**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**

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# FACTUM OF THE RESPONDENTS 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

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## PART I

## OVERVIEW OF THE APPEAL

1. On May 14, 2021, the Honourable Justice Scott Norton granted the Respondents application for a *quia timet* injunction prohibiting illegal public gatherings and certain activities that cause illegal public gatherings. [1] The Appellant has appealed that judgment. The Appellant says in the Notice of Appeal that this Honourable Court should allow the appeal and that the judgment appealed from be reversed and set aside.

2. The Appellant asserts that Justice Norton erred in law and claims that the *quia timet* injunction is unlawful and infringes the *Charter*, namely freedom of expression, freedom of assembly, and liberty. The Appellant also claims that the *quia timet* injunction is overbroad and was not supported by the evidence.[2] The Respondents oppose the appeal in its entirety.

3. The hearing of this appeal is scheduled for a half-day on April 11, 2022, commencing at 10 a.m.

## PART II

## STATEMENT OF FACTS

4. On May 10, 2021, counsel for 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 (hereinafter, the "Respondents"), was instructed to prepare and file an emergency application for a *quia timet* injunction to be heard before May 15, 2021. On May 12, 2021, the Attorney General filed a Notice of Application in Chambers (*Ex parte)* for a *quia timet* injunction against Freedom Nova Scotia, John Doe(s), Jane Doe(s), Amy Brown, Tasha Everett, and Dena Churchill (hereinafter, the "injunction"). Accompanying

[1] Appeal Book (A.B.), Part 1, pg. 4 to pg. 6, *Ex Parte* Application; pg. 7 to pg. 26, Justice Norton's written decision; pg. 27 to pg. 29, Injunction Order, dated May 14, 2021.
[2] A.B., Part 2, pg. 1 to pg. 3, Notice of Appeal, filed September 2, 2021.

the Notice of Application was the Attorney General's pre-hearing brief and draft Order. The evidence filed in support of the injunction application were two affidavits, one affidavit sworn May 12, 2021, by Dr. Robert Strang, Chief Medical Officer of Health for the Province of Nova Scotia (CMOH), and the second affidavit, sworn May 12, 2021, by Hayley Crichton, Director of Public Safety and Investigation with the Nova Scotia Department of Justice.

5. On May 13, 2021, counsel for the Attorney General also filed the Public Health Order in effect at the time. The Public Health Order was signed by Dr. Strang and issued on May 13, 2021, under section 32 of the *Health Protection Act*, 2004, c. 4, s. 1 (hereinafter, the "Public Health Order"). [3] The Public Health Order set out the following restrictions pertaining to illegal public gatherings:

> 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;
> (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.

6. When the Attorney General filed the *ex parte* injunction application on May 12, 2021, no public gatherings were permitted in Nova Scotia.[4] The Public Health Order, as amended, at all material times, prohibited illegal public gatherings. However, despite enforcement measures pertaining to illegal public gatherings being carried out under the Public Health Order (i.e., monetary fines, summary offence tickets), illegal public gatherings continued to occur within the Province in violation of the Public Health Order. Prior to May 12, 2021, illegal public

[3] Supplemental Appeal Book (S.A.B.), Tab 1, Restated Order #2 Of the Chief Medical Officer of Health Under Section 32 Of The *Health Protection Act* 2004, c. 4, s. 1, (the "Public Health Order").
[4] A.B., Part 2, pg. 47, Affidavit of Dr. Robert Strang, Exhibit A, pg. 60, section 13.1.

gatherings occurred in the form of anti-mask, anti-vaccine, anti-restriction protests, private parties, and religious gatherings.[5]

7. The illegal public gatherings organized by the respondents to the Province's injunction application did not comply with the requirements of the Public Health Order including but not limited to:

a. masking requirements;
b. attendance limits applicable to indoor or outdoor gatherings; and
c. minimum physical distancing requirements.[6]

8. Consequently, the Attorney General sought an additional measure of a *quia timet* injunction to restrain illegal public gatherings and certain activities (as set out in section 13.6 of the Public Health Order above) that cause illegal public gatherings to occur.

9. On May 14, 2021, Justice Scott Norton of the Nova Scotia Supreme Court heard the Respondents *quia timet* injunction application. The lower court had before it the draft Order and Notice of *Ex Parte* Application, pursuant to Civil Procedure Rule 5.02, the affidavits of Dr. Robert Strang and Hayley Crichton, sworn May 12, 2021, the Public Health Order dated May 13, 2021 (also referred to as: "Restated Order #2 of the Chief Medical Officer of Health under section 32 of the *Health Protection Act* 2004, c. 4 s. 1"), and the Attorney General's pre-hearing brief.[7]

10. Upon reviewing the materials filed by the Attorney General and hearing Duane Eddy, counsel for the Attorney General, Justice Norton granted the Attorney General's application and issued the *quia timet* injunction.

[5] A.B. Part 2, pg. 81, Affidavit of Hayley Crichton, paragraphs 6 to 29.
[6] A.B. Part 2, pg. 81, Affidavit of Hayley Crichton, paragraph 29.
[7] A.B. Part 1, pg. 4, *Ex Parte* Application; Part 2, pg. 47, Dr. Strang Affidavit; pg. 81, Hayley Crichton Affidavit; pg. 135, Attorney General's pre-hearing brief. Supplemental Appeal Book (S.A.B.), Tab 1 - Restated Order #2 of the Chief Medical Officer of Health under section 32 of the Health Protection Act 2004, c. 4 s. 1.

11. Justice Norton's written decision and Injunction Order were issued on May 14, 2021.[8]

12. On May 17, 2021, the Appellant wrote to the Premier of Nova Scotia and the Attorney General and Minister of Justice. In their correspondence, the Appellant raised issues and concerns with the *quia timet* injunction and Justice Norton's decision.

13. On May 27, 2021, the Appellant filed a Notice of Motion for Standing in the Supreme Court of Nova Scotia to have the *quia timet* injunction application reheard, pursuant to Civil Procedure Rule 22.06. The Attorney General consented to the motion and the motion was granted on June 4, 2021.

14. On June 4, 2021, Justice Gabriel set filing deadlines for the rehearing and scheduled the rehearing for June 30, 2021, commencing at 9:30 a.m. The Appellant and Attorney General filed briefs for the rehearing and the Attorney General filed supplementary affidavit evidence.

15. On June 17, 2021, the Attorney General filed a Notice of Motion to discharge the injunction, pursuant to paragraph nine (9) of the Injunction Order. In support of the motion the Attorney General filed a solicitor's affidavit setting out the following grounds (*inter alia*):

> "I am advised by the Attorney General of Nova Scotia and do verily belief that the Premier of Nova Scotia in consultation with the Chief Medical Officer of Health, Dr. Robert Strang, have determined that the Injunction Order issued by the Court in this proceeding is no longer necessary."

16. The Appellant opposed the Attorney General's motion and argued that the matter of discharging the Injunction Order should proceed on June 30th before the rehearing judge. However, Justice Gatchalian granted the motion and issued an Order, dated June 22, 2021, discharging the injunction. With respect to the issue of mootness arising from the injunction being discharged, Justice Gatchalian put the issue of mootness over to June 30, 2021, to be addressed by the rehearing judge.

[8] A.B. Part 2, pg. 27, Injunction Order, dated May 14, 2021; pg. 7 to pg. 26, Justice Norton's written decision.

17. The Appellant and the Attorney General filed pre-hearing briefs pertaining to the issue of mootness; and on June 30, 2021, the Appellant and the Attorney General made oral submissions before Justice Chipman. Dr. Strang and Hayley Crichton were present in court on June 30th. Both affiants were prepared to have their affidavits tendered as exhibits and to give direct evidence regarding the contents of their affidavits and be cross-examined during the rehearing. However, after hearing the parties' arguments on mootness, Justice Chipman found that the matter was moot and that it was not in the interests of justice for the rehearing to proceed as scheduled. Justice Chipman dismissed the matter without costs to any party. Justice Chipman issued a written decision on June 30, 2021.[9]

18. On July 15, 2021, the Appellant filed a motion in the Nova Scotia Court of Appeal to extend the deadline to appeal Justice Norton's judgment, which had expired on June 22, 2021. The motion was granted and an Order extending the deadline to appeal Justice Norton's decision and Injunction Order to September 3, 2021 was issued.[10]

19. On September 2, 2021, the Appellant filed a Notice of Appeal appealing the injunction and Justice Norton's decision.

20. The Respondents have chosen not to raise or argue the issue of mootness or standing on appeal.

## PART III

## LIST OF ISSUES

21. The Notice of Appeal sets out the following grounds of appeal:

> Ground 1: The judge below erred in granting an injunction order without the Applicants having advanced any common law cause of action, statutory authority, or other right to a remedy.

