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

Factum of the Canadian Civil Liberties Association

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PART 1 – OVERVIEW OF APPEAL

1. The Canadian Civil Liberties Association (the "CCLA") appeals from an unprecedented injunction order against all persons in Nova Scotia (the "Injunction Order"), obtained by the Province of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health (collectively the "Province") after a brief *ex parte* hearing, in the context of the COVID-19 pandemic. The issues raised in this appeal concern the proper exercise of government authority, and how provincial superior courts supervise that authority where *Charter*-protected rights are engaged. The decision under review (the "Decision") changes the law on expert evidence, injunctions, and judicial discretion that affects *Charter* rights. It requires close scrutiny by this Honourable Court.

2. The Injunction Order prohibited certain activities in respect of organizing, promoting or attending "Illegal Public Gatherings." These activities were defined by reference to existing public health instruments (the "Public Health Order"), that prohibited the activities and rendered them provincial offences.

3. The effect of the Injunction Order was to make these provincial offences also punishable as contempt of court, and enforceable by immediate arrest and detention by police until an offender could be brought before a Supreme Court Justice. The Injunction Order was not made returnable and did not expire.

4. The CCLA has serious procedural and substantive concerns with this far-reaching Injunction Order, and the approach used to obtain it, even though the Injunction Order has now been set aside.

5. In issuing the Injunction Order, the Honourable Justice Scott C. Norton ("the judge below") relied heavily on the evidence of the Chief Medical Officer of Health ("CMOH"). Despite being a named party to the proceeding, the judge below qualified the CMOH as an expert witness. The judge below did not consider or apply the legal test for the admissibility of expert evidence. He then accepted the Attorney General's summary of this "expert evidence" without qualification. This error of law and principle contaminated the entirety of the Decision.

6. After improperly admitting expert evidence, the judge below applied the wrong legal test for a final injunction, and treated an injunction as if it were a separate legal process containing its own authorizing force. He failed to identify any legal basis (cause of action, statutory authority or other legal authority) that warranted the remedy of an injunction, and instead improperly applied the tripartite interlocutory injunction test. He also misstated the test for a *quia timet* injunction. These errors of law change the basic principles of injunctions in Nova Scotia in a manner inconsistent with any precedent in Canada.

7. Even if the judge below had applied the law correctly, the record before him did not support an order that enjoined all Nova Scotians. The record before the judge below was limited and focused on an upcoming protest against public health restrictions. The record did not show that the general public was flouting the Public Health Order generally or planning to attend the specific protest. There was no evidence that the Province had tried to use existing public health enforcement provisions or that these measures had proven ineffective. The judge below made a palpable and overriding error in using scant and uncertain evidence about the actions of a few persons to enjoin all Nova Scotians.

8. The judge below acknowledged that enjoining all Nova Scotians would affect "rights which are protected under the *Charter*," but ended his analysis there. Instead of considering the impact of the *Charter* on the Province's injunction application (the "Application"), he reasoned that *Charter* rights could be dealt with later if the public wished to enforce their rights. This failure to articulate and apply the correct legal principles is an error of law and an abdication of the Court's duty to uphold the constitution.

PART 2 – STATEMENT OF FACTS

A. The *Health Protection Act* and Public Health Order

9. Section 32 of the *Health Protection Act* (the "*Act*") affords a medical officer the power to "by written order require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease",[1] including to:

> (i) require the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection.[2]

10. Section 37 of the *Act* provides broad powers for the medical officer to ensure compliance with a public health order made pursuant to s. 32:

> **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

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[1] *Health Protection Act*, SNS 2004, c 4, s. 32(1), Book of Authorities of the Appellant ("Appellant's BOA"), **TAB 57**.
[2] *Health Protection Act*, s. 32(3)(i), Appellant's BOA, **TAB 57**.

> (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.[3]

11. In addition to the powers available to the medical officer to ensure compliance with a public health order, s. 71 of the *Act* makes a breach of such an order a summary conviction offence, punishable by fine and/or imprisonment, with escalating penalties for repeat offenders:

> **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

[3] *Health Protection Act*, s. 37, Appellant's BOA, **TAB 57**.

> (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.[4]

12. In response to the COVID-19 pandemic, the CMOH, Dr. Robert Strang, issued a public health order under s. 32 of the *Act*. The version of the Public Health Order in effect at the time of the Province's Application for an injunction set out gathering limits and physical distancing and masking requirements.[5]

B. The Injunction Order obtained by the Province

13. On May 12, 2021, the Province filed an *ex parte* Notice of Application in Chambers, seeking a *quia timet* injunction. The urgent basis for the Province's Application was an imminent planned protest against COVID-19 public health restrictions, and the Province's anticipation that protest participants would not respect the gathering limits or physical distancing and masking requirements set out in the Public Health Order.[6]

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[4] *Health Protection Act*, s. 71, Appellant's BOA"), **TAB 57**.
[5] Affidavit of Dr. Robert Strang, Exhibit "A": Restated Order #2 of the Chief Medical Officer of Health under section 32 of the *Health Protection Act* 2004, c 4, Part II, ss 13A-19.2 (May 8, 2021) **[Appeal Book pp 60-68]**.
[6] Notice of *Ex Parte* Application, Grounds for order, para 7-8 **[Appeal Book p 5]**; Brief of the Attorney General of Nova Scotia, paras 17-18 **[Appeal Book pp 137-138]**.

14. However, the Application was not restricted to the particular circumstances of the planned protest. The Province sought to enjoin any person in Nova Scotia from organizing, promoting or attending "Illegal Public Gatherings", as defined (and prohibited) in the Public Health Order. This Public Health Order itself was subject to ongoing changes by the CMOH, including an amendment made on the day before the Application was heard.[7]

15. 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.

16. The Province made no reference to the compliance or enforcement provisions of the *Act* in its Application materials. Nor did it make any of the following assertions:

    a. that there was a common law cause of action against the Respondents;

    b. that the *Act* expressly authorized injunctive relief as an enforcement tool; or

    c. that the statutory remedies available under the *Act* had been tried against the Respondents and proven ineffective.[8]

17. The Application was heard *ex parte* on an expedited basis on May 14, 2021. Later that day, the judge below issued the Decision and granted the Injunction Order in the form requested by the Province.[9]

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[7] Restated Order #2 of the Chief Medical Officer of Health under section 32 of the *Health Protection Act* 2004, c 4, s 1 (May 13 2021) **[Supplemental Appeal Book p 1]**
[8] See *Health Protection Act*, SNS 2004, c 4, ss. 37 and 71, Appellant's BOA, **TAB 57**.
[9] Written decision of the Honourable Justice Scott C. Norton **[Appeal Book pp 7-26]**; Order of the Honourable Justice Scott C. Norton **[Appeal Book pp 27-29]**.

