom Nova Scotia have not complied with the requirements of COVID-19 Emergency Health Orders issued under section 32 of the *Health Protection Act*, including but not limited to:

a. masking requirements;

b. attendance limits applicable to indoor or outdoor gatherings; and

c. minimum physical distancing requirements.

14. During the week of May 3rd, 2021, Halifax Regional Police Inspector David Boon was contacted by Freedom Nova Scotia event participant Amy Brown via telephone. Ms. Brown requested protection for the rally participants who will attend Citadel Hill to protest the COVID-19 lockdown and restrictions.

15. Halifax Regional Police advised Ms. Brown that any such gathering would contravene the Public Health Order, and potentially the Travel Directive issued under the *Emergency Management Act*, SNS, 1990, c. 8, s. 1; 2005, c. 48, s. 1. (should people travel in from outside HRM).

16. The Halifax Regional Police provided the Province with information pertaining to Freedom Nova Scotia, Worldwide Rally for Freedom and Democracy, inclusive of the related social

media posts advertising the event scheduled for Saturday May 15, 2021, at 1:00 pm entitled, "Worldwide Rally for Freedom - Halifax".

17. The information provided by the Halifax Regional Police to the Province references multiple rallies hosted by Freedom Nova Scotia. The information provided by the Halifax Regional Police contains photographs depicting attendees gathering without masks and in large groups in direct contravention of the Public Health Order. This is supplemented by screenshots of the open group in which commenters have requested Halifax Regional Police and Government intervention.

18. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 pm at the Barrington baseball field. A Worldwide Freedom Rally is also scheduled for Dartmouth, Nova Scotia (Alderney Landing) on May 15, 2021 at 1:00 pm.

19. Similar anti-mask, anti-vaccine, anti-restriction protests have taken place across Nova Scotia that have included gatherings of people who were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order.

20. On April 24, 2021, an event was planned at the New Brunswick and Nova Scotia border to protest COVID-19 restrictions, including border closures and mask requirements, by disrupting traffic on Hwy 104. The event organizer Tasha Everett posted the following to her open Facebook page, "12PM tomorrow! Be there! Its time to make more noise than ever before! Truckers have our backs and are planning to block the highways with us. United we stand, Divided we fall. A screenshot of this post is marked Exhibit "G" of Hayley Crichton's affidavit.

21. On May 9, 2021, Kings District RCMP were called to Weston Christian Fellowship Church in Weston, Nova Scotia. 26 people were gathered at the church in contravention of the Public Health Order. 26 fines were laid against individuals and a larger fine was laid against the organizer.

22. On May 12, 2021, the Province received the following information from the Royal Canadian Mounted Police (RCMP) regarding a rally held on May 9, 2021:

PURPOSE:

To update the Attorney General of a protest, in relation to the continued border restrictions between Nova Scotia and New Brunswick that occurred on May 9, 2021.

BACKGROUND:

A group on Facebook, identified as "Support to OPEN The NS/NB Border", organized a protest for May 9, 2021 at 12:00 pm, at the NS Tourism Centre along Hwy 104, immediately as you enter Nova Scotia.

Organizers indicated that this was strictly about the border closure and the impact it is having on everyday lives.

CURRENT STATUS:

An assembly took place as scheduled on May 9, at 12:00 pm.

Approximately 20 protesters assembled along the Nova Scotia side of the Provincial border, Highway 104 Eastbound lane.

At approximately 12:30 pm, a passenger from a vehicle involved in the protest was seen throwing traffic cones into the ditch which had been positioned to block off exit 1.

The interaction between the RCMP and the vehicle passenger was met with hostility from the occupants of the vehicle.

Shorty after, a hostile crowd of 15-20 people formed around the police officer.

Protesters were recording police and expressed negative comments.

Protesters were not wearing masks or social distancing.

All attendees left by 2:30 pm.

Commentary from attendees suggests protests will be a weekly occurrence.

23. On May 10, 2021, Dena Churchill posted an advertisement for the May 15, 2021 rally on her Facebook page, among other anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.

9 Based on the evidence of Dr. Strang, I make the following findings of fact:

COVID-19

1. COVID-19 is a new disease which can cause adverse health outcomes, including death in individuals with pre-existing medical conditions and in individuals over 65 years of age. People not in a high-risk group can also experience adverse health outcomes after contacting the SARS-CoV-2 virus which causes COVID-19.
2. In addition, SARS-CoV-2 is a new strain of coronavirus for which there is no underlying immunity and therefore wide spread of the virus can create a significant burden of disease and negative impacts on health systems, communities and economies.
3. There are at present no drug therapies to cure COVID-19 nor its various strains. Accordingly, the only available resources to prevent or reduce the spread of the virus, aside from vaccination, involve the use of public health requirements, including physical distancing measures, limiting the size of gatherings and mandatory mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.
4. Nova Scotia public health requires that people maintain a distance of two meters from one another. This physical distance requirement is based on current knowledge regarding the virus' spreading mechanisms.
5. If left unchecked, SARS-Cov-2 can spread exponentially, for this reason, it is critical that public health requirements are followed in order to minimize the spread of the virus, reduce long-term consequences, and reduce the number of hospitalizations and deaths. It is therefore imperative to reduce the number of contacts an individual has with others to reduce the risk of spread of the virus.
6. Due to the virus' transmissibility patterns, restrictions on how people interact with others outside of their households are necessary to prevent the transmission of SARS-CoV-2 and its variants, which in turn can effectively reduce cases of COVID-19. This includes mandating the use of mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.

7. The current Public Health Order outlines measures directed toward preventing or reducing the transmission of COVID-19 among the population of Nova Scotia.
8. Transmission of SARS-Co V-2 can occur even when infected people are asymptomatic. SARS-CoV-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets or droplet nuclei (aerosols) produced when an infected person breathes, coughs, sneezes, talks, or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose, or mouth.
9. Risk of SARS-Co V-2 transmission depends on many variables, such as location (indoors versus outdoors), quality of ventilation, and activity. The Public Health Order requires that people maintain a distance of two meters (six feet) from one another. This physical distance requirement is based on current knowledge of droplet spread which is the main way the virus spreads between people.
10. These requirements are designed to be implemented together as no one measure alone will prevent all SARS-CoV-2 person-to-person transmission.
11. The time from infection with SARS-CoV-2 until the development of observable symptoms is called the incubation period. The incubation period can last 14 days or very rarely longer. Unfortunately, infected people can transmit SARS-CoV-2 to others beginning about 48 hours before symptoms are present (pre-symptomatic transmission) until at least 10 days after, longer if symptoms continue past 10 days.
12. Not all people infected with SARS-CoV-2 develop symptoms but, even without symptoms, an infected person can transmit the virus to others. This is called asymptomatic transmission.
13. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. Community spread refers to the spreading of a disease from person to person in the community. Community spread can occur when the source is known or unknown. The latter form of spread poses a serious threat to the community. The effectiveness of contact tracing is greatly reduced in cases of unknown community spread.
14. COVID-19 testing is available in Nova Scotia for both asymptomatic and symptomatic people, people in outbreak settings, and people identified as a close contact of a case. A COVID-19 test result only reflects a snapshot of a moment in time. A negative result does not necessarily mean that the person is not infected. A person infected with SARS- CoV-2 could have 13 days of negative results and a positive test on day 14.

Nova Scotia's Current COVID-19 Situation

The Spread of COVID-19

15. Since March 1, 2020, there have been a total of 4152 confirmed cases of COVID-19 and 71 deaths reported.
16. During Wave 3 (April 1, 2021 - present), there have been 2410 confirmed cases and 5 deaths have been reported. The cases reported in Wave 3 constitute 58% of the total cases reported in Nova Scotia since March 1, 2020. In addition, there have been 103 hospitalizations (non-ICU and ICU) compared to 12 during Wave 2, 54% of hospitalizations occurred in individuals <60 years of age and 13.7% of contacts became cases, compared to 7.6% in Wave 2 suggesting that the virus is more transmissible.

17. SARS-CoV-2 can spread exponentially if left unchecked. It is critical that Nova Scotians follow public health requirements and protocols to minimize the spread of the virus and its variants, reduce the long-term consequences, and reduce the number of hospitalizations and deaths.

18. Left unchecked SARS-CoV-2 virus will spread within a population resulting in an exponential growth in the number of people infected. Public health measures put in place in December 2020 brought cases down. When public health measures were eased in March 2021, cases plateaued but began to rise again in late April. Even with increased public health requirements in place, the number of recognized SARS-CoV-2 infections (COVID-19 cases) has continued to grow dramatically in the past 3 weeks.

Nova Scotia's COVID Health Care Capacity related to COVID-19

19. When this capacity is exceeded, non-COVID-19 patients will experience cancelled treatments for non-urgent conditions. The cancellation of these non-urgent, but necessary, surgeries can have health impacts, such as ongoing pain and mobility issues.

20. If Nova Scotia's COVID-19 hospitalization capacity is significantly exceeded, it could result in the need to ration acute care resources. This may mean that some patients, who are in need of critical care supports, may be unable to receive those supports.

21. In Nova Scotia, as of May 11, 2021, there were 1591 active cases of people with COVID-19, 64 people in the hospital due to COVID-19. There were 10 patients in the ICU, 54 patients in non-ICU beds due to COVID-19 and 71 people have died from COVID-19 or associated complications since the first Public Health Order was issued on March 23, 2020. This high level of hospitalization will result in continued cancellation of non-urgent surgical treatments. If the requirements for in hospital care continue to escalate, a need to triage access to care supports, especially supports in intensive care, may be required. This could require doctors and nurses to make decisions between which patients live and which die.

Nova Scotia's COVID-19 Public Health Measures

22. Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. Restrictions on how people interact with others outside of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19.

23. Nova Scotia's approach has been to attempt to protect Nova Scotians and control the spread of the virus through the enactment of Public Health restrictions on gathering limits, physical distancing and mandatory masking, no greater than reasonably required, considering the circumstances of the global pandemic and risk mitigation strategies required to respond to this communicable disease and its negative impact on Nova Scotians' lives. As the number of COVID-19 cases and related hospitalizations, ICU stays, and deaths have increased, public health measures have also evolved.

24. One of the health measures that Nova Scotia has employed to control the spread is to implement mandatory masking. Masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2. The use of masking can prevent an infected person from transmitting the virus to others and use of masks, especially medical masks, can help protect a healthy individual from infection in public places, whether indoor or outdoor settings. Masking, on its own, is not sufficient to control the spread of COVID-19.

25. In response to the number of COVID-19 cases with no identifiable source, Nova Scotia implemented additional public health measures, aimed at limiting the spread in high-risk settings or in settings with high-risk activities. High risk activities are activities that have more expulsions of air than ordinary activities. With increased expulsions of air, there is an increased risk of respiratory droplets or aerosols. For example, singing, shouting, and activities that result in heavy breathing are higher risk activities. These activities also may occur in higher risk settings, such as in indoor settings or settings where individuals will remain for prolonged periods of time. Reducing time spent indoors with large groups of people and reducing the time spent indoors engaging in high-risk activities can reduce the risk of the spread of COVID-19. Recent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else.

26. The available evidence shows that widespread public masking, in addition to other public health measures, such as reducing time spent indoors with large groups of people (relative to the size of the room and the spacing of people within the room) while engaging in high-risk activities, can contribute to controlling the overall transmission of SARS-CoV-2. In addition, outdoor gatherings must also include measures such as restricted gatherings, and physical distancing and masking in order to prevent COVID-19 transmission.

27. In Dr. Robert Strang's medical opinion if the scheduled social gathering is held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia then there is a substantial risk of Covid-19 transmission among the attendees.

28. It is also Dr. Strang's medical opinion that social gatherings similar to the one intended to be held by Freedom Nova Scotia on May 15, 2021 should not occur anywhere in the Province of Nova Scotia because there is a substantial risk of Covid-19 transmission among the attendees.

10 By "RESTATED ORDER #2 OF THE CHIEF MEDICAL OFFICER OF HEALTH UNDER SECTION 32 of the HEALTH PROTECTION ACT 2004, c. 4, s. 1." dated May 13 2021, an "illegal public gathering" was defined and prohibited as follows:

> 13.5 For the purpose of section 13.6, an "illegal public gathering" is defined as a gathering that does not comply with the requirements of this Order, including:
>
> (a) the attendance limits applicable to gatherings, whether indoors or outdoors;
>
> (b) physical distancing requirements; and
>
> (c) masking requirements.
>
> 13.6 For greater certainty, persons are prohibited from:
>
> (a) organizing an in-person gathering, including requesting, inciting, or inviting others to attend an illegal public gathering;10
>
> (b) promoting an illegal public gathering via social media or otherwise; or
>
> (c) attending an illegal public gathering of any nature, whether indoors or outdoors.

Law

11 Section 43(9) of the *Judicature Act*, *R.S.N.S. 1989, c. 240* provides this Court with the authority to

order an interlocutory injunction "in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made".

12 The three-part test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) is for the applicant to show:

1. a serious question to be tried between the parties;
2. the applicant will suffer irreparable harm if the injunction is not granted; and
3. that the balance of inconvenience lies in favour of the applicant.

13 The test for an interlocutory injunction has been applied many times by the Supreme Court of Nova Scotia.

14 However, the injunction being sought in the present case is a *quia timet* injunction. *Quia timet* means, "because he fears or apprehends". While injunctions are generally aimed at preventing harm into the future based on the recent conduct of a defendant, in a *quia timet* injunction the injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at a point in time in the future.

15 In *526901 BC Ltd. V. Dairy Queen Canada*, 2018 BCSC 1092, Justice Kent summarized the law pertaining to *quia timet* injunctions as follows:

> 71 For sure, the law permits a *quia timet* injunction to be granted when wrongful acts have not yet occurred but are imminent or have been threatened. To obtain such an injunction, an applicant must establish not only the three elements of the *RJR McDonald* test but also that there is a high degree of probability the alleged harm will in fact occur: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at para. 35; and *XY Inc. v. IND Lifetech Inc.*, 2008 BCSC 1215 (B.C. S.C. [In Chambers]) at para. 70.

16 In *Robinson v. Canada (Attorney General)*, 2019 FC 876, Justice Gascon expanded on the analysis of the law pertaining to *quia timet* injunctions at paras. 87 to 91:

> 87 All injunctions are future-looking in the sense that they all intend to prevent or avoid harm rather than compensate for injury already suffered (Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 23) [Sharpe] at para 1.660). One type of injunction that is frequently considered and issued by the courts is the *quia timet* ("because he or she fears") injunction, where injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at some future point. To a certain extent, and given its timing, the mandatory interlocutory injunction sought by Mr. Robinson is akin to such a *quia timet* injunction.
>
> 88 Applications for this type of injunction are not necessarily dismissed by the courts even though they often require the motion judge to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. To assess prospective harm for quia timet injunctions, the courts have adopted a cautious approach generally requiring two elements: a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future, thus adding a temporal dimension to the feared harm (*Merck & Co. v. Apotex Inc.*, [2000] F.C.J. No. 1033, 2000

CarswellNat 1291 (Fed. C.A.) at para 8; *Doucette v. Canada (Attorney General)*, 2018 FC 697 (F.C.) at para 23; *Gilead Sciences, Inc. v. Teva Canada Ltd.*, 2016 FC 336 (F.C.) [*Gilead*] at paras 5, 10; *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 162 (F.C.) [*Amnesty*] at para 70; see also Sharpe at para 1.690).

89 In the context of interlocutory injunctions, the first element (i.e., the high probability that the harm will occur) has often been expressed by the Court in terms of clear and non-speculative evidence that irreparable harm will ensue if the interlocutory relief is not granted (*Amnesty* at paras 69, 123), thus mirroring the general test for irreparable harm. On the imminence of harm, the case law developed by this Court offers no clear definition or timeline of what is "imminent", but rather suggests that it will depend on the facts of each case. For example, harm distant from as much as 18 months has been found to be imminent (*Gilead* at paras 5-6). In fact, in *Gilead*, the Court reframed the imminence criterion as a factor to be considered in determining the likelihood of future harm (*Gilead* at para 11):

> [11] At the same time the requirement of imminence in the temporal sense may be relevant in the determination of the likelihood of a future event. A potential event that is more distant in time may be an event that is less likely to occur.
>
> Furthermore, temporal imminence appears to be a subordinate consideration in a case where the likelihood of future harm appears high: see *Canadian Civil Liberties Assn v Toronto Police Service*, above, at para 88.