[9] *Nova Scotia (Attorney General) v. Freedom Nova Scotia* 2021 NSSC 217, BOA Tab 1.
[10] *The Canadian Civil Liberties Association v. Attorney General of Nova Scotia et al.* 2021 NSCA 65 -CA. No. 507688, at para. 40.

Ground 2: The judge below erred in applying the test for an interlocutory injunction to the Applicants' request for a permanent injunction.

Ground 3: The judge below erred in stating and applying the wrong test for a *quia timet* injunction.

Ground 4: The judge below erred in granting an injunction order against all Nova Scotians without requiring evidence that such a remedy was needed against all Nova Scotians.

Ground 5: The judge below erred in granting an injunction order, without considering that the order infringed *Charter* rights of all Nova Scotians and that this infringement may not be justified in the circumstances.

Ground 6: The judge below erred in accepting the evidence of a named Applicant as independent expert evidence, and without compliance with Rule 55 or the common law requirements of independent expert evidence.

## PART IV

## STANDARD OF REVIEW OF EACH ISSUE

22. The injunction granted by Justice Norton was a discretionary order. The Standard of Review pertaining to discretionary orders was set out by this Honourable Court in *Innocente v. Canada (Attorney General)* 12 NSCA 36, at paragraph 26:

> 26 I adopt Justice Matthews' 1995 statement from *MacCulloch*:
>
> As this Court has repeatedly said: we will not interfere with a discretionary order, especially an interlocutory one unless wrong principles of law have been applied ***or*** a patent injustice would result.
>
> [emphasis added]
>
> This passage was drawn from *Exco*, para 6 and *MacIntyre*, para 29. I also adopt Justice Chipman's 1991 statement in *Minkoff v. Poole* [1991 CarswellNS 530 (N.S. C.A.)]:
>
> The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations.

## PART V

## ARGUMENT

**Ground 1: The judge below erred in granting an injunction order without the Applicants having advanced any common law cause of action, statutory authority, or other right to a remedy.**

23. The Appellant appears to have restated ground of appeal number one (1) as issue #2 in the Appellant's factum on page nine (9). The Respondents submit that the grounds of appeal as stated in the Notice of Appeal are the issues to be addressed on appeal. In any event, the cause of action, statutory authority or other right to a remedy were outlined in the Respondents grounds for the injunction, namely paragraphs 8 and 9 of the *ex parte* Notice of Application:

> 8. Historical public gatherings organized by Freedom Nova Scotia and others within the Province 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 distance requirements.
>
> 9. The Applicant relies on the following legislation and points of law:
> a. *Health Protection Act* 2004, c. 4, s. 1.
> b. *Judicature Act*.
> c. Nova Scotia Civil Procedure Rule 5.02.
> d. Nova Scotia Civil Procedure Rule 2.03.

24. Furthermore, the cause of action, statutory authority or other right to a remedy was stated by Justice Norton at paragraphs 1, 2, and 3 of the written decision:

> 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*.

[A.B. Part 1, pg. 8, Written Decision]

25. With respect to ground of appeal number one (1) and issue #2 in the Appellant's factum, the Respondents disagree with the Appellant's submissions pertaining to the test for a *quia timet* injunction and the evidence required to obtain that injunction. To apply for a *quia timet* injunction to prevent or reduce the risk of future harm, namely the community spread and transmission of COVID-19 caused by illegal public gatherings, the Respondents first needed to establish an evidentiary foundation that illegal public gatherings had occurred within the Province. The fact that illegal public gatherings occurred in the Province and were planned to reoccur in the future, despite enforcement measures under the Public Health Order, is "**the cause of action**", contrary to the Appellant's submissions.[11] The affidavit of Hayley Crichton, sworn May 12, 2021, clearly evidenced the fact that persons within Nova Scotia attended illegal public gatherings, and caused other persons to attend illegal public gatherings within Nova Scotia through online communications (Facebook) and other communication mediums in different locations and times within the Province from March 2021 to May 12, 2021.[12]

26. The Respondents established a cause of action or serious question to be tried by proving the occurrence of illegal public gatherings in violation of the law and Public Health Order. The Respondents were then required to present evidence proving the following:

(a) the harm that is anticipated is imminent;
(b) the harm is irreparable; and
(c) the balance of convenience favored the Respondents.

27. Justice Norton, at paragraphs 28 to 30 and 31 of his decision accepted the Respondents evidence pertaining to the imminence of harm, the irreparability of the harm and that the balance of convenience favored the Respondents. The harm alleged by the Respondents in their injunction application was the risk of further transmission of COVID-19 and community spread of COVID-19 within the Province if illegal public gatherings and certain activities that

[11] Supplemental Appeal Book (S.A.B.), Tab 1, Restated Order #2 Of the Chief Medical Officer of Health Under Section 32 Of The Health Protection Act 2004, c. 4, s. 1.
[12] A.B. Part 2, pg. 81, Affidavit of Hayley Crichton.

cause illegal public gatherings were not prohibited by the injunction. The irreparability of harm was established through the evidence of CMOH, Dr. Strang. Based on Dr. Strang's evidence Justice Norton found at paragraph 29 of the decision that one of the risks associated with contracting COVID-19 is death.

28. It was also established through Dr. Strang's affidavit evidence, sworn May 12, 2021, that there was a high probability of harm (COVID-19 transmission) if illegal public gatherings and the activities that cause these gatherings were not restrained by the injunction. In his affidavit, Dr. Strang set out the correlation between illegal public gatherings and COVID-19 transmission:

> 30. 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.
>
> 31. 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.
>
> 32. 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.
>
> **Freedom Nova Scotia Rally**
>
> 33. It is my medical opinion that if the scheduled social gathering is held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia that there is a substantial risk of Covid-19 transmission among the attendees.
>
> 34. **It is also my 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.**

[A.B. Part 1, pg. 47 to pg. 80, at paras. 30 to 34, Dr. Strang, Affidavit]

29. Relying on the foregoing and on the Respondents brief and affidavits filed in the court below, the Respondents submit that they did in fact establish a cause of action, statutory authority or other right to a remedy to restrain illegal public gatherings and certain activities that cause illegal public gatherings through a *quia timet* injunction. Ground of appeal number one (1) is unsustainable. Justice Norton did not err in law or otherwise.

**Ground 2: The judge below erred in applying the test for an interlocutory injunction to the Applicants' request for a permanent injunction.**

**Ground 3: The judge below erred in stating and applying the wrong test for a *quia timet* injunction.**

30. The Respondents will address ground of appeal numbers two (2) and three (3) together. Ground of appeal numbers two and three also appear to be restated as issue # 2 in the Appellant's factum.

31. As the Court of Appeal is aware, the Respondents applied for a *quia timet* injunction that was granted on evidence by Justice Norton. At paragraph (9) of the Injunction Order was a provision permitting any person with notice of the order to apply to vary or discharge the injunction.[13] Evidenced by paragraph nine (9) of the Injunction Order, the *quia timet* injunction was not a permanent injunction.

32. With respect to the alleged "wrong legal test", the Respondents set out the law pertaining to interlocutory and *quia timet* injunctions at paragraphs 57 to 77 of their pre-hearing brief. The Respondents starting at paragraph 57 of their brief reference the test for interlocutory injunctions set out in *RJR-Macdonald* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 (S.C.C.). The Respondents cited the law in their brief pertaining to *quia timet* injunctions in

[13] A.B., Part I, pg. 29, Injunction Order, dated May 14, 2021.

reference to 526901 *BC Ltd. V. Dairy Queen Canada* 2018 BCSC 1092 and *Robinson v. Canada (Attorney General)*, 2019 FC 876. The Respondents then proceeded to articulate the differences in the evidentiary requirements between regular injunctions and *quia timet* injunctions. The Respondents articulated at paragraph 72 of their brief that the lower court was required to assess certain factors applicable to *quia timet* injunctions "in addition" to evaluating whether the Respondents satisfied the test for interlocutory injunctions set out in *RJR-MacDonald*. A *quia timet* injunction restrains acts or omissions that haven't happened. Consequently, the evidentiary requirements for a *quia timet* injunction are more onerous than a regular injunction because in addition to satisfying the *RJR-Macdonald* test, the Respondents also had to prove that the harm anticipated is imminent and prove a "high probability" that the harm would occur in the future. The Respondents cited *Robinson* (supra), at para. 88, wherein the court stated that the courts have adopted a cautious approach generally requiring evidence pertaining to 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***. The Respondents submission at paragraph 72 of their brief was not the entirety of the legal analysis or "test" for *quia timet* injunctions. This is evidenced by the preceding paragraphs of the Respondents brief. The Appellant in their factum at paragraph 71 misrepresents the Respondents submissions filed in the court below by isolating paragraph 72 of the Respondents brief for reasons unknown to the Respondent.[14] The Respondents brief when read in its entirety clearly cited Canadian case authorities pertaining to interlocutory and *quia timet* injunctions.