18. The injunctive relief ordered was not limited to the anticipated rally that was the focus of the Province's materials, or to known or unknown associates of Freedom Nova Scotia or the named Respondents. It applied to any Jane Doe or John Doe acting in concert with them, and to those acting "independently to like effect".[10]

19. Specifically, the Injunction Order prohibited any person with notice of the Order from organizing or attending outdoor gatherings that contravene public health restrictions, including political protests that respect physical distancing and masking.[11] The Injunction Order also prohibited "promoting" such protests, including through online expression, though no definition of "promoting" was included in the Injunction Order (or the referenced public health instruments).[12]

20. People who violated the Injunction Order, deliberately or accidentally, faced a risk of immediate arrest and detention until such time as they could be brought before a Justice of the Supreme Court.[13]

21. The Injunction Order did not have a time limit, expiring condition or comeback provision, and continued in effect indefinitely until varied or discharged by a further order of the Court.[14]

22. The Injunction Order was also not returnable for a full hearing on the merits. Instead, the Injunction Order provided that, "[t]he Respondents and anyone with notice of this Order may

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[10] Order of the Honourable Justice Scott C. Norton, para 3 **[Appeal Book pp 27-28]**.
[11] Order of the Honourable Justice Scott C. Norton, para 3 **[Appeal Book pp 27-28]**.
[12] Order of the Honourable Justice Scott C. Norton, para 3 **[Appeal Book pp 27-28]**.
[13] Order of the Honourable Justice Scott C. Norton, paras 4-5 **[Appeal Book p 28]**.
[14] Order of the Honourable Justice Scott C. Norton, para 8 **[Appeal Book p 29]**.

apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, in accordance with the process provided in the *Civil Procedure Rules*…".[15]

C. The Injunction Order is rescinded without rehearing

23. On June 4, 2021, the CCLA was granted public interest standing to seek a rehearing of the Application, and the rehearing was set down for June 30, 2021. Less than two weeks later, the Province filed a motion to discharge the Injunction Order on the basis of a solicitor's affidavit stating that it was "no longer necessary".

24. The CCLA opposed the Province's discharge motion given the lack of notice to other Respondents, a solicitor's affidavit containing hearsay statements, and the Province's failure to file a brief. However, the CCLA did not disagree that discharge of the order was appropriate, given its position on the merits of the Decision. Gatchalian J granted discharge of the Injunction Order in Chambers on June 22, 2021.

25. On June 30, 2021, Chipman J accepted the Province's submission that rehearing was moot, and refused to exercise his discretion to rehear the Application. In his decision, Chipman J wrote that no clarification of the principles of injunctions was needed because "[w]hether an injunction is granted is determined on a case-by-case basis" and the "exceptional circumstances" warranted an injunction. Chipman J deemed the CCLA's constitutional concerns "interesting and thought-provoking" but not worthy of a rehearing on the merits.[16]

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[15] Order of the Honourable Justice Scott C. Norton, para 8 **[Appeal Book p 29]**.
[16] *Nova Scotia (Attorney General) v Freedom Nova Scotia*, 2021 NSSC 217 at paras 32-33, 38, Appellant's BOA, **TAB 23**.

D. The CCLA appeals the Decision and the AGNS disclaims mootness and standing

26. Following a contested motion for an extension of time to appeal the Injunction Order and Decision of the judge below, Bourgeois JA determined that it was in the interests of justice for the appeal to proceed. She noted "in particular that on its face, the Injunction Order bound every citizen of Nova Scotia, precluding them from organizing, promoting, including via social media, and attending an 'Illegal Public Gathering' anywhere in the Province."[17]

27. Although the Attorney General of Nova Scotia had argued on the motion for an extension of time that the appeal was moot and that the CCLA lacked standing to bring the appeal, counsel for the Attorney General of Nova Scotia advised the Court during the motion for date and directions on December 15, 2021, that it would no longer be advancing these arguments on appeal.

PART 3 – LIST OF ISSUES

28. The CCLA raises the following issues on this appeal:

- **Issue #1:** The judge below erred in accepting the evidence of a named party as independent expert evidence.
- **Issue #2:** The judge below erred in granting a final *quia timet* injunction, in the absence of any legal authority and on the basis of the wrong legal test.
- **Issue #3:** The judge below erred in granting an injunction order against all Nova Scotians without any evidence that such a remedy was warranted.

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[17] *Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2021 NSCA 65 at para 37, Appellant's BOA, **TAB 12**.

- **Issue #4:** The judge below erred by failing to consider whether the Injunction Order infringed the *Charter* rights of all Nova Scotians in a manner that was justified.

PART 4 – STANDARD OF REVIEW

29. Issue #1: The admissibility of expert opinion evidence is a question of law reviewable on a correctness standard; however, deference is owed to a trial judge's application of the legal test and the weight given to such evidence.[18]

30. Issue #2: The failure to articulate and apply the proper legal test for an injunction is an extricable question of law reviewable on a correctness standard.[19]

31. Issue #3: The scope of an injunction granted as a final remedy to an application is discretionary and reviewable on a palpable and overriding error standard. An appellate court will only intervene where the trial judge misdirected themselves or made a clearly erroneous finding of fact, or where failure to intervene would cause a patent injustice.[20]

32. Issue #4: The failure to articulate and apply the proper legal test when exercising judicial discretion that engages the *Charter* is an extricable question of law reviewable on a correctness standard.[21] This follows the general principle that discretionary decisions are not insulated from review, and appellate intervention may be warranted where the judge below has

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[18] *R v Pearce; R v Howe*, 2021 NSCA 37 at para 261, Appellant's BOA, **TAB 35**.
[19] *3258042 Nova Scotia Limited v Transport Canpar LP*, 2021 NSCA 84 at para 17, Appellant's BOA, **TAB 2**.
[20] *Sorenson v Swinemar*, 2020 NSCA 62 at para 118, Appellant's BOA, **TAB 49**; *Prince v Canada (National Revenue)*, 2020 FCA 32 at para 12, Appellant's BOA, **TAB 30**; *R v Christie*, 2001 NSCA 147 at para 8, Appellant's BOA, **TAB 33**.
[21] *R v West*, 2012 NSCA 112 at para 74, Appellant's BOA, **TAB 40**.

misdirected themselves as to the applicable law or made a palpable error in their assessment of the facts.[22]

PART 5 – ARGUMENT

Issue #1: The judge below erred in accepting the evidence of a named party as independent expert evidence

33. The judge below qualified the CMOH, Dr. Robert Strang, "as an expert witness capable of giving expert opinion" and treated the CMOH's affidavit filed in support of his own Application as his "written report."[23] The judge below did so without being asked to qualify the CMOH as an expert, and without any consideration of the test for the admissibility of expert evidence, or the CMOH's status as a named Applicant. This was both an error of law and an error in principle.