90 In other words, the determinative element is the likelihood of harm, not its futurity (*Horii v. R.*, [1992] 1 F.C. 142 (Fed.C.A.) at para 13). The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. On this requirement to prove the imminence of harm, Justice Sharpe (writing extrajudicially) suggests that the temporal imminence of harm may not be the best way to analyze the issue, and that the courts should rather look at whether the factors relevant in the granting of injunctive reliefs have "crystallized" (Sharpe at para 1.750). According to this approach to the imminence criterion, prematurity only arises in situations where, for example, the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur. In other words, a *quia timet* injunction should not be granted by the courts unless the situation that will exist when the alleged harm eventually occurs is already crystallized.

91 In light of the foregoing, I am of the view that the test applicable for apprehended harm is whether there is clear, convincing and non-speculative evidence allowing the Court to find or infer that irreparable harm will result if the relief is not granted, using the cautious approach prescribed for quia timet injunctions. Stated differently, to meet its burden in an application where the harm is apprehended and more distant, the moving party must establish, on a balance of probabilities, that there is clear, convincing and non-speculative evidence demonstrating that such harm has crystallized, so that any findings or inferences made about the harm can be found to reasonably and logically flow from the evidence.

[Emphasis added]

17 In the present case, the Court must assess the propriety of the injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. The courts have adopted a cautious approach generally requiring two elements: the presence of harm that is about to occur imminently or in the near future; and, a high probability that the alleged harm will occur.

a. the presence of harm that is about to occur imminently

18 In Nova Scotia, the presence and spread of COVID-19 and its' variants among the public is irrefutable.

19 The harm is the continued spread of COVID-19 within the Province if the anti-mask rally or other rallies and public gatherings in violation of the Health Orders are permitted to proceed as scheduled on May 15, 2021, or otherwise.

b. high probability that the alleged harm will occur

20 The Court finds that there is a high probability that the harm will occur because the correlation between social gatherings and the spread of COVID-19 can reasonably be inferred from the evidence of Dr, Robert Strang.

21 Based on the foregoing, the Court finds that there is clear, convincing and non-speculative evidence allowing the Court to infer that irreparable harm will result if the injunction is not granted. The Province has met the test for a *quia timet* injunction on the evidence.

***Quia Timet* Injunctions and Charter Considerations**

22 In *Ingram v. Alberta (Chief Medical Officer of Health)*, *2020 ABQB 806*, the applicants challenged the validity of public health orders aimed at managing the spread of COVID-19, made by Alberta's Chief Medical Officer of Health (CMOH), on grounds that they offended the *Alberta Bill of Rights (ABR)* and unjustifiably infringed rights protected by the *Canadian Charter of Rights and Freedoms*. The applicants also challenged the validity of certain sections of Alberta's *Public Health Act* on grounds they violated the *ABR, Constitution Act, 1867, and the Charter*.

23 In *Ingram*, the applicants argued that restrictions and mandatory mask requirements unjustifiably infringed rights protected by ss. 2 and 7 of the *Charter*.

24 On the application Ms. Ingram asserted that without the injunction staying the Business Closure Requirement, there would be no possibility for her to recover losses of revenue from the closure of her gym and in turn, the value of her shares in that business.

25 In *Ingram*, the court found that her evidence fell short of the clear evidence required to establish irreparable harm of that nature. The court went on to find that it was speculation that an interlocutory injunction will necessarily ameliorate business losses, unemployment, or financial stress (para 57). It was not enough at irreparable harm stage for the applicants to simply say that *Charter* rights were being infringed; and to ask the court to presume that if the injunction was not granted, they would suffer harm for which there was no just and reasonable remedy.

Balance of Convenience and Public Authorities

26 With respect to balance of convenience and public interest considerations I adopt the following analysis from the court in *Ingram*:

> 64 While it is "... open to all parties in an interlocutory *Charter* proceeding to rely upon considerations of public interest" and to "... tip the scales of convenience in [their] favour by

demonstrating to the court a compelling public interest in the granting or refusal of the relief sought", the Supreme Court of Canada in *RJR* also observed at paragraph 73 that:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

65 And at paragraphs 76-78 of *RJR* the Court stated that:

> ... In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> ...

81 I am bound by Supreme Court of Canada authority to assume that the Restrictions serve the public good; here, that they protect public health. I also have evidence from Dr. Hinshaw explaining how, left unchecked, the virus is anticipated to spread, threatening people's lives and the capacity of the health care system to provide patient care for Albertans who need it, whether as a result of COVID-19 or otherwise.

82 The Applicants ask me to find that there will be no harm because the Respondents have not provided an adequate scientific basis to establish that the Restrictions work.

83 Not only is this inconsistent with their acknowledgment that it is in the public interest to address the transmission of COVID-19, it is not the law that guides the Court on an interlocutory application for injunctive relief.

84 Again, and precisely because these applications are brought on short notice and before the Court has a complete evidentiary record and can undertake the complex *Charter* analysis required, I must assume the Restrictions protect public health. Moreover, Dr. Hinshaw's affidavit sets out the data that leads to her concern for the health and safety of all Albertans if the Restrictions are stayed.

85 Given the risks associated with the spread of the virus that the Respondents are seeking to manage, I am of the view that there is a greater public interest in maintaining the integrity of Order 42 than there is in staying the parts of it that the Applicants ask me to suspend so that they, and

> other citizens of this Province, are able to gather and celebrate the holidays and to otherwise exercise their religious freedoms.
>
> [Emphasis added]

27 In order to grant a *quia timet* inunction, 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.

28 Having regard to the affidavit of Dr. Robert Strang, the Court finds that the harm that is anticipated if the anti-mask rally is permitted, i.e. the continued spread of COVID-19, is imminent.

29 In the present case, damages are not an adequate remedy because the harm associated with contracting COVID-19 is death. There are also serious medical and health complications that occur in individuals who contract the virus. The associated impact on the public health care system, communities, and economies is immeasurable.

30 In the context of interlocutory injunctions, the balance of convenience analysis requires the court to consider which of the parties would suffer greater harm if the injunction was not granted: *Laurent v. Fort McKay First Nation*, *2008 ABQB 84* (Alta. Q.B.), at para 10.

31 The Court finds that the balance of convenience does not favour permitting the anti-mask rally to proceed on May 15, 2021. The balance of convenience also does not favour permitting similar events to be held within the Province at any point in the future while the Public Health Order preventing such activity is in place.

32 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.

Conclusion

33 The intensive care units at our hospitals are filling with COVID patients. The health care workers in this Province have been working tirelessly for more than 14 months to manage this crisis. Schools have had to close. Businesses have had to close. Many Nova Scotians are unemployed as a result. Yet, Nova Scotia has done better than many other provinces because its public health officials have taken an aggressive approach based on science, medicine and common sense. The vast majority of Nova Scotians have and continue to support and follow the public health recommendations with a view to returning to pre-COVID activity and enjoyment of life as quickly and as safely as possible.

34 The Respondents and those who would support them by attending the planned or other in-person public gatherings, without following the public health recommendations and orders, are uninformed or willfully blind to the scientific and medical evidence that support those measures. Their plan to gather in-person in large numbers, without social distancing and without masks, in contravention of the public health recommendations and orders shows a callous and shameful disregard for the health and safety of their fellow citizens.

35 The Applicants are entitled to the injunction sought to:

1. prevent further transmission of COVID-19;
2. ensure the continued functioning of the health-care system; and
3. limit the amount of future deaths due to the virus.

36 It is appropriate that the order includes clear language that law enforcement officers and other law enforcement agencies will enforce the prohibitions. It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions. The leading authority on injunctions against unknown persons is *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048. At paras 41-42, Justice McLachlin (as she then was) stated:

> 41 ... I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.
>
> 42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe or Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct. Similarly to be commended is the practice followed by the courts in this case of ensuring that the wording of the orders is clear and that their effect is properly circumscribed.

37 The Province advises that it is its intention to serve the Respondents personally if possible and to post the Court's Order on the Government's COVID-19 internet website. That will form part of the Order. In addition, the Order will provide that the Order is to be posted if possible on all social media platforms associated with the Respondents and those of "Worldwide Rally for Freedom and Democracy".

38 The Order herein was granted on an *ex parte* basis. It is important that the Respondents, or anyone else effected by this Order, have an opportunity to apply to the Court to vary or challenge the Order or so much of it as effects that person. Accordingly the Order will contain a provision giving notice that any such person may apply to the Court, in accordance with the procedures set out in the *Civil Procedure Rules*, to challenge or vary the Court's Order.

39 The Applicants did not seek costs and none are ordered.

S. NORTON J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Attorney General) v. Freedom Nova Scotia,* 2021 NSSC 217

Date: 20210630
Docket: Hfx No. 506040
Registry: Halifax

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

Applicants

and

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

Respondents

and

The Canadian Civil Liberties Association

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	June 30, 2021 in Halifax, Nova Scotia
Oral Decision:	June 30, 2021
Written Decision:	June 30, 2021
Counsel:	Duane A. Eddy, for the Attorney General of Nova Scotia Nasha Nijhawan, Benjamin Perryman and Jaime Burnet, for the Canadian Civil Liberties Association

By the Court [orally]:

INTRODUCTION:

[1] On May 13, 2021, the Attorney General of Nova Scotia (the "Province") sought a *quia timet* injunction on an expedited basis. The Province applied for this pre-emptive injunction in anticipation of an imminent protest against COVID-19 public health restrictions as it was anticipated that participants would not respect social distancing or masking requirements.

[2] 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.

[3] The Application was heard in Chambers on May 14th *ex parte*, with none of the Respondents appearing and no cross-examination on the Province's affiants.

[4] In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, 2021 NSSC 170, this Court granted the requested order and issued the *quia timet* injunction (the "Injunction Order").

[5] In *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, Norton, J. described the injunction as follows:

> [3] The *quia timet* or pre-emptive injunction sought would: (1) order compliance with the provisions of the *Health Protection Act*; (2) enjoin the Respondents and any other person acting under their instructions or in concert with them, from organizing in-person public gatherings; and (3) authorize law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any order issued to date under that Act.

[6] The Court had before it the materials described at para. 5 of the decision:

> [5] On May 13, 2021 the Applicants filed the Notice of *Ex Parte* Application pursuant to *Civil Procedure Rule* 5.02. Accompanying the Notice, and forming the evidentiary basis for the Application, were Affidavits of Dr. Robert Strang, Nova Scotia's Chief Medical Officer of Health, sworn May 12, 2021; and, Hayley Crichton, Director of Public Safety and Investigations, Department of Justice for the Province of Nova Scotia, sworn May 12, 2021. On May 14, 2021 the Applicants filed "Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act* 2004, c.4, s.1", dated May 13, 2021. The Applicants also filed a Pre- Hearing Memorandum. …

[7] Relying on the affidavit evidence of Ms. Crichton, Justice Norton made 23 findings of fact (para. 8) and on the affidavit of Dr. Strang, 28 findings of fact (para. 9).

[8] Following a review of the law, Norton, J. noted as follows at paras. 27 – 31:

> [27] In order to grant a *quia timet* injunction, 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.
>
> [28] Having regard to the affidavit of Dr. Robert Strang, the Court finds that the harm that is anticipated if the anti-mask rally is permitted, i.e. the continued spread of COVID-19, is imminent.
>
> [29] In the present case, damages are not an adequate remedy because the harm associated with contracting COVID-19 is death. There are also serious medical and health complications that occur in individuals who contract the virus. The associated impact on the public health care system, communities, and economies is immeasurable.
>
> [30] In the context of interlocutory injunctions, the balance of convenience analysis requires the court to consider which of the parties would suffer greater harm if the injunction was not granted: *Laurent v. Fort McKay First Nation*, 2008 ABQB 84 (Alta. Q.B.), at para 10.
>
> [31] The Court finds that the balance of convenience does not favour permitting the anti-mask rally to proceed on May 15, 2021. The balance of convenience also does not favour permitting similar events to be held within the Province at any point in the future while the Public Health Order preventing such activity is in place.
>
> [32] 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.

[9] In concluding his decision, Justice Norton stated:

> [38] The Order herein was granted on an *ex parte* basis. It is important that the Respondents, or anyone else effected by this Order, have an opportunity to apply to the Court to vary or challenge the Order or so much of it as effects that person. Accordingly the Order will contain a provision giving notice that any such person may apply to the Court, in accordance with the procedures set out in the *Civil Procedure Rules*, to challenge or vary the Court's Order.

[10] No such person or public interest group applied to the Court to challenge or vary the Injunction Order until almost two weeks later when on May 27, 2021 The Canadian Civil Liberties Association ("CCLA") filed a Notice of Motion seeking among other things an Order:

> … Granting the CCLA public interest standing in this proceeding as a party for the purpose of requesting a rehearing of the Application in Chambers, seeking to set aside or vary the Injunction Order obtained *ex parte* by the Applicant.

[11] The CCLA's motion was set down for June 4, 2021. On June 1st the Province wrote to advise the Court that it consented to an Order granting the CCLA standing. On June 3rd Cara Zwibel, the CCLA's Director of the Fundamental Freedoms Program filed an affidavit (sworn May 27, 2021) in support of the motion, concluding with these paras.:

> 27. In addition to its expertise, the CCLA has the resources to pursue a rehearing of the Province's Application. CCLA is being represented by able and experienced counsel with the capacity to manage litigation of this nature, and will effectively present the issues to this Court.
>
> 28. I believe the CCLA's submissions will assist this Honourable Court in reviewing the Injunction Order's interference with the *Charter* rights of all Nova Scotians in the context of COVID-19 public health restrictions. The CCLA's submissions will be grounded in its mandate to promote and protect fundamental rights and liberties and its extensive experience in addressing the difficult questions that arise when those fundamental rights and liberties have to be balanced with other important governmental objective.

[12] Justice Gabriel heard the motion on June 4th. The Order granted public interest standing to the CCLA in this proceeding as a party for the purpose of a rehearing of the *ex parte* Application in Chambers and the rehearing was set for a full day on today's date.

[13] On June 14th the Province filed a Notice of Motion for an Order discharging the Injunction Order. The motion was scheduled for June 22nd. Having reviewed the filed material and hearing the parties on June 22nd, Justice Gatchalian issued an Order which discharged the Injunction Order. Her Ladyship then declined the Province's request to cancel today's hearing.

[14] Later on June 22nd as the Judge assigned for today's hearing, I received a letter from the Province. In his opening paragraph Mr. Eddy stated:

I am writing to advise that Justice Gail Gatchalian granted the Attorney General's motion for an Order discharging the injunction in this proceeding. Given that the injunction has been discharged, pursuant to paragraph nine (9) of the Injunction Order, the Attorney General submits that there is no longer a live controversy. The Attorney General submits that the matter is moot and relies on the enclosed case of *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291, wherein Justice Rosinski reviewed the law of mootness beginning at paragraph 14.

[15] He concluded his correspondence as follows:

- *"**adjudicating may be viewed as intruding into the role of the legislative branch"***

The Attorney General applied for the Injunction Order granted on May 14, 2021, to ensure compliance with the Public Health Order issued under s. 32 of the *Health Protection Act.*

Moreover, the Public Health Order remains in effect and sets out restrictions on illegal gatherings and the activities that cause illegal gatherings to occur. The CCLA is not challenging the Public Health Order. Adjudication of the impugned provisions of the Injunction Order which mirror the conditions prohibiting illegal gatherings in the Public Health Order and the activities set out in the Public Health Order that cause illegal gatherings to occur may be viewed as intruding into the role of the legislative branch.