33. Notwithstanding the Appellant's failure to acknowledge paragraphs 57 to 77 of the Respondents application brief, the Learned Chambers Judge set out the law pertaining to interlocutory and *quia timet* injunctions in reference to *RJR MacDonald v. Canada (Attorney*

[14] A.B. Part 2, see pg. 135 to 152, Attorney General of Nova Scotia's pre-hearing brief filed in support of the *Ex Parte quia timet* injunction application.

*General*, *526901 BC Ltd. V. Dairy Queen Canada*, and *Robinson v. Canada (Attorney General)* (supra), at paragraphs 11 to 21 of the decision.

34. The Respondents submit that Justice Norton did not err in setting out the law pertaining to *quia timet* injunctions nor did Justice Norton err in applying the law to the evidence adduced by the Respondents.

35. For instance, Hayley Crichton's evidence proved that illegal public gatherings occurred within the Province in violation of the law and Public Health Order. Consequently, and as previously stated, the evidence of Hayley Crichton established the serious question to be tried and/or the cause of action pertaining to the test for an interlocutory injunction and a *quia timet* injunction. Ms. Crichton's evidence established that there was an imminent risk that illegal public gatherings would continue to occur in the future unless prohibited by the injunction. The harm was proven by the Respondents by the evidence that illegal public gatherings had occurred within the Province and were planned to re-occur in violation of the Public Health Order. Ms. Crichton's evidence in the context of a permanent injunction, which will be discussed later on in these submissions, also established a breach of the Province's legal right of compliance with the Public Health Order and *Health Protection Act*.

36. With respect to irreparable harm, Dr. Strang set out in his affidavit evidence and expert opinion how COVID-19 spreads and how illegal public gatherings increases the risk of COVID-19 transmission and possible death, at paragraphs 28 to 34 of his affidavit, sworn May 12, 2021. Dr. Strang also provided evidence that the harm associated with contracting COVID 19 is death at paragraph one (1) of his affidavit.

37. Based on the evidence adduced by the Respondents Justice Norton found at paragraph 21 of his decision that there was "clear, convincing, and non-speculative evidence" allowing the court to infer that irreparable harm would result if the injunction was not granted. His Lordship also found at paragraph 21 that the Province met the test for a *quia timet* injunction on

evidence. Justice Norton went on to find that the balance of convenience favored the Respondents at paragraphs 30 to 32 of the decision.

38. The Appellant has not presented any evidence that contradicts or could change the 51 findings of fact made by Justice Norton pertaining to the serious question to be tried, imminence of harm, the irreparability of harm and balance of convenience. The serious question to be tried or cause of action was that Nova Scotians were violating the Public Health Order by engaging in illegal public gatherings and activities that caused illegal public gatherings. That evidence is disclosed in the record by the evidence of Hayley Crichton and the findings made by the lower court. The threshold for establishing a serious question to be tried is extremely low and was met by the Respondents. The remaining elements of the test for an interlocutory and *quia timet* injunction were also satisfied by the evidence adduced by the Respondents.

39. If the panel of this Court concludes that the injunction was a permanent injunction the Respondents provide the following submissions below in support of their submission that Justice Norton still did not apply wrong principles of law when he granted the *quia timet* injunction.

**The Law – Permanent Injunctions**

40. In *778938 Ontario Limited v. Annapolis Management Inc.*, 2019 NSSC 36, the applicant applied for a permanent injunction to restrain the respondents from trespassing on their roof or interfering with the applicant's prescriptive easement. The applicant owned a building on Barrington Street in Halifax adjacent to the respondents building known as the NFB building. The respondents wanted to build an additional two storeys onto their building. The applicant alleged that the respondents' construction activities caused a nuisance and would cause additional snow to drift and pile on the Attica store roof causing a danger to the structural integrity of that roof.

41. Before dismissing the application, in *778938 Ontario Limited* supra, Justice Coady analyzed the law pertaining to permanent injunctions in reference to *Northumberland Fisherman's Assn. v. Patriquin*, 2015 NSSC 30, starting at paragraph 29:

> 29 The applicant submits that the caselaw in Nova Scotia confirms that permanent injunctive relief is available, but that no specific test has been delineated. Accordingly, it relies on *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 NLTD(G) 175, [2012] N.J. No. 398, where the Newfoundland and Labrador Supreme Court adopted the reasoning of the British Columbia Court of Appeal in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396.
>
> 30 *Nalcor* involved an application for an injunction restraining certain projects at a work site. Stack J. held (following *Cambie Surgeries*) that the well-known test for an interim *injunction* set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, did not govern an application for a permanent *injunction*. Rather, "[f]or a permanent injunction, there is a two-prong test: first, has the applicant established its legal rights; and second, if so, is an *injunction* the appropriate remedy? (paras. 66-67). Stack J. described the first prong in the following terms:
>
> > **68 As to the first prong of the test, at the permanent injunction stage we are no longer dealing with whether a serious issue to be tried has been established. That low threshold is sufficient to continue the inquiry where an interim injunction is sought. To make the injunction permanent, however, the applicant must prove its legal rights, usually following a trial, based upon a balance of probabilities — the standard for establishing any civil entitlement in the courts. The permanence of the remedy sought requires a corresponding increased threshold of proof.**
>
> 31 As to the second prong of the analysis — whether a permanent injunction was an appropriate remedy — Stack. J. noted that "**the grant of permanent injunction is an extraordinary discretionary remedy**. It is, therefore, not a remedy that will be available to every party who has established a breach of legal rights" (para. 80). He discussed the relevant considerations:
>
> > **83 ... the first test of whether a permanent *injunction* is an appropriate remedy is whether there is an effective alternate remedy. Only where there is no effective alternate remedy will the evaluation of a permanent *injunction* as an appropriate remedy continue. Irreparable harm and the balance of convenience may then be evaluated because it is important that the extraordinary remedy of a permanent *injunction* not be disproportionate to the enjoined activity; in colloquial terms, the cure must not be worse than the disease. Both the degree of harm suffered by the applicant and the effects of the prohibition on each of the parties will assist in determining the issue of proportionality. There may be other factors that a court will want to consider in this regard in any given set of circumstances. But even in the absence of an effective alternate remedy, I would not think that the court would grant a permanent injunction without considering irreparable harm and the balance of convenience.**
> >
> > 84 Following the applicant's establishment of legal rights there are, therefore, two steps to the exercise of the discretion to grant a permanent

> *injunction*. **First: is an effective alternate remedy available? If one is, then the matter is at an end and the permanent *injunction* will not be granted. If, however, there is no effective alternative remedy, then the court must be satisfied that the remedy of a permanent *injunction* is proportionate to the behaviour being enjoined.**
>
> In *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76 (N.S. C.A.), Bryson, J.A. commented that "**the general rule favoring a permanent injunction does not relieve the Court of the need to apply the balancing test in interlocutory cases**."

42. Having regard to the first and second prong of the test for permanent injunctions set out in the *Nalcor Energy* decision referenced by Justice Coady at paras. 29 to 30 of *778938 Ontario Limited*, supra, the Respondents submit that Justice Norton's analysis also considered the relevant considerations for permanent injunctions.

**First Prong – breach of legal rights**

43. The Respondents adduced evidence in the lower court that the Public Health Order was being violated and that the Public Health Order and related enforcement measures (i.e., summary offence tickets among others) proved ineffective at deterring and preventing illegal public gatherings. The Respondents evidence that the Public Health Order was not an adequate alternative remedy is contained in Ms. Crichton's affidavit at paragraphs 6 to 29. Additional enforcement remedies pertaining to the Public Health Order, in the form of an injunction, were warranted on the facts and evidence because the Public Health Order proved ineffective at restraining illegal public gatherings. A breach of the Province's legal right of compliance with the provisions of the Public Health Order was proven.