34. In determining whether to admit expert evidence, trial judges are required to engage in a two-step inquiry that assesses first the threshold requirements for admissibility, and second whether the benefits of receiving the evidence outweigh any costs.[24] Rule 55 of the Nova Scotia *Rules of Civil Procedure* contain procedural requirements for expert reports, intended to protect the integrity of expert testimony.[25] By failing to undertake the two-step inquiry, and ignoring the requirements of Rule 55, the judge below failed to fulfil his gatekeeping role.

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[22] *R v Regan*, 2002 SCC 12 at para 117, Appellant's BOA, **TAB 37**; See also *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 27, Appellant's BOA, **TAB 32** (advancing a similar proposition in the context of mandatory interlocutory injunctions).
[23] Decision of the Honourable Justice Scott C. Norton, para 7 **[Appeal Book p 9]**.
[24] *R v Potter; R v Colpitts*, 2020 NSCA 9 at para 441, Appellant's BOA, **TAB 36**; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 23-24 [*White Burgess*], Appellant's BOA, **TAB 54**.
[25] Civil Procedure Rules, Rule 55.04, Appellant's BOA, **TAB 56**.

Instead, he improperly elevated the untested evidence of a party to the testimony of an independent and impartial expert, without attention to the requirements of the law.[26]

35. While there is no categorical rule against qualifying a party as an expert, the Supreme Court of Canada has made clear that an expert's interest in the litigation or relationship to the parties is grounds for exclusion.[27] Lower courts have characterized the prospect of qualifying a party as an expert as an "almost insurmountable barrier" and "impossible."[28]

36. Even if a party to a proceeding can be qualified as an expert based on their specialized knowledge, "the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage."[29]

37. There are principled reasons never to qualify a party as an expert. Parties are partial. They cannot provide "independent assistance" because they have an interest in the result and "lack the requisite objectivity that every person must have to be properly qualified as an expert."[30] For the same reasons, they cannot be seen to be independent. Accordingly, a party cannot fulfill the duty to the Court required of an expert witness.[31]

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[26] Decision of the Honourable Justice Scott C. Norton, para 9 **[Appeal Book pp 13-18]**; Brief of the Attorney General of Nova Scotia, paras 29-56 **[Appeal Book pp 140-146]**.
[27] *White Burgess* at paras 37, 40, Appellant's BOA, **TAB 54**.
[28] *Handley v Punnett*, 2003 BCSC 294 at para 19, Appellant's BOA, **TAB 16**; *Ocean v Economical Mutual Insurance Company*, 2010 NSSC 315 at para 22, Appellant's BOA, **TAB 25**.
[29] *White Burgess* at para 54, Appellant's BOA, **TAB 54**.
[30] *Rowse v wpd Canada Corporation*, 2016 ONSC 5299 at para 10, Appellant's BOA, **TAB 46**; See also *Rouleau v The Queen*, 2008 TCC 244 at para 28, Appellant's BOA, **TAB 45**.
[31] *White Burgess* at para 27, Appellant's BOA, **TAB 54**.

38. This error in principle undercuts the result and scope of the Decision. The improperly admitted expert evidence contaminated the entirety of the Decision as it was central to the reasons for granting an injunction, and to the scope of that injunction.

39. *Summary*: The judge below admitted the evidence of a named party as expert evidence without any consideration of the test for admitting such evidence. This is an error of law which impacted the whole Decision. Even if the judge below had considered the applicable test, qualifying a party as an expert witness is an error in principle.

Issue #2: The judge below erred in granting a final *quia timet* injunction, in the absence of any legal authority and on the basis of the wrong legal test.

40. The Province brought an Application in Chambers for an injunction to aid in the enforcement of the Public Health Order, without advancing any underlying cause of action, statutory authority or other legal authority which would justify this relief. The grounds for the Application were, in summary:

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

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

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

41. The Province characterized its request for relief as an interlocutory *quia timet* injunction, on the basis that it sought to enjoin anticipated harm, in advance of that harm occurring.

42. The judge below adopted the Province's characterization of the law of injunctions in the Decision granting the relief sought. This resulted in three significant, overlapping errors of law.

43. First, the judge below erred by applying the legal framework of analysis applicable to interlocutory, rather than permanent, injunctions. The injunctive relief sought by the Province was the totality of the relief sought against the Respondents within the Application. This made the injunctive relief sought final, rather than interlocutory. Despite the absence of any other pending legal claim against Freedom Nova Scotia or any other named or Jane Doe/John Doe respondents, the Province's Application framed the relief sought as interlocutory, and the judge below erred in law by treating it as such.[32]

44. Second, the fact that the Province's Application lacked any underlying cause of action, statutory authority, or other legal authority, meant that injunctive relief was granted as a remedy without first finding the infringement of any right or engagement of any power. This lack of legal authority made both interlocutory and final injunctive relief unavailable to the Province, and amounts to an error of law in the Decision of the judge below.

45. Finally, the test applied by the judge below in granting what amounted to a final, *quia timet* injunction was contrary to any precedent in Canadian law, and amounted to a legal error.