Furthermore, when Justice Gabriel set filing deadlines on June 4, 2021 with respect to the rehearing of the injunction application, his Lordship encouraged the parties to communicate to possible resolve some or all of the issues in this proceeding. The Order discharging the Injunction Order has effectively resolved the matter.

Conclusion

Based on the foregoing, the Attorney General requests that the June 30th hearing be removed from the docket and the filing deadlines pertaining to that hearing be set aside.

[16] On June 23rd Ms. Nijhawan wrote the Court, advising:

The CCLA disagrees that the issues raised on rehearing are moot, given that the issues raised by the CCLA include a challenge to the legal authority for the injunction, the state of emergency arising from the public health crisis remains in place, and the relief sought on the rehearing includes setting aside the decision of Justice Norton, dated May 14, 2021.

In our respectful submissions, the application of the doctrine of mootness to an *ex parte* injunction application is not adequately canvassed in the submissions of the Province, contained in Mr. Eddy's letter. The CCLA would like the opportunity to make full responding submissions to the request of the Province, prior to the

> determination of mootness by Your Lordship. In our view, this is best done in oral argument at the commencement of the hearing already scheduled on June 30, 2021. We would be pleased to make written submissions on this issue in advance of the hearing, at the Court's direction.

[17] In advance of today's hearing I reviewed the correspondence and determined that it would be appropriate to hear the parties on the issue of mootness. I also asked for any written submissions to be received from CCLA by June 25th and from the Province by June 28th.

[18] On June 25th CCLA provided their brief and affidavit of their counsel's paralegal, Jody Lussier sworn on that date. The Court also has Ms. Lussier's previously filed sworn affidavits. On June 28th the Province provided their mootness brief.

[19] In advance of today's decision I have reviewed the entirety of the file, inclusive of the Injunction Order and all of the subsequent filings. Although styled as a "rehearing", it is important to understand that the initial remedies sought by CCLA are as stated in their brief filed June 21, 2021:

> 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.

[20] There is no debate that the June 22nd Order discharges the Injunction Order.

[21] The Province's claim of mootness raises two issues:

1. Whether there is a live controversy that affects or may affect the rights of the parties?
2. If not, whether the Court should nevertheless exercise its discretion to hear the case?

[22] The doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties", *Barowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at para. 15.

[23] In *Borowski* the Supreme Court of Canada canvassed the types of circumstances that render a dispute moot. These included the repeal of a bylaw being

challenged, an undertaking to pay damages regardless of the outcome of an appeal, the non-applicability of statute to the party challenging the legislation, the death of a party appealing a criminal matter, or the end of the strike for which a prohibitory injunction was obtained. In *Borowski* the matter was found moot because the sections of the challenged legislation had been repealed.

[24] In *Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73, our Court of Appeal reviewed the doctrine of mootness at paras. 56 – 63. Justices Beveridge, Farrar and Bourgeois then applied the rationale articulated in *Barowski* in fashioning these comments at paras. 67 and 68:

> [67] The lack of an adversarial context informs the second rationale. The courts are full of live controversies, with real issues impacting upon the lives of real litigants. It is hardly a secret that the administration of justice is often criticized for backlogs and delay. Before adding a time consuming constitutional reference to the docket, it is "preferable to wait and determine the point in a genuine adversarial context".
>
> [68] Finally, there is nothing on the present record which would, in our view, justify a judge-initiated intrusion into the proper role of the Legislature. The issues raised by the hearing judge were moot. They were not triggered by a litigant with a real, or even potential, argument that the legislation constituted an infringement on their rights. The concerns raised were those solely of the hearing judge. They were entirely hypothetical. With respect, it was not his function to question the constitutionality of the statutory product of legislative decision-making.

[25] More recently, Chief Justice Wood referred to the above case in *C.S.J.L.M. v. Nova Scotia (Community Services)*, 2019 NSCA 59 at para. 11. Wood, CJNS succinctly set forth the rationale behind the mootness doctrine at para. 10.

> [10] Even if a matter is moot, the court retains discretion to consider the issue in appropriate circumstances. The seminal decision from the Supreme Court of Canada on the issue is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. There the Court said that, when considering its discretion to decide a matter which is moot, a court should consider the rationales behind the doctrine of mootness which are:
>
> 1. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.
> 2. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.

> 3. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of litigants.

[26] CCLA submits that the case is not moot. They submit that there is live controversy between the parties concerning the legality and constitutionality of this Court's *ex parte* decision. In CCLA's brief it is stated that "the COVID-19 pandemic is ongoing and at any time the Attorney General could return to this Court on an *ex parte* basis to again seek an order that would infringe upon the constitutionality protected rights of Nova Scotians". CCLA continues, stating "even if the case is moot, the interests of justice require that a re-hearing in open court proceeds. There is an adversarial context that has produced a more exhaustive record and complete legal submissions. The ongoing public health emergency and the far-reaching nature of this Court's *ex parte* decision warrant the use of judicial resources, particularly given the evidence and case law that was not presented to the application judge, the illegality of the injunctive relief granted, and the inadequate review that was given to the *Charter* issues. Re-hearing an *ex parte* application is squarely within the proper role of the Court and would not interfere in any way with policy making".

[27] The CCLA alleges that this Honourable Court issued an illegal injunction in this proceeding and argues that the injunction order violates *Charter* rights and is overly broad. The Province disagrees.

[28] The Province points out that the Injunction Order has been lifted and that there no longer remains a controversy affecting the parties. Accordingly, they submit that the matter is moot and it is not in the interests of justice to have the matter heard.

[29] In my view, there is no longer a live controversy or adversarial context. No party is advocating in favour of the injunction continuing given the Order discharging the Injunction Order granted by Justice Gatchalian. Furthermore, no contempt proceedings have been brought against any person under the Injunction Order. Consequently, no person's rights or liberties are in jeopardy under the Injunction Order. Given that there are no outstanding contempt proceedings requiring adjudication, this further supports the Province's submission that an adversarial context no longer exists in this case.

[30] Given my finding of no "live controversy" between the parties, the Court has discretion to hear an otherwise moot case where it is in the "interests of justice" to do so, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 17.

[31] The rule pertaining to *ex parte* applications or *quia timet* injunctions and when they may be granted does not need clarification.

[32] Whether an injunction is granted is determined on a case-by-case basis. The Court applies the settled law to the evidence before it. The Injunction Order incorporated verbatim certain restrictions contained in the Public Health Order. The Public Health Order remains effective and has gone unchallenged by the CCLA. In my view, there is no practical consequence on the rights of the parties when the impugned provisions of the Injunction Order remain incorporated into the Public Health Order, which all Nova Scotians are legally required to comply with.

[33] The Injunction Order was granted under the exceptional circumstance of the worst outbreak of COVID-19 in Nova Scotia – the "third wave". In the third wave daily case infections of COVID-19 ballooned into the triple digits. The Injunction Order was an extraordinary remedy granted in extraordinary circumstances. No injunctive relief was sought during the first or second wave. No injunctive relief is now being sought. If and when it is, the Court must then consider the evidence brought before it at that time. This contemporaneous, timely evidence will guide whether or not an injunction will then be granted. If an injunction is to be granted, it may be quite distinct from the one granted by Justice Norton six weeks ago. Rather than proceeding *ex parte,* the Province has gone on record stating that it will provide CCLA with notice.

[34] The record reflects that the Court upon hearing evidence inclusive of the expert evidence of Dr. Robert Strang, Chief Medical Officer of Health, issued a *quia timet* injunction. The burden of proof on a *quia timet* injunction is much higher than a regular injunction. The Province met the burden required to obtain a pre-emptive injunction in this matter. The Province set out the law pertaining to *quia timet* injunctions in its written submission to the Court, which the Court then referenced in its written decision. The Province also provided the evidentiary foundation supporting the *quia timet* injunction. The evidentiary foundation for the *quia timet* injunction was accepted as set out in the Court's written decision. I am mindful of CCLA's arguments that the decision is lacking in these areas. While the decision may not be perfect, to my mind it represents timely, thorough written reasons in the context of an urgent situation. The reader is given a clear understanding as to why the Judge felt the Injunction Order was required as referenced herein at para. 8 and continuing at paras. 33 – 37 of the decision.

[35] The Public Health Order remains in effect and sets out restrictions on illegal gatherings and the activities that cause illegal gatherings to occur. The CCLA is not challenging the Public Health Order. In my view, the adjudication at this time of the impugned provisions of the Injunction Order which mirror the conditions prohibiting illegal gatherings in the Public Health Order would intrude into the role of the legislative branch.

[36] In *C.S.J.L.M.* Chief Justice Wood concluded at para. 16:

> [16] I am satisfied that, in the circumstances of this case, the Court should not exercise its discretion and decide what would otherwise be a moot issue. Should future proceedings arise involving C.M., where the Minister believes it would be appropriate to seek appointment of a litigation guardian, that application should be supported by appropriate evidence and submissions. The hearing judge will make their decision based on the circumstances which exist at that time.

[37] Similar reasoning applies to this case. I am not prepared to exercise my discretion to allow the CCLA's requested rehearing to occur. The Injunction Order was granted in markedly different circumstances which existed six weeks ago. Who knows what another six weeks will bring. The mind contemplates anything from an extinguished pandemic to a raging variant fueled fourth wave.

[38] The Injunction Order was lifted just over a week ago. I am not persuaded that a lengthy hearing is now necessary. There will be no Order setting aside the May 14, 2021 decision of this Court. The CCLA's issues, while interesting and thought-provoking, do not necessitate a lengthy hearing (or rehearing) at this time. This is a courtroom not a classroom. Should it become necessary, the Court will be well-placed to make a decision based on the circumstances which exist at that time.

[39] Costs were not sought on this aspect of the hearing; consequently, they are not awarded.

Chipman, J.

Pratt v. Nova Scotia (Attorney General)

Nova Scotia Judgments

Nova Scotia Court of Appeal

Halifax, Nova Scotia

M.J. Wood C.J.N.S., J.W.S. Saunders and E. Van den Eynden JJ.A.

Heard: November 18, 2019.

Judgment: May 5, 2020.

Docket: CA 484665

Registry: Halifax

[2020] N.S.J. No. 174 | 2020 NSCA 39 | 64 C.R. (7th) 39 | 2020 CarswellNS 313

Between Maurice Pratt, Appellant, and Nova Scotia (Attorney General) and Central Nova Scotia Correctional Facility, Respondents

(101 paras.)

Case Summary

Criminal law — Extraordinary remedies — Habeas corpus — Appeal by Pratt from summary dismissal of his habeas corpus application for release from solitary confinement on basis that it was unlawful allowed — Judge convened teleconference and in oral decision declined jurisdiction to hear application and concluded application was moot — Judge then requested additional information and submissions from respondents' counsel not disclosed to appellant and rendered lengthy written decision relying on respondents' materials — Appellant was not provided procedural fairness — Appellant's application was not moot — Hearing should have been held — Proceeding to gather additional information after oral decision was procedurally unfair.

Appeal by Pratt from summary dismissal of his habeas corpus application for his release from solitary confinement on the basis that it was unlawful. The judge convened a teleconference and rendered an oral decision declining his jurisdiction to hear the application and concluding that the application was moot. Pratt was and remained in close confinement at the time of the teleconference. After rendering his oral decision, the judge requested additional information and submissions from the respondents' counsel since he intended to release a written decision. The appellant was not copied at any time on the communications between the judge's office and counsel and was not invited to respond to the additional materials requested by the judge. In his written decision, the judge dealt with substantive aspects of the application and materially expanded his reasons for concluding the appellant's application was moot by relying on the information not disclosed to the appellant. The additional documentation left material unanswered questions respecting the reasons for the appellant's continued detention in close confinement and raised questions about whether he was afforded due process throughout the disciplinary process undertaken by the respondent correctional facility. The judge determined that if the deprivation of liberty arose in a provincially-operated prison, there was a presumption of fairness in favour of the provincial correctional officials.

HELD: Appeal allowed.

The appellant was not provided procedural fairness. There was nothing procedurally fair in the events that unfolded after the teleconference leading up to and including the written decision. The appellant raised legitimate procedural fairness concerns sufficient to question the lawfulness of his detention. There was a clear deprivation of liberty. The appellant's application was neither moot on the day he filed it nor when the judge declined jurisdiction to hear it. His complaints of procedural fairness were raised to meet his threshold burden of establishing a legitimate doubt as to the reasonableness of his continued detention. At the time of the teleconference, the appellant was not provided with any material pertaining to his detention in close confinement beyond his known release date. The oral submissions from counsel left unexplained gaps as to why the appellant was still being detained in close confinement. There remained a live controversy. Legitimate fairness issues were raised that warranted a hearing. The judge went on to establish new legal principles for the adjudication of habeas applications in the context of provincially-operated prisons, a matter he was not asked, nor required, to adjudicate. The judge provided no indication to the parties that he intended to do so. It was improper for the judge to decline jurisdiction to hear the application. The judge proceeded to gather additional information, which was procedurally unfair, and then dealt with substantive issues on their merits, notwithstanding he declined to do so in his oral decision.

Statutes, Regulations and Rules Cited:

Civil Procedure Rules, Rule 7.12(7), Rule 7.13(1), Rule 7.13(2), Rule 7.14

Correctional Services Act, *S.N.S. 2005, c. 37*,

Court Summary:

Habeas corpus -- Close/solitary confinement -- Procedural fairness -- Exercise of jurisdiction.

The appellant filed a *habeas corpus* application seeking his release from close (solitary) confinement on the basis it was unlawful. The judge convened a teleconference with the appellant (self-represented) and counsel for the respondents. The appellant sought to have his application set down for a hearing on the merits. The respondents objected. At the conclusion of the call, the judge rendered an oral decision, declining his jurisdiction to hear the application. He said the appellant's *habeas* application was moot and summarily dismissed it. However, after rendering his oral decision, the judge requested additional information from the respondents' counsel. Numerous communications took place between respondents' counsel and the judge's office. Notice was not given to the appellant, nor was he invited to respond. The judge later released a written decision addressing the application on its merits; relying on the materials not disclosed to the applicant.

Issues:

1. Was Mr. Pratt afforded procedural fairness?

2. Did the judge err in the exercise of his *habeas corpus* jurisdiction?

Result The appeal is allowed. The decisions below and resulting order are set aside. The appellant was not afforded procedural fairness. The judge improperly exercised his *habeas* jurisdiction. The judge also erroneously determined the application of *habeas corpus* principles should be more relaxed in a provincially-run prison by imposing a presumption of fair treatment and process. There is no such presumption. The principles of *habeas corpus* apply consistently between federal and provincial correctional facilities. The application judge erred in law to conclude otherwise.

[Note: This summary does not form part of the Court's judgment. Quotations must be from the judgment, not this summary.]

Counsel

Claire McNeil with Alexa Jarvis (student), for the appellant.

Duane Eddy, for the respondents.

Held: Appeal allowed with costs, per reasons for judgment of E. Van den Eynden J.A.; M.J. Wood C.J.N.S. and J.W.S. Saunders J.A. concurring

Reasons for judgment

E. VAN den EYNDEN J.A.

Overview

1 Mr. Pratt filed a *habeas corpus* application seeking his release from close (solitary) confinement. He claimed his detention was unlawful.

2 The Honourable Justice Peter P. Rosinski convened a teleconference with Mr. Pratt (self-represented) and counsel for the respondents. Mr. Pratt wanted to have his application heard on the merits. The respondents asked the judge not to set the matter down for a hearing. At the conclusion of the call, the judge rendered an oral decision. The judge declined his jurisdiction to hear the application. He said Mr. Pratt's *habeas* application was moot and summarily dismissed it.

3 However, after rendering his oral decision, the judge requested additional information and submissions from the respondents' counsel. There were numerous communications between the judge's office and counsel. The communications revealed that the judge intended to release a written decision, but before doing so he wanted additional materials. Mr. Pratt was not copied, at any time, on the communications between the judge's office and counsel. Mr. Pratt was not invited to respond to the additional materials requested by the judge.