**Second Prong – Harm and Proportionality**

44. In the Respondents respectful submission, the "cure" being restraining illegal public gatherings and certain activities (as set out in paragraph 3 sub (a), sub (b), and sub (c) of the injunction) that cause illegal public gatherings, was not worse than the spread of COVID-19 infections. Mitigating the spread of COVID-19 and the resulting harm of possible death outweighed any

effect on Nova Scotians being restrained through an injunction from illegally gathering or engaging in activities causing illegal public gatherings that remain prohibited by law.

45. Moreover, applicable to permanent injunctions is the application of the balancing test – "***the general rule favoring a permanent injunction does not relieve the Court of the need to apply the balancing test in interlocutory cases***", - *Maxwell Properties Ltd.*, 2017 NSCA 76, supra. As previously stated, Justice Norton, at paragraphs 30 to 32 of the decision, made the finding of fact that the balance of convenience favored the Province.

46. Whether the injunction is found to be an interim injunction, interlocutory injunction, or permanent injunction Justice Norton did not apply wrong principles of law in granting the *quia timet* injunction nor did a patent injustice result. The Respondents have reiterated throughout the proceeding in the lower court and now in the Court of Appeal that the impugned provisions of the injunction are contained in the Public Health Order. Individuals who violate sections 13.5 and 13. 6 of the Public Health Order, referenced at paragraph 10 of the decision, would also violate paragraph 3 sub (a), sub (b), and sub (c) of the injunction. Consequently, an injustice cannot result if violating the injunction means violating the law and statutory Public Health Order. Moreover, the *Charter* does not protect activity that is illegal under sections 13.5 and 13.6 of the Public Health Order. The Public Health Order has not been challenged by the Appellant.

47. The injunction that was sought by the Respondents was a "*quia timet* injunction". The law pertaining to *quia timet* injunctions and when they may be granted are clearly articulated in Justice Norton's decision. In the alternative, if the Court of Appeal accepts the Appellant's submission that Justice Norton granted a "permanent injunction" his Lordship did not apply wrong legal principles in granting the injunction for the reasons set out above pertaining to the first and second prong of the test for permanent injunctions.

48. However, the Respondents maintain that the injunction was not a permanent injunction. In further support of this position, Justice Norton during the hearing of the Respondents *ex parte* application had regard to the possible consequences of granting a *quia time*t injunction *ex parte* on an emergency application. This is evident in Justice Norton's comments made to counsel during the *ex parte* hearing and paragraph nine (9) of the Injunction Order.[15] Any person with notice of the injunction could move to vary or discharge the injunction at a later date.

49. Counsel for the Respondents acknowledges that a Notice of Motion accompanying the application ought to have been filed to clearly indicate that the injunction was not permanent in nature. It was not the Province's intention for the injunction to be permanent evidenced by paragraph nine (9) of the Injunction Order. However, pursuant to Civil Procedure Rule 75.01 (1) the injunction can be found to have extended beyond the proceeding before Justice Norton. Notwithstanding, the Respondents submit that regardless of whether the injunction extended beyond the proceeding, or whether the injunction was interlocutory or permanent, Civil Procedure Rules 75.02 (b), 75.03, and 75.04 permitted Justice Norton's exercise of discretion to grant the injunction in the circumstances and on the terms and conditions set out in the Injunction Order.[16]

50. As the Court of Appeal is aware, injunctions are granted on a case-by-case basis on the evidence presented and the law. The Appellant has offered no fresh evidence that controverts the evidence relied on by Justice Norton. Justice Norton's decision articulates the reasons for granting the injunction and his Lordship set out the law pertaining to the *quia timet* injunction that he granted in this case. Wrong principles of law were not applied in this case.

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[15] A.B., Part 2, Transcript, pg. 37 lines 14 to 21, pg. 38 lines 1 to 10.

[16] Pursuant to Civil Procedure Rule 5.01 (1) an Application in Chambers is an original proceeding a motion for an injunction is an interlocutory step in the proceeding. Rule 5.02 permits an Application in Chambers to be made ex parte and expedited basis (Rule 2.03). Rule 75.02 (1)(b) permits the issuance of injunction following a hearing of an application. Rule 75.04 - a judge may grant an injunction on terms and conditions - Rule 2.02 - failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.

51. The errors alleged by the Appellant do not invalidate the injunction. Justice Norton's analysis considers the relevant factors and elements alleged by the Appellant to not be considered. For instance, the test for a permanent injunction is incorporated in Justice Norton's analysis – as explained above. His Lordship found that the Public Health Order proved ineffective [17], that breaches of the Public Health Order had occurred, that the harm existed, that the harm was probable to occur in the future, the harm was irreparable, and the balancing test favored the Province, at paragraphs. 18 to 21 and 28 to 32. The elements for an interlocutory, *quia timet*, or permanent injunction were all satisfied by the Respondents. With respect to ground two and three and issue #2 in the Appellant's factum the Learned Chambers Judge did not err in law or otherwise, nor did a patent injustice result from the decision.

**Ground 4: The judge below erred in granting an injunction order against all Nova Scotians without requiring evidence that such a remedy was needed against all Nova Scotians.**

52. Ground of appeal number four (4) is restated in the Appellant's factum as issue # 3.

53. In response, the Respondents submit that the purpose and intent of the injunction was to prohibit and restrain any person from increasing the risk of COVID-19 transmission by attending an illegal public gathering or causing illegal public gatherings within the Province. It was the Respondents intent to subject anyone who violates the Public Health Order to also be liable under the injunction given that illegal public gatherings persisted with increasing frequency despite enforcement activities levied under the Public Health Order. As previously stated, the Public Health Order proved ineffective at stopping illegal public gatherings. Justice Norton's decision and Injunction Order clearly disclose that the injunction application was granted, in part, to prevent further breaches of the Public Health Order.

54. The injunction restrained Freedom Nova Scotia, John Doe (s), Jane Doe (s), Amy Brown, Tasha Everett, Dena Churchill and any person acting under the direction or in concert with

[17] The injunction application was filed by the Attorney General in part to prevent further breaches of the Public Health Order issued under s. 32 of the *Health Protection Act*.

them independently to like effect from attending illegal public gatherings and engaging in any of the activities set out in the injunction, which the Province proved, through the evidence of Hayley Crichton, caused or materially contributed to illegal public gatherings.

55. The Learned Chambers Judge considered the leading authority pertaining to granting injunctions against unknown persons, in reference to *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at paragraph 36 of the decision. John Doe(s) and Jane Doe (s) who in effect were "All Nova Scotians" were named as respondents in the Province's *ex parte* injunction application. John Doe(s) and Jane Doe (s) were named as respondents to account for the fact that the identities of individuals who may choose to attend illegal public gatherings or engage in activities that cause illegal public gatherings, as set out in the Injunction Order, are unknown to the Respondents and cannot be known. For instance, Freedom Nova Scotia had, at all material times, an open Facebook group page and on that page Freedom Nova Scotia organized rallies against mask wearing and the restrictions set out in the Public Health Order. Attendees of the aforementioned rallies were observed not wearing masks and were not maintaining six feet of physical distance in violation of the Public Health Order (A.B., Part 2, pg. 81 Hayley Crichton, Affidavit). It is that activity and similar activity that posed a direct risk of COVID-19 transmission (A.B., Part 2, pg. 47 Dr. Strang, Affidavit). The fact that Freedom Nova Scotia is not a legal entity is irrelevant. It is the occurrence of illegal public gatherings traced back to Freedom Nova Scotia's advertisements of anti-mask rallies which was a contributing cause and created the risk of harm (COVID-19 spread and infection).

56. In addition to all persons residing in Nova Scotia being liable under the Public Health Order if they breach that Order, the naming of Jane Doe(s) and John Doe (s) as respondents also made anyone residing in the Province liable under the injunction for attending illegal public gatherings and engaging in activities that cause the gatherings to occur.

57. The Appellant's position that the injunction shouldn't have applied to all Nova Scotians is misguided. The restrictions contained in the injunction incorporate sections 13.5 and 13.6 of

the Public Health Order by reference. The Injunction Order did not expand the scope of compliance requirements that already existed under the Public Health Order.