46. Each of these errors is discussed in turn, below.

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[32] Decision of the Honourable Justice Scott C. Norton, paras 11-32, **[Appeal Book pp 18-25]**.

a) The test for an interlocutory injunction does not apply to a request for final injunctive relief

47. At common law, injunctive relief is available on either an interim, interlocutory or permanent basis, as a civil remedy. In *Adline v. Buckley Insurance Brokers*,[33] Gillese JA of the Court of Appeal for Ontario provided clarity on these different remedies:

    a. Both interim and interlocutory injunctions are granted on a pre-trial basis, prior to the determination of the final issues between the parties in the main proceeding.[34]

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

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

    b. Permanent injunctions are imposed only after a final adjudication of rights, and once it has been established that an injunction is an appropriate remedy.[35]

48. The three-part test for an interim or interlocutory injunction was set out in *RJR-MacDonald*, and requires (a) a serious issue to be tried; (b) irreparable harm if the injunction was not granted; and (c) the balance of convenience to favour the injunctive relief.[36] The *RJR-MacDonald* test does not apply to permanent injunctions, and is designed instead for situations where the court does not have the ability to finally determine the merits of the case.[37]

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[33] *1711811 Ontario Ltd (AdLine) v Buckley Insurance Brokers Ltd*, 2014 ONCA 125 ("*Adline*"), Appellant's BOA, **TAB 1**.
[34] *Adline,* paras 50-52, Appellant's BOA, **TAB 1**.
[35] *Adline,* para 56, Appellant's BOA, **TAB 1**; *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 ("*Cambie*"), para 28, Appellant's BOA, **TAB 8**.
[36] *RJR-MacDonald Inc. v. Canada (Attorney General),* 1994 CanLII 117 (SCC); [1994] 1 SCR 311, pp. 347-349, Appellant's BOA, **TAB 43**.
[37] *Adline,* paras 78-80, Appellant's BOA, **TAB 1**.

49. Despite the absence of any issue in the Application other than the Province's request for injunctive relief, the Province framed its request for an injunction as interlocutory relief, with reference to the *RJR-MacDonald* test for an interlocutory injunction.[38]

50. The judge below erred by adopting the Province's characterization of the injunctive relief sought as interlocutory, and endorsing the application of the test from *RJR-MacDonald* in the Decision without noting that there could be no "serious issue to be tried" in the absence of *any* subsequent issue to be tried.

b) **There was no legal authority for the injunctive relief**

51. The Province may not come before this Court to seek an injunction as a matter of course, in mere anticipation that any Nova Scotian may commit a provincial offence. As the Supreme Court of Canada held in *R. v. Canadian Broadcasting Corporation*, "an injunction is not a cause of action, in the sense of containing its own force. It is, I repeat, a remedy."[39]

52. Establishing a cause of action or statutory or other legal authority for action is a precondition to obtaining injunctive relief, whether on an interim, interlocutory, or final basis. The judge below erred by granting injunctive relief despite the Province's failure to advance any legal basis for its entitlement to a remedy.

53. The CCLA submits that there is no authority in statute, common law or equity for the injunctive relief that was sought by, and granted to, the Province.

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[38] *RJR-MacDonald Inc. v. Canada (Attorney General),* 1994 CanLII 117 (SCC); [1994] 1 SCR 311, pp. 347-349, Appellant's BOA, **TAB 43**.
[39] *R v Canadian Broadcasting Corp*, 2018 SCC 5 ("*CBC*"), para 25, Appellant's BOA, **TAB 32**.

Statutory injunctive relief

54. First, there is no authority under statute for the Injunction Order. The *Act* does not provide authority for the Province to obtain injunctive relief against any person subject to a Public Health Order. This is not a case where there is a statutory right for a public authority to seek injunctive relief to enjoin the breach of a statute or by-law.[40]

55. The absence of a statutory injunction power in the *Act* can be distinguished from the statutory remedies available in the province of Ontario in respect of public health violations. Section 9 of Ontario's *Reopening Ontario (A Flexible Response to COVID-19) Act* includes authorization for the Court to grant a restraining order sought by the Crown.[41]

56. The Legislature in Nova Scotia has not created a similar legal authorization in the *Health Protection Act* in respect of its public health orders. However, the CCLA notes that such a statutory right has been included in other more recent legislative provisions in Nova Scotia.[42]

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[40] See for example, the following cases involving the granting of a statutory injunction: *Saskatchewan (Minister of Environment and Resource Management) v Kelvington Super Swine Inc*, 1997 CanLII 11380 (SKQB), Appellant's BOA, **TAB 47**, in which an injunction was obtained to prevent a development under s. 18 of the *Environmental Assessment Act*, SS 1979-80, c E-10.1; *North Pender Island Local Trust Committee v Conconi*, 2009 BCSC 328, Appellant's BOA, **TAB 21**, aff'd 2010 BCCA 494**,** Appellant's BOA, **TAB 22**; *Township of King v 2424155 Ontario Inc*, 2018 ONSC 1415, Appellant's BOA, **TAB 51**, where injunctive relief was available under s. 440 of the Ontario *Municipal Act 2001*, SO 2001, c 25, to enjoin the contravention of a by-law; *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647, Appellant's BOA, **TAB 53**, in which an injunction was ordered pursuant to s. 334(1) of the *Vancouver Charter*, SBC 1953, c. 55, to enforce a by-law.

[41] See *Ontario v. Adamson Barbecue Limited*, 2020 ONSC 7679, paras 10-11, Appellant's BOA, **TAB 27**.

[42] *Protecting Access to Health Services Act*, SNS 2021, c 24, s 12, Appellant's BOA, **TAB 58**.

No common law cause of action against the Respondents

57. Though the Province may exercise its *parens patriae* jurisdiction to enjoin a public nuisance,[43] or may make another civil claim against the Respondents which can provide context for an injunction, none of the "grounds for order" advanced in the Application supported a legal right to an injunction as a final remedy.

58. At common law, injunctions are granted by the courts only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong. An injunction is a remedy ancillary to a cause of action.

59. The Supreme Court of Canada articulated this principle clearly in *CBC*, where the Crown sought a mandatory interlocutory injunction against the ongoing publication of information subject to a publication ban.[44] The Crown brought an application for criminal contempt at the same time as it applied to the Court for interlocutory injunctive relief.

60. In reversing the Alberta Court of Appeal, which had not connected the injunctive relief to the application for criminal contempt, the Court emphasized the "fundamental nature of an injunction and its relation to a cause of action."[45] This relationship was explained in the earlier decision of *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*:[46]

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[43] See for example, *Nova Scotia (Attorney-General) v. Beaver*, 1985 CanLII 3084 (NS SC) (CA), para 37, Appellant's BOA, **TAB 24** (cautioning, at para 35, that an injunction should be issued to prevent commission of a crime "only in very exceptional cases where by reason of lack of time or otherwise no other suitable remedy is available").
[44] *CBC*, para 25, Appellant's BOA, **TAB 32**.
[45] *CBC*, para 24, Appellant's BOA, **TAB 32**.
[46] *Amchem Products Inc v British Columbia (Worker's Compensation Board),* 1993 CanLII 124 (SCC), [1993] 1 SCR 897, pp. 930-931, Appellant's BOA, **TAB 4**.