4 Although the judge initially declined jurisdiction to hear the matter, in a written decision (*2019 NSSC 6*) rendered some months later, the judge went on to deal with substantive aspects of the application and materially expanded his reasons for concluding Mr. Pratt's application was moot. In doing so, the judge relied on the information not disclosed to Mr. Pratt.

5 Mr. Pratt argues the judge made serious errors that warrant appellate intervention. He claims the judge erred in declining to exercise his jurisdiction in the first instance, and further compounded this error by proceeding to gather additional information without any notice to Mr. Pratt or providing him with an opportunity to make submissions. Mr. Pratt says the manner in which his *habeas* application was disposed of was fundamentally unfair.

6 Furthermore, Mr. Pratt challenges the judge's establishment of new legal principles for dispensing with *habeas* applications. Mr. Pratt was being held in a provincially-operated prison. In his written decision, the judge determined, without providing any authority, that the binding legal framework for determining a *habeas* application should differ if the applicant prisoner is held within a provincially- operated correctional facility as opposed to a federal correctional facility. The judge made this and other determinations respecting the applicable principles absent these issues being raised by the parties and absent any submissions from the parties.

7 Mr. Pratt acknowledges his appeal before this Court is moot in the sense that he has been released from close confinement and no longer seeks the remedy of release. However, he argues this appeal raises issues about the proper procedures and legal principles to be employed by reviewing courts with respect to *habeas* applications.

8 The issues raised are important. They are subject to repetition yet evasive of review because individual circumstances in prisons can quickly change before appellate review of the challenged decision. These issues have a broader application. Furthermore, the respondents raised no objection to this Court hearing Mr. Pratt's appeal. Having reviewed the principles in *Borowski v. Canada (Attorney General)*, *[1989] 1 S.C.R. 342*, I am satisfied this Court should hear Mr. Pratt's appeal regardless of the mootness of his original release remedy.

9 How Mr. Pratt's application was dispensed with by the lower court was not procedurally fair. With respect, it is clear on the record that the judge made several errors. Appellate intervention is warranted. For the following reasons, I would allow the appeal.

Issues

10 The grounds of appeal as contained in Mr. Pratt's Amended Notice of Appeal are as follows:

1. In failing to send the application to an evidentiary hearing, the learned trial judge erred in his interpretation and application of the law.
2. The learned trial judge erred in his interpretation and application of the law in placing the burden of proving an 'arguable case' on the Applicant.
3. The learned trial judge denied procedural fairness to the Applicant in deciding to dismiss the application without proper disclosure, and without an evidentiary hearing of the application.
4. The learned trial judge erred in his interpretation and application of the law, in particular in creating and applying a presumption of procedural fairness and reasonableness in favour of decisions made by provincial prison officials.
5. Such further grounds as I may advise and this Honourable Court may permit.

6. The learned judge erred in law in considering documents and submissions provided by the Respondent following the teleconference without giving the Appellant notice or an opportunity to be heard with respect to those documents and submissions.

11 There is no dispute the grounds raise two core issues: procedural fairness and the exercise of jurisdiction. They can be examined under a simpler framework, as follows:

1. Was Mr. Pratt afforded procedural fairness?
2. Did the judge err in the exercise of his *habeas corpus* jurisdiction?

Standard of review

12 Issues that involve a lower court's exercise of its *habeas corpus* jurisdiction attract a correctness standard of review. It is well-established that if a provincial superior court improperly exercises or improperly declines to exercise jurisdiction this equates to an error of law and the correctness standard of review applies (*May v. Ferndale Institution*, *2005 SCC 82*).

13 When issues of procedural fairness or a denial of natural justice are raised, there is no deference afforded to the judge's decision. The role of this Court is to determine whether there was a breach (*McPherson v. Campbell*, *2019 NSCA 23*, at para20).

14 I will apply these standards of review in my analysis. Before examining the issues, some background is needed.

Background

15 Mr. Pratt was incarcerated at the Central Nova Scotia Correctional Facility, a provincial prison. He was being held in the close (solitary) confinement unit when he filed a *habeas corpus* application. His application disclosed the following claims:

* he was being detained in close confinement without reasons being given;
* he was not given a date for discharge;
* his detention was illegal because he was being held past the ten day maximum and this was contrary to the legislation and goes against the *Mandela Rules*[1].

16 After receiving Mr. Pratt's application, the Supreme Court Prothonotary wrote a memo to Justice Timothy Gabriel, the judge assigned to chambers. The Prothonotary wrote:

> ... I am referring this to you as the Criminal / Crownside judge. ...
>
> Should you direct that we decline to accept ... for filing ... provide your directions in writing pursuant to CPR 7.12(7).
>
> Should you decide to approve the filing ... kindly indicate when you would like the [motion] for directions to be set down as per CPR 7.13(2)(a).
>
> I note that recently there has been a trend towards holding a teleconference between the parties prior to any physical court appearances. If you prefer to proceed by telephone, kindly advise

> when you would like the call to take place and I will pass information onto the criminal scheduler. ...

17 The above *Civil Procedure Rules* provide:

> 7.12(7) A prothonotary must not refuse to file or act on a document purporting to seek review by way of *habeas corpus* unless a judge concurs in writing ...
>
> 7.13(2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:
>
> (a) appoint the earliest practical time and date and a place for a judge to give directions on the course of the proceeding;
>
> (b) order any person detaining the applicant to bring the applicant before the judge at the set time and date;
>
> (c) order a respondent to produce all documents relating to the detention immediately to the court;
>
> (d) cause the parties to be notified of the time, date, and place of the hearing for directions.

18 The record before this Court does not contain Justice Gabriel's reply to the Prothonotary. However, it is obvious from the record Mr. Pratt's application was accepted for filing, and a teleconference was scheduled so a judge could provide directions on the course of the proceeding.

19 *Rule* 7.14 authorizes a judge to provide directions for a quick and fair determination of the legality of an applicant's detention. This *Rule*, which is not exhaustive, allows the judge to give these directions:

> a) set a date for the court to determine the legality of the detention;
>
> b) order a person detaining the applicant to bring the applicant before the court for the hearing;
>
> c) set dates for filing affidavits and briefs;
>
> d) order production of a document not already produced;
>
> e) order attendance of a witness for direct examination, if the evidence is not obtained by affidavit;
>
> f) order attendance of a witness for cross-examination;
>
> g) determine what documents will constitute the record; ...

20 Mr. Pratt's *habeas* application was filed on October 25, 2018. The motion for directions was originally scheduled for October 30, 2018 before Justice Timothy Gabriel. However, Justice Gabriel set the matter over to November 6, 2018 because Mr. Pratt was not provided with a copy of correspondence counsel for the respondents filed with the court.

21 Justice Rosinski was the presiding chambers judge on November 6, 2018. At that time he had limited information respecting Mr. Pratt's detention. He had Mr. Pratt's application plus correspondence from the respondents' counsel, Duane A. Eddy (also counsel on appeal).

22 It is clear from the record that the proceeding on November 6, 2018 was not a hearing on the merits. Rather, it was a motion for directions. There was no dispute that Mr. Pratt had and continued to

experience a deprivation of liberty through his placement in close (solitary) confinement. The ultimate issue for determination--on another day--would be whether the deprivation was lawful. However, the parties never got to that point. The judge declined to hear the application, declaring it moot.

23 In effect, the judge drew a line in the sand, refusing to examine the lawfulness of Mr. Pratt's continuous deprivation beyond the filing date of his application. Over the objections of Mr. Pratt, the judge said he would have to file a new application if he wanted the court to examine that.

24 To understand what the judge did on November 6, 2018, it is necessary to review in some detail what was before him, as well as the respective positions of the parties.

25 No sworn documents were filed by the respondents in advance of the November 6, 2018 teleconference. None of the parties were under oath, and there were no witnesses called or exhibits submitted. Counsel for the respondents did provide the judge with a brief one-page letter which advised that Mr. Pratt was being housed in close confinement because of disciplinary sanctions. The respondents took this position:

> The Respondent's position in regards to Mr. Pratt's *habeas corpus* application is that because Mr. Pratt is in segregation for disciplinary reasons and because Mr. Pratt has failed to plead grounds pertaining to procedural unfairness the court should decline to set this matter down for hearing. ...
>
> Furthermore, grounds pertaining to alleged restrictions in privileges and allegations which impugn the general administration of the facility, are not matters that fall within the court's *habeas corpus* jurisdiction. ...

26 The information before the judge explaining Mr. Pratt's placement was far from complete. Furthermore, contrary to what the respondents asserted, Mr. Pratt clearly raised issues of procedural fairness. In addition to the concerns identified on the face of his application, during the telephone conference Mr. Pratt informed the judge several times what his specific complaints were. They included a failure to disclose discipline records to him--records upon which the respondents were relying--and a lack of due process. Mr. Pratt's complaints will be discussed later, but next I will explain the circumstances respecting Mr. Pratt's deprivation of liberty.

27 Mr. Pratt was held in continuous close confinement beginning October 12, 2018 and remained so at the time of the teleconference on November 6, 2018. He would continue to be for a period of time. The respondents' counsel acknowledged that he did not know all the details respecting why and for how long Mr. Pratt would be held in close confinement. Mr. Pratt pleaded with the judge to set the matter down for a hearing.

28 Based on the material that was available to the judge on November 6, 2018, it was known that Mr. Pratt received a disciplinary penalty of close confinement for three infractions. Mr. Pratt was placed in the close confinement unit on October 12 for sending a birthday card with inappropriate content to a correctional officer. For this, he was given five days in close confinement. Next, he received an additional five consecutive days for covering a security camera. The final incident also involved the covering of a security camera. Mr. Pratt said he covered the camera on this occasion to use the washroom. For the third infraction, Mr. Pratt received a penalty of five days concurrent along with a loss of canteen privileges. His solitary confinement for these three infractions was to expire October 22, 2018. It did not, and he filed his application on October 25, 2018.

29 These three disciplinary matters were not the subject of Mr. Pratt's application. His primary complaint

was "I am down here past the described 10 day limit and have not been given a discharge date". He made clear in his application that his detention had not ended when it should have.

30 Counsel provided the judge with a news article (that did not name Mr. Pratt), a brief email between counsel and an employee of the correctional facility, and some discipline records relating to Mr. Pratt. The judge had no discipline records or other internal prison documents to examine which would enable him to ascertain the lawfulness of Mr. Pratt's detention after October 22, 2018.

31 However, during the teleconference, counsel verbally relayed to the judge information he had just received from the correctional facility. Counsel advised he had received documentation dated October 23, 2018 indicating Mr. Pratt had been found guilty of breaching another correctional facility rule. This discipline hearing was conducted in the absence of Mr. Pratt, purportedly due to concerns for staff safety. Mr. Pratt was found guilty based only on the filed compliant. He was neither provided the complaint, nor given the opportunity to respond. Counsel also advised that a request was made to extend Mr. Pratt's detention in close confinement on October 24, 2018, which was approved on October 31, 2018 by the correctional authorities.

32 Counsel said the documentation set out serious complaints respecting Mr. Pratt's behaviour. They included the claims that Mr. Pratt:

* assaulted two sheriff officers in court on October 23, 2018;
* had behaviours that had become very erratic;
* had been calling and harassing lawyers;
* called the Ombudsman making a statement that he was going to murder someone in the facility.

33 As noted, the above documents referred to by counsel during the teleconference were not filed with the court. They were not provided to Mr. Pratt, nor did he have an opportunity to make submissions prior to these matters being determined by prison authorities. Although the governing legislative provisions (*Correctional Services Act*, S.N.S. 2005, c. 37 and supporting Regulations) permit hearings in the absence of the prisoner in certain circumstances, the prisoner must be notified both (1) of the decision and the penalty imposed; and (2) the prisoner's new release date. Neither of which happened here. The record contains no documents that would contradict Mr. Pratt's claim he had not received notification of any disciplinary matters after October 22, 2018.

34 Furthermore, Mr. Pratt disputed the factual circumstances relayed to the judge through counsel. In expressing his concerns respecting the failure to disclose these documents, Mr. Pratt told the judge on November 6, 2018:

> So Mr. Eddy said that today he received a level. I'm going to say on the record, Your Honour, I was not aware of that level nor was I provided with any like of the material that Mr. Eddy has.
>
> ...
>
> So for them to say, as Mr. Eddy stated, in the level that he received this morning, that they were unable to take me to an adjudication because there was a safety concern, that's not factual. That's not factual.
>
> ...

> Your Honour, I have not received a disciplinary report from that. Other than what Mr. Eddy said, I was unaware of it. Nor have I been charged for any staff assault on sheriffs. So I believe that is not in fairness to due process. I'm going to say that I have the right to make full answer and defence. I have the right to know the case that I have to meet.
>
> ...
>
> So I'm alleging procedural fairness. I don't believe due process has been followed. I don't believe you should take into account the newest levels that Mr. Eddy has in front of him or ... I don't even think he's provided to you. Definitely, he hasn't provided to myself. I'm requesting a date in court so that you can hear. This ... Your Honour, this should be concerning, that these kind of oversights are not going ... are not being provided.
>
> This speaks, I think, specifically to the culture of CNSCF at Burnside. Right? I'm not being told when I'm getting out. I'm not being told when I'm on a level, when I have court like today and I'm talking to you. I'm not being provided with any of the pertinent knowledge to defend myself in a fair or just manner. I believe that is an abuse of process. I believe it is an abuse of power. I also believe that it is detrimental to my rights to make full answer of ... my right to make full answer and defence and to know the case that I have to meet.
>
> And, Your Honour, I'm requesting a hearing so that we can ... I can provide further testimony as to what's really going on behind the wall. Because like I think that you would be astonished to find ... or to hear my testimony.

35 Mr. Pratt raised a breach of his *Charter* rights and further told the judge:

> These matters of *habeas corpus* should be expedient because they deal with my liberty and abuse of the power. So I'm going to request to you to make an order for me to come to the Superior Court and lay out my case and you hear what I have to say and then you make another ruling. Because this is just going on week to week and I have not picked up any level. I made sure that I was on compliance of all regulations in front of me ... expected of me.
>
> I seen the Deputy Super, Ms. Dominix, yesterday. Nobody told me nothing about these new levels. Nobody told me I was adjudicated. That's concerning for me. It prejudices me, Your Honour, and I want my court date for that. I can show you exactly what's going on. And Mr. Eddy can present his case for the Department of Justice.

36 Although counsel for the respondents acknowledged the lack of disclosure to Mr. Pratt, counsel suggested to the judge that Mr. Pratt should file a new *habeas* application to address his concerns with continuous close confinement. Counsel submitted that Mr. Pratt's status was evolving because of ongoing infractions and the respondents should not be subject to "rolling grounds of *habeas corpus*". In the alternative, counsel suggested the application be adjourned to another teleconference to allow for further disclosure.

37 Mr. Pratt objected to the respondents' request that in order to have the lawfulness of his deprivation reviewed by the lower court he would have to file yet another *habeas* application. The following excerpt from the November 6, 2018 transcript illuminates the competing positions:

> **THE COURT:** ... Well, here's the thing. Mr. Eddy says, Look, you filed October 25th the *habeas corpus ...*
>
> **MR. PRATT:** Correct.

THE COURT: ... application. It was in relation to these levels which are no longer going on.

MR. PRATT: Correct.

THE COURT: So his point is, Look, there should be a new *habeas corpus* application filed because the old one, there's nothing left for the Court to fix. Typically, the Court is asked to, you know, change the conditions of your confinement and so on. But, of course, if what you filed is no longer going on, the complaint is no longer really going on, then ...

MR. PRATT: Can I interject, Your Honour?

THE COURT: Yeah.

MR. PRATT: So why am I still in segregation then, Your Honour?

THE COURT: Well, that's another matter, you see. It's ...

MR. PRATT: No. No, no. It's regard ... I came down on the 12th for this incident. I have not left. It's not like I left and I came back. Now, I'm on an administrative segregation hold.

THE COURT: Yeah.

MR. PRATT: So it's in regard to the same initial levels.