58. Since the Public Health Order applies to all persons residing within Nova Scotia it cannot be the case, as suggested by the Appellant, that the injunction shouldn't have applied to all Nova Scotians. As set out in the Province's Notice of Application the intent of the injunction was to ensure compliance with the Public Health Order and authorize law enforcement to engage in enforcement measures to ensure compliance with the Public Health Order.[18] The injunction appropriately applied to any Nova Scotian who violated the Public Health Order. It is not the case that some persons in Nova Scotia are immune from COVID-19 transmission or community spread. It's irrefutable from an epidemiology standpoint evidenced through Dr. Strang's affidavit, sworn on May 12, 2021, that when people gather the COVID-19 virus can spread.

59. The Appellant's position that the injunction shouldn't have applied to all Nova Scotians is without merit nor is it supported by evidence or the epidemiology data existing at the time.

- **Inherent Jurisdiction to grant "*quia timet* "injunctions**

60. As this Court is aware superior courts possess "inherent jurisdiction" and have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.[19] The Respondents submit that the Supreme Court of Nova Scotia's inherent jurisdiction to grant *quia timet* injunctive relief in the present case does not conflict with the provisions of the *Health Protection Act*. The Supreme Court of Nova Scotia had concurrent jurisdiction in this matter

[18] A.B., Part 1, pg. 3 to pg. 6, *Ex Parte* Application.
[19] *MacMillan Bloedel Ltd. v. Simpson* 1995 CarswellBC 974, at paragraph 38.

and could grant a *quia timet* injunction on the same terms or conditions as set out in the statutory scheme under the *Health Protection Act* and Public Health Order.

61. The case of *Beaudoin v. British Columbia*, 2021 BCSC 248 referred to by the Appellant in their written submissions is distinguishable. In *Beaudoin*, the provincial government brought a motion for injunctive relief in the context of a *Charter* challenge to the underlying public health order commenced by religious groups. *Beaudoin* was not an application for a *quia timet* injunction. Also, unlike in the present case, in *Beaudoin* the court found the balance of convenience favored the religious groups:

> 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?
>
> ……
>
> 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.

62. In the present case, Justice Norton found that the balance of convenience favoured the Province. Furthermore, in the Respondents respectful submission whether the *quia timet* injunction would be enforced if it were issued or whether there was an "enforcement gap" is irrelevant to whether the Respondents met the legal test for a *quia timet* injunction. In support of this submission the Respondents note that the decision in *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BCSC 1903 relied on by the Appellant, at paragraph 64 footnote 49 of their factum, was overturned. The British Columbia Court of Appeal found at paragraph 78 that the judge erred in giving too little weight to the "public interest in upholding the rule of law." The Respondents assert that the same error could be found to have occurred in *Beaudoin* as well.

63. As previously stated, the Respondents proved that illegal public gatherings were still occurring despite enforcement measures under the *Health Protection Act*. The injunction appropriately applied to all Nova Scotians. If a person violated the injunction, they would also be in breach of the Public Health Order which also applied to all Nova Scotians.

64. Unlike the *Beaudoin* and *Teal* superior court decisions, Justice Norton had regard to the public interest in upholding the rule of law when he found the following at paragraph 32:

> [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.

65. Based on the foregoing, ground of appeal number four (4) and issue #3 stated in the Appellant's factum is unsustainable. The Appellant has not demonstrated that the lower court exceeded its jurisdiction in granting the injunction, nor has the Appellant established that the injunction was not supported by the evidence.

**Ground 5: The judge below erred in granting an injunction order, without considering that the order infringed *Charter* rights of all Nova Scotians and that this infringement may not be justified in the circumstances.**

66. Ground of appeal number five (5) is restated in the Appellant's factum at page 10, as issue # 4. In response to ground of appeal number five (5) and issue #4, the Respondents submit that breaching the Public Health Order is illegal. With respect to *Charter* considerations, the *Charter* does not protect illegal activity. In the present case, Justice Norton adopted the finding in *Ingram v. Alberta (Chief Medical Officer of Health)* at paragraph 25 of his decision that: "***It was not enough at irreparable harm stage for the applicants to simply say that Charter rights were being infringed***". Similar to *Ingram*, the Appellant offers a bare assertion that *Charter* rights were engaged and not considered by Justice Norton without further analysis. For instance, the Appellant in their factum does not demonstrate how the alleged infringements of Nova Scotians' *Charter* rights are not saved under section one (1) of the *Charter*. The Appellant received notice of the injunction on May 17, 2021. The Appellant has had

approximately seven (7) months to articulate how Justice Norton ought to have considered a bare allegation of *Charter* rights being engaged. The Appellant argues the alleged infringements of the *Charter* are not justified but provides no analysis in support under section 1 or otherwise.

67. The Respondents agree with Justice Norton's finding that a bare allegation of a *Charter* breach is insufficient at the irreparable harm stage to prove the injunction should not have been granted to the Province.

68. If the Learned Chambers Judge erred relative to ground of appeal number five (5) or issue #4, which is not conceded but denied by the Respondents, the Respondents submit that the injunction is not overbroad or unlawful under the *Charter* or otherwise. The injunction made persons who breach the Public Health Order in relation to gathering limits and activities that cause illegal public gatherings liable for contempt of court. Prohibiting illegal public gatherings through an injunction is rationally connected to its purpose of preventing or reducing the transmission of COVID-19, a deadly communicable disease. The harm that the injunction Order sought to prevent was "death".

69. As the Court of Appeal is aware the *Charter* incorporates the "harm" principle". Rights if they exit under the *Charter* may be limited or not protected under the *Charter*, if exercising such rights harm individuals.[20]

70. Freedom of expression, peaceful assembly, and liberty may be limited through government action or in a discretionary court order, in the present case, because the alleged infringements prevent harm to vulnerable groups and Nova Scotians. Stopping the spread of COVID-19 infections was at the time of the injunction and remains to be a pressing and substantial

[20] Common limitations to freedom of expression include libel, slander, obscenity, pornography, sedition, incitement, fighting words, classified information, copyright violation, trade secrets, food labeling, non-disclosure agreements, the right to privacy, dignity, public security, and perjury. Justifications for such limitations include the harm principle, proposed which suggests that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to other - *On Liberty,* by John Stuart Mill Fourth Edition, London Longmans, Green, Reader and Dyer, 1869.

objective. Any limitation of *Charter* rights is proportional to that objective.[21] The Injunction Order minimally impairs the right to freedom of expression, freedom of assembly, and liberty because Nova Scotians were permitted to protest, engage in expression, and assemble so long as that activity complies with the Public Health Order. For instance, at all material times, persons could protest while keeping six feet apart and wearing masks. If the injunction infringes *Charter* rights, as alleged by the Appellant, the infringement is saved by section 1.

71. In addition to the injunction being saved by section 1 the Injunction Order is a valid court order in furtherance of a valid statutory scheme "the *Health Protection Act*" intended to protect public health. The Respondents maintain that how the Injunction Order is enforced, and its validity will withstand *Charter* scrutiny until the statutory scheme is set aside. A challenge to the underlying statutory Public Health Order has not occurred in the present case.

72. Notwithstanding that the Public Health Order is not subject to a *Charter* challenge by the Appellant, the Respondents reiterate their position that the Injunction can still be justified under section 1 of the *Charter*. The alleged infringements can be justified based on the evidentiary record in the lower court.

***Context and the section 1 Justification – s. 2 (b) and s. 2 (c) of the Charter***

73. The central issue at this stage of the analysis is the nature and sufficiency of the evidence required for the Respondents to demonstrate that the limits imposed on freedom of expression and freedom of assembly are reasonable and justifiable in a free and democratic society (*Harper v. Canada (Attorney General)*, 2004 SCC 33 (S.C.C.). Section 7 will be discussed in a separate section below.

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[21] *R v. Oakes*; Threats of violence and harm -see: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraphs 107-108; *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, at para. 28. *R v. Sharpe* 2001 SCC 2 at para. 22: "Nevertheless, freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*, supra, **or the prevention of harm that threatens vulnerable members of our society as in *Butler*, supra, may justify prohibitions on some kinds of expression in some circumstances.** Because of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny."

74. The Respondents begin the section 1 analysis by considering the context of the injunction, and the nature of the problem it was intended to address. Context has been described as the "indispensable handmaiden" to the section 1 analysis.[22]

75. Contextual factors have been described as essentially determining to what extent the case before the court is a case where the evidence will rightly consist of "approximations and extrapolations" as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the section 1 case (*R v. Bryan*, 2007 SCC 12, at para. 29).