> While quia timet injunctions are granted by the courts, that is done only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong. In general, an injunction is a remedy ancillary to a cause of action.

Inherent authority to enforce statutory obligations

61. Finally, though the Court has limited jurisdiction to grant injunctions to enforce statutory obligations, even in the absence of an explicit statutory power, this power is exercised only where necessary. The Province did not explicitly argue in its Application that it relied upon this residual power as the legal authority for its request, nor did the judge below cite this authority in the Decision.

62. The Court's power to enjoin activity that is otherwise already prohibited by statute is sparingly exercised. As recently noted by the British Columbia Court of Appeal, "the court should not grant injunctive relief unless the statutory provision is shown to be inadequate in some respect."[47]

63. In determining whether the statutory provision is inadequate, the Court may have regard to the following considerations:[48]

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

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

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[47] *Cambie*, paras 33-34, Appellant's BOA, **TAB 8**.
[48] *Cambie,* paras 35-36, Appellant's BOA, **TAB 8**.

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

64. Recently, the British Columbia Supreme Court was faced with a request for injunctive relief by the Attorney General of British Columbia to enforce that province's COVID-19-related public health order.[49]

65. The Court considered the existing statutory remedies for breach of the public health order as part of the "balance of convenience" stage of the *RJR-MacDonald* analysis, because the government had brought its application on an interlocutory basis in response to an ongoing *Charter* challenge. The Court reasoned that since the police and public prosecution service had not sought to enforce or prosecute the existing statutory offences, the balance of convenience did not favour the government seeking additional injunctive remedies, and the application was denied.[50] Chief Justice Hinkson held:

> The respondents differ from many litigants who seek injunctive relief. In particular, they do not necessarily require the assistance of the Court to enforce their legislation. The alternate remedies available to the respondents are a factor to be considered in the exercise of my discretion. The challenged orders remain extant unless and until set aside or overturned by this Court.[51]

66. In the instant case, the activity the Province sought to enjoin was already expressly prohibited by the Public Health Order made under authority of the *Act*, and punishable by both fine and imprisonment. The Province did not assert in its Application that the statutory remedy

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[49] *Beaudoin v British Columbia*, 2021 BCSC 248 ("*Beaudoin*"), Appellant's BOA, **TAB 7**.
[50] *Beaudoin,* paras 58-61, 67-70, Appellant's BOA, **TAB 7**. See also the emphasis on the need to identify an "enforcement gap" in *Teal Cedar Products Ltd. v Rainforest Flying Squad*, **2021 BCSC 1903**, at para 45, Appellant's BOA, **TAB 50**.
[51] *Beaudoin,* para 52, Appellant's BOA, **TAB 7**.

available under s. 71 of the *Act* was insufficient in any way, nor did the Province adduce any evidence that its attempts to enforce the *Act* had been unsuccessful.

67. To the contrary, with respect to the Freedom Nova Scotia respondents, there was no evidence that any past enforcement steps had been taken, though the Province asserted that it was aware of three such rallies having occurred in the past.[52]

68. Accordingly, the CCLA submits that the Province may not retrospectively attempt to justify the Injunction Order on the basis of the inherent jurisdiction or residual powers of the Court. The Province offered no explanation for the failure of law enforcement to enforce the Public Health Order using the available powers under the *Act*, before asking the Court to intervene. In such circumstances, it is not appropriate for the Province to ask the Court to effect through civil contempt of court what the Province is not willing to do using existing law enforcement powers.

c) The test for an interlocutory *quia timet* injunction was incorrectly stated

69. The Province characterized its request for relief as a *quia timet* injunction, on the basis that it sought to enjoin anticipated harm, in advance of that harm occurring. *Quia timet* is a *type* of injunctive relief, which can be granted on an interim, interlocutory or permanent basis. It is not a special type of injunction that can be obtained in the absence of an underlying cause of action or other legal authority. In other words, the fact that the Province described its demand as *quia timet* did not cure the fatal absence of legal authority outlined above.[53]

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[52] Affidavit of Hayley Crichton, sworn May 12, 2021, para 11-23 **[Appeal Book pp 82-83]**.
[53] As demonstrated in the cases relied upon by the Province in its Application for an injunction, in which such relief was always sought within a legitimate legal proceeding, including: *526901 BC*

70. Even if the Province had an ongoing legal dispute within which to tether an interlocutory *quia timet* injunction, it asked the judge below to apply the wrong test, which was adopted verbatim in the Decision[54] from the Attorney General's *ex parte* brief.[55]

71. The Province offered the following test for consideration by the Court, without any attribution or authority:

> In order to grant a quia timet injunction, the Province submits that the court must find the following:
>
> 1. The harm that is anticipated is imminent.
> 2. The harm is irreparable.
> 3. Damages would not be an adequate remedy.[56]

72. The test, as stated, does not appear in any other modern Canadian case. In Canadian law, when a party seeks interlocutory relief on a *quia timet* basis, they must establish the elements of the *RJR-MacDonald* test for interlocutory injunctions, and then show "on a balance of probabilities, that there is clear, convincing and non-speculative evidence" that there is "a high degree of probability the alleged harm will occur; and the presence of harm that is about to

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Ltd v Dairy Queen Canada Inc, 2018 BCSC 1092, Appellant's BOA, **TAB 3**, in which *quia timet* relief was sought on a interlocutory basis, within an action seeking declaratory relief on a contract, as well as relief against forfeiture (paras 6-7); *Robinson v Canada (Attorney General)*, 2019 FC 876, Appellant's BOA, **TAB 44**, in which *quia timet* relief was sought pending the conclusion of an application for judicial review (paras 122-129); and *Ingram v Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806, Appellant's BOA, **TAB 17**, in which the applicants sought interim and interlocutory relief until the hearing of their challenge to the validity of various public health orders in Alberta (paras 5-7).

[54] Written decision of the Honourable Justice Scott C. Norton, para 27 **[Appeal Book p 24]**.

[55] Brief of the Attorney General of Nova Scotia, para 72 **[Appeal Book p 151].**

[56] Brief of the Attorney General of Nova Scotia, para 72 **[Appeal Book p 151].**

occur imminently or in the near future".[57] The test proposed by the Province included only the second branch of the *RJR-MacDonald* test (stated in two different ways).

73. Where the *quia timet* relief sought was permanent, the Court would have had to finally determine the issues and rights of the parties before finding that an injunction was an appropriate remedy in the circumstances.