THE COURT: Now, legally, it's not.

MR. PRATT: Your Honour, how ... so why am I still down ... like why am I still ... if I came on one level ... if I'm in jail for one charge, right, and that charge ends ...

THE COURT: Yeah.

MR. PRATT: ... and it's ... Your Honour gives me time served, right ...

THE COURT: Uh-huh.

MR. PRATT: ... I'm to be released then. If there's no more ... if there's no new information, if there's no specific offence, if there's no new charge, then I'm supposed to be released. How am I not released then if there's no concerns with my conduct or with my ... do you understand what I'm saying?

Like it's going on. It's going ... like I came down for one incident. I did my time. The guy said, Time served. They did not release me. The administrators here, they still keep me. So it's the same thing that I'm ... like why would I be required to file a *habeas corpus* every single new level, which I'm not even being told of? It's from the same incident. I filed them from those incidents, right, because my time exceeded. My time had exceeded, because the adjudicator, the judge in this matter, said, Your time is done. But they chose not to release me. So it's the same thing going on, Your Honour. And I'm asking to get a court date so that we can all understand why it's still going on.

THE COURT: Okay. And, Mr. Eddy, any last comment?

MR. EDDY: The Crown reiterates that circumstances have changed once again, My Lord, due to Mr. Pratt's own actions. And I understand how it may be inconvenient to pursue another *habeas corpus* in relation to these new circumstances, but the ultimate onus is on the Crown to be able to respond to what the current confinement ... the conditions are.

Now to continue on with historical levels and move forward, it's simply procedurally unfair to the Crown if the Court ...

THE COURT: Okay.

> **MR. EDDY:** ... were to agree with what Mr. Pratt proposes in relation to these most recent levels of incidents. The proper approach, the Crown would submit, in this circumstance is for Mr. Pratt to articulate in a new notice for *habeas corpus*, in a new application, why he feels his current conditions of confinement are illegal or unlawful. And then the Crown can then gather the documents and provide them to the Court. And we can convene another conference call ... and to Mr. Pratt. He'll be provided with those documents. We can convene another conference call to yet again determine whether or not these levels or his current condition of confinement warrants a hearing.

38 At the end of the motion for directions the judge rendered this brief oral decision:

> Well, yes, thank you very much then, gentlemen. In review of all these materials here, gentlemen, it is my view that it is appropriate for the Court to decline its jurisdiction in this particular case as the documentation relates to matters on or before October 25th, 2018. By that, I mean I do not include within that the matters which were not adjudicated on from October 23rd until October 29th.
>
> So the opportunity is there if there's proper grounds for Mr. Pratt to revisit those by way of a new *habeas corpus* application. But, at this point, I am dismissing the existing October 25th, 2018 application as being basically moot. That means that the matters have been resolved. But although some of them start within the time frame, October 23rd, those are not part of that decision. They, obviously, adjudicated October 29th, could be, if necessary, the subject of a new application. And that's my decision in relation to the matter.

39 Immediately after the judge rendered his decision, Mr. Pratt reiterated concerns about procedural fairness. The transcript concludes with this exchange between the judge and Mr. Pratt:

> **MR. PRATT:** Your Honour, this is Mr. Pratt. Can I ask about my procedural fairness and my right to make full answer and defence? I wasn't even given that, Your Honour ...
>
> **THE COURT:** The decision ...
>
> **MR. PRATT:** ... nor were you provided with that, it sounds like ...
>
> **THE COURT:** Mr. ...
>
> **MR. PRATT:** You weren't provided with those new levels.
>
> **THE COURT:** Mr. Pratt, I've made that decision and that's what's going to conclude the matter today. So thank you for your attendance and your submissions. As well, Mr. Eddy ...
>
> **MR. EDDY:** Thank you, My Lord.
>
> **THE COURT:** ... thank you.

40 It is difficult to understand how the judge could have concluded "the matters have been resolved". Mr. Pratt was and remained in close confinement at the time of the teleconference. The records in the three disciplinary matters produced by the respondents were not the subject of Mr. Pratt's complaint. These records did not address his deprivation of liberty that continued after the disciplinary sanctions had expired on October 22, 2018. Mr. Pratt's detention had not ended, nor "been resolved". Mr. Pratt clearly complained of a lack of disclosure of documents and concerns with due process.

41 Notwithstanding the fact that the judge disposed of the application on November 6, 2018, on November 13, he asked the respondents for further information. In an email, the judge's judicial assistant

wrote to counsel for the respondents asking:

> Justice Rosinski has requested the following information with respect to this matter:
>
> 1. Where in the legislation/policies is there reference to (and what is/when in use?) Sentence Management Plan?
> 2. Why does T. Dominix say in her Oct 30th email "Mr. Pratt has been on levels and SMP requiring him to be housed in CCU"? and
> 3. Regarding Section 75 *Correctional Services Act* are there Regs. Regarding (b) "Shall in accordance with the Regs, conduct a review of the close confinement."

42 Counsel responded in an email of the same date, providing the judge with documents and submissions respecting questions 1 and 3. As for the judge's second question, counsel provided a response, but for the wrong prisoner. This error was brought to counsel's attention by the judge's assistant on November 16, 2018. On November 17, 2018, counsel acknowledged his error in an email and on November 19, 2018 responded to the judge's inquiries as follows:

> With respect to the courts second question regarding Ms. Dominix's October 30/18 email I've requested copies of all of Pratt's disciplinary reports/levels and SMP's for his current custody term up to November 19, 2018. My understanding is that it is Pratt's extensive history of not following facility rules, specifically his assaultive/ violent behaviour towards staff and other inmates, that continually causes him to be placed in CCU [close solitary confinement].
>
> ... Once I have the documents and SMP's for Pratt I'll forward them to the court.

43 On December 11, 2018, the judge's assistant wrote to the respondents' counsel asking:

> Is there something else coming along to the Court with respect to the above-noted matter [Pratt]? ... Justice Rosinski is wanting to release a written decision and is awaiting any material that you may have.

44 Counsel responded on December 11, 2018, advising the judge's assistant that he would be sending materials to the judge. Counsel then wrote a letter directly to Justice Rosinski dated December 11, 2018 advising:

> In response to Ms. McCarthy's [the judge's judicial assistant] email, dated November 13, 2018 and enclosed herein for ease of reference, please find enclosed disciplinary records and Security and Sentence Management Plans for Maurice Pratt from February 2018 to November 2018; Correctional Services Policy and Procedures No 43.00.00 subsection 11 (Additional Measures - Security Management Plan); and section 80 of the Correctional Services Act Regulations - "Review of Close Confinement".
>
> Deputy Superintendent Tracy Dominix, in her email, dated October 30, 2018, was referring to Mr. Pratt's disciplinary incidents and reports.

45 This communication from counsel to the judge provided factual information respecting the email referenced in para30 above and included the three discipline reports previously provided to the judge before the November 6, 2018 motion for directions. Importantly, it also enclosed several additional disciplinary reports plus specific Sentence Management Plans pertaining to Mr. Pratt.

46 The record contains one further communication between the respondents' counsel and the judge's judicial assistant. Counsel followed up to ensure the materials he sent were received, and he added some additional information respecting the implementation of policies and procedures for the secure operation, management and administration of a correctional facility.

47 None of the multiple communications exchanged between the judge/judge's office and counsel for the respondents after the judge rendered his decision on November 6, 2018, nor the additional records provided as a result of these communications, were disclosed to Mr. Pratt. Accordingly, Mr. Pratt was afforded no opportunity to respond.

48 For reasons which will become apparent in my analysis, it is unnecessary to delve into the details of the supplemental records provided to and relied upon by the judge in his written decision. It is enough to say that the additional documentation leaves material unanswered questions respecting the reasons for Mr. Pratt's continued detention in close confinement and raises questions about whether Mr. Pratt was afforded due process throughout the disciplinary process undertaken by the respondent correctional facility.

49 The decision rendered on November 6, 2018 dismissing Mr. Pratt's application was two short paragraphs. The judge's written decision released January 10, 2019 was 21 pages plus 14 appended pages. The decision goes well beyond matters decided on November 6, 2018. In addition to relying on new materials, the judge boldly stated, without authority, that the legal principles that govern a *habeas* application should be more relaxed in a provincially-operated correction facility. Mr. Pratt says the judge failed to follow the law as he was required, and his revised legal principles cannot stand as they erode the constitutionally protected remedy of *habeas corpus*. I will elaborate on the judge's written decision in my analysis.

50 On May 22, 2019 an order was issued providing:

> WHEREAS an application for a writ of *Habeas Corpus* was filed by Maurice Pratt on October 25, 2018;
>
> AND WHEREAS a hearing was held in respect of that application on November 6, 2018, with Maurice Pratt representing himself, and Duane Eddy representing the Respondents;
>
> AND UPON hearing Maurice Pratt and Duane Eddy, and upon reviewing the documents and materials filed herein;
>
> IT IS ORDERED THAT:
>
> 1. The application is hereby dismissed without costs to any party.

51 Although the recitals indicate a "hearing was held in respect of that application on November 6, 2018..." the record does not support a conclusion that there was a hearing respecting the merits of Mr. Pratt's application. I will return to this point later.

52 Mr. Pratt filed a Notice of Appeal on January 29, 2019. By order of this Court, granted on August 15, 2019, Mr. Pratt was permitted to amend his Notice of Appeal by adding a sixth ground of appeal as noted in para10 herein.

Analysis

53 Before undertaking a review of the specific issues, a brief overview of the applicable legal principles is in order to contextualize the grounds of appeal.

54 *Habeas corpus* is a fundamental remedy with historical and constitutional significance in our legal system. The oversight obligation of reviewing provincial superior courts is a very important function. This obligation cannot be given short shrift even if it may be, by times, challenging, cumbersome and inconvenient. The *Rules* expressly acknowledge that *habeas corpus* takes priority over all other business of the court (see *Rule* 7.13 (1)).

55 The principles that govern are well-known and not controversial. By way of a cursory overview they include:

* *Habeas corpus* is a "non-discretionary" remedy. It must be issued as of right by the provincial superior courts where the requirements are met.
* If the applicant proves a deprivation of liberty and raises a legitimate ground to question the legality of the deprivation the matter must proceed to a hearing.
* If the applicant has raised such a ground, the onus shifts to the respondent authorities to show the deprivation of liberty was lawful.
* The requirement for a legitimate ground has been characterised as "a legitimate doubt" or "some basis" to question the lawfulness of the detention. This requirement is different than actual proof that the detention is unlawful. The legal burden to prove lawfulness rests upon the respondent decision maker.
* An interpretation of the test for "legitimate ground" that increases the standard of proof, or imposes technical legal requirements, runs the risk of unduly narrowing the scope of this constitutionally protected remedy.
* Thus, when interpreting the legitimate ground requirement attention must be paid to avoid shifting the burden improperly. This is especially so in situations where the applicant claims lack of access to information or reasons concerning their detention.
* This interpretation of the content of the applicant's obligation to show "grounds" to question the lawfulness of a decision is consistent with the purpose of the remedy to hold authorities to account for incursions on personal liberty.
* A challenge to the fairness of the process may be based on procedural violations of either or both the common law or statute. In determining the fairness of the process, apart from transient or trifling complaints, respondent decision makers are not entitled to deference by the reviewing court.
* In short, the rules that govern can be said to favour the prisoner, requiring the respondent decision maker to introduce evidence to justify the deprivation where the prisoner has discharged their evidential burden by establishing a factual context that "bears upon" the legality of the imprisonment. A claim based on no disclosure or reasons for decision can meet that requirement.

See *May v. Ferndale Institution*, *supra*; *Mission Institution v. Khela*, *2014 SCC 24*; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, *2017 ONCA 839*; J. Farbey, R.J. Sharpe and S. Atrill, *The Law of Habeas Corpus*, 3rd ed (Oxford: Oxford University Press, 2011).

56 It is also important to recognize the additional challenges self-represented prisoners face in advancing their *habeas* claims. It cannot be seriously disputed that, as a general statement, prisoners face challenges in advancing litigation. These challenges are particularly pronounced for prisoners in restricted detention, such as solitary confinement. There are added challenges if the prisoner has underlying literacy and/or mental health issues.

57 Given the many prisoner appeals and chambers matters before this Court, I can take judicial notice of the challenges self-represented prisoners face in getting legal documentation prepared and filed, gaining access to legal research, and even receiving or sending mail pertaining to active matters.

58 There is a role for lower court judges to manage *habeas corpus* applications with particular regard to facilitating access to justice for self-represented applicants. Bourgeois, J. (as she then was) noted in *Blais v. Correction Service Canada*, *2011 NSSC 508*:

> [9] ... [P]rovincial superior courts do have a role, in fact an obligation to diligently guard against the erosion of the *habeas corpus* remedy and in particular its continuing application in the prison context.

59 Aside from these observations, this record demonstrates a case on point. Although the correctional facility had control over Mr. Pratt, they failed to ensure he received important and relevant documents. Mr. Pratt filed his application on October 25, 2018. His motion for directions, originally scheduled in a timelier manner for October 30, 2018, had to be adjourned to November 6, 2018 because of the respondents' failure to provide Mr. Pratt with their materials. All the while, Mr. Pratt remained in close (solitary) confinement.

60 Placement in solitary confinement is not a minor curtailment of a prisoner's residual liberty interests. No longer is there any dispute that this type of confinement is a very serious form of incarceration--one that can have profound lasting negative effects on prisoners (see *Wilcox v. Alberta*, *2020 ABCA 104*; *Brazeau v. Canada (Attorney General)*, *2020 ONCA 184*). These authorities emphasize that it is particularly so for those suffering from mental health issues; Mr. Pratt informed the judge of his own mental health issues on November 6, 2018.

Was Mr. Pratt afforded procedural fairness?

61 The record raises some serious behavioural concerns presented by Mr. Pratt. Even if true, that does not deprive him of his constitutionally protected rights and remedies.

62 The question of whether Mr. Pratt was afforded procedural fairness arises in several contexts. He has a long list of complaints. For the purposes of this appeal, I need only address his primary complaints of a lack of procedural fairness respecting: (1) the November 6, 2018 teleconference; and (2) the way the judge gathered and used information after rendering his decision on November 6, 2018.

63 As noted, this Court's assessment of whether Mr. Pratt was afforded procedural fairness by the judge attracts no deference. These complaints tend to overlap with the assessment of whether the judge erred in the exercise of his *habeas corpus* jurisdiction because of their influence on his jurisdictional decisions. That said, I address procedural fairness as a standalone issue. It was argued that way by the parties and the overlap will be addressed in my analysis of the jurisdiction issue.

64 Turning to the November 6, 2018 teleconference, the respondents attempted to persuade the judge not to hear Mr. Pratt's application by asserting he did not allege any procedural unfairness on the part of correctional officials. That assertion flies in the face of the record. Mr. Pratt clearly raised issues of procedural fairness.

65 Mr. Pratt's complaints of procedural fairness were raised to meet his threshold burden of establishing a legitimate doubt as to the reasonableness of his continued detention. Recall that at the time of the teleconference, Mr. Pratt was not provided with any material pertaining to his detention in close confinement beyond his known release date of October 22. Counsel for the respondents was in possession of relevant documents that neither Mr. Pratt nor the judge had.

66 These documents referenced details and decisions made by the correctional facility respecting Mr. Pratt's alleged misconduct. Not only did Mr. Pratt not have the documents the respondents were relying upon, they revealed that decisions which resulted in continued deprivation of his liberty were made in his absence with no afforded opportunity for his input. Mr. Pratt stated this was unfair and impeded his ability to understand and respond to the case against him.

67 Mr. Pratt says the judge unfairly disposed of his application on November 6, 2018. The judge's oral decision is not a model of clarity. It is difficult to ascertain whether he overlooked Mr. Pratt's procedural fairness complaints, dismissed them out-of-hand, or avoided dealing with them by telling Mr. Pratt that he could file a new *habeas* application. In any of these scenarios, Mr. Pratt says the judge erred.