76. In *Harper* (supra), Justice Bastarache observed that the "legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case" (*Harper*, at para. 77). In the absence of determinative scientific evidence, the court is entitled to rely “on logic, reason and the application of common sense to what is known” (*Harper*, at para. 78).

77. At issue in *Harper* was whether the spending limits in s. 350 of the *Canada Elections Act*, S.C. 2000, c.9 infringed the right to free expression in s. 2 (b) of the *Charter*. The majority, led by Justice Bastarache, concluded that the infringement was demonstrably justified under section 1 of the *Charter*. For the majority the "central issue" in the section 1 analysis was ***the nature and sufficiency of the evidence*** (at para. 76).

78. Justice Bastarache, in *Harper* (supra), considered the applicable contextual factors under four categories:

(i) the nature of the harm and the inability to measure it;

(ii) vulnerability of the group;

(iii) subjective fears and apprehension of harm;

(iv) nature of the infringed activity.

[22] *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877 (S.C.C.) (at para. 87)

***(i) The Nature of the Harm and the Inability to Measure it***

79. In the present case, the nature of the harm caused by COVID-19 is unfortunately all too real. It is a severe acute respiratory illness that kills Nova Scotians and people across all age groups, races, ethnic backgrounds, gender, countries, and classes. There are characteristics which increase the complexity of public health decision making in the case of COVID-19. It is a novel virus and the illness caused by it is far more severe than observed in influenza. Infected, but asymptomatic persons, may unwittingly infect others.[23]

80. Dr. Strang's affidavit, sworn May 12, 2021, explains the challenges faced by those with the responsibility for public health decision making in the context of a pandemic such as COVID-19. In the context of the COVID-19 public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow. In such a circumstance, the response does not allow for surgical precision. Rather, in public health decision making the "precautionary principle" supports the case for action before confirmatory evidence is available.

***(ii) Vulnerability of the Group***

81. Nova Scotia has an aging population. Those in the age group of being 65 years and older are more likely to be hospitalized and admitted to Intensive Care Units (ICU) even without other co-morbidities. However, COVID-19 can have serious health consequences no matter your age.[24] Effectively, every Nova Scotian is part of the vulnerable group. Every individual's response to a COVID-19 infection is different and potentially deadly.[25]

[23] A.B., Part 2, pg. 47, Dr. Strang affidavit, sworn May 12, 2021.
[24] A.B., Part 2, pg. 47, Dr. Strang affidavit, sworn May 12, 2021.
[25] A.B., Part 2, pg. 47, Dr. Strang affidavit, sworn May 12, 2021.

82. Gathering restrictions were imposed by the Province at the very beginning of Nova Scotia's implementation of public health measures to stop the spread of COVD-19. Since March 2020, the gathering limits have fluctuated as the Province engaged in lockdown measures and then reopened.

***(iii) Subjective Fears and Apprehension of Harm***

83. It is stating the obvious but given the potential for serious illness or death from COVID-19, there is a heightened fear of contracting this illness within the population. The Appellant may argue that there is no evidence of this in the record. However, the Respondents submit that judicial notice may be taken that in a global pandemic that is killing people such fear and apprehension exists within Nova Scotia's population.

***(iv) Nature of the Infringed Activity***

84. In this case the activity infringed is set out in paragraph three (3), sub (a), sub (b), and sub (c) of the Injunction Order is follows:

> The Respondent and any other person acting under their instruction or in concert with the Respondent independently to like effect and with Notice of this Order, shall be restrained anywhere in the Province of Nova Scotia from:
>
> a. organizing an in person gathering, including requesting, inciting, or inviting others to attend an "Illegal Public Gathering";
>
> b. promoting an Illegal Public Gathering via social media or otherwise;
>
> c. attending an Illegal Public Gathering of any nature whether indoors or outdoors as set out in the Public Health Orders, as amended, and issued by Dr. Robert Strang, Chief Medical Officer of Health, under section 32 of the *Health Protection Act*.

**The Section 1 Test for Infringement**

85. As the Court of Appeal is well aware, the onus of proving that a limit or freedom guaranteed by the *Charter* meets the criteria of section 1 rests upon the party seeking to uphold the limitation, the Respondents in this case. The standard of proof is the civil standard, namely proof on balance of probabilities. A tipping of the scales.

**Does the Injunction Order Relate to a Pressing and Substantial Objective?**

86. The first step in the section 1 analysis is to determine whether the objectives of the law, or in the present case the injunction, are of sufficient importance to warrant the limitation of the constitutional right. Is the objective of the injunction, the stopping or reducing the spread of COVID-19 infections, pressing and substantial?

87. The Respondents submit that the express purpose of prohibiting illegal public gatherings and the activity that cause illegal gatherings set out in the injunction was "to prevent further transmission of COVID-19; ensure the continued functioning of the health-care-system; and limit the number of future deaths due to the virus".[26]

88. Prohibiting illegal activity in the injunction was intended to protect public health by aiding in controlling the transmission of COVID-19, by "flattening the curve", such that the goal of the injunction was reducing the number of COVID-19 infections to a level where the proper functioning of the health care systems could be maintained and where Nova Scotians would be subject to the lowest risk possible of contracting the deadly disease.

89. During the third COVID-19 wave, the injunction and gathering restrictions contributed to reducing COVID-19 case numbers and hospitalizations in the Province. The injunction and gathering restrictions assisted in containing further community spread of the virus. The Province was able to proceed with its phased reopening in June 2021, by lifting certain restrictions contained in the Public Health Order and lifting the injunction.

90. The Respondents concede that if a person violated the injunction, then the injunction provides for the same penalties in a proceeding for contempt of court that could have been imposed for a breach of the Public Health Order (i.e., fines). However, the powers of the court in contempt proceedings permit a tailored approach for deterrence that can be directed to the specific

[26] A.B., Part 2, pg. 25 Justice Norton's Decision, at paragraph 35; A.B., Part 2 pg. 152 paragraph 78 Brief of the Attorney General.

offender. The court may impose imprisonment but may impose conditions against the offender to ensure that breaches of the Public Health Order that endanger public health are prevented. In the Respondents respectful submission, it is entirely logical to put measures in place like the injunction to prevent further COVID-19 transmission where measures under the Public Health Order (i.e., fines) were proven ineffective at the time of restraining illegal public gatherings in the Province. Having the Public Health Order in place did not make the injunction unnecessary.

91. The objective of the injunction was not to interfere with Nova Scotians' rights. The objective was to protect Nova Scotia residents from illness and death attributable to COVID-19 transmission caused by gatherings and to reduce COVID-19 infections. While pressing and substantial objectives are not limited to emergencies (*P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 (S.C.C.)) the existence of COVID-19 as a public health emergency is beyond question.

92. Preventing COVID-19 transmission, infections, and health complications associated with the virus in Nova Scotia remains a pressing and substantial objective.

**Is there a Rational Connection between the Objective and Infringement of the Right?**

93. A rational connection prevents limits from being imposed on rights arbitrarily. The requirement to abide by gathering restrictions and the public health measures incorporated into the injunction, is tailored to suit its purpose. The injunction is tailored based on Dr. Strang's evidence of how COVID-19 spreads. One of the ways COVID-19 spreads is through gatherings. Consequently, it is reasonable to find that the restrictions contained in the injunction pertaining to illegal public gatherings would further the goal of reducing cases of COVID-19 transmission and infection, not that it is guaranteed to do so (*Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 (S.C.C.), at para. 48).

94. The Appellant argues that the Respondents have failed to show why the Public Health Order is ineffective at achieving the pressing and substantial objective noted above or why the

injunction should apply to everyone in the Province. However, the Respondents do not agree that alternative measures rendered the injunction unnecessary for the reasons already stated above; nor do possible alternative remedies prove that the injunction was not rationally connected to combating the transmission of COVID-19.

95. After the injunction was granted COVID-19 case numbers fell and the Province moved into phase three (3) of its reopening plan, hospitalizations decreased and gathering restrictions relaxed. The Court of Appeal, pursuant to the *Evidence Act*. R.S.N.S. 1989, c. 154, s. 1., may take judicial notice of the statutory Public Health Orders issued after May 13, 2021, evidencing the relaxation of restrictions and increase in gathering limits.[27]

96. While empirical evidence is not necessary to establish a rational connection, the Respondents assert that the injunction contributed to the reopening of the Province following the third wave of COVID-19. Based on the evidentiary record, and the evidence of Dr. Strang specifically, the injunction and the prohibitions contained therein were effective and assisted in reducing COVID-19 transmission and infection in Nova Scotia, at the time. The injunction was rationally connected to its objective.