74. Though it does not accord with any Canadian precedents, the Province's novel *quia timet* test does bear a close resemblance to a Wikipedia article, entitled "Quia Timet", which cites the English decision in *Fletcher v. Bealey* (1885), 28 Ch D 688 as authority.[58] The judge below erred by adopting this test, thus changing the law of injunctions in Nova Scotia, without proper consideration.[59]

75. *Summary*: The judge below erroneously applied the interlocutory injunction test to what was an application for a permanent injunction. He assumed, contrary to binding Supreme Court of Canada precedent, that a request for a permanent injunction created a freestanding basis with which to issue such a remedy, and neglected to analyze whether the grounds listed in the Application warranted such a remedy. Finally, he applied an articulation of the *quia timet* injunction test that was not supported by case law.

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[57] *526901 BC Ltd v Dairy Queen Canada Inc*, 2018 BCSC 1092, para 71, Appellant's BOA, **TAB 3**; *Robinson v Canada (Attorney General)*, 2019 FC 876, para 88, Appellant's BOA, **TAB 44**.
[58] "Quia timet" *Wikipedia* (21 October 2019), online: https://en.wikipedia.org/wiki/Quia_timet, Appellant's BOA, **TAB 55**.
[59] The test from *Fletcher* has never been the law in Nova Scotia, and is no longer good authority in England; see *London Borough of Islington v Elliott & Anor*, [2012] EWCA Civ 56, Appellant's BOA, **TAB 20**.

Issue #3: The judge below erred in granting an injunction order against all Nova Scotians without requiring any evidence that such a remedy was needed against all Nova Scotians.

76. The evidentiary record before the judge below was not capable of supporting an injunction order against Amy Brown or all unnamed individuals in the province. In issuing an injunction order with such a far-reaching scope, the judge below misapprehended the evidence before him.

77. The named respondents to the Province's Application included three individuals, Tasha Everett, Dena Churchill and Amy Brown, and the collective known as Freedom Nova Scotia (which is not a legal entity). In addition, the Province targeted all Jane Does and John Does present in Nova Scotia, who might also, intentionally or accidentally, contravene the Public Health Order.

78. The evidentiary record did not include any mention of one of the named respondents, and only minimal or unsupported evidence concerning the other named respondents. No evidence in the record mentioned "Amy Brown", or linked an "Amy Brown" to Freedom Nova Scotia, despite representations by the Province to the judge below that such evidence existed.[60] While evidence was presented of a single Facebook post showing that a "Tasha Everett" had encouraged others to attend a protest on Highway 104, there was no evidence to support the Province's representation that this person was the "event organizer" or that she attended this event.[61] For Dena Churchill, no documentary evidence was provided to support Ms. Crichton's bare assertion in her affidavit that a "Dena Churchill posted an advertisement for

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[60] Brief of the Attorney General of Nova Scotia, paras 19-20 **[Appeal Book p 138]**.
[61] Affidavit of Ms. Hayley Crichton, Exhibit "G": Screenshot of Tasha Everett Facebook page undated **[Appeal Book p 134]**; Brief of the Attorney General of Nova Scotia, para 25 **[Appeal Book p 139]**.

the May 15, 2021 [sic] on her facebook page, among other anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric."[62]

79. For Jane and John Does—that is, all persons in Nova Scotia—there was no evidence in the record to establish any widespread threat of contravention of the Public Health Order. There was no evidence showing that ordinary Nova Scotians were engaged in flouting the Public Health Order, beyond a handful of private gatherings and protests. The evidence of unlawful protests consisted of a few events attended by a maximum of approximately 100 people.[63]

80. There was also no evidence in the record to show what steps the Province had already taken to enforce the Public Health Order, or to explain why the existing enforcement powers were ineffective. In particular, there was no evidence showing that police had ticketed protestors associated with Freedom Nova Scotia and that these enforcement measures had failed to reduce either the prevalence of such protests or number of attendees at such protests.

81. *Summary*: The evidentiary record before the judge below was scant and untested. In issuing an injunction order that applied to all Nova Scotians, the judge below misapprehended the evidence before him and used the actions of a small portion of the population to enjoin the entirety of the Province from activities engaging constitutionally-protected rights.

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[62] Affidavit of Ms. Hayley Crichton, para 28 **[Appeal Book p 84]**.
[63] Affidavit of Ms. Hayley Crichton, paras 5-26 **[Appeal Book pp 81-83]**.

Issue #4: The judge below erred by failing to consider whether the Injunction Order infringed the Charter rights of all Nova Scotians in a manner that was justified

82. The Injunction Order engaged the *Charter* rights of all Nova Scotians, including the s. 2 rights to freedom of expression and assembly, and the s. 7 right to liberty. In particular, the Injunction Order restricted Nova Scotians from gathering, including for the purposes of political expression or peaceful protest, and gave police the power to arrest and detain offenders for civil contempt, thus stripping an alleged offender of the constitutional protections that attended the provincial offence of violating the Public Health Order.[64]

83. The judge below acknowledged that the Injunction Order would enjoin "rights which are protected under the *Charter*,"[65] but failed to consider those rights before granting the Injunction Order. Instead, he was content to leave consideration of the *Charter* to a later date, if members of the public wished to challenge the order.[66] This failure to articulate and apply the correct legal principles is an error of law, and an abdication of the Court's duty to uphold the constitution.

84. The *Charter* applies to all exercises of public authority, including judicial exercises of discretion under the common law. An injunction issued by a provincial superior court is subject to constitutional scrutiny and must comply with the fundamental standards established by the *Charter*.[67]

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[64] *Nova Scotia (Attorney-General) v. Beaver*, 1985 CanLII 3084 (NS SC), para 9, Appellant's BOA, **TAB 24**.
[65] Transcript of the *Ex Parte* Hearing, p 6, lines 7-10 **[Appeal Book, p 38]**.
[66] Transcript of the *Ex Parte* Hearing, p 6, lines 7-10 **[Appeal Book, p 38]**.
[67] *BCGEU v British Columbia (Attorney General)* ("*BCGEU*"), [1988] 2 SCR 214, p. 243-244; 1988 CanLII 3, para 56, Appellant's BOA, **TAB 6**.