68 Mr. Pratt says the judge should have set his application down for a hearing on its merits and provided the necessary directions pursuant to *Rule* 7.13 and 7.14 (see para17 and 19). The judge did neither.

69 Rather, he declined to hear the application on its merits by summarily concluding Mr. Pratt's application was moot. He did so notwithstanding: (1) an apparent deprivation of Mr. Pratt's residual liberty, unchallenged by the respondents (November 6, 2018 marked Mr. Pratt's 25th day in close (solitary) confinement--15 days beyond his stated discharge date); (2) relevant documentation was not disclosed to Mr. Pratt nor did he have an opportunity for input in decisions respecting the ongoing deprivation of his liberty, whether for disciplinary and/or administrative reasons. The oral submissions from counsel left unexplained gaps as to why Mr. Pratt was still being detained in close confinement. There remained a live controversy. Legitimate fairness issues were raised. In my view, these issues warranted a hearing. At the very least, Mr. Pratt says the judge should have afforded him the opportunity to amend his application as opposed to sending him back to square one. I agree.

70 Turning to the way the judge gathered and used information after rendering his decision on November 6, 2018, Mr. Pratt's complaints come as no surprise. Mr. Pratt says the judge's request for documentation and submissions post decision and his use of those materials to bolster prior reasons--without providing notice or the opportunity for Mr. Pratt to respond--is an obvious violation of due process/natural justice and was prejudicial to Mr. Pratt. Those complaints are warranted.

71 The written decision bears little resemblance to the judge's oral decision. The judge proceeded to decide substantive factual and legal issues without any evidence or submissions from Mr. Pratt. For example, the judge concludes Mr. Pratt's detention after October 29, 2018 was for non-disciplinary reasons. This is a sharp change from the circumstances known during the teleconference on November 6 and appears to be based on records produced without notice to Mr. Pratt by the respondent correctional facility after the application was dismissed. As acknowledged by the respondents, the judge

also went on to find the respondents had discharged their burden of proving that the deprivation was lawful. But this issue was not placed before the judge because the application was summarily dismissed without a hearing on the merits. The parties never got to this stage.

72 At the end of his January 10, 2019 written decision the judge concluded:

> [53] In these circumstances, I was satisfied that the disciplinary matters that arose on or before October 25 were fully moot on November 6, 2018, and that regarding his continued administrative close confinement detention between October 30 and November 6, 2018, the Respondents have discharged their onus to establish that there is no realistic ground which if established, would be of sufficient substance to convince the court that it should grant the remedy of habeas corpus.
>
> [54] Therefore, the application for *habeas corpus* is dismissed at stage one.

73 Although he arrives at the conclusion Mr. Pratt's application was "fully moot" and is "dismissed at stage one", it is important to note this was after he analyzed whether there was a deprivation of liberty, whether Mr. Pratt raised a legitimate complaint and the lawfulness (reasonableness) of Mr. Pratt's detention. For reasons never explained to the parties, and despite having unequivocally dismissed the application summarily on November 6, 2018, the judge conducted an analysis on the merits without holding a hearing. If a hearing is to be held, *Rule* 7 sets out the usual subjects addressed during the required motion for directions such as: setting a hearing date and dates for filing affidavits and briefs; ordering the detainer to bring the applicant to court for the hearing; the production of documents not already produced; the attendance of witnesses as required; and determining the documents which will constitute the record. None of this was done by the judge. Not only was it procedurally unfair for the judge do what he did, his decision discloses errors in principle.

74 For now I note that the judge went on to establish new legal principles for the adjudication of *habeas* applications in the context of provincially-operated prisons--again, a matter he was not asked, nor required, to adjudicate. The judge provided no indication to the parties that he intended to do so. As previously noted, he invited no submissions. There is nothing procedurally fair about this.

75 In the respondents' written submissions to this Court, they adopted a different approach to these complaints of an unfair process. They said the judge has broad discretion to set his own process, had the authority to request additional information, and there was nothing wrong with what he did. They put it this way:

> [73] The case at bar demonstrates that an in-court hearing is not necessary to determine whether an individual's detention is lawful. There was sufficient evidence, documentation, and representation made by the parties to enable the Learned Chambers Judge to conclude that the Respondents' actions were reasonable in the circumstances and the Appellant's detention in close confinement was lawful and not contrary to the legislation. Nothing regarding the November 6, 2018 telephone conference or supplementary returns provided by the Respondents, pursuant to s. 6 of the *Liberty of the Subject Act* was procedurally unfair to the Appellant or infringed the Appellant's s. 10 (c) *Charter* right.

76 However, when the panel posed questions to counsel during oral submissions respecting the judge's subsequent gathering of information without notice to Mr. Pratt, the respondents' counsel acknowledged that the unilateral communications were not appropriate and the judge should have stopped after having rendered his decision on November 6, 2018. Late, but nevertheless an appropriate concession.

77 I recognize the importance of judicial discretion. However, the process must still be procedurally fair and the parties should know what it is and how they are to participate. There was nothing procedurally fair in the events that unfolded after November 6, 2018 leading up to and including the written decision. I would allow this ground of appeal, and as a result set aside the judge's oral and written decisions and resulting order.

78 Although the procedural flaws are dispositive of the appeal, I will go on to address how the judge erred in the exercise of his jurisdiction. I will address Mr. Pratt's challenges to certain legal principles set out in the judge's written decision in the next issue.

Did the judge err in the exercise of his habeas corpus jurisdiction?

79 I refer back to the standard of review--that if a provincial superior court improperly exercises or improperly declines to exercise jurisdiction, this equates to an error of law and the correctness standard of review applies.

80 Turning to the judge's first decision, rendered orally on November 6, 2018, I will reproduce it here for convenience as it is brief:

> Well, yes, thank you very much then, gentlemen. In review of all these materials here, gentlemen, it is my view that it is appropriate for the Court to decline its jurisdiction in this particular case as the documentation relates to matters on or before October 25th, 2018. By that, I mean I do not include within that the matters which were not adjudicated on from October 23rd until October 29th.
>
> So the opportunity is there if there's proper grounds for Mr. Pratt to revisit those by way of a new *habeas corpus* application. But, at this point, I am dismissing the existing October 25th, 2018 application as being basically moot. That means that the matters have been resolved. But although some of them start within the time frame, October 23rd, those are not part of that decision. They, obviously, adjudicated October 29th, could be, if necessary, the subject of a new application. And that's my decision in relation to the matter.

81 For the same reasons expressed in the previous ground, I am satisfied Mr. Pratt raised legitimate procedural fairness concerns sufficient to question the lawfulness of his detention. To repeat, there was a clear deprivation of liberty. Mr. Pratt's application was neither moot on the day he filed it with the court (October 25, 2018), nor on November 6, 2018 when the judge declined jurisdiction to hear it. The line the judge drew at October 25, 2018 was artificial. There was a live unresolved issue: a continued deprivation beyond a discharge date for which there was no documentation before the court or provided to Mr. Pratt explaining why. More was required of the judge. Although I understand the respondents' concerns with open-ended applications, that issue does not realistically present itself here.

82 In these circumstances, Mr. Pratt's application should have been set down for a hearing as of right. In my view, it was improper for the judge to decline jurisdiction to hear the application.

83 Turning to the judge's written decision of January 10, 2019, I similarly conclude there was reviewable error. This error involves the improper exercise of jurisdiction rather than a decline of jurisdiction. That is because the judge proceeded to gather additional information (which was procedurally unfair) and then dealt with substantive issues on their merits notwithstanding he declined to do so in his first decision.

84 In addition to these problems, Mr. Pratt says the judge made several legal errors in his interpretation and application of the law. Although not a determinative error, the judge incorrectly identified the time a prisoner can be held in continuous close confinement without further authorization as "in excess of 15 days". However, the governing *Regulation* was amended in 2017 to reduce the length of time permitted in close confinement from 15 to 10 days.

85 Next I will deal with the most material error--the novel presumption of fairness championed by the judge that favours the respondent decision maker.

86 As noted earlier, neither party placed this legal principle in issue, nor did they have the opportunity to provide submissions as they were not invited to do so. The judge ventured down this path on his own initiative and cited no legal precedent for his conclusion. The judge constructed what he termed a presumption of fundamentally fair treatment and process. There is no such presumption. This critical error permeated the judge's reasoning.

87 During oral submissions before this Court, responding counsel acknowledged that even if the respondents had been invited to make submissions to the judge they would not have argued for the favourable presumption. In their written submissions to this Court, the respondents said that while they would not have relied upon such a presumption in any hearing on the merits, the judge did not err in his interpretation and that his declared "adjustment" of legal principles to suit the provincial context had not departed from the law respecting *habeas corpus*. Respectfully, the respondents' position is without merit.

88 The judge determined that if the deprivation of liberty arises in a provincially-operated prison there is a presumption of fairness in favour of the provincial correctional officials.

89 He reasoned the development of the presumption this way:

> [22] I bear in mind especially Justice Van den Eynden's reminder in *Gogan:* "It is clear the Supreme Court of Canada has directed the provincial superior courts should guard against unduly narrowing the scope of *habeas corpus* - which is a constitutionally protected right" (para. 27).
>
> [23] Justice Van den Eynden's comments in *Gogan*, are binding on this Court, however I will go on to suggest that they may be adjusted in the case at bar and still respect the spirit of binding precedent.[*12]
>
> * Footnote 12 provides: To be clear, I am speaking only for myself, and not on behalf of any other members of the court.
>
> [24] The most notable cases from the Supreme Court of Canada and the Nova Scotia Court of Appeal all concern *habeas corpus* applications arising in the federal penitentiary context.
>
> [25] The complexity and sophistication of the federal penitentiary scheme is reserved exclusively for "sentenced" inmates. (footnote omitted)
>
> [26] In the federal penitentiary context, the inmates are serving sentences of two or more years, and their applications typically involve profound matters such as the initial classification, or reclassification of an offender's status- whereas in the provincial correctional facility context, we find a mix of offenders serving sentences of up to two years less a day, and a large number of offenders on "provincial remand", whose applications necessarily involve less profound and more short-term matters, such as the imposition of disciplinary and administrative close confinement.

[27] Although the decisions of the Supreme Court of Canada and the Nova Scotia Court of Appeal are binding upon this Court, at least insofar as the *ratio decidendi* of each of their decisions, and they are persuasive beyond the *ratio decidendi*, in my opinion, because there are significant differences between the factual and legal nature of the *habeas corpus* applications arising in the federal penitentiary context, as contrasted with the provincial correctional facility context, it is appropriate to adjust the principles applicable to the Nova Scotia provincial correctional facility context.

[28] Bearing in mind that at stage two *habeas corpus* applications will examine the lawfulness of a material deprivation of liberty by reference to whether there has been a lack of procedural fairness, errors in the interpretation of the relevant legislation, or lack of the decision-maker's jurisdiction to act (all of which attract a correctness standard of review), and the reasonableness of the decision made (which attracts a reasonableness standard of review), I suggest that it is appropriate in the provincial correctional facility context to adjust the governing principles as follows:

a. Although provincial correctional services policies do appear have the force and effect of law (per s. 39 *Correctional Services Act*, S.N.S. 2007, c. 35 and *Jivalian v. Nova Scotia*, *2013 NSCA 2*, at para. 31) even if they do not have the force of law (as I wrongly suggested at footnote 4 in *Coaker v. Nova Scotia (Attorney General),* *2018 NSSC 291*), generally speaking, if an institution has fundamentally fair policies made applicable to it, as I find are in existence at present, or internal rules to similar effect, and it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise;

b. If an inmate has received fundamentally fair treatment, absent other valid grounds for review, the court will not examine the merits of any disciplinary findings or sanctions imposed, including disciplinary close confinement permitted by s. 74(c) of the *Correctional Services Act* (*R. v. Van den Elsen-Finck,* *2005 NSSC 71*, at paras. 145-197 per MacAdam J.);

c. If an inmate is placed in administrative close confinement (i.e. non-disciplinary) per s. 74(b) of the *Correctional Services Act*, and has received fundamentally fair treatment, absent other valid grounds for review, *the court should be reluctant to examine the reasonableness of the decision to impose administrative close confinement.*

[Emphasis added]

90 As correctly identified by the appellant, this analysis is flawed. The appellant provided thorough and helpful submissions to explain the error. The following is a summary of those submissions:

* The judge's conclusion there should be different principles for *habeas corpus* in provincial correctional facilities (compared to those detained in federal facilities) departs from the clear and established binding principles. The presumption could erode the important oversight role provincial superior courts have over unlawful detention claims by prisoners held in provincially-operated correctional facilities.

* There was no evidence before the judge to support his conclusion that provincial applications "necessarily involve less profound and more short-term matters" and in theory a deprivation of liberty in a provincial institution could exceed that imposed in a federal facility in terms of duration.

* In terms of the jurisprudence, the principles applied by courts in *habeas corpus* appear uniform across correctional bodies, as well as other bodies such as immigration authorities. For example,

the Supreme Court of Canada in *Khela* reached the opposite conclusion. It determined those detained in federal prisons should have the same rights to *habeas corpus* as those detained in provincial prisons.

* One area in which the judge departed from the established principles was in finding that provincial correctional policies are "fundamentally fair":

> ... generally, speaking if an institution has fundamentally fair policies made applicable to it, **as I find are in existence at present**, or internal rules to similar effect, and **it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise.** [emphasis added]

* The judge found the provincial policies at issue to be "fundamentally fair" in the absence of any evidence, argument or precedent. The judge failed to identify whether he was referring to all correctional policies, or specific policies. The judge failed to provide any detailed analysis of the policies or provide reasons for his conclusions they are fair. In addition, policies can change. There was no proof these were the same policies in place on November 6.

* At the time of the November 6 teleconference, the respondents had not submitted copies of any correctional policies to the court in support of its position. The correctional policies at issue are not law, but rather matters of fact. In the absence of any evidence concerning the correctional policies and their application, the judge erred in law in making any findings concerning the "fairness" of the correctional policies.

* Alternatively, if the Nova Scotia correctional policies have the status of 'law', the fairness of the application of those policies by the respondent correctional facility involves mixed questions of fact and law requiring evidence. In the absence of such evidence concerning the application of otherwise fair policies, the judge erred in making any findings concerning the fairness of the process afforded Mr. Pratt in this case.

91 I agree with the appellant's assertion that the correctional policies at issue in this case do not have the force of law. This was made clear by my colleague Justice Fichaud in *Jivalian v. Nova Scotia (Department of Community Service)*, *2013 NSCA 2* where he explained that in order for a policy to have the force of law, the governing legislation must explicitly authorize departmental employees to create policies that have the effect of law. There is no enabling provision in the *Correctional Services Act* or *Regulations* authorizing the Executive Director to create policies that have the force of law. Absent explicit authority, Nova Scotia correctional services policies do not have the force of law. That said, this is not an issue upon which the appeal turns.

92 To conclude, I would allow this ground of appeal.

Additional considerations

93 Mr. Pratt invited this Court to offer clarification and guidance. In his factum, Mr. Pratt stated:

> This appeal raises significant questions concerning the procedures to be employed by reviewing courts in response to applications for *habeas corpus*. It provides a rare and significant opportunity to this Court to clarify the steps that courts below should follow to protect the fairness and integrity of *habeas corpus* as [*sic*] fundamental remedy with historical and constitutional significance in our legal system and constitutional democracy.

> This appeal also indirectly raises access to justice questions as many *habeas corpus* claimants come before the court without the benefit of legal representation. In this context, it is of heightened importance that courts below employ procedures and practices that enhance access to justice, rather than closing the door in cases that engage significant human rights interests.

94 There were numerous material shortcomings in the handling of this application. This Court's identification and response to these shortcomings hopefully provides clarity respecting the proper procedures and legal principles to be employed by the reviewing court with respect to *habeas* applications and will guard against similar future errors and ensure that the remedy remains robust, as it should regardless of whether the applicant is in a provincial or federal prison.