**That the Means Chosen Interfere as Little as Possible with the Protected Right**

97. This component of the *Oakes* test (supra) requires that the injunction not impair the right any more than is necessary to achieve its desired objective.

98. Here, as throughout the section 1 analysis, the onus is on the Respondents to establish that the other measures taken are not an effective substitute for the injunction, or that the injunction itself cannot be tweaked to accommodate a less intrusive infringement on *Charter* rights. The

[27] Respondents BOA "Other Documents" – Public Health Orders from June 2021 to September 2021.

court is required to assess whether there are reasonably feasible and less impairing alternatives to achieve the same objective.

99. In the Respondents respectful submission, the Court of Appeal must tread carefully when conducting this analysis. With the benefit of hindsight, it is always possible for imaginative counsel to posit alternatives. As Justice Binnie observed in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 (S.C.C.) "resourceful counsel, with the benefit of hindsight, can multiply the alternatives" (at para. 96). This is particularly true when it comes to the management of the COVID-19 public health emergency.

100. While some measure of deference to the decisions of Dr. Strang or the Province is appropriate, the Respondents would agree that the Supreme Court of Nova Scotia must not abdicate its responsibility as a guardian of the Constitution and rule of law. The Respondents would also agree that the pandemic is not a magic wand which can be waved to make constitutional rights disappear; nor can the decisions of the Supreme Court of Nova Scotia be immunized from review. That is certainly not the position being advocated by the Respondents.

101. In considering whether or not the injunction could have been less intrusive, the Court of Appeal should exercise caution in recognition of the fact that the public health response to COVID-19 is ever evolving. The incorporation of the provisions of the Public Health Order, existing at the time, in paragraphs 3 sub (a), sub (b), and sub (c) of the injunction must be gauged by the circumstances that existed on May 14, 2021, and what was known about COVID-19 at that time. It was proven in evidence that Nova Scotians were violating the law by violating the Public Health Order and illegally gathering in the form or protests, social parties, and religious gatherings. It was proven in evidence that Covid-19 can be transmitted through social and/or public gatherings. At the time the injunction was granted Covid-19 infections in Nova Scotia's population were the worst they had ever been since the pandemic began, vaccination rates were low, and Nova Scotians were being hospitalized due to the virus at an increasing rate. Relying on the affidavit evidence of Dr. Strang, there is no simple one size fits all solution to

the effective management of the COVID-19 pandemic. A variety of public health measures, inclusive of the Injunction Order were utilized in combination.

102. In May 2021, prohibiting illegal public gatherings was one of a number of special measures the Province sought to implement to prevent COVID-19 infections. However, an additional measure had to be taken to protect the public and that additional measure was the *quia timet* injunction granted by the Supreme Court on May 14, 2021.

103. The COVID-19 pandemic presents as a moving target and as a consequence the necessity of the injunction and Public Health Order was regularly reassessed such that the injunction was lifted by the Province on June 22, 2021.

104. An enemy as resilient as COVID-19 will not be kept in check through the approach advocated by the Appellant. The task of wrestling this disease is no easy feat and requires a dynamic and multipronged approach. The injunction was integral to that approach since it provided for elevated penalties, pursuant to Civil Procedure Rule 89, for those who chose to violate the law and breach the Public Health Order. With respect to the non-trivial risk of imprisonment argued by the Appellant, the Respondents reiterate that how the injunction would be enforced is not relevant to the test for *quia timet* injunctions. Furthermore, the *Charter* does not protect illegal activity established as "illegal" under a valid statutory Public Health Order, which is not challenged by the Appellant.

105. Based on the foregoing, the Respondents submit that the least drastic means component of the *Oakes* test has been satisfied.

**Do the Salutary Effects of the Measure outweigh its Deleterious Effects?**

106. This stage involves balancing the objective sought by the injunction with the infringement on expression and assembly. Arguably, this has already been done in determining whether the impugned objective is sufficiently pressing to warrant overriding the *Charter*.

107. The application of section 1 of the *Charter* in this instance involves a balancing of rights with the protection of public health. The Respondents reference the United States Supreme Court decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (U.S. Sup. Ct. 1905) as illustrative of a circumstance where individual rights were found to give way to the common good. At issue was a constitutional challenge to a law passed by Cambridge, Massachusetts, imposing compulsory smallpox vaccinations in response to an increase in that disease in the city.

108. In response to the argument that compulsory vaccination is "hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best", the court observed that real liberty could not exist in a circumstance where each individual operates regardless of the injury that may be done to others, and "**there are manifold restraints to which each person is necessarily subject for the common good**" (at p. 3).

109. This step in the proportionality analysis asks whether the harm done by restricting illegal public gatherings and the activities set out in the injunction that were proven to cause illegal gatherings benefits the public through the prevention, or at least the reduction of COVID-19 transmission in the Province. To ask the question, is to answer it.

110. While restrictions on being able to assemble and express sentiments against Public Health Orders or COVID-19 restrictions or participating in illegal public gatherings may cause mental anguish, anger, and frustration, to some, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the Respondents respectfully submission, the right to attend illegal public gatherings or engage in activities that cause illegal public gatherings must give way to the common good. The Appellant takes issue with the fact that the injunction applied to all Nova Scotians. Again, in response the Respondents submit that the evidence provided by CMOH, Dr. Strang, pertaining to COVID-19 transmissibility proved that COVID-19 can affect every Nova Scotian directly or indirectly. Based on that evidence it necessitated that the injunction applied to all Nova Scotians because

it was impossible for the Province to know which one of its residents or persons within the Province would decide to attend illegal public gatherings or engage in the activities enumerated in the injunction that cause illegal public gatherings.

**Section 7 of the *Charter***

111. There are two stages to an analysis under section 7 of the *Charter*. First, an applicant asserting a violation of section 7 must establish that the impugned injunction imposes limits on a "life", "liberty" or "security of the person" interest, such that section 7 is "engaged". If the first step is met, the applicant must then establish that this "deprivation" is contrary to the "principles of fundamental justice": *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 57.

112. The principles of fundamental justice include the principles against arbitrariness, overbreadth, and gross disproportionality. The deprivation of a right will be arbitrary and thus violate section 7 if it bears no real connection to the injunctions purpose (in this case, protection of public health). The deprivation of a right will be overbroad if it goes too far and interferes with some conduct that bears no connection to its objective. Finally, the deprivation of a right will be grossly disproportionate if the seriousness of the deprivation is so totally out of sync with the objective that it cannot be rationally supported: *Bedford* (*supra*).

113. The Respondents concede that an individual's liberty interest is affected by the injunction but that any infringement is saved by section 1 of the *Charter*. The limitations contained in the injunction were connected to the objective of reducing COVID-19 transmission during the third wave of COVID-19. The injunction was proportional in that the least intrusive measures were employed to meet the objective – some public gatherings were permitted but others that posed increased risk of COVID-19 transmission, as set out in Dr. Strang's affidavit, were not. The prohibitions outlined in the injunction were rationally connected to the purpose of preventing and/or reducing COVID-19 infections by prohibiting illegal public gatherings and the activities that were proven through Ms. Crichton's affidavit to cause illegal public gatherings.

**Conclusion with Respect to Section 1 of the *Charter***

114. Based on the evidence admitted in the lower court the injunction under appeal represents a reasonable limit on the right of freedom of expression, freedom of assembly, and liberty, as demonstrably justified in a free and democratic society. Restraining illegal public gatherings and the activities that cause illegal public gatherings through an injunction was rationally connected to the objective of preventing COVID-19 infections and community spread of the virus. The injunction was minimally impairing in that the means chosen only impaired the right as was reasonably necessary to meet the objective. Breach of the injunction was also a breach of the Public Health Order, a valid statutory order. Persons could assemble, gather, or otherwise live their lives so long as they adhered to paragraph 3 sub (a), sub (b), and sub (c) of the injunction which were a mirror image of sections 13.5 and 13.6 of the Public Health Order, dated May 13, 2021, which all Nova Scotians still must abide by.