85. In *BCGEU v British Columbia (Attorney General)*, the Supreme Court of Canada applied the traditional *Charter* framework while reviewing an injunction order that engaged *Charter* rights. The Court identified the *Charter* rights that were infringed and analyzed the extent of that infringement before considering whether the infringement could be demonstrably justified in a free and democratic society pursuant to the *Oakes* test.[68]

86. In other contexts, the Supreme Court of Canada has made clear that judicial discretion engaging the *Charter* must balance infringement against other important public interests. This requires identification of the *Charter* rights at stake, identification of the competing public interest, an analysis of whether the order sought is necessary to prevent a serious risk to this public interest, and an assessment of the proportionality between the rights infringement and protection of the competing public interest.[69]

87. Appellate courts across Canada have followed this approach in the context of injunctions, requiring lower courts to consider and protect *Charter* rights that are engaged subject to appropriate justification and balancing.[70] This requirement acknowledges that superior courts are the primary guardians of the rule of law.[71]

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[68] *BCGEU*, [1988] 2 SCR 214, p. 244-249; 1988 CanLII 3 at paras 57-72, Appellant's BOA, **TAB 6**.
[69] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38, Appellant's BOA, **TAB 48**.
[70] *Unifor Canada Local 594 v Consumers' Co-Operative Refineries Limited*, 2021 SKCA 34 at para 58, Appellant's BOA, **TAB 52**; *College of Midwives of British Columbia v Mary Moon*, 2020 BCCA 224 at para 111, Appellant's BOA, **TAB 14**; *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716 at para 8, Appellant's BOA, **TAB 19**; *Re Brake*, 2019 NLCA 17 at para 77, Appellant's BOA, **TAB 41**; *Ontario Public Service Employees Union v Ontario (Attorney General)* (2002), 58 OR (3d) 577, 2002 CanLII 41785 (CA), Appellant's BOA, **TAB 29**.
[71] *Reference re Code of Civil Procedure (Quebec), art 35*, 2021 SCC 27 at para 50, Appellant's BOA, **TAB 42**.

88. In this case, the Injunction Order limited freedom of expression and freedom of assembly in places where these rights are not normally restricted, and therefore engaged sections 2(b) and 2(c) of the *Charter*.[72] The Injunction Order also engaged section 7 of the *Charter*, as it created a non-trivial risk of imprisonment for conduct that carried either no risk of COVID-19 transmission or risk that was equivalent to other activities permitted at law.[73] Though specific sections of the *Charter* were not identified, both the judge below and the Attorney General of Nova Scotia acknowledged that *Charter* rights were engaged by the Injunction Order.[74]

89. Having acknowledged that the Province's Application for an injunction order engaged the *Charter*, the judge below was required to identify which rights were engaged and the extent to which they were infringed. He was then required to consider whether the extent of that infringement was demonstrably justified in a free and democratic society.

90. This justification analysis required the judge below to consider whether the rights infringements were rationally connected to a pressing and substantial objective, minimally

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[72] *BCGEU*, [1988] 2 SCR 214, p. 244-245; 1988 CanLII 3, paras 57-58, Appellant's BOA, **TAB 6** (an injunction order enjoining picketing at a courthouse engages s. 2(b)); *Ontario (Attorney General) v Dieleman* (1994), 117 DLR (4th) 449, 1994 CanLII 7509 at paras 617, 702 (ONSC), Appellant's BOA, **TAB 26** (an injunction order enjoining protesting at an abortion clinic engages ss. 2(b) and 2(c)); *Garbeau c. Montréal (Ville de)*, 2015 QCCS 5246, paras 171-173, Appellant's BOA, **TAB 15** (a provincial offence prohibiting demonstrating on public roadways engages s. 2(b)) (decision only available in French); *R v Banks*, 2007 ONCA 19, paras 112-113, Appellant's BOA, **TAB 31** (a provincial offence prohibiting soliciting money on public roadways engages s. 2(b)); *Batty v City of Toronto*, 2011 ONSC 6862 at para 75, Appellant's BOA, **TAB 5** (trespass notices issued against protesters camping in a public park engage s. 2)

[73] *R v Vaillancourt,* [1987] 2 SCR 636; p. 652-653, 1987 CanLII 2 (SCC), para 27, Appellant's BOA, **TAB 39**; *R v Swain*, [1991] 1 SCR 933, Appellant's BOA, **TAB 38**; *R v Heywood,* 1994 CanLII 34 (SCC), [1994] 3 SCR 761, pp. 789-790, Appellant's BOA, **TAB 34**; *Canada (Attorney General) v Bedford*, 2013 SCC 72 paras 97-123, Appellant's BOA, **TAB 9**; Order of the Honourable Justice Scott C. Norton, ss 2-5 **[Appeal Book pp 27-28]**; Restated Order #2 of the Chief Medical Officer of Health under section 32 of the *Health Protection Act* 2004, c 4, ss 13A-19.2 (May 13 2021) **[Supplemental Appeal Book p 8-17]**

[74] Transcript of the *Ex Parte* Hearing, p 6, lines 7-17 **[Appeal Book, p 38]**.

impairing, and proportional.[75] When considering proportionality, the judge below was required to balance the impacts of the Injunction Order against its benefits by asking questions like: "What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[76] The judge below did not engage in any of this required analysis.

91. The only consideration of the *Charter* undertaken by the judge below appears in paragraphs 22 to 26 of his reasons under the heading "*Quia Timet* Injunctions and Charter Considerations."[77] This is part of a large portion of the reasons (paras 12 to 32) that are copied directly from the Province's brief (paras 57 to 77).[78] While not necessarily an independent error, this level of reliance on the Province's materials in an *ex parte* application may give the impression that the judge below did not engage in any independent constitutional analysis.[79]

92. The copied "*Charter* considerations" were also irrelevant to the issues in this case. These reasons reviewed the *Ingram v Alberta (Chief Medical Officer of Health)* decision, in which the Alberta Court of Queen's bench refused to grant an interlocutory stay of public health orders pending a constitutional challenge. The injunction request before the judge below in

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[75] *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 ("*JTI-MacDonald*"), paras 35-36, Appellant's BOA, **TAB 10**.
[76] *JTI-Macdonald*, *supra*, para 45, Appellant's BOA, **TAB 10**.
[77] Written decision of the Honourable Justice Scott C. Norton, paras 22-26 **[Appeal Book pp 22-23]**.
[78] Brief of the Attorney General of Nova Scotia, paras 6-56, 57-77 **[Appeal Book pp 136-146, 146-151]**. Note that the factual findings of the judge below (paras 8 to 9) are also copied directly from the Respondents' brief (paras 6 to 56).
[79] See *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras 49-50, 54, Appellant's BOA, **TAB 13** (discussing judicial copying as a standalone reviewable error).

the instant case was not interlocutory and did not concern a stay of presumptively valid public health orders.