95 As stated, lower courts must diligently guard against the erosion of the *habeas corpus* remedy in the prison context. Fair and speedy processes are necessary to ensure the urgent objective of hearing *habeas corpus* applications on an expedited basis is realized.

96 In *Beals c. Anctil*, *2018 QCCA 2000*, the Quebec Court of Appeal calls upon judges, courts--both trial and appellate-level--to revise and correct their processes as necessary to ensure the urgent objective of hearing *habeas corpus* applications on an expedited basis is realized (para39).

97 To protect the *Charter* right to detention review and to best facilitate access to justice for self-represented *habeas corpus* applicants, lower courts can play a helpful role by simplifying and clarifying their *habeas* process. As Beveridge, J.A. noted in *Springhill Institution v. Richards*, *2015 NSCA 40*:

> [159] For virtually all challenges to the actions of CSC, the applicant is self-represented. Simplicity in procedure is to be encouraged. ...

98 As a starting point, *Rule* 7 provides a fairly comprehensive framework for ensuring *habeas* applications get the priority mandated over the lower court's business. The employment of timely motion for directions via video or teleconference--desirable tools to help sort through many preliminary matters that may arise--provides a venue to work through some of the challenges self-represented prisoners face in marshalling their applications.

99 Some courts, such as the Court of Queens Bench in Alberta, have developed accelerated review processes to address the high number of self-represented *habeas* applicants (*Latham v. Her Majesty the Queen*, *2018 ABQB 69*). My reference is no indication one way or the other of an endorsement, rather I mention *Latham* to illustrate that some courts have developed detailed processes.

100 These comments are intended as constructive and sensitive to the important and challenging obligations of provincial superior courts in their oversight function. Beyond the foregoing, the actual development of its timely, clear, fair and effective processes is best left to the lower reviewing court.

Disposition

101 I would allow the appeal and set aside the decisions below and resulting order. The appellant was represented by Dalhousie Legal Aid on appeal and, pursuant to *Rule* 77.03(5), I would award costs payable to Dalhousie Legal Aid by the respondents in the amount of $3,000.00, inclusive of disbursements.

E. VAN den EYNDEN J.A.

Concurred in:
M.J. WOOD C.J.N.S.
J.W.S. SAUNDERS J.A.

---

1 The United Nations Standard Minimum Rules for the Treatment of Prisoners, (the *Nelson Mandela Rules*), UNGAOR, 70th Sess., UN Doc. A/Res/70/175 (2015).

End of Document

R. v. Canadian Broadcasting Corp.

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 1, 2017;

Judgment: February 9, 2018.

File No.: 37360.

[2018] 1 S.C.R. 196 | *[2018] 1 R.C.S. 196* | *[2018] S.C.J. No. 5* | *[2018] A.C.S. no 5* | *2018 SCC 5*

Canadian Broadcasting Corporation Appellant; v. Her Majesty The Queen Respondent, and CTV, a Division of Bell Media Inc., Global News a division of Corus Television Limited Partnership The Globe and Mail Inc., Postmedia Network Inc. Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/ Canadian Media Lawyers Association Interveners

(33 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Case Summary

Catchwords:

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet's website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, *R.S.C. 1985, c. C-46, s. 486.4*(2.1), (2.2).

[page197]

Summary:

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior

to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR -- MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR -- MacDonald* test entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to [page198] the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and the Crown has failed to do so here. The chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*, [page199] [1998] 1 S.C.R. 626; **referred to:** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd *[1991] 1 S.C.R. 62*; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

Statutes and Regulations Cited

Alberta Rules of Court, *Alta. Reg. 124/2010, r. 3.8*(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 486.4 (2.1), (2.2).

[page200]

Authors Cited

Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed. Toronto: Canada Law Book, 2012.

Vermette, Marie-Andrée. "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review*

of Civil Litigation, 2011. Toronto: Carswell, 2011, 367.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol JJ.A.), *2016 ABCA 326*, *404 D.L.R. (4th) 318*, *[2017] 3 W.W.R. 413*, *43 Alta. L.R. (6th) 213*, *93 C.P.C. (7th) 269*, *[2016] A.J. No. 1085* (QL), *2016 CarswellAlta 2034* (WL Can.), setting aside a decision of Michalyshyn J., *2016 ABQB 204*, *[2016] 9 W.W.R. 613*, *37 Alta. L.R. (6th) 299*, *86 C.P.C. (7th) 373*, *[2016] A.J. No. 336* (QL), *2016 CarswellAlta 620* (WL Can.). Appeal allowed.

Counsel

Frederick S. Kozak, *Q.C.*, *Sean Ward*, *Tess Layton* and *Sean Moreman*, for the appellant.

Iwona Kuklicz and *Julie Snowdon*, for the respondent.

Iain A. C. MacKinnon, for the interveners.

The judgment of the Court was delivered by

BROWN J.

I. Introduction

1 The background leading to this appeal was summarized in the reasons of the chambers judge:[1]

> On March 5, 2016, [the accused] was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.
>
> [page201]
>
> As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.
>
> In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.
>
> On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

> One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction[2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:[3]

> TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.
>
> [page202]
>
> AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.
>
> RELIEF SOUGHT:
>
> 1. That [CBC] be cited in criminal contempt of court.
> 2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
> 3. That an appropriate sentence be imposed against [CBC].
> 4. Any such further order that this Honourable Court deems appropriate.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.[4]

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,[5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim [page203] is entitled to an order "directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way".

III. Judicial History

A. *The Chambers Judge's Reasons*

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR - MacDonald Inc. v. Canada (Attorney General)*.[6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban.[7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,[8] he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order.[9]

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing [page204] display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. *The Court of Appeal*

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it",[10] in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.[11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website".[12]

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance [page205] of such information on a website after it is first posted, the majority conceded that "either position is arguable".[13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory.[14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the

relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled [page206] to consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

12 In *Manitoba (Attorney General) v. Metropolitan Stores Ltd*.[15] and then again in *RJR - MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*.[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

13 This general framework is, however, just that - general. (Indeed, in *RJR - MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR - MacDonald* test is into whether the applicants have shown a strong [page207] *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc*.[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR - MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR - MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR - MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* [page208] case. A mandatory injunction directs the defendant to undertake a positive course of

action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR - MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR - MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions".[29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that [page209] information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be".[30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge [page210] must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR - MacDonald* test, which proceeds as follows:

(1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;

(2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and

(3) The applicant must show that the balance of convenience favours granting the injunction.

B. *Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?*

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.[38] This would entail the applicant showing "the rarest and clearest of cases",[39] such that the conduct complained of would be impossible to defend.

[page211]

20 In *Liberty Net*, the Court explained that the *RJR - MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".[40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR - MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] other than the expression itself".[41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR - MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.[42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.[43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR - MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

C. *What Strong Prima Facie Case Must the Crown Show?*

21 As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the [page212] Originating Notice, properly read, was "hybrid",[44] such that the application for the injunction did not "relate directly"[45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings".[46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website".[47]

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding".[48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively [page213] hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ...

for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".[49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*[50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "a remedy ancillary to a cause of action".[51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal [page214] of the identifying material from the website",[52] therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.[53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that - even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt - an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In [page215] *Metropolitan Stores*,[54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*[55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it".[56] This principle was recently affirmed in *Google*.[57]

28 In this case, and as I have explained, the first stage of the modified *RJR - MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). [page216] The Crown must prove these elements beyond a reasonable doubt.[58]

30 As to the *actus reus* - that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way"[59] by leaving the victim's identifying information on its website - the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted.[60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable".[61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order".[62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law [page217] and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR - MacDonald* test.

V. Conclusion

33 I would allow this appeal.

Appeal allowed.

Solicitors:

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Solicitors for the interveners: Linden & Associates, Toronto.

---

1 *2016 ABQB 204*, *[2016] 9 W.W.R. 613*, at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R. J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

3 A.R., at pp. 39-40.

4 *2016 ABCA 326*, *404 D.L.R. (4th) 318*.

5 *R.S.C. 1985, c. C-46*.

6 *[1994] 1 S.C.R. 311*.

7 Chambers judge's reasons, at para. 26.

8 *[1992] 1 S.C.R. 901*, at p. 933.

9 Chambers judge's reasons, at para. 34.

10 para. 5.

11 para. 6.

12 para. 7.

13 para. 10.

14 para. 11.

15 *[1987] 1 S.C.R. 110*.

16 [1975] A.C. 396.

17 *RJR - MacDonald*, at pp. 334-35.

18 *RJR - MacDonald*, at pp. 334 and 348.

19 *RJR - MacDonald*, at p. 334.

20 pp. 338-39.

21 *2017 SCC 34*, *[2017] 1 S.C.R. 824*.

22 *Google*, at paras. 25-27.

23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, *2005 ABCA 97*, *19 C.C.L.I (4th) 161*, at para. 4; *Modry v. Alberta Health Services*, *2015 ABCA 265*, *388 D.L.R. (4th) 352*, at para. 40; *Conway v. Zinkhofer*, *2006 ABCA 74*, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, *2004 NSCA 53*, *223 N.S.R. (2d) 1*, at para. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, *2003 NSSC 112*, *214 N.S.R. (2d) 369*, at para. 20, aff'd *2003 NSCA 126*, *219 N.S.R. (2d) 126*; *Cytrynbaum v. Look Communications Inc.*, *2013 ONCA 455*, *307 O.A.C. 152*, at para. 54.

24 *Sawridge Band v. Canada*, *2004 FCA 16*, *[2004] 3 F.C.R. 274*, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, *2015 FCA 104*, *130 C.P.R. (4th) 414*, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, *2011 SKCA 120*, *341 D.L.R. (4th) 407*, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, *2011 SKCA 43*, *[2012] 3 W.W.R. 293*, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, *2006 PESCAD 11*, *256 Nfld. & P.E.I.R. 277*, at para. 65.

25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

26 *Injunctions and Specific Performance*, at para. 2.640.

27 *RJR - MacDonald*, at pp. 338-39.

28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.

31 *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.

32 *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).

33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).

34 *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.

35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.

36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (QL).

37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M.-A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2011* (2011), 367, at pp. 378-79.)

38 [1998] 1 S.C.R. 626.

39 *Liberty Net*, at para. 49 (emphasis deleted).

40 paras. 47 and 49.

41 para. 47 (emphasis in original).

42 para. 47.

43 Chambers judge's reasons, at para. 59.

44 para. 5.

45 para. 6.

46 C.A. reasons, at para. 6.

47 C.A. reasons, at para. 7.

48 C.A. reasons, at para. 23 (emphasis added).

49 A.R., at p. 39.

50 *Alta. Reg. 124/2010*.

51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).

52 C.A. reasons, at para. 7.

53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

54 pp. 154-55.

55 *[1982] 1 All E.R. 1042*, at p. 1046 (H.L.).

56 See also *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff'd *[1991] 1 S.C.R. 62*; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.

57 para. 22.

58 p. 933 (emphasis added).

59 Chambers judge's reasons, at para. 12.

60 para. 33.

61 C.A. reasons, at para. 10.

62 C.A. reasons, at para. 10; transcript, at pp. 65 and 70-71.

End of Document

Shupe v. Beaver Enviro Depot

Nova Scotia Judgments

Nova Scotia Court of Appeal

Halifax, Nova Scotia

D.P.S. Farrar J.A. (In Chambers)

Heard: June 3, 2021.

Judgment: June 10, 2021.

Docket: CA 506198

Registry: Halifax

[2021] N.S.J. No. 251 | 2021 NSCA 46

Between Christine Shupe, Appellant, and Beaver Enviro Depot, Wyatt D. Redmond, 2557617 Nova Scotia Ltd., Attorney General of Nova Scotia, Nova Scotia Human Rights Commission, and Nova Scotia Human Rights Commission Board of Inquiry, Respondents

(21 paras.)

Case Summary

Human rights law — Enforcement and procedure — Appeals and judicial review — Application — Limitation periods — Extension — Application by complainant for extension of time to appeal dismissal of human rights complaint allowed — Complainant filed complaint against employer — Complainant was actually employed by different company — Board of Inquiry held it did not have jurisdiction to amend complaint to add proper employer — Complainant missed deadline for appeal — Length of delay in bringing motion was short, delay due to error by solicitor and there was no prejudice to employer — It was in interests of justice to extend time to appeal — Civil Procedure Rules, Rules 90.13, 90.16(8), 90.37(12) — Human Rights Act, ss. 33, 33(d), 33(e), 36.

Application by Christine Shupe for an extension of time to appeal the dismissal of her human rights complaint. Shupe worked for Beaver Enviro Depot. Wyatt Redmond was the owner of Beaver Enviro Depot. Shupe filed a complaint alleging that Redmond discriminated against and sexually harassed her. The complaint was made against Beaver Enviro Depot and Redmond was not personally named. It was subsequently discovered Beaver Enviro Depot was neither incorporated nor a registered business name. It does not exist. Rather, Shupe was employed by 2557617 Nova Scotia Ltd. (255) of which Redmond was the sole director. The Human Rights Commission (HRC) asked the member appointed as the Board of Inquiry (Board) on the Complaint to amend the complaint to add the correct legal name of the business. The member found that he did not have the jurisdiction to amend the complaint and, because the Beaver Enviro Depot was not a legal person against whom an order could be made, the complaint must be dismissed. Shupe missed the deadline for filing an appeal and brought a motion to extend the time to file the appeal.

HELD: Motion allowed.

The length of delay between the deadline to file the notice of appeal and the date of the motion was

relatively short. The failure to file the notice of appeal on time was due to a misapprehension of a practice direction by Shupe's solicitor. Redmond and 255 were not parties to the complaint and would not suffer prejudice if it was revived. There was an arguable issue raised that the Board had jurisdiction to amend the complaint. It was in the interest of justice to grant the extension of time to file the notice of appeal. The time was extended until June 18, 2021.

Statutes, Regulations and Rules Cited:

Civil Procedure Rules, Rule 90.13, Rule 90.16(8), Rule 90.37(12), Rule 91.05

Human Rights Act, *R.S.N.S. 1989, c. 214, s. 33*, s. 33(d), s. 33(e), s. 36

Counsel

Andrea MacNevin, for the appellant.

Andrew Christofi, for the respondents Mr. Redmond and 2557617 Nova Scotia Ltd.

Kymberly Franklin, for the respondent NSHRC.

Held: Motion granted without costs to any party.

Decision

D.P.S. FARRAR J.A.

Background

1 Christine Shupe is the complainant in a Human Rights Complaint (the Complaint) -- Beaver Enviro Depot is the respondent. The complaint materials state Beaver Enviro Depot was Ms. Shupe's employer and Wyatt Redmond is the owner of Beaver Enviro Depot. The materials allege Mr. Redmond discriminated against and sexually harassed Ms. Shupe . He is not personally named in the Complaint . It was subsequently discovered Beaver Enviro Depot is neither incorporated nor a registered business name . It does not exist . As it turns out, Ms. Shupe was actually employed by 2557617 Nova Scotia Ltd. of which Mr. Redmond is the sole director .

2 On March 5, 2021, the Human Rights Commission asked Benjamin Perryman, who had been appointed to sit as a Board of Inquiry (the Board) on the Complaint, to amend the Complaint to add "in the correct legal name of the Respondent's business".

3 On March 22, 202, Mr. Perryman issued his decision . He found that he did not have the jurisdiction to amend the Complaint and, because the respondent was not a legal person against whom an order could be made, he considered he had no choice but to dismiss the Complaint and did so.

4 Ms. Shupe now seeks to appeal the Board's decision dismissing the Complaint.

5 Section 36 of the *Human Rights Act*, *R.S.N.S. 1989, c. 214*, gives any party before the Board of Inquiry an appeal directly to this Court on a question of law. *Civil Procedure Rule* 90.13 requires that an appeal be filed within 25 clear days of the decision of the Board of Inquiry. Therefore, the deadline for filing Ms. Shupe's appeal was April 26, 2021.