**Ground 6: The judge below erred in accepting the evidence of a named Applicant as independent expert evidence, and without compliance with Rule 55 or the common law requirements of independent expert evidence.**

115. Ground of appeal number six (6) is restated in the Appellant's factum as issue # 1.

116. The Respondents disagree with ground of appeal number six (6) and issue # 1. Dr. Strang is charged with protecting public health in Nova Scotia during a historic global pandemic. The Respondents can think of no better witness qualified to provide expert evidence to the Courts of Nova Scotia on all matters pertaining to Sars CoV2 and COVID-19. Justice Norton sitting as a Supreme Court Justice had inherent jurisdiction to qualify any person to be an expert witness capable of providing expert opinion evidence to the court.

117. In *Layes v. Bowes* 2020 NSSC 345, the Supreme Court of Nova Scotia reviewed the common law pertaining to the admission of expert evidence and opinion at paras. 48 to 60.

> 48 The purpose of expert opinion is to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act

of informed judgment, not an act of faith:*R. c. J. (J.)*, [2000] 2 S.C.R. 600 (S.C.C.) at para. 56.

49 In *White Burgess* Cromwell J., speaking for the Supreme Court, outlined the dangers of expert opinion:

1. An expert's lack of independence and impartiality can result in miscarriages of justice.

2. The risk is that the jury will be unable to make an effective and critical assessment of the evidence.

3. Expert evidence is resistant to effective cross-examination by counsel who are not experts in that field.

4. Potential prejudice created by the expert's reliance on unproven material might not be subject to cross-examination.

5. The risk of admitting "junk science".

6. The risk that a "contest of experts" distracts rather than assists the trier of fact.

7. Expert evidence may lead to an inordinate expenditure of time and money.

(para. 18)

50 In *R. v. Abbey*, 2009 ONCA 624 (Ont. C.A.), the Court of Appeal outlined a two-step process for determining the admissibility of expert evidence:

I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence... Second 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)

51 The Supreme Court of Canada in *White Burgess* followed the *Abbey* approach with minor variations:

At the first step, the proponent of the evidence must establish the threshold requirements of admissibility ... Relevance at this threshold stage refers to logical relevance ... Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.

(para. 23)

52 Cromwell J. in *White Burgess* confirmed that 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 the expert's duty to the court (para. 34).

53 Cromwell J. explained that the expert's opinion must be impartial, independent and unbiased:

... in the sense that it reflects an objective assessment of the question 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: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-9. 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.
>
> (para. 32)
>
> 54 The requirement that an expert be fair, objective and non-partisan is a duty owed to the court. The appropriate threshold for admissibility flows from this duty: *White Burgess* at para. 46.
>
> 55 If a witness is unable to or unwilling to fulfill this duty owed to the court, they do not qualify to perform the role of an expert and should be excluded: *White Burgess* at para. 46, quoting from Prof. Paciocco (as he then was) in "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 (para. 46).
>
> 56 Cromwell J. in *White Burgess* stated that the expert witness must, therefore, be aware of this primary duty to the court and be able and willing to carry it out (para. 46).
>
> 57 Cromwell J. observed that imposing this additional threshold requirement is not intended to, and should not result in, trials becoming longer or more complex. He also observed that he would not go so far as to hold that the expert's independence and impartiality should be presumed, absent challenge:
>
> My 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.
>
> (para. 47)
>
> 58 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: *White Burgess* at para.48.
>
> 59 If the proffered opinion evidence passes the first stage, the trial judge must determine whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as relevance, necessity, reliability and absence of bias: *White Burgess* at para. 54.

118. The Respondents, submit that because Dr. Strang was a party to the proceeding his party status did not prohibit his qualification as an expert witness or the admissibility of the evidence set out in his affidavit. The Appellant has not raised a realistic concern pertaining to Dr.

Strang's independence and impartiality. At most, the Appellant's arguments pertaining to ground of appeal number six (6) and issue #1 go to "weight" not the "admissibility" of Dr. Strang's expert evidence. In support of this submission the Respondents rely on *Layes* (supra) and the Court of Appeal's analysis on the admissibility of expert evidence in *Abbott and Haliburton Co. v. White Burgess Langille Inman* 2013 NSCA 66, at paras. 28 to 33. The Supreme Court also had jurisdiction to dispense with any procedural irregularities found within Rule 55, pursuant to Civil Procedure Rule 2.02. There is simply no basis to conclude that Dr. Strang was not independent and impartial when he provided expert evidence and opinion pertaining to matters that included the risk and harms associated with COVID-19, the risk and harms of illegal public gatherings in the context of COVID-19, and opinion evidence in the field of Public Health and Preventative Medicine, the assessment and interpretation of evidence in public health matters, and expert evidence on all matters related to COVID-19 pertaining to the Public Health Measures implemented by the Office of the Chief Medical Officer of Health for the Province of Nova Scotia.

119. The Appellant has not offered into evidence any contrary opinions, expert evidence, or any evidence in this proceeding or otherwise to rebut or controvert any of Dr. Strang's findings, conclusions, medical opinions, or evidence contained in his affidavit, sworn on May 12, 2021. Instead, the Appellant offers conjecture and speculation in replace of admissible evidence going to the merits of whether Dr. Strang provided an objective, critical, or unbiased assessment of COVID-19 transmission relative to public gatherings and matters related thereto.

120. In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference to public health officials and the role of the judiciary (*South Bay United Pentecostal Church v. Newsom, Doc. 19A1044 (U.S. Sup. Ct. May 29, 2020)* at p. 1):

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake to act in area fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).

121. Nova Scotia Public Health Officials make decisions that are objective, independent and are in the best interest of Nova Scotians. To suggest Dr. Strang did not provide an independent objective opinion based on his knowledge and expertise as the CMOH when the *quia timet* application was heard is without merit and not supported by any evidence in the record. To also suggest that Dr. Strang was not impartial or could not be objective in his evidence or expert opinion submitted in the lower court is also without merit and unsustainable.

**Conclusion**

122. The Respondents submit that counsel for the Attorney General acted in good faith in preparing an injunction application within 48 hours of being instructed to do so with no prior notice and in the context of a public health emergency at the time. The Respondents agree with the Appellant's submission that the Attorney General is not your normal litigant and counsel for the Attorney General is held to a standard of perfection. Notwithstanding that standard, the Appellant's grounds of appeal are unsustainable and do not warrant setting aside the decision under appeal. The Respondents rely on their factum herein in support of this submission. The Attorney General's application documents set out the legal authority for the application, the evidence in support of the application, and the relevant case law pertaining to *quia timet* injunctions. The injunction was granted on the basis of clear, non-speculative and relevant evidence. The injunction restrained illegal activity enumerated in sections 13.5 and 13.6 of the Public Health Order. Illegal activity is not protected by the *Charter*. The Appellant has provided

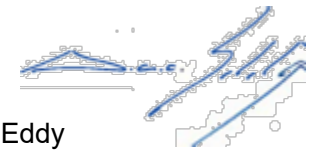
no evidence to undermine Justice Norton's 51 findings of fact. The Appellant's alleged errors or procedural irregularities do not prove that the injunction was not necessary or warranted in the circumstances. The Appellant has failed to provide any analysis that demonstrates that the alleged infringements of the *Charter*, apparently caused by the inunction prohibiting "illegal activity", are not saved under section 1 of the *Charter*. The Appellant has not demonstrated how the Respondents affidavit evidence did not satisfy the test for the *quia timet* injunction; nor has the Appellant provided evidence of how Dr. Strang was not impartial and objective. The Appellant has also not provided a reasonable basis for this Court to find Dr. Strang's evidence inadmissible. The Appellant has failed to demonstrate how Justice Norton misapprehended the fact that COVID-19 is a deadly disease that may be transmitted when people violate the Public Health Order and illegally gather or engage in activity that cause illegal public gatherings. Bare assertions of *Charter* breaches and that evidence didn't meet the test is insufficient. The Respondents have demonstrated in their factum how and why the evidence adduced in the lower court satisfied the test for the *quia timet* injunction. The Respondents have also demonstrated that any infringement of the *Charter* caused by the injunction is saved by section 1.

## PART VI

## ORDER

123. The Respondents request that this appeal be dismissed. The Respondents are not requesting costs.

124. All of which is respectfully submitted.



Duane A. Eddy
SOLICITOR FOR THE RESPONDENTS

Halifax, Nova Scotia
February 15, 2022

## APPENDIX A

## CASE LAW

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## APPENDIX B

## STATUTES, REGULATIONS AND OTHER DOCUMENTS

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*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11: ss. 1, 2 (b), 2 (c), and 7. 26

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