93. Counsel for the Attorney General acknowledged during the *ex parte* hearing that constitutional rights were engaged, but failed to make detailed submissions on this position in advance of the hearing. It is well-established that parties appearing before the court on an *ex parte* basis are under a duty of utmost good faith in the representations that they make, including a duty to not present only their side of the case.[80] The Attorney General is not an "ordinary party", and agents of the Attorney General have even broader responsibilities to the court.[81]

94. Regardless of this lack of assistance from the Province in the instant case, given that the Injunction Order engaged s. 2(b), s. 2(c) and s. 7 of the *Charter*, it was a legal error for the judge below to fail to conduct a complete analysis of whether the infringement was justified.

95. *Summary*: The Injunction Order requested by the Province engaged ss. 2(b), 2(c), and 7 of the *Charter*. The judge below acknowledged that the rights of all Nova Scotians would be affected by the Injunction Order, but failed to undertake any of the analysis required when judicial exercises of discretion impact the *Charter*. As a result, the judge below did not identify the *Charter* rights that were engaged, or consider whether the important public health dimensions of this case justified the infringement of those rights. This abdication of the Court's constitutional oversight function was an error of law.

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[80] *Kriegman v Dill*, 2018 BCCA 86 at para 40, Appellant's BOA, **TAB 18**; *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 101, Appellant's BOA, **TAB 11.**

[81] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 37, Appellant's BOA, **TAB 28.**

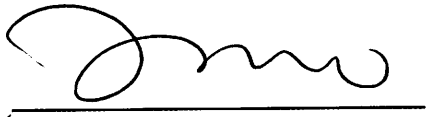
PART 6 – ORDER OR RELIEF SOUGHT

96. The CCLA requests that this Honourable Court set aside the Decision of the judge below dated May 14, 2021.

97. The CCLA is a public interest litigant and requests that no costs be ordered against any party, irrespective of the result.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF JANUARY, 2022.

Nasha Nijhawan



for Benjamin Perryman

Counsel for the CCLA

APPENDIX A - LIST OF CITATIONS

CASELAW

1. *1711811 Ontario Ltd (AdLine) v Buckley Insurance Brokers Ltd*, 2014 ONCA 125
2. *3258042 Nova Scotia Limited v Transport Canpar LP,* 2021 NSCA 84
3. *526901 BC Ltd v Dairy Queen Canada Inc*, 2018 BCSC 1092
4. *Amchem Products Inc v British Columbia (Worker's Compensation Board)*, [1993] 1 SCR 897
5. *Batty v City of Toronto*, 2011 ONSC 6862
6. *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214
7. *Beaudoin v British Columbia*, 2021 BCSC 248
8. *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396
9. *Canada (Attorney General) v Bedford*, 2013 SCC 72
10. *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30
11. *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37
12. *Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2021 NSCA 65
13. *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30
14. *College of Midwives of British Columbia v Mary Moon*, 2020 BCCA 224
15. *Garbeau c. Montréal (Ville de)*, 2015 QCCS 5246
16. *Handley v Punnett*, 2003 BCSC 294
17. *Ingram v Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806
18. *Kriegman v Dill*, 2018 BCCA 86
19. *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716
20. *London Borough of Islington v Elliott & Anor*, [2012] EWCA Civ 56
21. *North Pender Island Local Trust Committee v Conconi*, 2009 BCSC 328
22. *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494
23. *Nova Scotia v. Freedom Nova Scotia*, 2021 NSSC 217
24. *Nova Scotia (Attorney-General) v. Beaver*, 1985 CanLII 3084 (NS SC) (CA)
25. *Ocean v Economical Mutual Insurance Company*, 2010 NSSC 315
26. *Ontario (Attorney General) v Dieleman*, (1994), 117 DLR (4th) 449
27. *Ontario v Adamson Barbecue Limited*, 2020 ONSC 7679
28. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43

29. *Ontario Public Service Employees Union v Ontario (Attorney General) (2002)*, 58 OR (3d) 577, 2002 CanLII 41785 (CA)
30. *Prince v Canada (National Revenue)*, 2020 FCA 32
31. *R v Banks*, 2007 ONCA 19
32. *R v Canadian Broadcasting Corp*, 2018 SCC 5
33. *R v Christie*, 2001 NSCA 147
34. *R v Heywood*, [1994] 3 SCR 761
35. *R v Pearce; R v Howe*, 2021 NSCA 37
36. *R v Potter; R v Colpitts*, 2020 NSCA 9
37. *R v Regan*, 2002 SCC 12
38. *R v Swain*, [1991] 1 SCR 933
39. *R v Vaillancourt*, [1987] 2 SCR 636
40. *R v West*, 2012 NSCA 112
41. *Re Brake*, 2019 NLCA 17
42. *Reference re Code of Civil Procedure (Quebec), art 35*, 2021 SCC 27
43. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311
44. *Robinson v Canada (Attorney General)*, 2019 FC 876
45. *Rouleau v The Queen*, 2008 TCC 244
46. *Rowse v wpd Canada Corporation*, 2016 ONSC 5299
47. *Saskatchewan (Minister of Environment and Resource Management) v Kelvington Super Swine Inc*, 1997 CanLII 11380 (SKQB)
48. *Sherman Estate v Donovan*, 2021 SCC 25
49. *Sorenson v Swinemar,* 2020 NSCA 62
50. *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BCSC 1903
51. *Township of King v 2424155 Ontario Inc*, 2018 ONSC 1415
52. *Unifor Canada Local 594 v Consumers' Co-Operative Refineries Limited*, 2021 SKCA 34
53. *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647
54. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23

SECONDARY SOURCES

55. "Quia timet" *Wikipedia* (21 October 2019), online: https://en.wikipedia.org/wiki/Quia_timet.

APPENDIX B - STATUTES AND REGULATIONS

56. Civil Procedure Rules, Rule 55.04

55.04 Content of expert's report

(1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;

(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

57. *Health Protection Act*, SNS 2004, c 4

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.

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.

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.

58. *Protecting Access to Health Services Act*, SNS 2021, c 24

Injunction

12 (1) On application by any person, including the Attorney General, the Supreme Court of Nova Scotia may grant an injunction to restrain a person from contravening this Act.

(2) An injunction may be granted under subsection (1) whether or not a penalty or other remedy is provided by this Act. 2021, c. 24, s. 12.