6 On May 18, 2021, she filed a Notice of Motion asking this Court to extend the time for filing her appeal.

7 In support of her motion, Andrea MacNevin, Ms. Shupe's solicitor, has filed her own affidavit. In the affidavit, Ms. MacNevin deposes that she received instructions from Ms. Shupe to file an appeal and that she had prepared the appeal documents and was ready to file on April 26, 2021.

8 However, she misread a Practice Directive from the Supreme Court of Nova Scotia which, due to the third wave of COVID-19, advised the Supreme Court was entering into an essential services model and was suspending deadlines for filings under the *Civil Procedure Rules*. Ms. MacNevin, mistakenly, assumed the directive applied to filings in this Court and, in particular, to filing Notices of Appeal.

9 On May 18, 2021, Ms. MacNevin realized her error and on May 19, 2021, she filed a Notice of Motion to extend the time for filing the appeal.

10 The relevant portions of Ms. MacNevin's affidavit are reproduced here:

> 7. I hereby confirm that I received instructions from my client to file an appeal, and that my client has had a genuine intention to appeal since April 3rd, 2021.
> 8. The Appellant was not able to file her Notice of Appeal within the deadline provided in *Civil Procedure Rule* 90.13 or 91.05 for the following reasons.
> 9. The decision being appealed from was issued on March 22, 2021. Pursuant to the *Human Rights Act*, section 36, a party has twenty-five (25) clear business days to appeal from a decision of a Board of Inquiry. Therefore, the deadline or filing the Appellant's appeal was April 29, 2021. The appeal documents were prepared and ready to file on April 26, 2021.
> 10. Due to the COVID-19 pandemic entering into its third wave in Nova Scotia on or about April 21, 2021, a directive was issued on April 24, 2021, from the Supreme Court of Nova Scotia directing that the Halifax Law Courts were entering into the essential services model and suspending deadlines for filing under the Rules of Civil Procedure. The directive stated that the purpose of entering into the essential services model was to, "allow staff to focus on processing documents related to urgent and essential matters that are proceeding."
> 11. In error, I believed his directive to also apply to the Nova Scotia Court of Appeal filings, in particular to the deadline for filing a Notice of Appeal under Rule 90. Accordingly, while I had prepared the materials for filing, I did not submit them.
> 12. On Tuesday, May 18, 2021, I re-reviewed the practice directives from the Courts of Nova Scotia. It was at this time that I first realized my error, contacted the Registrar, and immediately began the process to prepare a Notice of Motion for an extension of the time to file.

11 Attached to Ms. MacNevin's affidavit is a proposed Notice of Appeal, it raises two grounds of appeal

as follows:

> The grounds of appeal are
>
> > The Board of Inquiry erred in law by dismissing the Appellant's complaint under the *Human Rights Act*, RSNS 1989, c 214 without an inquiry into its merits, by:
> >
> > a. Holding that because the Board has no jurisdiction in the *Human Rights Act* to amend the complaint, the complaint must be dismissed; and
> >
> > b. Failing to consider ss. 33(d) and (e) of the *Human Rights Act* when holding that the Board of Inquiry lacked jurisdiction under the *Act* to name Wyatt D. Redmond and 2557617 Nova Scotia Ltd. as respondents to the proceeding.

12 Although Mr. Redmond and 2557617 Nova Scotia Ltd. were not parties to the proceeding before the Board, they were named in and served with the Notice of Motion. They were represented by Andrew Christofi at the hearing of the Motion on June 3, 2021.

13 With this backdrop, I will now turn to whether I should grant Ms. Shupe's request for an extension of time.

Analysis

14 Rule 90.37(12) gives a judge of this Court the authority to extend the time to file a Notice of Appeal:

> 90.37 (12) A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
>
> ...
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

15 In *Farrell v. Casavant*, 2010 NSCA 71, Beveridge, J.A., explained the test for granting an extension of time to appeal as, ultimately, a determination of whether it is in the interest of justice to grant the extension (P17). In determining whether it is in the interest of justice, common factors to be considered are:

* the length of the delay;
* the reason for the delay;
* the presence or absence of prejudice;
* the apparent strength or merit in the proposed appeal; and
* the good faith intention of the appellant who exercises his or her right of appeal within the prescribed time period.

16 The relative weight to be given to any of these factors may vary from case to case (*Farrell*, P17).

17 I will now consider those factors:

* **Length of delay** -- the length of delay between the expiration of the time for filing a Notice of Appeal -- April 29, 2021, and the date of filing the Motion to extend the time -- May 18, 2021, is relatively short and can be explained by Ms. MacNevin's error.

* **The reason for delay** -- I am satisfied that Ms. Shupe has established that she had a reasonable excuse for the delay. She gave instructions to her solicitor to file a Notice of Appeal and, as a result of her solicitor's misapprehension of a directive from the Supreme Court of Nova Scotia, the appeal was not filed as it should have been.

* **The presence or absence of prejudice** -- Mr. Christofi argues on behalf of Mr. Redmond and 2557617 Nova Scotia Ltd. that they would be prejudiced if an extension of time was granted. They say it would resurrect a Human Rights Complaint that had been dismissed. However, neither Mr. Redmond nor 2557617 Nova Scotia Ltd. were parties to the Complaint. At best, if the extension is granted and the appeal is successful, they may be added as parties in the future. That is the same position they would have been in if the appeal was filed in time. The short delay occasioned by the error has not caused them any prejudice.

* **The apparent strength or merit of the proposed appeal** -- the proposed grounds of appeal allege that the Board of Inquiry erred in failing to consider s. 33(d) and (e). Section 33 in its entirety provides:

Parties to proceeding

33 The parties to a proceeding before a board of inquiry with respect to any complaint are

(a) the Commission;

(b) the person named in the complaint as the complainant;

(c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;

(d) any person named in the complaint and alleged to have con-travened this Act; and

(e) any other person specified by the board upon such notice as the board may determine and after the person has been given an opportunity to be heard against joinder as a party.

Ms. Shupe argues that the Board failed to consider s. 33(d) and (e), which would have allowed them to add either Mr. Redmond or 2557617 Nova Scotia Ltd. to the Complaint. In essence, he could have substituted them as respondents pursuant to those sections. I am satisfied that this raises at least an arguable issue, and one which has not been considered by this Court.

* **Good faith intention of the appellant** -- I am satisfied that Ms. Shupe had a good faith intention to file an appeal prior to the expiration of the appeal period. I would note at this point that it is not appropriate practice for a solicitor to simply file her own affidavit on matters of substance on a motion such as the good faith intention of her client. Ms. Shupe did not swear and file an affidavit.

Ms. MacNevin deposed that she received instructions and had prepared the Notice of Appeal prior to the expiration of the appeal period. Ms. MacNevin does not indicate when she received those instructions, but I am prepared to accept her evidence that the Notice of Appeal was prepared on April 26, 2021, before the expiration of the appeal period, which evidenced Ms. Shupe's good faith intention to appeal. However, the failure to file an affidavit of the individual having direct knowledge, in this case Ms. Shupe, could be fatal on a motion such as this.

18 Based on my consideration of the factors, I am satisfied that it is in the interest of justice to grant the extension of time to file the Notice of Appeal. I will extend the time do so until June 18, 2021.

19 During the course of the hearing of this matter, Mr. Christofi indicated that his clients would like to be added as respondents to the appeal. They were not parties before the Board and would not otherwise be a party to this appeal. In light of this request, I will join Mr. Redmond and 2557617 Nova Scotia Ltd. as respondents pursuant to Rule 90.16(8), which provides:

> 90.16(8) A judge of the Court of Appeal may order that a person be joined as a respondent.

Conclusion

20 The motion is granted and Ms. Shupe shall file her Notice of Appeal on or before June 18, 2021. Mr. Redmond and 2557617 Nova Scotia Ltd. shall be added as respondents to the appeal when it is filed.

21 There shall be no costs awarded to any party on this motion.

D.P.S. FARRAR J.A.

White Burgess Langille Inman v. Abbott and Haliburton Co.

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

Heard: October 7, 2014;

Judgment: April 30, 2015.

[page183]

2015 SCC 23

File No.: 35492.

[2015] 2 S.C.R. 182 | *[2015] 2 R.C.S. 182* | *[2015] S.C.J. No. 23* | *[2015] A.C.S. no 23*

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess, Appellants; v. Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée., U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited, Respondents, and Attorney General of Canada and Criminal Lawyers' Association (Ontario), Interveners.

(63 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Case Summary

Catchwords:

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out

expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

Summary:

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

[page184]

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, *[1994] 2 S.C.R. 9* (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the [page185] expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laique québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396; [page186] *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for*

Transport, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Statutes and Regulations Cited

Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, arts. 22, 235 [not yet in force].

Civil Procedure Rules (Nova Scotia), rr. 55.01(2), 55.04(1)(a), (b), (c).

[page187]

Federal Courts Rules, SOR/98-106, r. 52.2(1)(*c*).

Queen's Bench Rules (Saskatchewan), r. 5-37.

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*, rr. 4.1.01(1), (2), 53.03(2.1).

Rules of Civil Procedure (Prince Edward Island), r. 53.03(3)(g).

Rules of Court, *Y.O.I.C. 2009/65, r. 34*(23).

Supreme Court Civil Rules, *B.C. Reg. 168/2009*, rr. 11-2(1), (2).

Authors Cited

Anderson, Glenn R. *Expert Evidence*, 3rd ed. Markham, Ont.: LexisNexis, 2014.

Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*. Cowansville, Qué.: Yvon Blais, 2011.

Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24. Toronto: Carswell, 2014 (loose-leaf updated 2014, release 6).

Chamberland, Luc. *Le nouveau Code de procédure civile commenté*. Cowansville, Qué.: Yvon Blais, 2014.

Corpus Juris Secundum, vol. 32. Eagan, Minn.: Thomson West, 2008.

Cross and Tapper on Evidence, 12th ed. by Colin Tapper. Oxford: Oxford University Press, 2010.

Freckelton, Ian, and Hugh Selby. *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th ed. Pyrmont, N.S.W.: Lawbook Co., 2013.

Halsbury's Laws of Canada: Evidence, 2014 Reissue, contributed by Hamish C. Stewart. Markham, Ont.: LexisNexis, 2014.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.

McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Canada Law Book, 2013 (loose-leaf updated 2014, release 5).

Michell, Paul, and Renu Mandhane. "The Uncertain Duty of the Expert Witness" *(2005), 42 Alta. L. Rev. 635*.

Ontario. *Civil Justice Reform Project: Summary of Findings & Recommendations* (Osborne Report). Toronto: Ministry of Attorney General, 2007.

Ontario. *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Goudge Report). Toronto: Ministry of the Attorney General, 2008.

Ontario. *The Commission on Proceedings Involving Guy Paul Morin: Report* (Kaufman Report). Toronto: Ministry of the Attorney General, 1998.

[page188]

Paciocco, David. "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135.

Paciocco, David M. "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" *(2009), 34 Queen's L.J. 565*.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.

Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds. London: Sweet & Maxwell, 2013.

Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.

Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown and Co., 1898 (reprinted South Hackensack, N.J.: Rothman Reprints, Inc., 1969).

United Kingdom. *Access to Justice: Final Report* (Woolf Report). London: HMSO, 1996.

History and Disposition:

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Oland and Beveridge JJ.A.), *2013 NSCA 66*, *330 N.S.R. (2d) 301*, *361 D.L.R. (4th) 659*, *36 C.P.C. (7th) 22*, *[2013] N.S.J. No. 259* (QL), *2013 CarswellNS 360* (WL Can.), setting aside in part a decision of Pickup J., *2012 NSSC 210*, *317 N.S.R. (2d) 283*, *26 C.P.C. (7th) 280*, *[2012] N.S.J. No. 289* (QL), *2012 CarswellNS 376* (WL Can.). Appeal dismissed.

Counsel

Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

[page189]

The judgment of the Court was delivered by

CROMWELL J.

I. Introduction and Issues

1 Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

2 Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

3 Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. *Facts and Proceedings*

4 The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the [page190] Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

5 The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms - the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

6 The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

[page191]

B. *Judgments Below*

(1) Nova Scotia Supreme Court: *2012 NSSC 210*, *317 N.S.R. (2d) 283* (Pickup J.)

7 Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert ... does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: *2013 NSCA 66*, *330 N.S.R. (2d) 301* (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

8 The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge - that an expert "must be, and be seen to be, independent and impartial" - was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

9 MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had

properly articulated and applied the relevant legal principles.

III. Analysis

A. *Overview*

10 In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, [page192] however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

11 There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.

12 Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, *2000 SCC 43*, *[2000] 2 S.C.R. 275*, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice?: para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right [page193] Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

13 To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

14 To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences - that is, the opinions - that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [page194] *[1982] 2 S.C.R. 819*, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. *HEV-137* "General rule against opinion evidence".

15 Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, *[1982] 2 S.C.R. 24*, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

16 Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

17 We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, *[1994] 2 S.C.R. 9*. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather [page195] than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, *2000 SCC 51*, *[2000] 2 S.C.R. 600*, at paras. 25-26; *R. v. Sekhon*, *2014 SCC 15*, *[2014] 1 S.C.R. 272*, at para. 46.)

18 The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence?: *R. v. Abbey*, *2009 ONCA 624*, *97 O.R. (3d) 330*, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert? is also

exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

19 To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility [page196] of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect - a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

20 *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

21 So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis [page197] and concerns such as those about reliability fit into the overall analysis.

22 *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

23 At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L.

Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

24 At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

[page198]

25 With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

26 There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

27 One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ... .
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise ... . An expert witness in the High Court should [page199] never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

28 Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert

regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

29 There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, *B.C. Reg. 168/2009, r. 11-2*(1); *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194, r. 4.1.01*(1); *Rules of Court*, *Y.O.I.C. 2009/65, r. 34*(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of [page200] Civil Procedure*, art. 235 (not yet in force); *Federal Courts Rules*, *SOR/98-106, r. 52.2*(1)(*c*).

30 The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party (r. 4.1.01(2)). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

31 Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

32 Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's [page201] position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" *(2005), 42 Alta. L. Rev. 635*, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

E. *The Expert's Duties and Admissibility*

33 As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather

than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

34 In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) *The Canadian Law*

35 The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

[page202]

36 Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.?C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590?91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" *(2009), 34 Queen's L.J. 565*, at pp. 598-99).

(*Mouvement laique québécois v. Saguenay (City)*, *2015 SCC 16*, *[2015] 2 S.C.R. 3*, at para. 106)

37 I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 40 O.R. (3d) 456* (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman (2000), 49 O.R. (3d) 187* (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, *2010 ONSC 3628* (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, *2010 NSSC 315*, *293 N.S.R. (2d) 394* (expert was also a party to the litigation); *Handley v. Punnett*, [page203] *2003 BCSC 294* (expert was also a party to the litigation); *Bank of Montreal v. Citak*, *[2001] O.J. No. 1096* (QL) (S.C.J.) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, *2011 ONSC 4629*, *5 C.L.R. (4th) 240* (expert's retainer agreement was inappropriate);

Hutchingame v. Johnstone, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

38 Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

39 Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case [page204] or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

40 I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

41 Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

42 For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [page205] [2003] Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

43 In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: "... to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT*

Custodians Pty. Ltd. v. Fagenblat, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

44 In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) *Conclusion*

45 Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to [page206] the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

46 I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept ... that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" *(2009), 34 Queen's L.J. 565* ("Jukebox?), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my [page207] view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

48 Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not

be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

49 This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, [page208] assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

50 As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

51 Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

52 Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one [page209] way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, *2010 ONSC 166*; *R. v. Demetrius*, *2009 CanLII 22797* (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-*

Tech Industries Inc. v. FANUC Robotics Canada Ltd., 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

53 In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12: 30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 -- Evidence, at s.469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12: 30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

54 Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge [page210] must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. *Expert Evidence and Summary Judgment*

55 I must say a brief word about the procedural context in which this case originates - a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight - or at least potential weight - to the evidence.

[page211]

H. *Application*

56 I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

57 There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

58 The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

59 First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

[page212]

60 The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

61 The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

62 There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be [page213] excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

63 I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.
